Nos. 23-195, 23-255

IN THE

Supreme Court of the United States

AARON HASHIM AND PAUL HASHIM,
Petitioners,
v.
MALIA M. COHEN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS STATE CONTROLLER OF THE STATE OF CALIFORNIA, ET AL.,
Respondents.

COOPER D. JOHNSON,
Petitioner,
v.
MALIA M. COHEN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS STATE CONTROLLER OF THE STATE OF CALIFORNIA, ET AL.,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

REPLY IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

WILLIAM W. PALMER
PALMER LAW GROUP, a PLC
2443 Fair Oaks Boulevard
No. 545
Sacramento, CA 95825
(916) 972-0761
wpalmer@palmercorp.com

JONATHAN S. MASSEY
MASSEY & GAIL LLP
1000 Maine Ave. SW
Suite 450
Washington, D.C. 20024
(202) 650-5452
jmassey@masseygail.com

LAURENCE H. TRIBE
Counsel of Record
KAPLAN HECKER
& FINK LLP
350 Fifth Ave., 63rd Floor
New York, NY 10118
(929) 224-0174
ltribe@kaplanhecker.com

Dated: November 10, 2023

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

Aaron Hashim and Paul Hashim (Petitioners in No. 23-195) and Cooper D. Johnson (Petitioner in No. 23-255) file this joint reply in support of their Petitions for Writ of Certiorari, in response to the State's consolidated Brief in Opposition ("BIO"), which was filed in both dockets.

These Petitions involve putative class actions challenging the California Unclaimed Property Law ("UPL") on behalf of owners of property worth less than $50, who are entitled to *no individualized notice at all* before their property is appropriated by the State (acting through profit-seeking auditors incentivized by the State via commissions to seize as much private property as possible). The State estimates that over fifty percent (50%) of the $11.9 billion UPL fund (taken from over 70.4 million accounts) is made up of cash amounts below $50. Pet. No. 23-195, at 11, 14. Moreover, items under $25 in value are aggregated, so that the State has no record at all of the names of those owners. *Id.* at 10–11.

Under the UPL, tens of millions of persons are deemed "unknown" to the State of California, including LeBron James, former House Speaker Nancy Pelosi, former Governor Arnold Schwarzenegger, and former Presidents George W. Bush and Barack Obama. *Id.* at 3. When California seeks to locate residents to force them to pay taxes that are due and owing, it is quick to resort to all government databases to locate them, such as the DMV database and other readily available sources of information. *Id.* at 13–14. Yet when it comes time to

provide constitutional notice and to return property to its rightful owner, the same people are "unknown" to the State, which does not use the available databases.

Two Justices of this Court have already addressed the California UPL, opining that "the constitutionality of current state escheat laws is a question that may merit review in a future case." *Taylor v. Yee*, 136 S. Ct. 929, 930 (2016) (Alito, J., joined by Thomas, J., concurring in the denial of certiorari). Those Justices expressed their concern that States are "doing less and less to meet their constitutional obligation to" reunite property owners with their property before seeking escheatment, even as they more aggressively go about classifying property as abandoned. *Id*.

These cases squarely present the stark legal question of whether the government can seize billions of dollars of private property under an unclaimed property statutory scheme without providing any notice at all. This Court should grant plenary review over this case to put constitutional limits on California's scheme – one that mocks the Constitution's protections for private property.

ARGUMENT

1. Respondents challenge Petitioners' Article III standing. BIO 8–9. Their objection lacks merit. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 561 (1992) (internal quotation marks omitted). Petitioners clearly meet that standard.

The BIO faults the Hashim Petitioners for alleging that they "believe" the State has seized their property. BIO 8. But pleading on information and belief is a well settled practice that leading commentators have described as "desirable and essential." Wright & Miller, 5 FEDERAL PRACTICE & PROCEDURE (Civil) § 1224 (4th ed. 2002). And Respondents ultimately confess that the State's own website supports the Hashims' allegation. BIO 8-9 n.5.

