No. 23-65

IN THE
Supreme Court of the United States

ALFREDO MOLINA et al.,

Petitioners,

v.

BMO HARRIS BANK et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION 2

RESPONDENT JENNINGS HAUG & CUNNINGHAM LLP'S BRIEF IN OPPOSITION

VAIL C. CLOAR
Counsel of Record
SCOT L. CLAUS
DICKINSON WRIGHT PLLC
1850 N. Central Avenue,
Suite 1400
Phoenix, Arizona 85004
(602) 285-5000
vcloar@dickinsonwright.com
Counsel for Respondent

QUESTION PRESENTED

Under longstanding principles of federal law, this Court does not consider mere errors of state law as a due process violation, nor does it consider issues not properly raised below. Does a plaintiff suffer a due process violation when he utterly fails to adequately raise and brief an issue in summary judgment proceedings before a state court?

CORPORATE DISCLOSURE STATEMENT

Respondent Jennings Haug & Cunningham, LLP, now known as Jennings Haug Keleher McLeod, LLP, is an Arizona limited liability partnership. No publicly traded company has any ownership in that entity.

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

The Petition is the final death rattle of nearly 10 years of litigation between Jennings Haug & Cunningham ("Jennings") and Alfredo Molina. More than ten years ago, a partner at Jennings, Phil Mitchell, filed a lawsuit against Sedona Luxury Homes ("SLH") on a promissory note in which SLH was the debtor and M&I Bank, now BMO Harris (the "Bank") was the creditor. Because Mr. Molina and his then-spouse had executed a "catch-all" personal guaranty, Mr. Molina and his spouse were included as defendants in the lawsuit. The Bank obtained summary judgment and, shortly thereafter, Mr. Mitchell left Jennings to join another law firm, and he took the Bank's file with him. From the time of Mr. Mitchell's departure onward, Jennings had absolutely nothing to do with the action pending against SLH and Mr. Molina.

Ultimately, SLH and Mr. Molina were successful in litigation with the Bank; the Bank's claims on the note and guaranty were dismissed, and Mr. Molina was awarded attorneys' fees and costs by the trial court. That wasn't good enough. Mr. Molina then launched a years' long crusade against Respondents for imagined wrongdoing. That included a claim against Jennings, whose only role was to act as the Bank's counsel at the outset of the case.

What became clear in this litigation, however, was that neither the Bank, Mr. Mitchell, or Jennings did

anything wrong. Mr. Molina and entities he controlled had made thousands of dollars of payments on the note at issue; he took tax deductions for those payments; before litigation commenced he had full copies of both the note and guaranty; and he filed a counterclaim against the Bank in the underlying litigation predicated on the allegation that he was a "guarantor" of the note. What's more, in declarations filed in connection with the motion for summary judgment in the underlying litigation, the authorized agent for SLH, Bryan Greenwood, testified under penalty of perjury that SLH was the debtor on the note; and Mr. Molina declared under penalty of perjury that he had guaranteed the note. Based on these undisputed facts, those defendants (the current Respondents) all moved for, and were granted, summary judgment.[1] Critically, in response to the Motion for Summary Judgment, Petitioners failed to refute the dispositive facts which led the trial court to grant summary judgment in the Respondents' favor.

Later, when the Cavanagh Defendants sought summary judgment on the same grounds, Mr. Molina came up with new theories, introduced new evidence, and avoided summary judgment. But those new theories and new evidence presented to the trial court *after* entry of summary judgment for Respondents had

---

[1] The Cavanagh Law Firm and Henry Timmerman (the "Cavanagh Defendants") did not join in the Respondents' summary judgment motions. Following entry of summary judgment for Respondents, the Cavanagh Defendants remained in the case.

absolutely no bearing on the propriety of the entry of summary judgment for Respondents. The trial court explained that repeatedly. The Arizona Court of Appeals affirmed, and the Arizona Supreme Court saw no reason to consider Mr. Molina's nonsensical arguments. This Court should reach the same conclusion.

