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Appendix A

Case No. A161478

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

Aaron Hashim and Paul Hashim,
Plaintiffs and Appellants,

v.

BETTY YEE,
Defendant and Respondent.

Appeal from Superior Court of the County of San Francisco, California
Case No.: CGC-13-531294
Hon. Judge Ethan P. Schulman

APPELLANTS' AMENDED OPENING BRIEF

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I. ISSUES PRESENTED

1. Whether the Controller's actions under color of the California Unclaimed Property Law, Code of Civil Procedure sections 1300, *et seq*., violate the Fifth and Fourteenth Amendments and unconstitutionally deprive owners of their private property rights.

2. Whether the Controller's privately commissioned auditors and claim process are constitutional when the processes do not comply with California's Administrative Procedure Act, Government Code sections 11340, *et seq*.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This is the second appeal in this case. The first appeal resulted in a reversal of the lower court's decision dismissing the case and awarded costs to plaintiffs and appellants Aaron Hashim and Paul Hashim ("Plaintiffs"). (*See Hashim v. Betty T. Yee*, 2019 Cal. App. Unpub. LEXIS 5888 (September 4, 2019) (hereafter, "*Hashim v. Yee*").) This case has now been pending since 2013.

On May 27, 2020, another case was filed by Plaintiff's counsel on behalf of student Cooper D. Johnson ("Cooper") whose approximately $14,000.00 college stock fund was seized and sold without notice for which he received $173.56. (*See Cooper D. Johnson v. Betty T. Yee,* San Francisco Superior Court Case Number CGC-20-584592; California Court of Appeal, First Appellate District Case Number A161442 (hereafter, "*Johnson v. Yee*").) Plaintiffs in both cases sought temporary restraining orders and brought motions for preliminary injunctions, which were each denied without hearing. (*See* 7 Clerks Transcript "CT" 2042-2096; 8 CT 2098-2396; 9 CT 2398-2632.) [1]

During the hearing, the Honorable Judge Ethan P. Schulman was confronted with the fact that stock and dividends belonging to him and his wife had been seized under the identical process outlined by the Hashim family and Cooper in their complaints. Judge

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[1] Citations to the Clerk's Transcript "CT" on Appeal shall contain the abbreviation "CT," preceded by volume number and followed by the page number(s), and line number(s) (if applicable) of the referenced document(s).

Schulman became angry and acknowledged that he was communicating and negotiating with the respondent and defendant Controller (hereafter, "Controller" or "Defendant") for the return of his family's property (stock). (*See* Reporter's Transcript of Proceedings dated July 22, 2020 ("RT").)[2]

The Judge (and his wife), and the California Attorney General's Office, for that matter, see nothing wrong with failing to disclose the obvious conflict of interest and engaging in confidential negotiations with one of the litigants standing before the lower court. Judge Schulman noted: "So I… my personal experience is not particularly pertinent here, but for the record, I will state that I am aware of that and I in fact received, if I recall correctly, e-mail notice from the Controller of that fact." (*See* Transcript at pg. 6, lines 10-13; *see also* California Code of Judicial Ethics (July 1, 2020).) The Transcript speaks for itself and the added comment that Plaintiff's counsel was "very disrespectful" (9 CT 2657 at *fn*. 1) merely shows the taint and bias of the proceedings below.

This second appeal thus once again challenges the *application* of California's Unclaimed Property Law, Code of Civil Procedure sections 1300, *et seq*. (hereafter, "UPL"),[3] which is administered by the Controller. Plaintiffs allege standing as taxpayers standing, potential claims for property, and that they

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[2] Citations to the Reporter's Transcript on Appeal shall contain the abbreviation "RT" and the page and line numbers contained therein.

[3] Further statutory references are to California's Code of Civil Procedure (Deerings 2021), unless otherwise noted.

operate a business in California that reunites owners with their lost and unclaimed property which is disrupted by the unconstitutional conduct of the state official. (7 CT 2010-2014.)

The purpose of the UPL is to be twofold. The *primary* purpose of the UPL is to "reunite" lost property owners with their "unclaimed" or "abandoned" property. (*See Azure v I-Flow, supra*, 46 Cal. 4th 1323, 1328 (citing *Harris v. Westly* (2004) 116 Cal.App.4th 214, 219; *quoting Douglas Aircraft Co. v. Cranston*, 58 Cal.2d 462, 463 (1962)); *Bank of America v. Cory* (1985) 164 Cal. App. 3d 66, 74.) The *secondary* purpose of the UPL is to allow the State of California, rather than a private business, to benefit from the use of the property while its owner is sought. (*Ibid*.) Instead, the purposes are flipped, the law is used as a source of revenue and property owners receive little or no notice whatsoever of the property seizures.[4]

In order to accomplish the dual purpose, the UPL appoints the Controller as the trustee of all unclaimed property delivered to her custody which is maintained in the Unclaimed Property Fund ("UPF"). The UPF is supposed to be comprised of funds and private property (like stocks and the contents of safe deposit boxes) and requires the Controller to attempt to locate and to return the unclaimed property. (*See* Section 1300 (Definitions); *Taylor v. Westly*, 402 F.3d 924 (9th Cir. 2005), *reh'g and reh'g en banc den.* (May 13, 2005) (Describing California's "new approach" to escheat) ("*Taylor I*"); *Taylor v. Westly,* 488 F.3d 1197, 1200-02 (9th Cir. 2007) ("*Taylor II*"); *Taylor v. Westly,* 525 F.3d

[4] *See* 6 CT 1705-1706; 1731-1766.

1288, 1291 (9th Cir. May 12, 2008) ("*Taylor III*").) The Controller takes actual "title" to the property (*see* Section 1300(c)[5]) and "stands in the shoes" of the true owner of the property. (*See Bank of America v. Cory*, *supra*, 164 Cal.App.3d at 74.)

California acquires the unclaimed personal property through operation of the UPL, which requires the "Holders," like corporations, business associations, financial institutions, and insurance companies, to annually report and to transfer title to property to the Controller or face fines and penalties.[6] This transfer occurs after there has been no consumer, customer, client, or shareholder contact by the "Owner" for statutorily prescribed time periods that vary depending on the nature of the property; for example, three years' of "dormancy" or no contact with the corporation by the shareholder regarding the owner's stock.[7] As a precondition, the private property owners must be "unknown" to the state official and their property "abandoned" under this law. The Holders are sometimes audited by privately commissioned auditors who are under contract with the Controller and receive a percentage of all private property that they seize on behalf of the State.

But the Controller does not view the funds and property held in trust in the UPF as escheated private property but lists unclaimed property as a "revenue source" generated for the use of the State. The

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[5] *See* Section 1300(c).

[6] *See* Sections 1570-1574 (typically 13% interest penalty per annum).

[7] *See* Sections 1510-1511, 1513-1519.5, 1521.

Controller transfers all but $50,000 to the General Fund each month. This "revenue" from unclaimed property is listed in official reports as the fifth (5th) largest source of General Fund revenue. The General Fund's five (5) top sources of revenue in descending order are: the personal income tax, the sales and use tax, the corporation tax, the insurance tax, and funds generated by the private property taken as unclaimed property.[8] Since the revenue stream created by the unnoticed seizure and sale of the unclaimed private property is not considered proceeds from taxes, it is not restricted under Proposition 98 (which benefits schools and community colleges), and therefore is without limitation and the most useful funding to California, which may spend the money freely, as needed. (*Id*.)

As noted in the preliminary injunction filing (7 CT 2040-2082), California property seizures are growing at an exponential rate. The bankrupt State of California, "…from the city council level to the state level, is over $1.3 trillion in debt."[9] The secondary purpose (to give the State the use of the private property while the owners are located) has now

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[8] Taylor, Mac, "Unclaimed Property: Rethinking the State's Lost & Found Program, Legislative Analyst's Office (LAO)" (February 10, 2015) at pp. 16-17 found at: http://www.lao.ca.gov/reports/2015/finance/Unclaimed-Property/unclaimed-property-021015.pdf.

[9] T. Del Beccaro, Forbes Magazine, "CA Is Heading Due Left and You Are Paying For It." (April 5, 2017): https://www.forbes.com/sites/thomasdelbeccaro/2017/04/05/ca-is-heading-due-left-and-how-you-are-paying-for-it/#2d7c04201dce.

supplanted the original and primary purpose of the UPL statutory scheme, which is to reunite the private citizens with their purportedly "lost" and "abandoned" private property. The UPF has become a permanent, free (no-interest) loan of private money seized illegally from citizens to pay for the needs of the General Fund in violation of the Constitution and Supreme Court precedent, discussed *infra*.

During the pendency of the appeal in *Hashim v. Yee*, the United States Supreme Court reviewed this Controller's administration of the UPL and after nine (9) conferences by the Justices, two Justices issued an opinion in *Taylor v. Betty T. Yee*, 136 S. Ct. 929 (2016) directed at the same defendant here. Associate Supreme Court Justices Samuel A. Alito, Jr. and Clarence Thomas warned this same Defendant that: "The Due Process Clause requires States to give adequate notice before seizing private property. When a State is required to give notice, it must do so through processes 'reasonably calculated' to reach the interested party—here, the property owner." (*Taylor v. Yee*, 136 S. Ct. at 929, *supra*.)

The previous Controller John Chiang was federally enjoined for the identical conduct alleged now. (*See Taylor v. Westly,* 488 F.3d 1197 (9th Cir. 2007) ("*Taylor II*") and 9 CT 2399-2410 [Federal Injunction Order issued by Hon. Judge William B. Shubb ("Federal Injunction Order")].) The Controller *verbally* promised the federal court that the unconstitutional conduct would stop.

But the Controller's unconstitutional conduct alleged in the Complaint continued and openly conflicts with the "dual objectives" of the Unclaimed

Property Law. The UPL is not intended as an open-ended revenue stream for the State. Thus, irreparable harm is suffered by the very property owners, like the Plaintiffs who the Controller is charged to protect under the primary purpose of the statutory scheme. (*See* 9 CT 2399-2410 [Federal Injunction Order, Illustrations 1 and 2, at pp. vii, viii.])

The declarations and evidentiary support filed with the TRO and the Motion for Preliminary Injunction (7 CT 2040-2096, 8 CT 2098-2396, 9 CT 2398-2622) were dismissed out-of-hand by the Hon. Judge Schulman without a hearing. This evidence includes deposition testimony from the Controller's two Persons Most Knowledgeable ("PMK") and (CT RFJN Volumes I and II), and the Declarations of Aaron J. Hashim ("A. Hashim Decl."); Cooper D. Johnson ("Johnson Decl."); and an internet expert Ryan R. Stevens ("Stevens Decl.") that confirm the undisputed facts: Defendant provides no constitutional notice whatsoever or otherwise falls far below the constitutional standard articulated by the United States Supreme Court in *Taylor v. Yee*, 136 S. Ct. at 929, *supra,* by the California Supreme Court in *Azure*, and by the Ninth Circuit Court of Appeal in *Taylor II*; *Taylor III*; *Suever v. Connell*, 439 F. 3d 1142 (9th Cir. 2006) ("*Suever I*").

The violations are also confirmed by the Controller's own authenticated internal government memos in which state officials openly admit that the UPL program does not follow the law. These were also provided to the lower court. (*See, e.g.*, 1 CT 145-147, 170-172, 185-187 [Controller's staff noting conduct is unlawful and does not comply with UPL];

watch ABC's "Good Morning America" which discusses government memorandum, at *fn*. 10.)

Controller Chiang confirmed this conduct on national television and in a statewide media blitz and with a public written apology. Even European television and newspapers covered the story: "British Celebrities' assets seized under Draconian California Law." [10] But despite a federal injunction, verbal promises, mass media with public apologies, the practices continued and escalated.

The Complaint alleges and more importantly the undisputed facts filed in support of the TRO and Motion for Preliminary Injunction show the

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[10] *See*, for example: C. Hedley, "British Celebrities' assets seized under Draconian California Law" The London Daily Telegraph (April 3, 2009) and the "Tonight Show" with Sir Trevor McDonald (England's version of CBS News "60 Minutes"); http://www.telegraph.co.uk/news/newstopics/celebritynews/5096202/British-celebrities-assets-seized-under-draconian-California-law.html;

National Public Radio "NPR" "All Things Considered – State Unclaimed Property Laws Under Scrutiny," National Broadcast:http://www.npr.org/templates/story/story.php?storyId=12379040;

ABC Good Morning America, Not-So-Safe-Deposit Boxes: States Seize Citizens' Property to Balance Their Budgets (May 12, 2008) found at: http://www.youtube.com/watch?v=ZdHLIq0qHhU.

See also J. Chiang, "State Controller on asset seizure" Orange County Register (July 29, 2007) (8 CT 2350-5351).

misconduct is just as it was before the Federal Injunction Order:[11]

(1) the Controller cannot and does not provide Constitutional Notice and Due Process prior to taking the property for use by the government, which is strictly prohibited by the Supreme Court's opinions in *Taylor v. Yee*, 136 S. Ct. at 929, *supra*, *Jones v. Flowers,* 547 U.S. 220 (2006) ("*Jones*") (citing *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, *supra,* and the *Taylor I, II, III, Suever I* decisions;

(2) the Controller cannot return the property because she does not ask for the owners' names, so that she cannot verify payment of a claim or the amount that is owed;

(3) the owners cannot claim the property because the Controller does not list their names on her inoperable broken "searchable website," i.e., citizens cannot see their names or property on the website, which is broken (*see* 9 CT 2595-2622 [Stevens Decl.]);

(4) there are no APA-approved regulations to guide the UPL process, just 300+ pages of miscellaneous information posted on the Controller's website; and

(5) the Controller pays no interest on the private property that has been taken when (and if) it is returned to the owner in violation of the Constitution. (*See* 4 CT 1043-1044 [Com., ¶ 24, a-f, at pp. 7-8].) These facts are not in dispute.

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[11] *See* 9 CT 2399-2410.

In issuing the Federal Injunction Order in 2007, the Honorable Judge William B. Shubb observed:

> "… the primary purpose of the UPL is not supposed to be to raise revenue for the state. The Controller's webpage says the law was enacted 'to prevent holders of unclaimed property from using your money and taking it into their business income.' If the purpose of the law is, as the Controller has reportedly said, to reunite owners with their [property, it would] generate little or no revenue at all for the state."

(*Taylor v. Chiang*, U.S. Dist. LEXIS 43711, 43715 (2007) [Bracketed insert added].)

Hon. Judge Shubb noted the irreparable harm suffered by the very property owners who the Controller is charged to protect under the primary purpose of the statutory scheme. The Hashims respectfully request that this Court remand and order that a new "untainted" lower court immediately issue a Preliminary Injunction to protect the private property owners from further unnoticed seizure of their private property.

III. STATEMENT OF APPEALABILITY

This appeal is timely made from a Judgment of Dismissal entered on October 13, 2020 (9 CT 2665-2666), following the Order Dismissing Action with Prejudice entered on July 23, 2020. (9 CT 2656-2664.) The Judgment is appealable under Code of Civil Procedure section 904(a)(1).

IV. STANDARD OF REVIEW

While it is the duty of the reviewing court, in most cases, to indulge in every reasonable presumption in favor of sustaining the trial court, substantially the reverse is true when plaintiff appeals from a demurrer. (*See Crain v. Electronic & Magnetics Corp.* (1975) 50 Cal. App. 3d 509, 512.)

This case also turns entirely on issues of law. Specifically, this Court must decide: (a) whether the Controller was required to provide prior notice to Plaintiffs and property owners as required by the United States Constitution; and (b) whether the process required of owners to reclaim their property is constitutional. (*See Long v. City of Los Angeles,* (1998) 68 Cal.App.4th 782.) Both of the preceding issues presented in this appeal are purely issues of law and are entitled to *de novo* review. (*Ibid.*)

V. STATEMENT OF THE CASE

A. Statement of Facts

This case arises from the Controller's ongoing violations of the United States Constitution in the course of her administration of the UPL. While the *Hashim v. Yee* appeal was pending, the number of property seizures increased dramatically in size from 32.5 million (now 48 million) private accounts taken from citizens containing $5.1 billion (now $10.2 billion) retained in the Unclaimed Property Fund ("UPF").

These seizures include shares of stock, for example, belonging to foreign citizens who have no contact whatsoever with the forum State of California and who receive no constitutional notice of any kind.