Moreover, the BIO's attack on Petitioners' standing simply confirms their due process challenge to the California UPL: the scheme's lack of notice prevents many property owners from even realizing (let alone confirming with certainty) that the State has seized and appropriated their property. The State's Controller is not required to provide any individualized notice at all to persons whose property is less than $50 in value. As Respondents admit, "property worth less than $25 may be reported to the Controller in aggregate," with no individualized information available to property owners on the Controller's website. *Id.* at 15 n.10. Thus, when Paul Hashim alleges that he "is a State Farm insurance policy holder and believes that the Controller may be holding some of his money in one of the aggregated accounts," Resp. App. at 13a, his allegation is as concrete as humanly possible, given the lack of notice

provided by the State.[1] The BIO perversely treats the lack of notice, a constitutional vice, as an argument against certiorari, asking the Court to allow the UPL to continue to operate under the radar to confiscate billions of private dollars a bit at a time. George Orwell would smile.

Respondents essentially overlook the Hashim Petitioners' independent argument for standing based on injury to their commercial business of assisting clients reclaim property under the UPL - an independent source of standing. Resp. App. at 2a; *see also id*. at 13a (scheme "prevent[s] [Petitioners] from notifying owners of their existing property if the property's value fails to exceed $50"). This is an individualized, not "probabilistic," injury. Contra BIO 9. *See Nat'l Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 256 (1994) (finding standing where petitioners alleged that defendant "has injured the business and/or property interests of the [petitioners]").

Petitioner Johnson also has standing. As the state appellate court below recognized, he "alleged 'amounts held by the Controller in sums less than $50.00 and other property' of his was seized by the state without notice, and he had been unable to have the property returned." Pet. 23-255 App., at 4a.

2. Nor is this Court's review barred under the doctrine of "adequate and independent state-law

---

[1] As noted in Pet. 23-195, at 11 the State's website lists an aggregated property amount of "State Farm Insurance Policyholders - $6 Million," with no individually identifiable information.

ground[s]." *Contra* BIO 9–11. This Court has explained that, "[e]ven though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis." *Lawrence v. State Tax Comm'n of Mississippi*, 286 U.S. 276, 282 (1932). As the Court explained in *Ward v. Bd. of County Comm'rs of Love County, Oklahoma*, 253 U.S. 17 (1920), such review is necessary to ensure that this Court's jurisdiction to resolve questions of federal law is not circumvented:

> It therefore is within our province to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect . . . . Of course, if nonfederal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.
>
> *Id*. at 22 (internal citations omitted).

There is no "adequate or independent" state-law ground precluding review of either the Hashim or the Johnson Petition.

(a) In the *Hashim* case, the court of appeal stated that the Hashims' appellate brief failed to "cite to the operative pleading or set forth its allegations," Pet. No. 23-195 App., at 13a. The court cited *Rakestraw v. California Physicians' Serv.*, 81 Cal. App. 4th 39 (2000), which opines that on appeal from a trial court order sustaining a demurrer, the plaintiff "bears the burden of demonstrating that the trial court erroneously sustained the demurrer" and therefore "must

show the complaint alleges facts sufficient to establish every element of each cause of action." *Id.* at 43.

The state court's ground was neither adequate nor independent. It was not "adequate" because the *Hashim* appellate brief addressed the operative complaint and extensively cited the trial record on appeal. Indeed, the brief at issue is replete with citations to the "Clerk's Transcript" (abbreviated CT). *See* Reply App. at 16a, 92a. Nothing in California law – as reflected in the cases cited by the appellate court and in the BIO – requires more. The citations recite the California standard for challenging a demurrer on appeal. They do not require a specific number of citations to the complaint in the appellate brief.[2] In any event, the respective complaints were in the record on appeal and are in the record in this Court (Resp. App. at 1a–47a). Even a cursory glance reveals that the federal claims are well pleaded; the only conceivable basis for dismissal was the California courts' substantive decision that the complaints failed to establish a federal claim on the merits.

For a state-law ground to be sufficiently "adequate" to preclude a federal review, the rule must be "firmly established and regularly followed." *See James v. Kentucky*, 466 U.S. 341, 348 (1984); *Ford v. Georgia*, 498 U.S. 411, 425 (1991). The citation "rule" advanced by the BIO and appellate court below has

[2] The BIO's authority is no different (BIO 10 n.6): it merely recites the legal standard for challenging a demurrer on appeal.

no precedential support in California law; it is not firmly established and regularly followed.