STATEMENT

1. This case began during the real estate boom of the early 2000s. In 2004, Sedona Luxury Homes ("SLH") an entity controlled by Mr. Molina, borrowed approximately $2.9 million from the Bank, secured by undeveloped real property in Sedona, Arizona. Pet. App. 3. SLH was manager-managed limited liability company, and was managed by an entity called Phoenix Holdings II, LLC ("PHII"), which was itself managed by Brent Hickey. *Id.* In 2006, the Bank refinanced the earlier loan with an approximately $1.6 million loan. *Id.* Although Mr. Molina filled out the loan application, Mr. Hickey signed the promissory note and mortgage securing that note. In 2009, SLH obtained another loan from the Bank, and Mr. Molina signed a personal guaranty containing a broad dragnet clause covering *all* of SLH's indebtedness. *Id.*

2. As with many real estate loans made between 2006 and 2009, the $1.6 million loan went into default. Pet. App. 4. In response, Mr. Molina specifically authorized the CFO of Molina, Inc., Bryan

Greenwood, to negotiate with the Bank to attempt to negotiate a workout of not only the loan, but the guaranty; Mr. Greenwood received unredacted copies of every relevant document, and attempted to negotiate a resolution. When he failed, the Bank foreclosed on SLH's property securing the note, sued SLH for the deficiency, and sued Mr. Molina on his guaranty of the note.

SLH and Molina counterclaimed, alleging that the Bank had intentionally diminished the value of the collateral in violation of Mr. Molina's rights as a guarantor. *Id.* Specifically, Mr. Molina alleged that as a "guarantor," he had "equitable rights of subrogation to the collateral" that the Bank had undermined by selling adjacent lots at discounted prices. Pet. App. 10. That allegation was not pleaded in the alternative. *Id.*

In 2010, the superior court granted summary judgment in favor of the Bank. *Id.* Shortly after summary judgment was granted, Mr. Mitchell left Jennings and jointed another law firm, The Cavanagh Law Firm ("Cavanagh"), and Jennings had no further involvement in the underlying litigation. Pet. App. 5.

Four years later, Mr. Molina moved for a new trial, urging for the first time that Mr. Hickey was not authorized to sign the note. Pet. App. 4. The superior court granted a new trial, and ultimately ruled in Mr. Molina's favor over competing motions for summary judgment. *Id.* No appeal was taken from that judgment. *Id.*

3. In 2015, Mr. Molina and SLH sued the Bank, Jennings, Mr. Mitchell, Cavanagh, and a lawyer at Cavanagh, Henry Timmerman, for a host of state law torts for prosecuting the underlying action against Mr. Molina. *Id.* Although claims brought by other corporate entities—Molina, Inc. and Black Starr & Frost—were part of that litigation, they were dismissed from this case and are not pertinent to the Petition. Pet. App. 4–5.

4. After years of litigation, the Bank, Jennings, and Mr. Mitchell moved for summary judgment, arguing that Mr. Molina had ratified the purportedly unauthorized loan and that, therefore, Plaintiffs could not meet their burden to show wrongful or unreasonable conduct. Pet. App. 5. The superior court granted that motion in October 2019, based largely on its determination that Mr. Molina's counterclaim for impairment of collateral securing the 2009 loan (in which he expressly alleged he was a guarantor of the note and that SLH was the debtor) was sufficient to constitute ratification under Arizona law. *Id.* Although Cavanagh and Mr. Timmerman later filed a similar motion for summary judgment months later, Mr. Molina and SLH raised new arguments and adduced new evidence that convinced the superior court that a dispute of fact existed vis a vis Plaintiff's remaining claims against Cavanagh and Mr. Timmerman.

After moving for reconsideration and for a new trial—in effect, four motions for reconsideration, Pet

App. 56—Plaintiffs appealed to the Arizona Court of Appeals.

5. The court of appeals unanimously affirmed the trial court's judgment in an unpublished decision. As explained by that court, the allegation that Mr. Molina was, in fact, a guarantor of the 2009 loan was more than sufficient to ratify that loan. Further, the court identified several other items that, on the undisputed record before it, supported ratification and independently supported affirming the trial court:

- Mr. Molina declared under penalty of perjury that SLH took out the loan and that he personally guaranteed the debt.
- Mr. Molina sent an email to a Bank employee stating categorically that he personally guaranteed the debt.
- Mr. Molina's other entities made "several payments" towards the loan at issue.
- Mr. Molina took tax deductions for interest payments on that loan, and avowed that he had paid over $200,000 in interest to the Bank.

Pet. App. 12–13. The court also explained that several of Mr. Molina's attempts to explain away that conduct were "patently false," and that the plaintiffs cited to their controverting statement of facts "exactly zero

times"[2] in their appellate briefs. Pet. App. 13. Finally, the court rejected the notion that the rulings on summary judgment were "incompatible" or "inconsistent" because "Molina and SLH presented different evidence in opposition of the second motion that they did not present to the trial court in response to the earlier motion despite having opportunity to do so." Pet. App. 15.