(*See* 8 CT 2372-2374 - Examples of foreign citizens irreparably injured by Defendant.) This property (for instance, shares of stock and contents of safe deposit boxes) is seized, destroyed, and monetized for use by the state government so that the stock and property rights are permanently lost or disrupted. (*See* 9 CT 2574-2594 [Johnson Decl. describing seizure of stock]; 9 CT 2399-2410 [Federal Injunction Order – Hon. Federal Judge Shubb notes seizure of stock creates irreparable harm].)

Two Associate Justices of the United States Supreme Court, Samuel A. Alito, Jr. and Clarence Thomas, issued an opinion in *Taylor v. Yee*, 136 S. Ct. at 929, *supra* (8 CT 2222-2348) that is directed to this Defendant specifically on these very facts. While this case was pending, $4 million of Amazon Stock was seized from Jan Peters who lives in Munich, Germany. The Controller then wired $1,603,807.46 to Mr. Peters. Mr. Peters has notified the German government and sued the Controller in *Jan Peters v. Betty T. Yee*, U.S. District Court Central District of California Case No. CV 21-4929-JFW(ASx).[12]

Four separate Panels of the Ninth Circuit already held that the same conduct addressed in the Complaint is unconstitutional. (*See Taylor I-III*, *Suever I.*) The current process used to seize and to sell the individual's private property was (and continues to be) illegal and unconstitutional, and the Controller admitted such. (*See*, for instance, 8 CT 2349-2352 [article authored by the Controller John Chiang, "State Controller on Asset Seizures," Orange

[12] *See* Statement of Related Cases at p. 65.

County Register (July 29, 2007) admitting the Unclaimed Property Law was "perverted" over the past two decades to harm the citizens it is intended to protect].) The Controller reiterated these same phrases repeatedly, "What we did was wrong." (*See fn*. 10, ABC's Good Morning America, "Not-So-Safe-Deposit Boxes: States Seize Citizens' Property to Balance Their Budgets.") Yet despite being "perverted" and "wrong" the Controller continues the identical unconstitutional practices to this day, to the detriment of Plaintiffs, Jan Peters, and the Honorable Judge Schulman and his wife Marcia.

All federal courts considered and rejected California's published authority found in *Fong v Westly,* (2004) 117 Cal. App. 4th 841 ("*Fong*") and *Harris v. Westly, supra,* 116 Cal. App. 4th 214 ("*Harris*"), cited with approval by the California Supreme Court in *Azure*, *supra*, 46 Cal. 4th at 1328, 1330. The *Fong* and *Harris* cases stand for the novel, unconstitutional proportion that a statutory scheme standing alone and with no compliance with the notice provisions provides "constructive notice" when state officials fail to provide the constitutional direct mail and publication notice mandated by the statutory scheme. (*Id*.) These courts reassured that property owners are placed on "inquiry notice" when communications like bank statement and stock reports stop arriving in the mail. These same *Fong* and *Harris* courts openly rejected the briefing and reasoning of *Mullane*, which was cited by counsel.

And rather than base their reasoning on Supreme Court precedent in Unclaimed Property Law, the *Fong* and *Harris* Courts noted their decisions in the

area "mineral rights law." Thus, taking a "use it or lose it" approach to private property rights.

Even before the two United States Supreme Court Justices' opinion in *Taylor v. Yee* or the Ninth Circuit's multiple rulings in the *Taylor I*, *Taylor II*, *Taylor III*, and *Suever I*, the state officials openly ignored the written warnings issued by the California State Auditor, the California State Attorney General, the Controller's private consultant KPMG Peat Marwick, and even her own staff that forecast potential exposure at $1.5 Billion as of 2003,[13] if the Controller lost the *Taylor I* action.[14] The Controller then lost the *Taylor I* action. The High Court now appears to be prepared to weigh in on California's "new form of escheatment." (*See Taylor v. Yee*.)

The *Taylor III* Court did not hold - as the Controller has repeatedly suggested throughout this case and others - that the conduct described herein is constitutional. In *Taylor III* the Ninth Circuit assumed that then-Controller Chiang (and future elected officials who hold that office) would adhere to the four (4) published rulings against him, issuance of a federal injunction, and the Controller's media confessionals: "What we did was dead wrong."[15] This

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[13] *See* 9 CT 2492-2566 - California State Auditor *State Controller's Office: Does Not Always Ensure the Safekeeping, Prompt Distribution, and Collection of Unclaimed Property,* Report 2002-122.

[14] Steve Westly, California Controller, 2003 Comprehensive Annual Financial Report for Year Ended June 30, 2003 at p. 130.

[15] *See, e.g., fn.* 10.

is sadly not the case to the detriment of the Plaintiffs, Cooper, Judge Schulman and his wife, and the 43 million property owners whose private property has been seized for use by the state government.

Such "lost and unknown" property owners include famous "unknown" athletes, personalities, citizens like Kobe Bryant (Property ID Nos. 962594045 and 017241610), the Speaker of the United States House of Representatives Nancy Pelosi (Property ID Nos. 015048011, 012390561, and 968473966), the former Governor of the State of California, Arnold Schwarzenegger (Property ID No. 964627703), the Queen of England (Elizabeth Windsor),[16] Vladimir Putin (Property ID No. 986208586), Presidents George W. Bush (Property ID No. 956318038) and Barack Obama (Property ID No. 969500727), and one member of the California Supreme Court. (8 CT 2132-2138, 2222-2348 [Petition For Writ of Certiorari With The United States Supreme Court at p. 29].)

The lack of constitutional notice is amply demonstrated by the fact that the same California state officials may easily locate these same citizens when it is time to tax them, to count their votes, pay small parking tickets, or charge a vehicle registration fee, etc. But otherwise, these officials make no effort

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[16] C. Hedley, "British Celebrities' assets seized under Draconian California Law" The London Daily Telegraph (April 3, 2009) and the "Tonight Show" with Sir Trevor McDonald (England's version of CBS News "60 Minutes");

http://www.telegraph.co.uk/news/newstopics/celebritynews/5096202/British-celebrities-assets-seized-under-draconian-California-law.html

to notify the same citizens when it is time to restore property rights to them, which is the primary purpose behind the UPL's very existence. (*See Azure v. I-Flow*, *supra*, 46 Cal. 4th at 1328.) The Controller does not bother to consult readily available state records and databases, though specifically authorized to do so under both the Constitution and Section 1531.5.

Yet another equally absurd and unacceptable possibility is that the Controller has simply misplaced the identities of 43 million of the 39.9 million citizens residing in this State and around the World. In this case, for instance, the Honorable Judge Ethan P. Schulman (and his wife) were "lost" and "unknown" to the Controller, even while the Controller was appearing right before him.

In *Taylor II*, the Ninth Circuit flatly rejected all the arguments made by the Controller to the lower court now and issued a federal injunction that closed the Controller's unclaimed property operation. (2 CT 439-451 [Federal Injunction Order].) In *Taylor III*, the Ninth Circuit reserved judgment on the Controller's application of the newly revised UPL, and held:

> The Controller has hardly begun enforcing the new escheat law. We cannot say, on the record before us, that the district court abused its discretion in dissolving the preliminary injunction. Our review in this case is confined by our limited standard of review, and is not a definitive adjudication of the constitutionality of the new law and administrative procedure.

(*Id*. at 1290.)

Put very simply, it is not the express language of the UPL that is unconstitutional; rather, it is the Controller's application and failure to fulfill "the promises" of "the new escheat law" that is unconstitutional. The fact that a state official blows through a bright red traffic stop sign does not make the sign "unconstitutional," it is the act of violating the law that is illegal. The harm visited on private citizens by these illegal acts is irreparable and may not be repaired with money; their property was seized, destroyed, and, like Cooper's stock, sold for pennies. (*See* 9 CT 2574-2594 [Johnson Decl.], 9 CT 2567-2573 [A. Hashim Decl.]; *see also* 8 CT 2371-2374 [illustration of these foreign citizens who each lost $1 million in stock value].)

Instead, the lower court tethered its reasoning to *Taylor v. Yee,* 780 F.3d 928 (9th Cir. 2015) ("*Taylor IV*"), without bothering to glance at the allegations in this case and the facts supporting the preliminary injunction. (9 CT 2656-2664.) A financially troubled state may not arbitrarily seize sums of money from its citizens with no notice and with no ability by those citizens to ever reclaim the private property and funds under color of the UPL. The primary purpose of the UPL, just as Judge Shubb observed, is to reunite lost private property rights, with their "unknown" owners. The goal of the UPL is to protect the citizens' property rights not to destroy them. (*See* 9 CT 2398-2410 [Federal Injunction Order]; *Azure v I-Flow, supra*, 46 Cal. 4th at 1328; *Bank of America v. Cory, supra*, 164 Cal. App. 3d 66, 74.)

It is important to recognize that the private property owners, like Plaintiffs, who are impacted by the UPL process did nothing wrong, violated no laws, and owe no fines or penalties. Their property in question not only includes utility deposits, for example, but valuable stock and retirement savings accounts, the irreplaceable contents of bank safe deposit boxes, and many other forms of private property. In the case of items that have little or no commercial value (such as paper wills and trust documents, love letters, military citations for valor, and other items of immeasurable sentimental importance), the irreplaceable property is shredded by state officials and permanently destroyed because it has no value as "revenue."

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 in order to locate them, such as the Department of Motor Vehicles ("DMV") database and other readily available sources of information. Yet when it comes time to return property under the mandatory language of UPL that requires the state officials to locate the owners and to return their property, and to otherwise provide constitutionally required notice prior to the appropriation of property, the same property owners are "unknown" to the State, which does not use the available databases. Inexplicably, the State is unable to locate virtually the entirety of its own citizens.

However, these same databases are used by the Controller to verify the identity of the owner and whether he or she may later reclaim his or her seized property held in the UPF under this UPL scheme.

The United States Supreme Court has recognized that the government's fiscal self-interest creates a danger of self-dealing that warrants heightened judicial scrutiny in cases such as this one. (*See United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996); *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977).)

The first step under the UPL escheat process occurs when "Holders" of property (which are "Banking organizations" "Business associations" "Financial organization" and other entities defined by Section 1501) identify property that, per the UPL, has been statutorily defined as "unclaimed" and therefore subject to confiscation by the State. Under the UPL, when there is no activity on an account or when the owner has had no contact with the Holder (such as a bank) for a fixed period of time (known as the "dormancy period"), the property is statutorily defined as "abandoned" or "unclaimed," and the Controller is automatically authorized to take title to the property. (*See* Section 1300 (Basic definitions); *Bank of America v. Cory*, *supra*, 164 Cal. App. 3d at 74, (Describing the process); *Taylor I*, 402 F.3d 924 (9th Cir. 2005) (Discribing California's "new approach" to escheat).) When the UPL was enacted in 1959, the dormancy period was fifteen (15) years. In 1976, it was reduced to seven (7) years; in 1988 to five (5) years, and in 1990 to three (3) years. (*See* Statutory Notes, 2007 Main Volume, C.C.P. § 1513; *see also* Stats. 1976, c. 648, § 1 & c. 1214 § 1; Stats. 1988, c. 286 § 2; Stats. 1990, c. 450 (S.B. 57), § 4.)[17] This

[17] A later amendment extended the dormancy period back to five years only for "any other written instrument on

reduction in time allows for the collection of more property.

Prior to 1993, the Controller provided direct mail notice to some owners and published the names and addresses of persons with "unclaimed" property in newspapers in each county that listed an address for that individual. (*See* sample advertisements retrieved by Plaintiff from the California State Archives at 7 CT 2095-2096; 8 CT 2098-2101.) By 1989, the Controller had stopped sending direct mail notice and stopped publishing names and property descriptions in newspapers altogether, although Section 1531 continued to require this form of constitutional notice to owners. From among all the other states, the California Controller unilaterally shifted to generic single five (5) inch advertisements directed to no one in particular with footnotes stating that the effort was "in lieu of compliance with the CCP 1531." (*Id.*)

As the Controller was decreasing the amount spent on notice to owners, the State was simultaneously spending increasingly large sums of money on privately commissioned auditors to expand the amount of property seized. The Controller hired "private auditors" who are paid a percentage commission which increases with the rate of seizures.[18]

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which a banking or financial organization is directly liable," such as a certified check. Stats. 1990, c. 1069 (S.B. 1186), § 1.

[18] *See, e.g.*, D. Savage, Los Angeles Times, "Is California doing enough to find owners of 'unclaimed' funds before

This strategy predictably redounded to the State's financial benefit. In 2001, the Controller had seized property worth approximately $2.7 billion; by 2007, it had grown to $4.1 billion from 8.7 million persons; by 2011 that number had increased to 17.6 million – a 101% increase, to nearly half the State's inhabitants – and today the number is up to 48 million. Thus, today, the Controller holds property valued at over $10.2 billion,[19] taken from over 48 million persons,[20] almost a five-fold increase in ten (10) years while the Hashim case was pending before this Court for a program that was initiated in 1950. According to the State of California, the Controller currently does not know the identity or location of the vast majority of its citizens under this property seizure program.

The risk of erroneous seizures is heightened by the profit motives created by the State's scheme. As noted, the Controller hires private companies to audit Holders' (the statutory term referring to private businesses) books and records and to instruct the Holders (businesses) as to the property subject to confiscation by the Controller. There are no published state regulations on this process, only constantly changing internet "guidelines" found on the Controller's website (*see*, *e.g.*, 1 CT 79-174 ("State of California Unclaimed Property Holders Handbook"

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pocketing the money?" (January 7, 2016): http://www.latimes.com/nation/la-na-court-california-cash-20160107-story.html.

[19] https://sco.ca.gov/eo_pressrel_21369.html.

[20] https://sco.ca.gov/eo_pressrel_19941.html.

(March 2013)), [21] which is a violation of California's Administrative Procedure Act or APA, discussed at Section VI.E., *infra*. The auditors are paid a commission of 11% on everything seized by them on behalf of the Controller, so that their profits are directly tied to the amount of property they take. (8 CT 2240.) This scheme requires that the property must be sold or monetized in order to pay the auditors their percentage, and to guard against price fluctuation in the property's value such as in the case of Cooper's and other citizens' stocks. If the stock goes down in price before it is sold, then the Auditors will not get paid as much money. Of course, if the Controller held the stock, then Cooper, Jan Peters, and Judge Schulman would not be harmed because their property would be returned to them.

Once auditors have identified the "abandoned" property, Holders are required to send the Controller a statutorily mandated notice report ("Notice Report") listing the properties in question, the owners' names, and their last known addresses.[22] Holders are not required to report the owner's Social Security Number (SSN) for any type of escheated property, even if the Holder possesses the SSN. Notably, any person who does not have a Social Security Number and does not reside in the State of California will receive neither direct mail nor publication notice of any kind.

The Notice Report must be filed no later than November 1 each year. (Section 1530(d).) The

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[21] *See* Controller's Website found at: https://www.sco.ca.gov/upd_lawregs.html

[22] See *fn.* 8.

Controller is required to send a "pre-escheat notice" to owners listed on the Holder's Notice Report within 165 days of the November 1 filing. (*Id*.) No sooner than seven (7) months and no later than seven (7) months and fifteen (15) days after the November 1 report, Holders are required to pay or deliver to the Controller "all escheated property specified in the report." (*Id*.; Section 1532.) In most instances, the Controller uses the same address information provided by the Holders, which is already known to be stale (indeed, that is the reason the Holder is providing the ownership information and the property to the Controller in the first place).

Holders are not required to report the owner's Social Security Number (SSN) for every type of escheated property, even if the Holder possesses the SSN. Notably, any person who does not have a Social Security Number and does not reside in the State of California will receive neither direct mail nor publication notice of any kind.

The Notice Report must be filed no later than November 1 each year. (Section 1530(d).) The Controller is required to send a "pre-escheat notice" to owners listed on the Holder's Notice Report within 165 days of the November 1 filing. (*Id*.; *see also Vanacore & Associates, Inc. v. Rosenfeld* (2016) 246 Cal. App. 4th 438 (Discussing application of C.C.P § 1582, and requirements for proper filing in order to make a claim with the SCO).) No sooner than seven (7) months and no later than seven (7) months and fifteen (15) days after the November 1 report, Holders are required to pay or deliver to the Controller "all escheated property specified in the report." (*Id*., Section 1532.)

In most instances, the Controller uses the same stale address information provided by the Holders, which is already known to be incorrect. Indeed, that is the reason the Holder is providing the ownership information and the property to the Controller in the first place.

Hence, the UPL requires the Controller to send pre-escheat (or no notice at all) to property owners to knowingly stale addresses on or about April 15, and Holders must deliver escheated property to the Controller every year between June 1 and June 15, before constitutional notice is provided.