This Court has previously held that a similar state-law ground was not "adequate" and did not preclude this Court's review, based on an assessment of the precedential support for the state court's determination and the manner in which the state issue was raised. In *Staub v. City of Baxley*, 355 U.S. 313 (1958), this Court held it had jurisdiction to review a federal constitutional claim despite the fact that the state court had rested its decision in part on an asserted defect in the claim under state law; the state court had pointed to Petitioner's failure to challenge "specific sections" of the ordinance as required by state law. After undertaking its own review of state law, this Court determined that the state-law ground decision was "without any fair or substantial support" and thus could not operate to deny the Court jurisdiction. *Id.* at 319–20. The same reasoning applies here.

In addition, "the state appellate court's willingness to reach the merits of petitioner's federal claims provides convincing proof that the judgment does not rest on adequate state grounds." *Wardius v. Oregon*, 412 U.S. 470, 477 n.10 (1973).

Nor was the state-law ground "independent." The citation "rule" is intertwined with the underlying merits of the constitutional claim, because it relates to how that claim is pled. Where a state-law ground is "interwoven" with a federal issue, it is not an "independent" ground and does not preclude this Court's review. *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

(b) Similarly, the appellate court's ruling in *Johnson* does not contain an adequate state-law ground preventing review of the federal question. The court of appeal affirmed essentially because it was adhering to its ruling in the *Hashim* case. The appellate court explained that "[t]he trial court exercised its inherent authority to dismiss the complaint because it was duplicative of *Hashim*, in which the trial court sustained defendant's demurrer without leave to amend." Pet. No. 23-255 App., at 5a–6a. The Court of Appeal held that petitioner "fail[ed] to demonstrate the trial court abused its discretion" in "concluding this action constituted an impermissible attempt to circumvent its rulings in *Hashim*." *Id.* at 7a. The court added that "[i]n any event, an injunction is not warranted where, as here, Johnson has not established a viable claim for relief." *Id.* at 8a.

The appellate court's adherence to *Hashim* poses no obstacle to this Court's review. Quite the contrary: it heightens the need for such review because it shows that, absent this Court's intervention, the state courts will continue to treat *Hashim* and related cases as barring constitutional challenges to the UPL.

Respondents do not deny that the instant cases are simply the latest in a long series of California state-court decisions rejecting federal constitutional challenges to the UPL. Pet. No. 23-195, at 19–20. Where a state court has clearly decided a federal constitutional claim, a merely "possible adequate and independent state ground for a decision does not bar [the Court's] reaching the federal questions." *Oregon v. Guzek*, 546 U.S. 517, 523 (2006) (internal quotation marks and citation omitted).

3. Respondents' due process arguments, far from undermining the need for this Court's review, clearly heighten the case for granting certiorari. Respondents maintain, remarkably, that "it is doubtful whether property valued at less than $50" deserves constitutional protection under the standard requirement of pre-deprivation notice. BIO 12. That statement puts to shame even Anatole France's mockery of the "majestic equality" of a legal regime that forbid rich and poor alike to beg in the streets and sleep under the bridges of Paris. *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring). Because the very idea of due process implies equal justice under law, *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954), there can be no arbitrary floor on the quantum of property eligible for protection under the Fourteenth Amendment. Thankfully, no such floor exists. *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 338 (1969), involved a $34 garnishment that this Court held invalid for lack of prior notice, even though the garnishment would be "unfrozen" if the wage-earner prevailed in a subsequent proceeding. *Id.* at 339. *Fuentes v. Shevin*, 407 U.S. 67 (1972), involved several property owners, one of whom claimed a stove and stereo worth just $500; another with a bed, a table, and other household goods; and a third with child's clothes, furniture, and toys. *Id.* at 71–72.