REASONS FOR DENYING THE PETITION

I. There is no federal or constitutional question for the Court's consideration.

In terms of a case unworthy of this Court's consideration, this case is a paradigm. The Petition does not point to a single federal claim or issue that was properly raised before the Arizona courts, nor could it do so. The claims alleged are pure state law torts, there is no diversity between the parties, and there is no basis for federal jurisdiction anywhere in

[2] As explained in more detail below, Arizona has adopted the summary judgment standard set forth by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). And the Arizona Rules of Civil Procedure require a party opposing a summary judgment motion to present admissible evidence demonstrating the presence of a genuine issue of material fact. Petitioner's failure on appeal to cite to a *single fact* presented to the trial court—standing on its own—amply justifies the appellate court's decision.

the record. The notion that this Court should sit as an arbiter of Arizona law is absurd.

This Court generally does not meddle in matters of state law entrusted by the Constitution to state courts, and has not done so since at least 1789 with the passage of the Federal Judiciary Act. Indeed, the Court's jurisdiction to review state court judgments is circumscribed by 28 U.S.C. § 1257, which "derives, albeit with important alterations, from the Judiciary Act of 1789." *Illinois v. Gates*, 462 U.S. 213, 218 (1983). Of course, section 1257 does not confer *general* jurisdiction over state court decisions, but instead only decisions where the "validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a).

Because certiorari requires a federal question, litigants have oft tried to convert every asserted error of state law into violation of the Due Process Clause of the 14th Amendment; the Court has repeatedly and routinely rejected such attempts. "We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *see also Engle v. Isaac*, 456 U.S. 107,

121 n.21 (1982); *Barclay v. Florida*, 463 U.S. 939, 951 n.8 (1983) (plurality). That rule is not only clear, but entirely logical. As explained concisely by the Seventh Circuit, "[w]ere the rule otherwise, federal courts would sit effectively as appellate tribunals over every state court proceeding." *Tucker v. City of Chicago*, 907 F.3d 487, 495 (7th Cir. 2018) (citing *Gryger*, 334 U.S. at 731). Federal courts have enough to do without babysitting the state judiciary.[3]

Petitioners' cited cases are not to the contrary. The Petition relies on *Mallory v. Norfolk Southern Railway*, 143 S. Ct. 2028, 2032 (2023), for the dubious proposition that "[t]he Court has regularly granted petitions for writ of certiorari to determine if state courts have interpreted and applied state law in a manner" that violates due process. Pet. 8. Nonsense. The issue in *Mallory* was a question of the 14th Amendment's limitations on personal jurisdiction in the vein of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). Specifically, this Court considered in *Mallory* whether a Pennsylvania statute that required companies to consent to jurisdiction of Pennsylvania

[3] And here, of course, the Arizona courts need no oversight. The decision of a trial court to grant summary judgment in light of a party's failure to present admissible evidence creating a triable issue of fact is hardly surprising. Further, the appellate courts' decision to uphold summary judgment when a party cites no facts presented to the trial court is manifestly proper.

courts as a condition to transacting business in that state was consistent with the Due Process Clause's sense of fair play and substantial justice. *Mallory*, 143 S. Ct. at 2023. *Mallory*, therefore, deals with a question at the heart of section 1257 jurisdiction—whether a state statute violates the Constitution. It could not be more different than the case at hand.

Thus, even if Petitioners were correct that the state courts erred in their application of Arizona common law (and they clearly are not), they cannot transmute a routine "error" of state law into a federal due process question. *Gryger*, 334 U.S. at 731; *Engle*, 456 U.S. at 121 n.21. Such a construct has been routinely rejected by this Court and, standing alone, warrants denial of the Petition.

II. Petitioners have not preserved any due process question.

Even if this Court had not entirely foreclosed Petitioners' attempts to transubstantiate a pure question of state law into a violation of due process, Petitioners have failed to preserve any constitutional question.

This Court does not consider questions raised for the first time in connection with a petition for writ of certiorari, even when of a federal or constitutional magnitude. The reason is foundational to our federal system. "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the

federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements." *Webb v. Webb*, 451 U.S. 493, 499 (1981). Thus, where state courts have not been "apprised of the nature or substance of the federal claim at the time an in the manner required by state law," the federal issue is not properly before this Court. *Id.* at 501; *see also Clark v. Arizona*, 548 U.S. 735, 765 (2006) ("But because a due process challenge to such a restriction of observation evidence was, by our measure, neither pressed nor passed upon in the Arizona Court of Appeals, we do not consider it."); *Kahlr v. Kansas*, 140 S. Ct. 1021, 1027 n.4 (2020).