As discussed later in the Argument section of this brief, the Constitution requires notice and due process before private property rights are distributed. (*See Taylor I*, *II*; 9 CT 2398-2410 [Federal Injunction Order].) And common-sense dictates that if the property owner is not told that the State is taking his or her property, then he or she would have no reason to know to file a claim form under the UPL – the primary purpose of which is to reunite owners with the unclaimed property.

The UPL's "notification program" for property valued under $50 requires of the Controller no attempt at any individualized notice whatsoever, even on multiple aggregated payments owed to a single owner that exceed $50, such as in the case of royalty checks, installment payments, etc. The Controller maintains no records whatsoever for these property owners. Their accounts are aggregated into a single lump sum with no names of the owners on the government website, *e.g.*, "State Farm Insurance Policyholders - $6 Million." (Examples are provided at

8 CT 2139-2143.) Therefore, no notice at all is provided to these owners and it is impossible for them to reclaim their property from the Controller. The State estimates that over fifty percent (50%) of the $10.2 billion is made up of cash amounts below $50.[23] For property whose value exceeds $50, the "notification program" has four principal components.

First, The Controller does not provide direct mail notice to *any* property owner with a property value is less than $50, and other categories of property (like cashier's checks) or property belonging to foreign citizens who live in other countries. (9 CT 2430 [p. 56, lines 17-23]; 9 CT 2457 [p. 127, lines 2 – 24].) The Controller does not even request the identity of the property owners from the Holders (companies) when the Controller takes custody of the private property and does not post the property owners' names on the public website. Companies are told to "aggregate" all amounts under $50.00 into a single payment to the Controller and forward the property *without* the identities of the owners. (*Id.* at p. 122, line 25 – page 123, line 4.) This is known as the Controller's "Under $50 Rule," and extends to all property, including stock dividends, mineral royalties, etc. (*Id.*, at p. 123, lines 2-4; p. 127, lines 8-18.)

Second, the UPL requires a series of manifestly inadequate steps at individualized notification: If the Notice Report provides the Controller with the owner's SSN, Section 1531 requires the Controller to send the owner's name and SSN to the Franchise Tax Board ("FTB") to determine whether the FTB has a

[23] S*ee fn.* 9, graph at p. 5.

Current address for that person. (Section 1531(d).) If the FTB address and the Holder's address are the same, the Controller sends notice to that address. If the FTB has an address different from that provided by the Holder, or multiple addresses, the Controller mails just one arbitrary notice to the FTB address only, and she does not send any notice to the address reported by the Holder, or contained in another California database, such as the records of the DMV. If the FTB has no address, then the Controller sends notice to the address reported by the Holder ("the Last Known Address" or "LKA"), which is already known to be a stale address and is the reason for the UPL report to the Controller in the first place.

If the Holder does not provide an SSN, which is not a mandatory requirement pursuant to the Controller's internet guidelines, then the Controller does not request information from the FTB, or any other electronic database accessible to her. She merely sends notice only to the stale address reported by the Holder. Obviously, citizens residing in other states and those who do not pay taxes in California would have no record of their correct address at the FTB. The same is true of citizens residing in other countries (like England, Germany, or Korea) who also do not have U.S. Social Security Numbers.

Third, Section 1531 provides for newspaper publication notice, which the Controller has implemented through a practice of generic, inconspicuous 3" x 5" "block" publication notices in newspapers that do not provide actual notice to the owners that their specific property is to be taken, sold, and destroyed for use by the State. (Sample advertisements are contained in the record at 8 CT

2098-2101.) The generic "advertisements" are often published on dates calculated to reduce readership, e.g., Thanksgiving Day.

Multiple federal courts have advised the Controller that these generic "advertisements" - directed to no one in particular - do not constitute constitutional notice and simply alert the public to the Controller's website or toll-free number.[24] Indeed, it is overwhelmingly likely that only a miniscule fraction of affected property owners will actually chance upon them and would have no warning that their property rights are to be impacted or lost. Until 1989, the Controller interpreted the identical statutory language (like the other states) to require publication of the "names" of owners and a description of "the property," which was published in alphabetical order in yearly newspaper inserts in the State's major papers. (6 CT 1691 (Controller's Government Memorandum); 6 CT 1704-1706 (Controller Memorandum describing publication notices.).)

The fourth part of the Controller's "Notification Program" is a website. In theory, the website allows property owners to search online for property appropriated by the Controller. But the website is broken. (7 CT 2040-2041; 9 CT 2567-2622.)

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[24] *See Taylor I,* 402 F.3d 924, *supra*; *Taylor II,* 488 F.3d at 1200-02, *supra*; *Taylor III,* 525 F.3d 1288, 1291, *supra*: *Suever v. Westly*, 439 F. 3d 1134 (9th Cir. 2006) ("*Suever I*"); *Taylor v. Yee,* 136 S. Ct. 929 (2016); *contra Suever v. Westly*, (9th Cir. 2009) 579 F.3d 1047, 1057 ("*Suever II*"); *Taylor v. Yee*, (9th Cir. 2015) 780 F.3d 928.

And this also assumes that data relevant to seized property is properly inputted into the system. Typically, no identifying information is listed on the website or maintained by the Controller in the case of amounts under $50, or aggregated amounts, so that it is impossible for the owner to locate or claim the property. (8 CT 2139-2143.) Owners who locate their property online may submit a claim form to the Controller and engage in the "claim process," the unconstitutionality of which is discussed *infra* in Section VI.C..

Thus, through a website, the Controller shifts the burden of conveying constitutional notice from the government to the citizen who must ferret out his or her own property information by running queries on a broken government website search engine. The property has already been sold or auctioned off by the time it appears on the website, which is merely a catalogue of the sold property. The website identifies the property as though it might still exist, e.g., named shares of stock are listed though the stock is already sold.

In addition to state databases, the Controller has ready access to private commercial databases such as Accurint to locate owners of unclaimed property. The Controller does not use either Accurint or any other commercial database to locate the purportedly "unknown" owners of "unclaimed" property before or after their property is taken for use by the State and sold.

The palpable inadequacy of this notification scheme is confirmed by the end results. In 2008, no fewer than 75,000 notice letters mailed to property

owners were returned to the Controller because they were sent to the wrong address without any additional steps being taken to find the owner. (8 CT 2245.) Despite the advances in technology and readily available governmental and commercial databases that could be used to locate the hundreds of thousands of persons whose property the Controller takes each year without notice. While using the same technologies and databases to compel taxes and even pay claims under the UPL program, the Controller refuses to take these same simple steps to provide critical *Mullane*-style constitutional notice and information to owners to exercise their due process rights and to enable them to stop the process or to reclaim their property before it sold**. (*See** *Mullane* 339 U.S. 306, *supra*; *Jones* 547 U.S. 220, *supra*.)

B. Procedural History

On May 9, 2013, Plaintiffs filed their complaint, Defendant filed the first demurrer on August 5, 2013, which was heard on January 15, 2014, wherein Defendant's demurrer to complaint was sustained in part and denied in part, with leave to amend. On April 30, 2014, Plaintiff filed the first amended complaint.

Defendant filed a second demurrer to the entirety of the first amended complaint on May 30, 2014, while raising the previously denied arguments, which was heard and granted on July 21, 2014, with leave to amend. Plaintiff filed the second amended complaint on July 30, 2014, and Defendant filed a demurrer to the second amended complaint on September 2, 2014. On November 25, 2014, the Court granted the demurrer to the second amended complaint with

leave to amend. Plaintiffs filed a third amended complaint on December 15, 2014, and Defendants filed a motion to strike the third amended complaint on March 6, 2015. The Court entered the order granting Defendant's motion to strike third amended complaint on September 23, 2015 (5 CT 1429-1430) and entered Judgment on December 16, 2015 (5 CT 1439-1440). Plaintiff filed a timely notice of the first appeal on February 16, 2016. This Court reversed and awarded costs in *Hashim v. Yee* on September 4, 2019.

Plaintiffs filed their Motion for Temporary Restraining Order and Preliminary Injunction on May 13, 2020, which was denied on May 14, 2020, by the Hon. Judge Ethan P. Schulman. The Order Dismissing Action with Prejudice was filed on July 23, 2020. Plaintiffs filed a timely notice of appeal on October 15, 2020.

VI. ARGUMENT

A. California's Published Authority in The *Fong* And *Harris* Cases is Unconstitutional.

In a series of rulings, such as the decision by the lower court in this case, the state courts of California have immunized the Controller from operation of the United States Constitution while denying state-law relief from the Controller's California's unconstitutional application of the UPL. (*See Azure v I-Flow, supra*, 46 Cal. 4th at 1328, 1330, citing with approval *Harris, supra,* 116 Cal. App. 4th 214, 219); *Fong, supra,* 117 Cal. App. 4th 841.) The *Fong* and *Harris* Courts concocted the novel legal theory that constitutional notice is provided, even when none is admittedly given, because the mere existence of a

statute constitutes "constructive notice" that property *could* be seized. (*Fong*, *supra* 117 Cal. App. 4th at 841; *Harris*, *supra*. 116 Cal. App. 4th at 223 *fn*.15).

In *Fong*, plaintiff shareholders challenged a dismissal by the Sacramento County Superior Court of California, which entered judgment in favor of defendant Controller in an action seeking monetary and equitable relief after shares of their Berkshire Hathaway stock were seized and sold without notice. (*Fong*, *supra*, 117 Cal. App. 4th at 846.) Thereafter, the injured shareholders filed a claim for the money left from the sale of their stock investment, which had been sold at $7,082 per share. (*Id*., at 847; *see also* Controller's memorandum discussing sale of Berkshire Hathaway stock without notice (6 CT 1690-1691).) Currently the same shares of Berkshire Hathaway stock are valued at $416,400.00 per share.[25] The shareholders then filed an action against the Controller for constitutional violations. After judgment was entered on a motion in limine in favor of the Controller based on "statutory immunity," the owners sought review. (The Controller's internal government memos noting that there Berkshire shares of stock were sold in violation of the UPL with no direct mail notice and no publication are included in support of the preliminary injunction and found at 8 CT 2130-2131.)

In affirming the lower court, the Third District Court of Appeal determined that the Controller was

[25] *See* Yahoo Finance – Berkshire Hathaway stock price quote: http://finance.yahoo.com/quote/BRK-A?ltr=1 (last visited September 17, 2021).

not required to provide constitutional notice or to even comply with Section 1531 and is immune from liability under Section 1566 because the owners' claims arose primarily from the Controller's sale of their escheated property. (*Fong*, *supra*, 117 Cal. App. 4th at 851-854.) Because the injured shareholders in that case had already recovered the proceeds from the unnoticed sale of their stock under Section 1541, the Third District reasoned that the owners had received the full amount allowed under the law from the unnoticed seizures and sale. (*Id*., at 852-854.)

The Third District Court noted that the escheat did not amount to an unconstitutional taking because the state did not acquire "actual title" to the stock under the UPL. The Third District Court chose not to consider *Mullane* or the 5th and 14th Amendments.

In the *Harris* case, plaintiff stockholders were employees who were owed stock in their employee stock purchase plan when their company merged with another corporation called GTE. These shareholders brought a class action against the defendant Controller, alleging that he had a statutory obligation under the Unclaimed Property Law to notify them prior to taking and selling their stock. (*Id.,* at 218.) The lower court granted the Controller's motion for judgment on the pleadings, and the stockholders appealed.

The Second District Court held that failure to provide notice to the stockowners did not restrict the Controller's statutory duty to sell the escheated shares. The Second District reasoned that no provision of the UPL suggested that the owner of unclaimed property was entitled to prior notice that

his or her stock was about to escheat to the State where it would be sold but was entitled to only an "in-kind return" of the property where the Controller returned money from the sale of this owner's stock. "Harris refers to no principle of law, and we know of none, entitling a shareholder who has lost track of his or her shares to require the state to ensure that those unclaimed securities are not converted to cash without prior notice to the shareholder." (*Id.*, at 222.)

Like the Third District, the Second District reasoned that the unnoticed seizure by commissioned state-employed private "auditors" and the subsequent unnoticed sale of private property to create revenue for the State's general fund is neither a violation of the explicit language of the UPL (Section 1531) nor the United States Constitution Amendments 5th and 14th.

Further, the Second District held that the timing requirement in the notice provision in Section 1531, and the absence of any timing restriction in the sale requirements in Section 1563, confirmed the lack of connection between the two separate duties. "The statute does not require notice be given under section 1531 before securities may be sold under section 1563, and the sale results in no constitutional deprivation." (*Id.*, at 224.) In short, nothing prevented the Controller from the unnoticed selling of securities belonging to private citizens immediately upon receipt or at any other time. The Second District Court concluded that: (1) the sale of unclaimed securities without notice did not violate the owners' constitutional due process rights; and (2) the Controller did not lose her immunity under the UPL even when she failed to follow the notice provisions of

the statute and to notify the stockholders. (*Id.*, at 223-224.)

The Second District chose not to consider the holding of *Mullane* or the 5th or 14th Amendments. Nor did the Second District consider the express language of Section 1531, which requires direct mail and publication notice prior to the sale of private property for use by the State government.

In 2005, the Ninth Circuit declined to follow the 2004 decisions in the *Fong* and *Harris* cases. (*See Taylor I*, 402 F.3d at 930, *fn.* 22, *supra.*) The Ninth Circuit held that this "new approach to escheat" is unconstitutional.

In 2007, the Ninth Circuit issued a federal injunction that shuttered the State's UPL program. The California authority found in *Fong* and *Harris* cannot be squared with precedent of the United States Supreme Court regarding the pre-deprivation notice required by the Due Process Clause, including its decisions in *Mullane*, 339 U.S. 306, *supra*, and *Jones*, 547 U.S. 220, *supra.*

These California *Fong* and *Harris* cases also conflict squarely with the numerous decisions by other federal courts of appeal and divisions in other states, some of which are footnoted below.[26] The Ninth Circuit Court described the Controller's UPL "new form of escheat" process as follows:

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[26] *See e.g.*, *Garcia-Rubiera v. Fortuno*, 665 F.3d 261 (1st Cir. 2011); *Luessenhop v. Clinton Cnty., New York*, 466 F.3d 259 (2d Cir. 2006); *Perez-Alevante v. Gonzales*, 197F. App'x 191 (3d Cir. 2006).

> "The escheat problem, in this case, arises from a new approach used by some state governments, greatly shortening the time before which untouched property is treated as though it had been abandoned, greatly reducing or eliminating notice to the true owner, and ignoring the true owner's pleas. For example, California is taking the flight attendant's stock in her airline on the basis, basically, that she cannot be found, even while she is standing in court shouting, 'Here I am! Here I am! Give me my money!' And the State of California turns a deaf ear, pretending it cannot hear her."

(*See Taylor I*, 402 F.3d at 926, *supra*.)

The lower Court declined to follow *Azure*, *Fong*, or *Harris*, but instead defaulted to the Ninth Circuits decision in *Taylor IV* (9 CT 2656-2664.) The lower Court reasoned that the UPL is constitutional per *Taylor IV* but ignored the factual allegations on the face of the operative complaint.

B. The Controller Fails to Apply The Unclaimed Property Law as Expressly Written.

The Controller does not comply with fundamental rules of statutory construction and interpretation and seizes private property from citizens who are well "known" to the state as taxpayers, license holders, voters, etc., by labeling them instead as "unknown" though far outside of the scope of the statute. The Controller affords these "known" citizens no constitutional notice whatsoever.

1. Private Property is Seized From "Known Owners."

The many UPL definitions prohibit exactly this conduct described above. For instance, the threshold definitions Section 1300(c) states:

> "'Escheat,' unless specifically qualified, means the vesting in the state of title to property the whereabouts of whose owner is *unknown* or whose owner is *unknown* or which a known owner has refused to accept, whether by judicial determination or by operation of law, subject to the right of claimants to appear and claim the escheated property or any portion thereof… ."

(Section 1300 ("Definitions;" underlining and italics added for emphasis), *see also* 1510-1521, 1513.5, 1520, 1530, and 1531.)