The State points to its website (BIO 15), but a searchable website is not notice, particularly for those on the wrong side of the Digital Divide. Besides, the website operates only after the fact, *after* the Controller has seized the owner's property without individualized notice. *Fuentes* held that "a temporary,

nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment," even where a statute "include[s] recovery provisions" allowing the property owner to reclaim the property. 407 U.S. at 85. This Court has uniformly rejected attempts to justify the seizure of property without notice by pointing to an after-the-fact opportunity for the property's return. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 54 (1993); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983).

Put simply, the Controller cannot shift the burden of conveying constitutional notice from the government to property owners, requiring them to ferret out their own property information on an often-broken government website when, lacking notice, they would have no reason to look on the website in the first place. Making matters worse, property valued under $25 need not be listed with any owner's name at all, making it literally impossible for owners to identify their property on the state's website.

Respondents contend there is no conflict between the California state courts' decisions upholding the UPL and the Ninth Circuit's decisions striking down an earlier version as a violation of due process. BIO 17-18. But none of the post-revision Ninth Circuit decisions approved the seizure and appropriation of property with *no pre-deprivation individualized notice whatsoever*. Pet. 23-195, at 30 n.11. Nor has the Ninth Circuit wavered in its holding that due process is not satisfied "by a newspaper advertisement saying that a person concerned about his property can check a website to see whether he has already been (or soon will be) deprived of it."

Taylor v. Westley, 488 F.3d 1197, 1201 (9th Cir. 2007). Petitioners' cases would have reached a different result in federal court in California.

4. The State's responses to Petitioners' takings claims (BIO 18–20), far from justifying a denial of review, further support the need for plenary briefing and argument. The State does not deny that, under the UPL, the Controller does not merely take "custody" of unclaimed property but takes "title," which vests in the State. Cal. Civ. Proc. Code § 1300(c). *See* Pet. 23-195, at 31–32. Holders of unclaimed property (like financial institutions) remit the unclaimed funds to the State under pain of significant penalties. *Id*. at 8. Once this property is auctioned off or destroyed by operation of the UPL scheme, *the most* the rightful owner could ever recover is part of the monetary proceeds of the sale. Moreover, California pays no interest on the appropriated property, in violation of this Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). *See also Cerajeski v. Zoeller*, 735 F.3d 577, 578-79 (7th Cir. 2013) (Posner, J.) (failure of unclaimed property scheme to pay interest represented taking of property).

The taking here is even clearer than in *Horne v. Dep't of Agriculture*, 576 U.S. 350 (2015), where "[r]eserve raisins are sometimes left on the premises of handlers" and "held 'for the account' of the Government." *Id*. at 361. This Court held that "[t]he Government's 'actual taking of possession and control' of the reserve raisins gives rise to a taking as clearly 'as if the Government held full title and ownership.'" *Id*. at 362. Here, the State *actually has* "full title and

ownership" under the UPL, making the taking of property even plainer.

The State's claim that the Comptroller works to "reunite" owners with their property, BIO 18–19, is fanciful – the property (such as stock and the contents of safe deposit boxes) is liquidated or auctioned. And the lack of notice in the Comptroller's scheme makes it virtually impossible for owners to reclaim cash.

The State finally contends that Petitioners may not challenge the taking until they have exhausted their state-law remedy to seek return of their property. *Id.* at 19. But, given the complete lack of notice, that remedy is a mirage and in any event this Court has squarely held that a property owner's constitutional claim "arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019).

CONCLUSION

One of the two Petitions at issue should be granted and the other held in abeyance pending decision. Alternatively, both petitions should be granted and the cases consolidated for briefing and argument.

Respectfully submitted.

WILLIAM W. PALMER
PALMER LAW GROUP, a PLC
2443 Fair Oaks Boulevard
No. 545
Sacramento, CA 95825
(916) 972-0761
wpalmer@palmercorp.com

JONATHAN S. MASSEY
MASSEY & GAIL LLP
1000 Maine Ave. SW
Suite 450
Washington, D.C. 20024
(202) 650-5452
jmassey@masseygail.com

LAURENCE H. TRIBE
Counsel of Record
KAPLAN HECKER
& FINK LLP
350 Fifth Ave., 63rd Floor
New York, NY 10118
(929) 224-0174
ltribe@kaplanhecker.com

Dated: November 10, 2023