Even a cursory review of Petitioners' Appendix makes manifest they failed to raise any constitutional issue in the manner required by Arizona law. They did not raise any due process issues before the intermediate appellate court. Pet. App. 99–100. They did not raise any due process issues before the Arizona Supreme Court. Pet. App. 71–72. Indeed, the *only* place that Petitioners ever uttered the words "due process" before the state courts was in an (improper)[4] motion to the Arizona Supreme Court to reconsider its denial of a petition for review. Pet. App. 200–213.

Under Arizona law, that was far too late. Cases are legion explaining that the Arizona Supreme Court—

[4] Motions for reconsideration from a denial of a petition for review are not permitted under Arizona law without leave of court, Pet. App. 59, and the Arizona Supreme Court declined to grant leave. Pet App. 61.

just as this Court—does not consider questions not raised before the court of appeals or properly raised in the filing seeking review by the Arizona Supreme Court. *See, e.g.*, *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 568 (Ariz. 1986) ("A waiver by failure to raise an issue in the court of appeals should be even more readily found when the party seeking review has also failed to raise the issue in his petition."); *Grand v. Nacchio*, 236 P.3d 398, 404 (Ariz. 2010) (declining to consider issue raised for the first time after petition for review).

Plainly, Petitioners failed to raise any constitutional issue in the manner required by state law. *Webb*, 451 U.S. at 499. The tacit assumption that a party can decline to raise an issue at the intermediate state court, decline to raise it in its petition to the highest state court, raise it for the first time in an *improper* filing, and then seek review from this Court is anathema to this Court's role in our system of federalism.

III. The state courts were correct on an issue of state law.

Finally, even assuming Petitioners had actually articulated some federal question that they had properly preserved, their position on the law is substantively fallow.

The notion that a state court granting summary judgment based on the evidence before it violates due process is unfathomable. Arizona has interpreted its rule of summary judgment to align with this Court's

opinions in *Celotex* and *Anderson*. *See Orme School v. Reeves*, 802 P.2d 1000, 1004 (Ariz. 1990) (explaining the desirability of interpreting Arizona's procedural rules with this Court's interpretation of federal rules of civil procedure), *id.* at 1006–09 (citing and adopting *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Manifestly, granting summary judgment "because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof" does not violate due process. *Celotex*, 477 U.S. at 323.

As explained by the court of appeals, Arizona law permits a principal to ratify her agent's unauthorized conduct "by taking a position in litigation that is warranted only by consent to be bound by the act." Pet. App. 9 (citing Restatement (Third) of Agency § 4.01 cmt. h and *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 603 P. 2d 513, 527 (Ariz. Ct. App. 1979)).

The undisputed facts before the trial court established that is precisely what Mr. Molina did when he brought a counterclaim against the Bank based on his status as an alleged guarantor for SLH's loan. Pet. App. 10. The fact that Petitioners failed to refute that factual record left summary judgment as the only viable option. *Orme School*, 802 P.2d at 307–310; *Celotex*, 477 U.S. at 323.

It is also critical to note that there was a panoply of other undisputed conduct and words that made

clear Mr. Molina ratified the loan: Mr. Molina declared under penalty of perjury he guaranteed the debt; he sent an email to a Bank employee stating in no uncertain terms that "SLH was the borrower" and he "was the guarantor;" entities Mr. Molina controlled made several payments on the loan over a course of years; and Mr. Molina took thousands of dollars in tax deductions from interest paid on the loan. Pet. App. 11–12. Nothing in Petitioner's filings before the state courts refuted those points, and Petitioners cited their opposing statement of facts filed in opposition to the Bank and Jennings' motion "exactly zero times" on appeal. Pet. App. 13. That failure was fatal under Arizona law precisely as it would be under federal law. *Compare Celotex*, 477 U.S. at 322 ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.") *with Doe v. Roe*, 955 P.2d 951, 961 (Ariz. 1998) ("Upon a moving party's prima facie showing that no genuine issue of material fact exists, the opposing party bears the burden of producing sufficient evidence that an issue of fact does exist."). Petitioners' failure to abide by the applicable rules is, at worst, their own error, not a due process violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

VAIL C. CLOAR
Counsel of Record
SCOT L. CLAUS
DICKINSON WRIGHT PLLC
1850 N. Central Avenue,
Suite 1400
Phoenix, Arizona 85004
(602) 285-5000
vcloar@dickinsonwright.com

Counsel for Respondent
Jennings Haug &
Cunningham