These above-cited Sections define that a citizen must be truly "lost" and "unknown" before his or her property rights are disturbed. The purpose of the UPL is to "restore" property to its rightful owner, i.e., to protect property rights (*Azure, supra*, at 1328), which the Controller may never accomplish when no constitutional notice is provided and various properties belonging to different owners with no identifying information are aggregated in a single account that says, for instance, "Owner Unknown" or "Aggregate." (6 CT 1700-1703)[27] Or property owners go unlisted or with incorrect address and misspellings

[27] Plaintiffs provided actual examples of these aggregated accounts.

in the public registries without any ownership information listed on a broken, unsearchable website. (*See* 9 CT 2595-2622 [Stevens Decl. (Tech Expert)]; 9 CT 2567-2573 [A. Hashim Decl. (Same)]; 8 CT 2375-2396 [samples of Controller's records].)

"…[T]he 'plain meaning' rule of statutory construction does not require or allow us to read a single sentence of a statutory provision in isolation. Words in a statute must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." (*Los Angeles Times v. Alameda Corridor Trans. Auth.*, 88 Cal. App. 4th 1381, 1387 (2001) (*citing Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal. 3d 222, 230 (1973), quoting *Johnstone v. Richardson*, 103 Cal. App. 2d 41, 46 (1951); internal quotation marks omitted.).)

In *Bank of America v. Cory, supra*, 164 Cal.App.3d at 74, the Third District Court of Appeal reviewed earlier misconduct by the Controller, who refused to claim dormant bank accounts from banks, and held: "[W]hen considered in total context, the statutory scheme of the UPL compels the Controller to affirmatively take all steps necessary to carry out the purposes of the UPL."

2. No Publication Notice is Provided to Affected Property Owners.

No constitutional publication notice is provided to the property owners. The plain wording of the unclaimed property statute clearly requires notice to "the apparent owner" "… of the property." (*See* Section 1531(a) (Emphasis added).) "Each published notice shall be entitled 'notice to owners of unclaimed property'." (*See* Section 1531(b) (Underline added).)

The Ninth Circuit observed that the notices used by the Controller are not directed to "the apparent owners…of the property," but to the general public – instead they are "advertisements." (7 CT 2095-2096; 8 CT 2098-2103 [sample generic advertisement]; *see Taylor II,* 488 F.3d at p. 1201, *supra* ("California cites no authority for the proposition that due process is 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 I*, 402 F.3d at 928, *supra* ("… [the advertisement] does not say what property is being taken or from whom. No names of property owners are listed."); *Suever I*, 439 F.3d 1142, *supra* (Same).) Plaintiffs pulled prior Section 1531 publication notice in proper form from the California State Archives to show the lower Court that earlier elected Controllers provided publication notice in statutory and constitutional form.

3. The Controller Will Not Repair The Website And Does Not Consult The Readily Available Databases to Provide The Best Possible Notice to The Property Owners.

The Controller does not consult readily available databases to correct addresses and misspelled names and has stated that she has no obligation to do so: "Yee says she is not allowed to clean up the database even if there are obvious misspellings, like "Franciscalif" [San Francisco, California]."") (*See* 8 CT 2368-2370 [Controller's public statement [Bracketed insert added].]) These are the same knowingly incorrect addresses used for the purported direct mail notice to the impacted property owners.

C. The California Unclaimed Property Law Scheme Violates The Due Process Clause.

Plaintiffs sought a TRO and Preliminary Injunction against the state officials' seizure and sale of property without the notice required by Section 1531 and the Constitution for use by the State's General Fund. Every day, approximately 23,000 of California residents, including many elderly residents of limited means, suffer the appropriation of their property with no meaningful notice and no meaningful avenue of recourse. Retirement stock savings, which were intended as a hedge against time, are seized from the owner without notice and sold for a fraction of their value, for example, the elderly Fong's valuable $400,000 per share Berkshire Hathaway stock sold for $7,000.

The contents of safe deposit boxes are arbitrarily held for varying periods of time and then auctioned off on eBay.[28] Stock accounts are held for 18 months and then liquidated.[29] The fact that owners do not

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[28] *See, e.g.,* CBS News Call Kurtis Investigates: Unclaimed Property: $275,000 Vanishes From Retirees Account, Transferred To The State Of California: (May 18, 2021): https://sacramento.cbslocal.com/2021/05/18/state-of-california-unclaimed-property-275k-vanishes-retirement/; *see also fns.* 12 and 20.

[29] California State Controller's Office explained on her website: "Your investment accounts will be turned over to the State Controller's Office, which is required by law to sell the securities, no sooner than 18 months and no later than 20 months, after the due date for reporting the securities to the State Controller's Office" at: http://www.sco.ca.gov/upd_faq_about_q01.html (last visited, September 22, 2021)).

receive constitutional notice prior to the seizure of their property renders the arbitrary holding periods irrelevant because the owners are left uninformed regarding their due process rights. The property owners do not know to claim their property because the state officials do not tell them that they have taken the property and intend to sell it under a statutory scheme, the primary purpose of which is to return "property" and to protect property rights.

The Ninth Circuit noted the danger of "the permanent deprivation of property subsequent to California's sale of that property, which – pursuant to California's policy of immediately selling property after escheat – would frequently occur even if plaintiffs were diligent about monitoring their property." (*See Taylor II*, 488 F.3d at 1200, *supra* [emphasis in original].)

In a wide variety of contexts, the Supreme Court has warned that the state government's financial interest (as well the financial interest of whatever agent the government uses to administer its scheme) creates the danger of self-dealing that raises constitutional red flags and triggers heightened judicial scrutiny. The Supreme Court has long expressed constitutional "concern with governmental self-interest" when "the State's self-interest is at stake'." (*United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (quoting *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977).)

In *Winstar*, the Court spoke of the "taint" of "a governmental object of self-relief" where the government is party to a contract. (*Id.*; *see also Energy Reserves Group, Inc. v. Kansas Power & Light*

Co., 459 U.S. 400, 412-13 & *fn.*14 (1983) (holding that a stricter level of scrutiny applies under the Contract Clause when a State alters its own contractual obligations).)

In *Mullane,* even when the exacerbating feature of fiscal self-interest was absent, the Court held that notice by newspaper publication was insufficient with respect to known present beneficiaries of a trust and did not satisfy due process. The Supreme Court observed that the "elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Id.*, at 313.) "[P]rocess which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (*Id.* at 315.)

The record in this case demonstrates the Controller's application of the California UPL falls far below the standards of *Mullane*, even though technological advances since 1950 make it vastly easier to locate individuals now than it was when *Mullane* was decided.[30] The California scheme has resulted in the absurd situation where approximately 48 million[31] of California's 39,512,223 total inhabitants[32] are listed as "unknown."

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[30] *See fn.* 12.

[31] https://sco.ca.gov/eo_pressrel_19941.html.

[32] https://www.census.gov/quickfacts/CA.

The result of this fatally flawed system speaks for itself. Virtually every property-owning California citizen in now "lost" for purposes of the UPL property seizure program. California's procedures have hardly produced "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane,* 339 U.S. at 313 *supra.*) "Known" property owners are listed as "unknown" only for purposes of seizing property as "a revenue stream," while the same state officials know preciously where these individuals reside for purpose of tax collection.

The Controller does not provide *Mullane*-style constitutional "publication notice," but merely generic "advertisements." (*See* sample of current Controller advertisement at 1 CT 144.) *Mullane* held that such advertisements are not constitutionally adequate (except in special circumstances) because "[c]hance alone" brings a person's attention to "an advertisement in small type inserted in the back pages of a newspaper." (*Mullane*, 339 U.S. at 315, *supra.*) The Ninth Circuit held such advertisements to be insufficient as a matter of due process. (*Taylor II*, 488 F.3d at 1201, *supra*; *see also Suever I*, 439 F.3d at 1148, *supra*; *Taylor I*, 402 F.3d at 926-29, *supra*; *see also Shipes v. Trinity Industries*, 987 F.2d 311, 322 (8th Cir. 1993); *Hall v. Borough of Roselle*, 747 F.2d 838, 843 (3d Cir. 1984).)

Nor does the Controller's "searchable website" provide constitutionally adequate notice. In reality, the website is broken and conveys no constitutional notice at all to property owners. The Controller's website is nothing more than a dysfunctional

catalogue of the owners' misspelled names, wrong addresses, and sold and destroyed property. The Controller acknowledged this fact, but publicly states that she has no duty to fix the website that contains property records for over 48 million people. The Ninth Circuit acknowledged, "California cites no authority for the proposition that due process is satisfied by a newspaper advertisement saying that a person concerned about his property can check a [broken] website to see whether he has already been (or soon will be) deprived of it." (*Taylor II*, 488 F.3d at 1201, *supra* [bracketed insert added].)

The State provides no notice (direct mail, publication notice, or even listing the owners' names on the searchable website) with respect to property valued under $50. This is not a small matter.[33] The most recent report from the Legislative Analyst's Office notes that amounts under $50 comprise more than fifty percent (50%) of the $8 billion (at that time) of the Unclaimed Property Fund in California.[34]

A fortiori, California's published 2004 decisions in *Fong* and *Harris* cannot be squared with *Jones*, 547 U.S. 220, *supra*, in which the Supreme Court held that, "[b]efore a state may take property and sell it for

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[33] CBS News, Call Kurtis Investigates: State Can Keep Your Unclaimed Money Under Bill Meant To Close Loophole (June 6, 2013): http://sacramento.cbslocal.com/2013/06/06/call- kurtis-investigates-state-can-keep-your-unclaimed-money-under-bill-meant-to-close-loophole/#.UbJVXKCsoJE.email.

[34] *See fn.* 8 at pgs. 5, 6 (*see* Figure 2).

unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case." (*Jones*, 547 U.S. at 223, *supra* (quoting *Mullane*, 339 U.S. at 313, *supra*).) The United States Supreme Court held that "...when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." (*Id.*, at 225 (emphasis added).) The Highest Court found there were "several reasonable steps the State could have taken," and that "[w]hat steps are reasonable in response to new information depends upon what the new information reveals." (*Id.*)

One reasonable step would have been for the State to "resend notice by regular mail, so that a signature was not required." (*Id.*) This would "increase the chances of actual notice to [the petitioner] if—as it turned out—he had moved." (*Id.*, at 235.) The Supreme Court concluded:

> "There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner-taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when

> the notice letter addressed to him is returned unclaimed."

(*Id.*, at 239.)

Precisely the same reasoning applies here. In *Jones*, the Supreme Court reasoned that a State may not rely solely on mailed notice "when the government learns its attempt at notice has failed." (*Id.*, at 227.) The record and the allegations in this case demonstrate that California's attempts at notice under the UPL scheme have predictably failed, not once but millions and millions of times. Just as in *Jones*, "...the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." (*Id.*, at 230.)

In *Jones*, the Supreme Court cited *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005), which observed that, "as most cases addressing this situation recognize, it is, at the very least, reasonable to require examination (or reexamination) of all available public records when initial mailings have been promptly returned as undeliverable." (*Jones*, 547 U.S. at 227, *supra* (citing *Plemons v. Gale*, 396 F.3d at 577, *supra* (emphasis added).) "Extraordinary efforts typically describe searches beyond the public record, not searches of the public record." (*Id.* (internal quotation marks and citation omitted and emphasis in original).)

In *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), the Supreme Court held that when the identity and location of a mortgagee can be obtained through examination of public records, "constructive notice alone does not satisfy the mandate of *Mullane*."

(*Id*., at 798.) Moreover, a "party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." (*Id*., at 799.) Although a party required to provide notice need not "undertake extraordinary efforts to discover ... whereabouts ... not in the public record," it must use "reasonably diligent efforts to discover addresses that are reasonably ascertainable." (*Id*., at 798.)

The *Fong* and *Harris* decisions citied with approval by the California Supreme Court in *Azure*, held that the Controller need not provide any notice to property owners before their property is seized and sold for use by the State. These same state courts determined that the Controller is not even required to follow notice provisions contained in the UPL, at all.

While the lower court declined to follow the Supreme Court's endorsement of these decisions, it failed to understand that the state officials' actions alleged in the complaint and confirmed in the Preliminary Injunction filings do not conform to the requirements of the UPL statutory scheme or the Constitution. (9 CT 2656-2664.)

D. The Controller Engages in a Taking of Property in Violation of The Fifth Amendment.

The Controller's physical appropriation of personal property under the UPL scheme is constitutionally significant under the United States Supreme Court's decision in *Horne v. Department of Agriculture,* 133 S. Ct. 2053 (2016), which focused on the physical appropriation of personal property as a key element in its taking analysis. The Supreme Court noted "the settled difference in our takings

jurisprudence between appropriation and regulation" and held that the Ninth Circuit had erred in analyzing the seizure of raisins as a restriction on the use of personal property. (*Id.,* at 2064.) The Supreme Court opined that the seizure was a physical appropriation of property, giving rise to a *per se* taking: "The 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,' as it essentially does." (*Id*.)

The Supreme Court explained that a physical appropriation of personal property should be treated as a taking, even if its economic impact is no different from a regulation: "A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends." (*Id*.) Moreover, the Supreme Court held that possible residual compensation offered to an owner, after physical appropriation of the property itself, did not excuse the taking; this Court brushed off "the speculative hope that some residual proceeds may be left when the Government is done with the raisins." (*Id*.)

The lower court held and made a similar category error in this case. Clearly, the UPL statute does not affect simply a deprivation of property without due process – it also affects a governmental appropriation and hence a *per se* taking of private property. The Ninth Circuit decisions analyzed the property seizures as though the property was held in custody, "like a car that is towed and held in an impound lot," (*Taylor I*, 402 F.3d at 931, *supra*), when in reality the property is sold or otherwise monetized in order to

pay the commissioned auditors and for use by the State in its budget. The owners are divested of their property rights, like Cooper's stock. The California published cases – *Fong* and *Harris* – are far worse and fail to acknowledge the Fifth and Fourteenth Amendments altogether. According to *Fong* and *Harris*, very valuable private property (like Berkshire Hathaway stock) may be seized and sold without any prior notice or due process as long as the owners receive the money from the sale.

The United States Supreme Court has held that the government has a "categorical duty" under the Fifth Amendment to pay "just compensation" when it "physically takes possession of an interest in property." (*Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012).) The *Horne* decision reaffirmed that this rule applies in full to personal property. (*See Horne,* at 2063*, supra.*) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").)

In addition to providing constitutional notice and due process, under the just compensation requirement of the Fifth Amendment, the government must establish the existence of a "'reasonable, certain and adequate provision for obtaining compensation' at the time of [a] taking." (*Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)).) And to be adequate, compensation must represent "…the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position peculiarly as he would have occupied if his

property had not been taken." (*United States v. Miller*, 317 U.S. 369, 373 (1943).) Typically, in the case of funds, the Supreme Court precedent requires the payment of interest. (*See Webbs*, 449 U.S. 155 at 162, *supra*.)

Under the Takings Clause, if there is no adequate mechanism for just compensation, the government is prohibited from taking the private property in the first place. (*See*, e.g., *Eastern Enters. v. Apfel*, 524 U.S. 498, 538 (1998) (opinion of O'Connor, J., joined by three Justices) (directing injunction against uncompensated taking).) Accordingly, if it is impracticable to locate and provide meaningful notice to property owners, such as property owners below the $50 threshold or those residing in other states or countries – *i.e.*, if just compensation is impossible to provide – then the UPL scheme is impermissible under the Takings Clause, and the State is not allowed to appropriate the owners' private property in the first place.

The Supreme Court made clear in *Jones* that the State was required to undertake "reasonable steps" to provide notice and "[w]hat steps are reasonable in response to new information depends upon what the new information reveals." (*Id*., at 234.) But today, advances in technology, private databases, and computer-indexed government databases ensure that almost no one is genuinely "unknown."[35]

[35] *See fn.* 10

E. The Controller Does Not Return or Allow Owners to Even Access Their Private Property Through a Constitutional Claim Process.

The Controller is required by law to promulgate and to publish written regulations that explain the various rules that she creates as part of her claim process pursuant to California's Administrative Procedures Act, Government Code sections 11340, *et seq*. ("APA"). The California Supreme Court held:

> "The APA provides that "[*n*]*o state agency* shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." The APA applies "to the exercise of *any quasi-legislative power* conferred by *any statute* heretofore or hereafter enacted," and the APA's provisions "shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

(*Tidewater Marine Western v. Bradshaw* (1996) 14 Cal 4th 557, 570 ("*Tidewater*") (citations to Govt. Code omitted; emphasis added by Court).)

The Controller never promulgated *any* regulations pursuant to the APA that explain what

she: (1) expects from companies that are audited and otherwise required to transfer property to the state agency; or (2) used to guide her claim process; in other words, as to this second point, what the Controller requires of a claimant to prove up or to "perfect" a UPL claim. (4 CT 1043-1044 [Com. at ¶ 18(c), at pp. 8-9].)

The Court may readily see in the Plaintiffs' RFJN Vol. I, No. 10 (8 CT 2170-2221) and Vol. II, No. 19 (9 CT 2411-2491), the process is subjective, arbitrary, and capricious – identically situated claimants are treated differently – the proceeds from the seizure are returned to some citizens, while not to others. The Controller's policies are "verbal" and arbitrary. (8 CT 2170-2221 and 9 CT 2411-2491 [sworn Controller PMK testimony].) In *Tidewater*, the California Supreme Court held that an Agency's actions are "void" for failure to adopt written regulations pursuant to public rulemaking under the APA. Aaron Hashim describes the illegal process in his filed declaration.

The Controller's failure to promulgate claim (and audit) regulations pursuant to the APA means that her process is "void" as a matter of law according to the State's Supreme Court. (*Id*.) There are no APA regulations; instead, the Controller posts hundreds of pages of ever-changing guidelines, bulletins, and random rule-change notices on her website.[36]

The APA establishes the procedures by which all state agencies, such as the Controller's agency, may

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[36] *See* Controller Website:
http://sco.ca.gov/upd_msg.html

adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov. Code §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code § 11346.2, subds. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code § 11346.8); respond in writing to public comments (Gov. Code §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code §§ 11349.1, 11349.3).

One purpose of the APA is to ensure that those persons or entities who may be impacted by a regulation will have a voice in its creation (*see Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 202 ("*Armistead*")), as well as notice of the law's requirements so that they can conform their conduct accordingly. (*See Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583, 588.)

In this case, the 300+ pages of miscellaneous guidelines, bulletins, forms, and notices that the Controller has written as posted as "Underground Regulations" on the Controller's internet website (*see, e.g.*, 8 CT 2147-2169) are "void" as a matter of law, because they were not adopted in accordance with the APA. (*Tidewater* at 576.) It is unclear what criteria the Controller uses to perfect a claim for an amount below $50, or one of the aggregated sums (with no names) belonging to many owners, when she does not ask for the name(s) of the owner(s) or maintain any records of the property specifics, and there are no APA

regulations to guide these citizens through the claim process.

The California Supreme Court states, "...if an agency simply ignores the APA, it ceases to be responsive to the public, and its regulations are vulnerable to attack in the courts." (*Id*.) Where an agency fails to comply with the APA, its decisions are to be afforded "no deference" by a reviewing court, such as this one. (*Id*., at p. 577).

The State of California's Office of Administrative Law's homepage declares that a California regulation must conform to certain minimum procedural requirements for its adoption, amendment or repeal, including adequate notice and a general statement of the reasons for adoption or amendment. (*See* Govt. Code §11346; *Naturist Action Committee v. California State Dept. of Parks & Recreation* (2009) 175 Cal. App.4th 1244, 1250.)

The "guidelines" and "forms," "notices" and "bulletins" that the Controller periodically writes and posts (and then removes) to and from her website are "*void"* as a matter of law, because they were not adopted in accordance with the APA. (*See Tidewater*, *supra*, 14 Cal. 4th at 576.) As the Controller's *verbal* policy indicates (*see* 8 CT 2170-2221 and 9 CT 2411-2491 [sworn Controller PMK testimony]), it is unclear what "criteria" the Controller uses to "perfect" a claim, this is particularly the case when the Controller does not know the name of the owner and there are no proper regulations. If the Court were to ask the Controller to explain the claim process, just as was asked in a sworn PMK deposition (*see* 8 CT

2170-2221), the Court would find the verbal claim process to be absurd and baffling.

The California Supreme Court flatly states, "…if an agency simply ignores the APA, it ceases to be responsive to the public, and its regulations are vulnerable to attack in the courts." (*Tidewater, supra,* 14 Cal. 4th at 576.)

In *City of West Covina v. Perkins*, 525 U.S 234, 240-241 (1999) the Supreme Court held that property owners can turn to these readily available "public sources" for specific instructions on how to reclaim their property. (*Id*.; *see also Butler v. Castro*, 896 F.2d 698, 703 (2d Cir.1990) (Supreme Court held that where New York City's procedures for returning seized property in its administrative scheme violated the basic notice requirements of the due process clause).) There is no such published procedure in California.

F. Plaintiffs And Class Members Are Entitled to Interest on The Funds Generated From The Unconstitutional Seizure (And in Some Instances Sale) of Their Property.

Plaintiffs are entitled to recover their own private property (as opposed to damages) with interest and other substantive due process rights under the 5th and 14th Amendments. The law requires just compensation and interest at California's *alternative borrowing rate*, which is the amount of interest the State avoids when it uses the illegally seized property instead of funds borrowed on the open market. (*See Webbs Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 162 (1980); *United States v. $277,000 of United States Currency*, 69 F.3d 1491, 1495-96, (9th Cir. 1995);

United States v. $133,735.30 Seized from U.S. Bancorp Brokerage Account No. 32130630, 139 F. 3d 729 (1998) (relying on and affirming *$277,000, supra*); *United States v. $515,060.42 in United States Currency*, 152 F.3d 491, 504-05 (6th Cir. 1998) (same); *Brooks v. United States*, 980 F. Supp. 321, 322 (E.D. Mo. 1997) (finding government liable for interest actually accrued, or if seized funds were placed in Treasury account, the constructively earned interest at the government's alternative borrowing rate from the time seized until its return); *contra Suever II*

The California Supreme Court held in *Holt v. Kelly* (1978) 20 Cal.3d 560, 562 and in *Minsky v. City of Los Angeles* (1974) 11 Cal. 3d 113, 121, that: "A claim for the specific recovery of property has never been considered a claim for money or damages."

G. A Permanent Injunction Must Issue to Halt Unconstitutional Conduct When The Undisputed Facts Demonstrate Ongoing Irreparable Harm to Citizens.

Plaintiffs reviewed each of the constitutional violations above in Argument Sections A-F, *supra.*

1. General Statutory Authority Supports The Issuance of a TRO And Injunction.

The "bible" for injunctions pending trial is Sections 525-533, and particularly Section 527, which, together with California Rules of Court, Rules 3.11 50 – 3.1152, provide the basic legal framework. (*See generally*, Weil & Brown, California Practice Guide: Civil Procedure Before Trial (Rutter Group 2021) ("Weil & Brown") §§ 9:500-9:968.) Any local

court rules or policies in this area are preempted by Rule 3.20(a) of the California Rules of Court.

In *Azure* (at page 1336), the California Supreme Court held: "Requiring compliance with the UPL—i.e., ensuring that the owners are in fact unknown, and the property is in fact unclaimed—furthers the purpose of protecting unknown owners. Moreover, the state has no legitimate interest in receiving and using property that is not unclaimed." Plaintiffs seek an order that requires compliance with the UPL and the Constitution.

2. The Legal Remedy is Inadequate.

Section 526(a) lists many of the traditional equity considerations and requirements re granting of injunctions. Inadequacy of the legal remedy is listed only 4th and 5th ("(4) when pecuniary compensation would not afford adequate relief;" and "(5) where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief"). Injunctions must be granted where a suit for damages does not provide a clear remedy. (*See Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp*. (1967) 255 Cal. App. 2d 300, 307; *Pacific Decision Sciences Corp. v. Sup. Ct. (Maudlin)* (2004) 121 Cal. App. 4th 1100, 1110.)

3. There is Irreparable Harm to The Citizens in This Case.

Section 526(a)(2) lists the traditional consideration of "irreparable harm." Irreparable harm is often related to the above "inadequate legal remedy" (i.e., the damages remedy is inadequate because some immeasurable harm is threatened).

One need only review the A. Hashim Decl. filed herewith. (9 CT 2567-2573.)

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the lower court's interlocutory orders and judgment be vacated with the action remanded with instruction for entry of a preliminary injunction and for disposition consistent with this Court's decision.

Dated December 28, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

PURSUANT TO RULE 8.20(c)(1) OR 8.360(B)(1) OF THE CALIFORNIA RULES OF COURT FOR CASE NUMBER A147670

I certify that:

___x___ 1. Pursuant to Rule 8.20(c)(1) or 8.360(b)(1) the attached brief is:
Proportionately spaced, has a typeface of 13 points or more, and contains 13,974 words;

or is

_____ 2. Monospaced, has 12 or fewer characters per inch.

Dated this 28th day of December 2021,

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STATEMENT OF RELATED CASES

Pursuant to California Rules of Court Rule 3.300, Appellant submits this Statement of Related Cases:

1. *Hashim v. Betty T. Yee*, 2019 Cal. App. Unpub. LEXIS 5888 (September 4, 2019).

2. *Hashim v. Betty T. Yee*, California Court of Appeal First Appellate Case Number A161478.

3. *Jan Peters v. Betty T. Yee*, U.S. District Court Central District of California Case No. CV 21-4929-JFW(ASx).

4. *Lisa Salvato v. Kevin D. Walsh*, U.S. District Court of New Jersey Case No. 3:21-cv-12706.

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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San Francisco Superior Court
Attn: Hon. Judge Ethan P. Schulman
400 McAllister St.
San Francisco, CA 94102

DATED: December 28, 2021

By: */s/ William W. Palmer*
William W. Palmer

Appendix B

Case No. A161442

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

COOPER D. JOHNSON,
Plaintiffs and Appellant,

v.

BETTY YEE,
Defendant and Respondent.

Appeal from Superior Court of the County of San Francisco, California
Case No.: CGC-20-584592
Hon. Judge Ethan P. Schulman

APPELLANTS' OPENING BRIEF

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I. ISSUES PRESENTED

1. Whether the California Unclaimed Property Law, Code of Civil Procedure sections 1300, *et seq*. ("UPL"), violates the Just Compensation and Due Process Clauses of the Fifth and Fourteenth Amendments because it deprives owners of their private property without affording constitutionally adequate notice.

2. Whether the Controller's claim process is constitutional when the list of property in the Unclaimed Property Fund does not include the names of the owners and description of their property and the procedure does not comply with California's Administrative Procedure Act, Government Code sections 11340, *et seq*.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal confronts the Controller Betty T. Yee's (hereafter, "Defendant" or "Controller") misapplication of California's Unclaimed Property Law, Code of Civil Procedure sections 1300, *et seq*. (hereafter, "UPL" or "Unclaimed Property Law").[1] Plaintiff and appellant Cooper D. Johnson ("Plaintiff" or "Cooper") is a young California resident, who alleges taxpayer standing, and has a justiciable claim. (1 Clerks Transcript "CT" 009.)[2]

The Controller took and sold Cooper's college stock savings without any notice to him whatsoever. The Complaint alleges the unconstitutionally seizes the private property of "known" property owners at the rate of approximately 21,000 citizens per day. This action is without any prior constitutional notice and the 5th and 14th Amendments to the United States Constitution and takes place under color of the Unclaimed Property Law.

This is the second of two cases pending before this Court. The First District Court of Appeal held that other plaintiffs complied with the lower court's

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[1] Further statutory references are to California's Code of Civil Procedure (Deerings 2021), unless otherwise noted.

[2] Citations to the record below are to the Clerk's Transcript "CT" on Appeal shall contain the abbreviation "CT," preceded by volume number and followed by the page number(s), and line number(s) (if applicable) of the referenced document(s). Citations to the Reporter's Transcript on Appeal shall contain the abbreviation "RT" and the page and line numbers contained therein.

September 23, 2015 order and reversed and remanded the action. (*See Hashim v. Betty T. Yee*, 2019 Cal. App. Unpub. LEXIS 5888 (September 4, 2019) (hereafter, "*Hashim v. Yee*" or "Related Case").) This Plaintiff's stock was seized during the pendency of the *Hashim v. Yee* appeal. After remand, the *Hashim v. Yee* action was promptly dismissed again by the lower court after the Judge was confronted and then disclosed that his family's stock had also been seized and sold, just like Plaintiff's stock. Judge Schulman explained that he and his wife were engaged with the Defendant in discussions that are "my private business." (*See* Appellant's Motion for Judicial Notice "RFJN," Exh. B - July 22, 2020, Certified Transcript in *Hashim, et al., v. Yee*, San Francisco Superior Court Case No. CGC-13-531294.)

Also, during the pendency of the appeal in *Hashim v. Yee*, the United States Supreme Court reviewed this Controller's administration of the UPL and after nine (9) conferences by the Justices issued an opinion in *Taylor v. Betty T. Yee*, 136 S. Ct. 929 (2016) who is the same defendant here. Associate Supreme Court Justices Samuel A. Alito, Jr. and Clarence Thomas warned this Defendant that: "The Due Process Clause requires States to give adequate notice before seizing private property. When a State is required to give notice, it must do so through processes 'reasonably calculated' to reach the interested party—here, the property owner." (*Taylor v. Yee*, 136 S. Ct. at 929, *supra*.)

The previous Controller John Chiang was federally enjoined for the identical conduct alleged now. (*See Taylor v. Westly,* 488 F.3d 1197 (9th Cir. 2007) ("*Taylor II*") and 2 CT 439-451 [RFJN Vol. II,

No. 18 is the Federal Injunction Order issued by Hon. Judge William B. Shubb ("Federal Injunction Order")].) The Controller verbally promised the federal courts that the unconstitutional conduct would stop. But it did not, and so Cooper's college stock savings was seized and sold and he received a check for $173.56 instead of approximately $14,000.00 stock value. (1 CT 72.)

The Controller's unconstitutional conduct alleged in the Complaint openly conflicts with the "dual objectives" of the Unclaimed Property Law. The Defendant is supposed " '…to protect unknown owners by locating them and restoring their property to them, and to give the state rather than the holders of unclaimed property the benefit of the use of it, most of which experience shows will never be claimed'." (*Azure v I-Flow* (2009) 46 Cal. 4th 1323, 1328 ("*Azure*") (quoting *Douglas Aircraft Co. v. Cranston* (1962) 58 Cal. 2d 462, 463).) In other words, the UPL is not intended as a revenue stream for the State. (*See* 2 CT 439-451 [Federal Injunction Order, RFJN Vol. II, No. 18; Illustrations 1 and 2, at pp. vii, viii.]) Thus, irreparable harm is suffered by the very property owners like Cooper who the Controller is charged to protect under the primary purpose of the statutory scheme.

The declarations and evidentiary support filed with the TRO and the Motion for Preliminary Injunction (1 CT 32-69, 619-624) were dismissed out-of-hand by the Hon. Judge Schulman without any hearing. This evidence includes deposition testimony from the Controller's two Persons Most Knowledgeable ("PMK") and (CT RFJN Volumes I and II), and the Declarations of Aaron J. Hashim ("A.

Hashim Decl."); Cooper D. Johnson ("Johnson Decl."); and an internet expert Ryan R. Stevens ("Stevens Decl.") that confirm the undisputed facts: Defendant provides no constitutional notice whatsoever or otherwise falls far below the constitutional standard articulated by the United States Supreme Court in *Taylor v. Yee*, 136 S. Ct. at 929, *supra,* by the California Supreme Court in *Azure*, and by the Ninth Circuit Court of Appeal in *Taylor v. Westly*, 402 F.3d 924 (9th Cir. 2005), *reh'g and reh'g en banc den.* (May 13, 2005) (Describing California's "new approach" to escheat) ("*Taylor I*"); *Taylor v. Westly,* 488 F.3d 1197 (9th Cir. 2007) ("*Taylor II*"); *Taylor v. Westly,* 525 F.3d 1288 (9th Cir. May 12, 2008) ("*Taylor III*"); *Suever v. Connell*, 439 F. 3d 1142 (9th Cir. 2006) ("*Suever I*").

The violations are also confirmed by the Controller's own authenticated internal government memos in which state official openly admit that the UPL program does not follow the law. These were also provided to the lower court. (*See, e.g.*, 1 CT 145-147, 170-172, 185-187 [RFJN Vol. I, Nos. 3, 5, 8 – Controller's staff noting conduct is unlawful and does not comply with UPL].) Controller Chiang confirmed this conduct on national television and in statewide press conferences and was a public written apology. Even European television and newspapers covered the story: "British Celebrities' assets seized under Draconian California Law." [3]

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[3] C. Hedley, "British Celebrities' assets seized under Draconian California Law" The London Daily Telegraph (April 3, 2009) and the "Tonight Show" with Sir Trevor McDonald (England's version of CBS News "60 Minutes"); http://www.telegraph.co.uk/news/newstopics/celebritynew

The Complaint alleges and the undisputed facts show the misconduct is just as it was before the Federal Injunction Order: (1) the Controller cannot provide Constitutional Notice and Due Process prior to taking the property for use by the government, which is strictly prohibited by the Supreme Court's opinions in *Taylor v. Yee*, 136 S. Ct. at 929, *supra*, *Jones v. Flowers,* 547 U.S. 220 (2006) ("*Jones*") (citing *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) ("*Mullane*"), and *Taylor I, II, III* decisions; (2) the Controller cannot return the property because she does not ask for the owners' names, so that she cannot verify payment of a claim or the amount that is owed; (3) the owners cannot claim the property because the Controller does not list their names on her inoperable "searchable website," i.e. citizens cannot see their names or property on the website, which is broken (*see* 1 CT 91---118 [Stevens Decl.]); (4) there are no APA-approved regulations to guide the UPL process, just 300+ pages of miscellaneous information posted on the Controller's website; and (5) the Controller pays no interest on the private property that has been taken when (and if) it is returned to the owner in

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s/5096202/British-celebrities-assets-seized-under-draconian-California-law.html; National Public Radio "NPR" "All Things Considered – State Unclaimed Property Laws Under Scrutiny," National Broadcast: http://www.npr.org/templates/story/story.php?storyId=12379040; ABC Good Morning America, Not-So-Safe-Deposit Boxes: States Seize Citizens' Property to Balance Their Budgets (May 12, 2008) found at: http://www.youtube.com/watch?v=ZdHLIq0qHhU

violation of the Constitution. (*See* 1 CT 15-17 [Com., ¶ 18, a-e, at pp. 7-9].) These facts are not in dispute.

In issuing the Federal Injunction Order in 2007, the Honorable Judge William B. Shubb observed: "… the primary purpose of the UPL is not supposed to be to raise revenue for the state. The Controller's webpage says the law was enacted 'to prevent holders of unclaimed property from using your money and taking it into their business income.' If the purpose of the law is, as the Controller has reportedly said, to reunite owners with their [property, it would] generate little or no revenue at all for the state." (*Taylor v. Chiang*, U.S. Dist. LEXIS 43711, 43715 (2007) [Bracketed insert added].)

Hon. Judge Shubb noted the irreparable harm suffered by the very property owners who the Controller is charged to protect under the primary purpose of the statutory scheme. Cooper respectfully requests that a Permanent Injunction issue to protect the private property owners from further unnoticed seizure of private property.

III. STATEMENT OF APPEALABILITY

This appeal is timely made from a Judgment of Dismissal entered on October 5, 2020 (3 CT 632-633), following the Order Dismissing Action with Prejudice entered on July 23, 2020. (3 CT 629-630.) The Judgment is appealable under Code of Civil Procedure section 904(a)(1).

IV. STANDARD OF REVIEW

The trial court dismissed this case based on the logic of its own decision in the related *Hashim, et al., v. Yee*, San Francisco Court Case No. CGC-13-531294.

(RFJN, Exhibits A and B.) While it is the duty of the reviewing court, in most cases, to indulge in every reasonable presumption in favor of sustaining the trial court, substantially the reverse is true when plaintiff appeals from a demurrer or a motion to strike. (*See Crain v. Electronic & Magnetics Corp.* (1975) 50 Cal. App. 3d 509, 512.) Further, the lower court dismissed the Plaintiff's pending Temporary Restraining Order ("TRO") and Motion for Preliminary Injunction which were supported with sworn, undisputed facts that are reviewed below.

This case also turns entirely on issues of law. Specifically, this Court must decide: (a) whether the Controller was required to provide prior notice to Plaintiff and property owners as required by the United States Constitution; and (b) whether the process required of owners to reclaim their property is constitutional. (*See Long v. City of Los Angeles,* (1998) 68 Cal.App.4th 782.) Both of the preceding issues presented in this appeal are purely issues of law and are entitled to *de novo* review. (*Ibid.*)

V. STATEMENT OF THE CASE

C. Statement of Facts

This case arises from the Controller's ongoing core violations of the United States Constitution in the course of her administration of the UPL. While the *Hashim v. Yee* appeal was pending, the number of property seizures increased dramatically in size from 32.5 million (now 48 million) private accounts taken from citizens containing $5.1 billion (now $10.2 billion) retained in the Unclaimed Property Fund ("UPF").

These seizures include shares of stock, for example, belonging to foreign citizens who have no contact whatsoever with the forum State of California and who receive no constitutional notice of any kind. (*See* 2 CT 413-416 [RFJN Vol. II, No. 16] - Examples of foreign citizens irreparably injured by Defendant.) This property (for instance, shares of stock and contents of safe deposit boxes) is seized, destroyed, and monetized for use by the state government so that the stock and property rights are permanently lost or disrupted. (*See* 1 CT 70-90 [Johnson Decl. describing seizure of stock]; 2 CT 443-444 [Federal Injunction Order, RFJN Vol. II, No. 18 at pp. 4-5 – Hon. Federal Judge Shubb notes seizure of stock creates irreparable harm].)

Two Associate Justices of the United States Supreme Court, Samuel A. Alito, Jr. and Clarence Thomas, issued an opinion in *Taylor v. Yee*, 136 S. Ct. at 929, *supra* (1 CT 263-300; 2 CT 302-390 [RFJN Vol. I, No. 11]) that is directed to this Defendant specifically on these very facts. While this case was pending, $4 million of Amazon Stock was seized from Jan Peters who lives in Munich, Germany. The Controller then wired $1,603,807.46 to Mr. Peters. Mr. Peters has notified the German government and sued the Controller in *Jan Peters v. Betty T. Yee*, U.S. District Court Central District of California Case No. CV 21-4929-JFW(ASx).[4]

Four separate Panels of the Ninth Circuit already held that the same conduct addressed in the Complaint is unconstitutional. (*See Taylor I-III*,

[4] *See* Statement of Related Cases at p. 64.

Suever I.) The current process used to seize and to sell the individual's private property was (and continues to be) illegal and unconstitutional, and the Controller admitted such. (*See*, for instance, 2 CT 391-393 [RFJN Vol I, No. 12, which is an article authored by the Honorable Controller John Chiang, "State Controller on Asset Seizures," Orange County Register (July 29, 2007) admitting that Unclaimed Property Law was "perverted" over the past two decades to harm the citizens it is intended to protect].) The Controller reiterated these same phrases repeatedly, "What we did was wrong." (*See fn*. 3, ABC's Good Morning America, "Not-So-Safe-Deposit Boxes: States Seize Citizens' Property to Balance Their Budgets.") Yet despite being "perverted" and "wrong" the Controller continues the same unconstitutional conduct to this day, to the detriment of Cooper, Jan Peters, and the Honorable Judge Schulman and his wife.

All federal courts considered and rejected California's published authority found in *Fong v Westly* (2004) 117 Cal. App. 4th 841 ("*Fong*") and *Harris v. Westly* (2004) 116 Cal. App. 4th 214 ("*Harris*"), cited with approval by the California Supreme Court in *Azure*, *supra*, 46 Cal. 4th at 1328, 1330. The *Fong* and *Harris* cases stand for the novel, unconstitutional proportion that a statutory scheme standing alone and with no compliance with the notice provision provides "constructive notice" when state officials fail to provide the constitutional direct mail and publication notice mandated by the statutory scheme. (*Id*.) These same *Fong* and *Harris* courts rejected the briefing and reasoning of *Mullane*.

Even before the United States Supreme Court's opinion in *Taylor v. Yee* or the Ninth Circuit's multiple rulings in the *Taylor I*, *Taylor II*, *Taylor III*, and *Suever I*, the state officials openly ignored the written warnings issued by the California State Auditor, the California State Attorney General, the Controller's private consultant KPMG Peat Marwick, and even her own staff that forecast potential exposure at $1.5 Billion as of 2003,[5] if the Controller lost the *Taylor I* action.[6] The Controller then lost the *Taylor I* action. The High Court is now prepared to weigh in. (*See Taylor v. Yee*.)

The *Taylor III* Court did not hold - as the Controller has repeatedly suggested throughout this case and others - that the conduct described herein is constitutional. In *Taylor III* the Ninth Circuit assumed that then Controller Chiang (and future elected officials who hold that office) would follow the lead after four (4) published rulings against him, a federal injunction, the Controller's public national media confessionals: "What we did was dead wrong."[7] This is sadly not the case to the detriment of at Cooper

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[5] *See* 2 CT 533-600, 3 CT 608 [RFJN Vol. II, No. 20] California State Auditor *State Controller's Office: Does Not Always Ensure the Safekeeping, Prompt Distribution, and Collection of Unclaimed Property,* Report 2002-122.

[6] Steve Westly, California Controller, 2003 Comprehensive Annual Financial Report for Year Ended June 30, 2003 at p. 130.

[7] *See, e.g.,* ABC Good Morning America, Not-So-Safe-Deposit Boxes: States Seize Citizens' Property to Balance Their Budgets (May 12, 2008) found at: http://www.youtube.com/watch?v=ZdHLIq0qHhU.

and the 43 million property owners whose private property has been seized for use by the state government.

Such "lost and unknown" property owners include famous "unknown" athletes, personalities, citizens like Kobe Bryant (Property ID Nos. 962594045 and 017241610), the Speaker of the United States House of Representatives Nancy Pelosi (Property ID Nos. 015048011, 012390561, and 968473966), the former Governor of the State of California, Arnold Schwarzenegger (Property ID No. 964627703), the Queen of England (Elizabeth Windsor), Vladimir Putin (Property ID No. 986208586), Presidents George W. Bush (Property ID No. 956318038) and Barack Obama (Property ID No. 969500727), and one member of the California Supreme Court. (1 CT 173-179; 1 CT 263-300, 2 CT 302-390 [RFJN Vol. I, Nos. 6, 11 (Petition For Writ of Certiorari With The United States Supreme Court at p. 29)].)

The lack of constitutional notice is amply demonstrated by the fact that the same California state officials may easily locate these same citizens when it is time to tax them, to count their votes, pay small parking tickets, or charge a vehicle registration fee, etc. But otherwise, these officials make no effort to notify the same citizens when it is time to restore property rights to them, which is the primary purpose behind the UPL's very existence. (*See Azure v. I-Flow*, *supra*, 46 Cal. 4th at 1328,) The Controller does not bother to consult readily available state records and databases, though specifically authorized to do so under Section 1531.5.

Yet another equally absurd and unacceptable possibility is that the Controller has simply misplaced the identities of 43 million of the 39.9 million citizens residing in this State and around the World. In this case, for instance, the Honorable Judge Ethan P. Schulman (and his wife) were "lost" and "unknown" to the Controller, even while the Controller was appearing right before him.

In *Taylor II*, the Ninth Circuit flatly rejected all the arguments made by the Controller to the lower court now and once again in *Hashim v. Yee* and issued a federal injunction that closed the Controller's unclaimed property operation. (2 CT 439-451 [RFJN Vol. II, No. 18 – Federal Injunction Order].) In *Taylor III*, the Ninth Circuit reserved judgment on the Controller's application of the newly revised UPL, and held:

> The Controller has hardly begun enforcing the new escheat law. We cannot say, on the record before us, that the district court abused its discretion in dissolving the preliminary injunction. Our review in this case is confined by our limited standard of review, and is not a definitive adjudication of the constitutionality of the new law and administrative procedure.

(*Id*. at 1290.)

Put very simply, it is not the express language of the UPL that is unconstitutional; rather, it is the Controller's application and failure to fulfill "the promises" of "the new escheat law" that is unconstitutional. The fact that a state official blows through a traffic stop sign does not make the sign

"unconstitutional," it is the act of violating the law that is illegal. The harm visited on private citizens by these illegal acts is irreparable and may not be repaired with money; their property was seized, destroyed, and sold for pennies. (*See* 1 CT 70-90 [Johnson Decl.], 1 CT 119-125 [A. Hashim Decl.]; *see also* 2 CT 413-416 [RFJN Vol. II, No. 16 - illustration of these foreign citizens who each lost $1 million in stock value].)

Instead, the lower court tethered its reasoning to *Taylor v. Yee,* 780 F.3d 928 (9th Cir. 2015) ("*Taylor IV*"), without bothering to glance at the allegations in this case and the facts supporting the preliminary injunction. (3 CT 629-631.) A financially troubled state may not arbitrarily seize sums of money from its citizens with no notice and with no ability by those citizens to ever reclaim the private property and funds under color of the UPL. The primary purpose of the UPL, just as Judge Shubb observed, is to reunite lost private property rights, with their unknown owners. The goal of the UPL is to protect the citizens' property rights not to destroy them. (*See* 2 CT 439-451 [Federal Injunction Order]; *Azure v I-Flow, supra*, 46 Cal. 4th at 1328,; *Bank of America v. Cory* (1985) 164 Cal. App. 3d 66, 74.)

It is important to recognize that the private property owners, like Cooper, who are impacted by the UPL process did nothing wrong, violated no laws, and owe no fines or penalties. Their property in question not only includes utility deposits, for example, but valuable stock and retirement savings accounts, the irreplaceable contents of bank safe deposit boxes, and many other forms of private property. In the case of items that have little or no

commercial value (such as paper wills and trust documents, love letters, military citations for valor, and other items of sentimental importance), the irreplaceable property is shredded by state officials and permanently destroyed because it has no value as "revenue."

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 in order to locate them, such as the Department of Motor Vehicles ("DMV") database and other readily available sources of information. Yet when it comes time to return property under the mandatory language of UPL that requires the state officials to locate the owners and to return their property, and to otherwise provide constitutionally required notice prior to the appropriation of property, the same property owners are "unknown" to the State, which does not use the available databases. Inexplicably, the State is unable to locate virtually the entirety of its own citizens.

However, these same databases are then used by the Controller to verify the identity of the owner and whether he or she may later reclaim his or her property held in the UPF under this UPL scheme. The United States Supreme Court has recognized that the government's fiscal self-interest creates a danger of self-dealing that warrants heightened judicial scrutiny in cases such as this one. (*See United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996); *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977).)

The first step under the UPL escheat process occurs when "Holders" of property (which are "Banking organizations" "Business associations" "Financial organization" and other entities defined by Section 1501) identify property that, per the UPL, has been statutorily defined as "unclaimed" and therefore subject to confiscation by the State. Under the UPL, when there is no activity on an account or when the owner has had no contact with the Holder (such as a bank) for a fixed period of time (known as the "dormancy period"), the property is statutorily defined as "abandoned" or "unclaimed," and the Controller is automatically authorized to take title to the property. (*See* Section 1300 (Basic definitions); *Bank of America v. Cory*, *supra*, 164 Cal. App. 3d at 74, (Describing the process); *Taylor I*, 402 F.3d 924 (9th Cir. 2005) (Discribing California's "new approach" to escheat).) When the UPL was enacted in 1959, the dormancy period was fifteen (15) years. In 1976, it was reduced to seven (7) years; in 1988 to five (5) years, and in 1990 to three (3) years. (*See* Statutory Notes, 2007 Main Volume, C.C.P. § 1513; *see also* Stats. 1976, c. 648, § 1 & c. 1214 § 1; Stats. 1988, c. 286 § 2; Stats. 1990, c. 450 (S.B. 57), § 4.)[8] This reduction in time allows for the collection of more property.

Prior to 1993, the Controller provided direct mail notice to some owners and published the names and

[8] A later amendment extended the dormancy period back to five years only for "any other written instrument on which a banking or financial organization is directly liable," such as a certified check. Stats. 1990, c. 1069 (S.B. 1186), § 1.

addresses of persons with "unclaimed" property in newspapers in each county that listed an address for that individual. (*See* sample advertisements retrieved by Plaintiff from the California State Archives at 1 CT 137-142.) By 1989, the Controller had stopped sending direct mail notice and stopped publishing names and property descriptions in newspapers altogether, although Section 1531 continued to require this form of constitutional notice to owners.[9] From among all the other states, the California Controller unilaterally shifted to generic single five (5) inch advertisements directed to no one in particular with footnotes stating that the effort was "in lieu" of compliance with the "CCP 1531." (*See* 5 CT 1110-1114.)

As the Controller was decreasing the amount spent on notice to owners, the State was simultaneously spending increasingly large sums of money on privately commissioned auditors to expand the amount of property seized. The Controller hired "private auditors" who are paid a percentage commission which increases with the rate of seizures.[10]

This strategy predictably redounded to the State's financial benefit. In 2001, the Controller had seized property worth approximately $2.7 billion; by 2007, it

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[9] *See* 5 CT 1158-1159

[10] *See, e.g.*, D. Savage, Los Angeles Times, "Is California doing enough to find owners of 'unclaimed' funds before pocketing the money?" (January 7, 2016): http://www.latimes.com/nation/la-na-court-california-cash-20160107-story.html

had grown to $4.1 billion from 8.7 million persons; by 2011 that number had increased to 17.6 million – a 101% increase, to nearly half the State's inhabitants – and today the number is up to 48 million. Thus, today, the Controller holds property valued at over $10.2 billion,[11] taken from over 48 million persons[12] (almost a five-fold increase in ten (10) years) for a program that was initiated in 1950. According to the State of California, the Controller currently does not know the identity or location of the vast majority of its citizens under this property seizure program.

The California property seizures are growing at an exponential rate, and there is clearly little regard for "reuniting" "unknown" owners, like Cooper, the Hashims, Jan Peters, or Judge Schulman and his wife, with their "unclaimed property" prior to its seizure and sale. The statutory scheme has been turned on its head and is now used as a means to confiscate property in order to fuel the California State Government's General Fund.

Published State reports openly refer to the private property seizures as "revenue" so that this UPL process has now become the fifth largest source of "revenue" to a bankrupt State of California which, "…from the city council level to the state level, is over $1.3 trillion in debt."[13] The secondary purpose (to

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[11] https://sco.ca.gov/eo_pressrel_21369.html.

[12] https://sco.ca.gov/eo_pressrel_19941.html.

[13] T. Del Beccaro, Forbes Magazine, "CA Is Heading Due Left and You Are Paying For It." (April 5, 2017): https://www.forbes.com/sites/thomasdelbeccaro/2017/04/0

give the State the use of the private property while the owners are located) has now supplanted the original and primary purpose of the UPL statutory scheme, which is to reunite the private citizens with their purportedly "lost" and "abandoned" private property. The private UPF has become a permanent, "free" (no-interest) loan of private money to the General Fund in violation of the Constitution and Supreme Court precedent, discussed *infra* in Section VI.E.

The risk of erroneous seizures is heightened by the profit motives created by the State's scheme. As noted, the Controller hires private companies to audit Holders' (the statutory term referring to private businesses) books and records and to instruct the Holders (businesses) as to the property subject to confiscation by the Controller. There are no published state regulations on this process, only constantly changing internet "guidelines" found on the Controller's website[14] (*see*, *e.g.*, 1 CT 189-210 ("State of California Unclaimed Property Holders Handbook" (March 2013)), which is a violation of California's Administrative Procedure Act or APA, discussed at Section VI.C., *infra*. The auditors are paid a commission of 11% on everything seized by them on behalf of the Controller, so that their profits are directly tied to the amount of property they take. (1 CT 281.) This scheme requires that the property must be sold or monetized in order to pay the auditors

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5/ca-is-heading-due-left-and-how-you-are-paying-for-it/#2d7c04201dce

[14] *See* Controller's Website found at: https://www.sco.ca.gov/upd_lawregs.html

their percentage, and to guard against price fluctuation in the property's value such as in the case of Cooper's and other citizens' stocks. If the stock goes down in price before it is sold, then the Auditors will not get paid as much money. Of course, if the Controller held the stock, then Cooper, Jan Peters, and Judge Schulman would not be harmed because their property would be returned to them.

Once auditors have identified the "abandoned" property, Holders are required to send the Controller a statutorily mandated notice report ("Notice Report") listing the properties in question, the owners' names, and their last known addresses.[15]

Holders are not required to report the owner's Social Security Number (SSN) for every type of escheated property, even if the Holder possesses the SSN. Notably, any person who does not have a Social Security Number and does not reside in the State of California will receive neither direct mail nor publication notice of any kind.

The Notice Report must be filed no later than November 1 each year. (Section 1530(d).) The Controller is required to send a "pre-escheat notice" to owners listed on the Holder's Notice Report within 165 days of the November 1 filing. (*Id.*; *see also Vanacore & Associates, Inc. v. Rosenfeld* (2016) 246 Cal. App. 4th 438 (Discussing application of C.C.P §

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[15] Taylor, Mac, "Unclaimed Property: Rethinking the State's Lost & Found Program, Legislative Analyst's Office (LAO)" (February 10, 2015) found at: http://www.lao.ca.gov/reports/2015/finance/Unclaimed-Property/unclaimed-property-021015.pdf.

1582, and requirements for proper filing in order to make a claim with the SCO).) No sooner than seven (7) months and no later than seven (7) months and fifteen (15) days after the November 1 report, Holders are required to pay or deliver to the Controller "all escheated property specified in the report." (*Id.*, Section 1532.) In most instances, the Controller uses the same stale address information provided by the Holders, which is already known to be incorrect. Indeed, that is the reason the Holder is providing the ownership information and the property to the Controller in the first place.

Hence, the UPL requires the Controller to send pre-escheat (or no notice at all) to property owners to knowingly stale addresses on or about April 15, and Holders must deliver escheated property to the Controller every year between June 1 and June 15, before constitutional notice is provided.

As discussed in the Argument section of this brief, the Constitution requires notice and due process before private property rights are distributed. (*See Taylor I*, *II*; 2 CT 439-451 [Federal Injunction Order].) And common sense dictates that if the property owner is not told that the State is taking his or her property, then he or she would have no reason to know to file a claim form under the UPL – the primary purpose of which is to reunite owners with the unclaimed property.

The UPL's "notification program" for property valued under $50 requires of the Controller no attempt at any individualized notice whatsoever, even on multiple aggregated payments owed to a single owner that exceed $50, such as in the case of

royalty checks, installment payments, etc. The Controller maintains no records whatsoever for these property owners. Their accounts are aggregated into a single lump sum with no names of the owners on the government website, *e.g.* "State Farm Insurance Policyholders - $6 Million." (Examples are provided at 1 CT 211-262.) Therefore, no notice at all is provided to these owners and it is impossible for them to reclaim their property from the Controller. The State estimates that over fifty percent (50%) of the $10.2 billion is made up of cash amounts below $50.[16] For property whose value exceeds $50, the "notification program" has four principal components.

First, The Controller does not provide direct mail notice to *any* property owner with a property value is less than $50, and other categories of property (like cashier's checks) or property belonging to foreign citizens who live in other countries. (2 CT 56 [RFJN Vol. II, No. 19 at p. 56, lines 17-23]; 2 CT 498 [p. 127, lines 2 – 24].) The Controller does not even request the identity of the property owners from the Holders (companies) when the Controller takes custody of the private property and does not post the property owners' names on the public website. Companies are told to "aggregate" all amounts under $50.00 into a single payment to the Controller and forward the property *without* the identities of the owners. (*Id.* at p. 122, line 25 – page 123, line 4.) This is known as

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[16] S*ee* graph at p. 5 - Taylor, Mac, "Unclaimed Property: Rethinking the State's Lost & Found Program, Legislative Analyst's Office (LAO)" (February 10, 2015) found at: http://www.lao.ca.gov/reports/2015/finance/Unclaimed-Property/unclaimed-property-021015.pdf.

the Controller's "Under $50 Rule," and extends to all property, including stock dividends, mineral royalties, etc. (*Id.*, at p. 123, lines 2-4; p. 127, lines 8-18.)

Second, the UPL requires a series of manifestly inadequate steps at individualized notification: If the Notice Report provides the Controller with the owner's SSN, Section 1531 requires the Controller to send the owner's name and SSN to the Franchise Tax Board ("FTB") to determine whether the FTB has a Current address for that person. (Section 1531(d).) If the FTB address and the Holder's address are the same, the Controller sends notice to that address. If the FTB has an address different from that provided by the Holder, or multiple addresses, the Controller mails just one arbitrary notice to the FTB address only, and she does not send any notice to the address reported by the Holder, or contained in another California database, such as the records of the DMV. If the FTB has no address, then the Controller sends notice to the address reported by the Holder ("the Last Known Address" or "LKA"), which is already known to be a stale address and is the reason for the UPL report to the Controller in the first place.

If the Holder does not provide a SSN, which is not a mandatory requirement pursuant to the Controller's internet guidelines, then the Controller does not request information from the FTB, or any other electronic database accessible to her. She merely sends notice only to the stale address reported by the Holder. Obviously, citizens residing in other states and those who do not pay taxes in California would have no record of their correct address at the FTB. The same is true of citizens residing in other

countries (like England, Germany, or Korea) who also do not have U.S. Social Security Numbers.

Third, Section 1531 provides for newspaper publication notice, which the Controller has implemented through a practice of generic, inconspicuous 3" x 5" "block" publication notices in newspapers that do not provide actual notice to the owners that their specific property is to be taken, sold, and destroyed for use by the State. (Sample advertisements are contained in the record at 1 CT 137-142.) The generic "advertisements" are often published on dates calculated to reduce readership, e.g., Thanksgiving Day.

Multiple federal courts have advised the Controller that these generic "advertisements" - directed to no one in particular - do not constitute constitutional notice and simply alert the public to the Controller's website or toll-free number.[17] Indeed, it is overwhelmingly likely that only a miniscule fraction of affected property owners will actually chance upon them, and would have no warning that their property rights are to be impacted or lost. Until 1989, the Controller interpreted the identical statutory language (like the other states) to require publication of the "names" of owners and a description of "the property," which was published in alphabetical order in yearly newspaper inserts in the State's major

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[17] *See Taylor I,* 402 F.3d 924, *supra*; *Taylor II,* 488 F.3d at 1200-02, *supra*; *Taylor III,* 525 F.3d 1288, 1291, *supra*: *Suever v. Westly*, 439 F. 3d 1134 (9th Cir. 2006) ("*Suever I*"); *Taylor v. Yee,* 136 S. Ct. 929 (2016); *contra* Suever v. Westly, (9th Cir. 2009) 579 F.3d 1047, 1057 ("*Suever II*"); *Taylor v. Yee*, (9th Cir. 2015) 780 F.3d 928.

papers. (1 CT 172 (Controller's Government Memorandum); 1 CT 185-187 (Controller Memorandum describing publication notices.).)

The fourth part of the Controller's "Notification Program" is a website. In theory, the website allows property owners to search online for property appropriated by the Controller. But the website is broken. (1 CT 70-125, 619-624.)

And this also assumes that data relevant to seized property is properly inputted into the system. Typically, no identifying information is listed on the website or maintained by the Controller in the case of amounts under $50, or aggregated amounts, so that it is impossible for the owner to locate or claim the property. (1 CT 180-184.) Owners who locate their property online may submit a claim form to the Controller and engage in the "claim process," the unconstitutionality of which is discussed *infra* in Section VI.C..

Thus, through a website, the Controller shifts the burden of conveying constitutional notice from the government to the citizen who must ferret out his or her own property information by running queries on a broken government website search engine. The property has already been sold or auctioned off by the time it appears on the website, which is merely a catalogue of the sold property. The website identifies the property as though it might still exist, e.g., named shares of stock are listed though the stock is already sold.

In addition to state databases, the Controller has ready access to private commercial databases such as Accurint to locate owners of unclaimed property. The

Controller does not use either Accurint or any other commercial database to locate the purportedly "unknown" owners of "unclaimed" property before or after their property is taken for use by the State and sold.

The palpable inadequacy of this notification scheme is confirmed by the end results. In 2008, no fewer than 75,000 notice letters mailed to property owners were returned to the Controller because they were sent to the wrong address without any additional steps being taken to find the owner. (1 CT 286.) Despite the advances in technology and readily available governmental and commercial databases that could be used to locate the hundreds of thousands of persons whose property the Controller takes each year without notice. While using the same technologies and databases to compel taxes and even pay claims under the UPL program, the Controller refuses to take these same simple steps to provide critical *Mullane*-style constitutional notice and information to owners to exercise their due process rights and to enable them to stop the process or to reclaim their property before it sold**. (*See** *Mullane* 339 U.S. 306, *supra*; *Jones* 547 U.S. 220, *supra*.)

D. Procedural History

Plaintiff filed his complaint on May 27, 2020. Plaintiff filed the Motion for Temporary Restraining Order and Preliminary Injunction on July 13, 2020, which was denied the next day on July 14, 2020, by the Hon. Judge Ethan P. Schulman. The Order Dismissing Action with Prejudice was filed on July 23, 2020 – no hearing was granted. Plaintiff filed a timely notice of appeal on October 15, 2020.

VI. ARGUMENT

A. California's Published Authority in The *Fong* And *Harris* Case is Unconstitutional.

In a series of rulings, such as the decision by the lower court in this case, the state courts of California have immunized the Controller from operation of the United States Constitution while denying state-law relief from California's unconstitutional UPL. (*See Azure v I-Flow, supra*, 46 Cal. 4th at 1328, 1330, citing with approval *Harris, supra,* 116 Cal. App. 4th 214, 219); *Fong, supra,* 117 Cal. App. 4th 841.) The *Fong* and *Harris* Courts concocted the novel legal theory that constitutional notice is provided, even when none is admittedly given, because the mere existence of a statute constitutes "constructive notice" that property *could* be seized. (*Fong*, *supra* 117 Cal. App. 4th at 841; *Harris*, *supra*. 116 Cal. App. 4th at 223 *fn*.15).

In *Fong*, plaintiff shareholders challenged a decision from the Sacramento County Superior Court of California, which entered judgment in favor of defendant Controller in an action seeking monetary and equitable relief after shares of their Berkshire Hathaway stock were seized and sold without notice. (*Fong*, *supra*, 117 Cal. App. 4th at 846.) Thereafter, the injured shareholders filed a claim for the money left from the sale of their stock investment, which had been sold at $7,082 per share. (*Id*., at 847; *see also* Controller's memorandum discussing sale of Berkshire Hathaway stock without notice (1 CT 172).) Currently the same shares of Berkshire Hathaway

stock are valued at $416,400.00 per share.[18] The shareholders then filed an action against the Controller for constitutional violations. After judgment was entered on a motion in limine in favor of the Controller based on "statutory immunity," the owners sought review.

In affirming the lower court, the Third District Court of Appeal determined that the Controller was not required to provide constitutional notice or to even comply with Section 1531 and is immune from liability under Section 1566 because the owners' claims arose primarily from the Controller's sale of their escheated property. (*Id*., at 851-854.) Because the injured shareholders in that case had already recovered the proceeds from the unnoticed sale of their stock under Section 1541, the Third District reasoned that the owners had received the full amount allowed under the law from the unnoticed seizures and sale. (*Id*., at 852-854.)

The Third District Court noted that the escheat did not amount to an unconstitutional taking because the state did not acquire actual title to the stock under the UPL. The Third District Court chose not to consider *Mullane* or the 5th and 14th Amendments. Or, as to this last point, Section 1300(c) [Definitions] of the UPL which states:

> "'Escheat,' unless specifically qualified, means the vesting in the state of title to property the whereabouts of whose owner

[18] *See* Yahoo Finance – Berkshire Hathaway stock price quote: http://finance.yahoo.com/quote/BRK-A?ltr=1 (last visited September 17, 2021).

> is unknown or whose owner is unknown or which a known owner has refused to accept, whether by judicial determination or by operation of law, subject to the right of claimants to appear and claim the escheated property or any portion thereof. When used in reference to the law of another state, 'escheat' includes the transfer to the state of the right to the custody of such property."

(Cal. Code Civ. Proc. § 1300(c) [Underlining added].)

In the *Harris* case, plaintiff stockholders were employees who were owed stock in their employee stock purchase plan when their company merged with another corporation called GTE. These shareholders brought a class action against the defendant Controller, alleging that he had a statutory obligation under the Unclaimed Property Law to notify them prior to taking and selling their stock. (*Id.,* at 218.) The lower court granted the Controller's motion for judgment on the pleadings, and the stockholders appealed.

The Second District Court held that failure to provide notice to the stockowners did not restrict the Controller's statutory duty to sell the escheated shares. The Second District reasoned that no provision of the UPL suggested that the owner of unclaimed property was entitled to prior notice that his or her stock was about to escheat to the State where it would be sold but was entitled to only an "in-kind return" of the property where the Controller returned money from the sale of this owner's stock. "Harris refers to no principle of law, and we know of

none, entitling a shareholder who has lost track of his or her shares to require the state to ensure that those unclaimed securities are not converted to cash without prior notice to the shareholder." (*Id*., at 222.)

Like the Third District, the Second District reasoned that the unnoticed seizure by commissioned state-employed private "auditors" and the subsequent unnoticed sale of private property to create revenue for the State's general fund is neither a violation of the explicit language of the UPL (Section 1531) nor the United States Constitution, Amendments 5th and 14th.

Further, the Second District held that the timing requirement in the notice provision in Section 1531, and the absence of any timing restriction in the sale requirements in Section 1563, confirmed the lack of connection between the two separate duties. "The statute does not require notice be given under section 1531 before securities may be sold under section 1563, and the sale results in no constitutional deprivation." (*Id*., at 224.) In short, nothing prevented the Controller from the unnoticed selling of securities belonging to private citizens immediately upon receipt or at any other time. The Second District Court concluded that: (1) the sale of unclaimed securities without notice did not violate the owners' constitutional due process rights; and (2) the Controller did not lose her immunity under the UPL even when she failed to follow the notice provisions of the statute and to notify the stockholders. (*Id*., at 223-224.)

The Second District chose not to consider the holding of *Mullane* or the 5th or 14th Amendments.

Nor did the Second District consider the express language of Section 1531, which requires direct mail and publication notice prior to the sale of private property for use by the State government.

In 2005, the Ninth Circuit declined to follow the 2004 decisions in the *Fong* and *Harris* cases. (*See Taylor I*, 402 F.3d at 930, *fn*. 22, *supra*.) The Ninth Circuit held that this "new approach to escheat" is unconstitutional.

In 2007, the Ninth Circuit issued a federal injunction that shuttered the State's UPL program. The California authority found in *Fong* and *Harris* cannot be squared with precedent of the United States Supreme Court regarding the pre-deprivation notice required by the Due Process Clause, including its decisions in *Mullane*, 339 U.S. 306, *supra*, and *Jones*, 547 U.S. 220, *supra*.

These California *Fong* and *Harris* cases also conflict squarely with the numerous decisions by other federal courts of appeal and divisions in other states, some of which are footnoted below.[19] California is thus the national pariah in this area of law, and other states do not follow the process outlined above. The Ninth Circuit Court described the Controller's UPL "new form of escheat" process as follows:

> "The escheat problem, in this case, arises from a new approach used by some state

[19] *See e.g.*, *Garcia-Rubiera v. Fortuno*, 665 F.3d 261 (1st Cir. 2011); *Luessenhop v. Clinton Cnty., New York*, 466 F.3d 259 (2d Cir. 2006); *Perez-Alevante v. Gonzales*, 197F. App'x 191 (3d Cir. 2006).

> governments, greatly shortening the time before which untouched property is treated as though it had been abandoned, greatly reducing or eliminating notice to the true owner, and ignoring the true owner's pleas. For example, California is taking the flight attendant's stock in her airline on the basis, basically, that she cannot be found, even while she is standing in court shouting, 'Here I am! Here I am! Give me my money!' And the State of California turns a deaf ear, pretending it cannot hear her."

(*See Taylor I*, 402 F.3d at 926, *supra.*)

B. The Controller Fails to Apply The Law as Expressly Written.

The Controller does not comply with fundamental rules of statutory construction and interpretation and seizes private property from citizens who are well "known" to the state as taxpayers, license holders, voters, etc., by labeling them instead as "unknown" though far outside of the scope of the statute. The Controller affords these citizens no constitutional notice whatsoever.

1. Private Property is Seized From "Known Owners."

The many UPL definitions prohibit exactly this conduct described above. For instance, the threshold definitions Section 1300(c) states:

> "'Escheat,' unless specifically qualified, means the vesting in the state of title to property the whereabouts of whose owner

> is *unknown* or whose owner is *unknown* or which a known owner has refused to accept, whether by judicial determination or by operation of law, subject to the right of claimants to appear and claim the escheated property or any portion thereof. When used in reference to the law of another state, "escheat" includes the transfer to the state of the right to the custody of such property."

(Section 1300 ("Definitions;" underlining and italics added for emphasis), *see also* 1510-1521, 1513.5, 1520, 1530, and 1531.)

These above-cited Sections define that a citizen must be truly "lost" and "unknown" before his or her property rights are disturbed. The purpose of the UPL is to "restore" property to its rightful owner, i.e. to protect property rights (*Azure, supra*, at 1328), which the Controller may never accomplish when no constitutional notice is provided and various properties belonging to different owners with no identifying information are aggregated. Or property owners go unlisted or with incorrect address and misspellings in the public registries without any ownership information listed on a broken, unsearchable website. (*See* 1 CT 91-118 [Stevens Decl. (Tech Expert)]; 1 CT 119-125 [A. Hashim Decl. (Same)]; 2 CT 417-438 [RFJN Vol. II, No. 17 – samples of Controller's records].)

"…[T]he 'plain meaning' rule of statutory construction does not require or allow us to read a single sentence of a statutory provision in isolation. Words in a statute must be construed in context,

keeping in mind the nature and obvious purpose of the statute where they appear." (*Los Angeles Times v. Alameda Corridor Trans. Auth.*, 88 Cal. App. 4th 1381, 1387 (2001) (*citing Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal. 3d 222, 230 (1973), quoting *Johnstone v. Richardson*, 103 Cal. App. 2d 41, 46 (1951); internal quotation marks omitted.).)

In *Bank of America v. Cory, supra*, 164 Cal.App.3d at 74, the Third District Court of Appeal reviewed earlier misconduct by the Controller, who refused to claim dormant bank accounts from banks, and held: "[W]hen considered in total context, the statutory scheme of the UPL compels the Controller to affirmatively take all steps necessary to carry out the purposes of the UPL."

2. No Publication Notice is Provided to Affected Property Owners.

As just another example, no constitutional publication notice is provided to the property owners. The plain wording of the unclaimed property statute clearly requires notice to "the apparent owner" "… of the property." (*See* Section 1531(a) (Emphasis added).) "Each published notice shall be entitled 'notice to owners of unclaimed property'." (*See* Section 1531(b) (Underline added).)

The notices used by the Controller are not directed to "the apparent owners…of the property," but to the general public – instead they are "advertisements." (1 CT 137-144 [RFJN Vol. I, Nos. 1, 2 [sample generic advertisement]; *see Taylor II,* 488 F.3d at p. 1201, *supra* ("California cites no authority for the proposition that due process is 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 I*, 402 F.3d at 928, *supra* ("… [the advertisement] does not say what property is being taken or from whom. No names of property owners are listed."); *Suever I*, 439 F.3d 1142, *supra* (Same).)

3. The Controller Will Not Repair The Website And Does Not Consult The Readily Available Databases to Provide The Best Possible Notice to The Property Owners.

The Controller does not use the readily available databases to correct addresses and misspelled names and has stated that she has no obligation to do so: "Yee says she is not allowed to clean up the database even if there are obvious misspellings, like "Franciscalif" [San Francisco, California]."") (*See* 2 CT 410-412 [Controller's public statement, RFJN Vol. II, No. 15 [Bracketed insert added].]) These are the same knowingly incorrect addresses used for the purported direct mail notice to the impacted property owners.

C. The California Unclaimed Property Law Scheme Violates The Due Process Clause.

Plaintiff was a student and his stock was intended to fund his education but was seized and sold without the notice required by Section 1531 and the Constitution for use by the State's General Fund. Every day, approximately 21,000 of California residents, including many elderly residents of limited means, suffer the appropriation of their property with no meaningful notice and no meaningful avenue of recourse. Retirement stock savings, which were

intended as a hedge against time, are seized from the owner without notice and sold for a fraction of their value, for example, the elderly Fong's valuable $400,000 per share Berkshire Hathaway stock sold for $7,000.

The contents of safe deposit boxes are arbitrarily held for varying periods of time and then auctioned off on eBay.[20] Stock accounts are held for 18 months and then liquidated.[21] The fact that owners do not receive constitutional notice prior to the seizure of their property renders the arbitrary holding periods irrelevant because the owners are left uninformed regarding their due process rights. The property owners do not know to claim their property because the state officials do not tell them that they have taken the property and intend to sell it under a statutory scheme, the primary purpose of which is to return "property" and to protect property rights.

The Ninth Circuit noted the danger of "the permanent deprivation of property subsequent to California's sale of that property, which – pursuant to California's policy of immediately selling property

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[20] *See, e.g.,* ABC Good Morning America, Not-So-Safe-Deposit Boxes: States Seize Citizens' Property to Balance Their Budgets (May 12, 2008) found at: http://www.youtube.com/watch?v=ZdHLIq0qHhU

[21] California State Controller's Office explained on her website: "Your investment accounts will be turned over to the State Controller's Office, which is required by law to sell the securities, no sooner than 18 months and no later than 20 months, after the due date for reporting the securities to the State Controller's Office" at: http://www.sco.ca.gov/upd_faq_about_q01.html (last visited, September 22, 2021)).

after escheat – would frequently occur even if plaintiffs were diligent about monitoring their property." (*See Taylor II*, 488 F.3d at 1200, *supra* [emphasis in original].)

Under the UPL scheme, the Controller physically appropriates private property and as a matter of course permanently divests owners of title to that property such as the Plaintiff. Once this property is auctioned off, sold, or destroyed by the operation of this UPL scheme, at most the rightful owner (like Plaintiff) will be offered part of the monetary proceeds of the *taxable* sale, and without interest for the time the funds are withheld. This process also affords little comfort or relief to the owner in circumstances where the sentimental value of the property (such as family heirloom jewelry in a safe deposit box) far exceeds its commercial value.[22]

The lower court's decision cannot be squared with the United States Supreme Court's many decisions establishing the pre-deprivation notice required by the Due Process Clause, even in cases where the government has no direct stake in the outcome. In a wide variety of contexts, the Supreme Court has warned that the state government's financial interest (as well the financial interest of whatever agent the government uses to administer its scheme) creates the danger of self-dealing that raises constitutional

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[22] *See, e.g.,* ABC Good Morning America, Not-So-Safe-Deposit Boxes: States Seize Citizens' Property to Balance Their Budgets (May 12, 2008):
http://www.youtube.com/watch?v=ZdHLIq0qHhU,
http://abcnews.go.com/GMA/story?id=4832471&page=1#.Udhur5yLfCY

red flags and triggers heightened judicial scrutiny. The Supreme Court has long expressed constitutional "concern with governmental self-interest" when "the State's self-interest is at stake'." (*United States v. Winstar Corp*., 518 U.S. 839, 896 (1996) (quoting *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977).)

In *Winstar*, the Court spoke of the "taint" of "a governmental object of self-relief" where the government is party to a contract. (*Id*.; *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co*., 459 U.S. 400, 412-13 & *fn*.14 (1983) (holding that a stricter level of scrutiny applies under the Contract Clause when a State alters its own contractual obligations).)

In *Mullane,* even when the exacerbating feature of fiscal self-interest was absent, the Court held that notice by newspaper publication was insufficient with respect to known present beneficiaries of a trust and did not satisfy due process. The Supreme Court observed that the "elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Id*., at 313.) "[P]rocess which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (*Id.* at 315.)

The record in this case demonstrates that the California UPL falls far below the standards of *Mullane*, even though technological advances since

1950 make it vastly easier to locate individuals now than it was when *Mullane* was decided. The California scheme has resulted in the absurd situation where approximately 48 million[23] of California's 39,512,223 total inhabitants[24] are listed as "unknown."

The result of this fatally flawed system speaks for itself. Virtually every property-owning California citizen in now "lost" for purposes of the UPL property seizure program. California's procedures have hardly produced "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane,* 339 U.S. at 313 *supra.*)

The Controller does not provide *Mullane*-style constitutional "publication notice," but merely generic "advertisements." (*See* sample of current Controller advertisement at 1 CT 144.) *Mullane* held that such advertisements are not constitutionally adequate (except in special circumstances) because "[c]hance alone" brings a person's attention to "an advertisement in small type inserted in the back pages of a newspaper." (*Mullane*, 339 U.S. at 315, *supra.*) The Ninth Circuit held such advertisements to be insufficient as a matter of due process. (*Taylor II*, 488 F.3d at 1201, *supra*; *see also Suever I*, 439 F.3d at 1148, *supra*; *Taylor I*, 402 F.3d at 926-29, *supra*; *see also Shipes v. Trinity Industries*, 987 F.2d 311, 322

[23] https://sco.ca.gov/eo_pressrel_19941.html.

[24] https://www.census.gov/quickfacts/CA.

(8th Cir. 1993); *Hall v. Borough of Roselle*, 747 F.2d 838, 843 (3d Cir. 1984).)

Nor does the Controller's "searchable website" provide constitutionally adequate notice. In reality, the website is broken and conveys no constitutional notice at all to property owners. The Controller's website is nothing more than a dysfunctional catalogue of the owners' misspelled names, wrong addresses, and sold and destroyed property. The Controller acknowledged this fact, but publicly states that she has no duty to fix the website that contains property records for over 48 million people. The Ninth Circuit previously acknowledged, "California cites no authority for the proposition that due process is satisfied by a newspaper advertisement saying that a person concerned about his property can check a [broken] website to see whether he has already been (or soon will be) deprived of it." (*Taylor II*, 488 F.3d at 1201, *supra* [bracketed insert added].)

The State provides no notice (direct mail, publication notice, or even listing the owners' names on the searchable website) with respect to property valued under $50. This is not a small matter.[25] The most recent report from the Legislative Analyst's Office notes that amounts under $50 comprise more

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[25] CBS News, Call Kurtis Investigates: State Can Keep Your Unclaimed Money Under Bill Meant To Close Loophole (June 6, 2013): http://sacramento.cbslocal.com/2013/06/06/call- kurtis-investigates-state-can-keep-your-unclaimed-money-under-bill-meant-to-close-loophole/#.UbJVXKCsoJE.email.

than fifty percent (50%) of the $8 billion Unclaimed Property Fund in California.[26]

California provides no notice to residents of the other states and countries whose property is taken and sold – these individuals do not pay taxes in California, hold no residency in the State, and would have no reason to be alerted by a generic advertisement published in a California newspaper, or to search the California Controller's website.[27]

A fortiori, California's published 2004 decisions in *Fong* and *Harris* cannot be squared with *Jones*, 547 U.S. 220, *supra*, in which the Supreme Court held that, "[b]efore a state may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case." (*Jones*, 547 U.S. at 223, *supra* (quoting *Mullane*, 339 U.S. at 313, *supra*).) The United States Supreme Court held that "...when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." (*Id.*, at 225 (emphasis added).) The Highest Court found there were "several reasonable steps the State could have taken," and that "[w]hat steps are

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[26] *See* Legislative Analyst's Office report date February 10, 2015: Unclaimed Property: Rethinking the State's Lost & Found Program' pgs. 5, 6 (*see* Figure 2).

[27] *See*, e.g., *Jan Peters v. Betty T. Yee*, U.S. District Court Central District of California Case No. CV 21-4929-JFW(ASx)

reasonable in response to new information depends upon what the new information reveals." (*Id.*)

One reasonable step would have been for the State to "resend notice by regular mail, so that a signature was not required." (*Id.*) This would "increase the chances of actual notice to [the petitioner] if—as it turned out—he had moved." (*Id.*, at 235.) The Supreme Court concluded:

> "There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner-taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed."

(*Id.*, at 239.)

Precisely the same reasoning applies here. In *Jones*, the Supreme Court reasoned that a State may not rely solely on mailed notice "when the government learns its attempt at notice has failed." (*Id.*, at 227.) The record and the allegations in this case, which may also be judicially noticed as true, demonstrate that California's attempts at notice under the UPL scheme have predictably failed, not once but millions and millions of times. Just as in *Jones*, "...the government's knowledge that notice pursuant to the

normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." (*Id*., at 230.)

In *Jones*, the Supreme Court cited *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005), which observed that, "as most cases addressing this situation recognize, it is, at the very least, reasonable to require examination (or reexamination) of all available public records when initial mailings have been promptly returned as undeliverable." (*Jones*, 547 U.S. at 227, *supra* (citing *Plemons v. Gale*, 396 F.3d at 577, *supra* (emphasis added).) "Extraordinary efforts typically describe searches beyond the public record, not searches of the public record." (*Id*. (internal quotation marks and citation omitted and emphasis in original).)

Similarly, in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), the Supreme Court held that when the identity and location of a mortgagee can be obtained through examination of public records, "constructive notice alone does not satisfy the mandate of *Mullane*." (*Id*., at 798.) Moreover, a "party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." (*Id*., at 799.) Although a party required to provide notice need not "undertake extraordinary efforts to discover ... whereabouts ... not in the public record," it must use "reasonably diligent efforts to discover addresses that are reasonably ascertainable." (*Id*., at 798.)

The *Fong* and *Harris* decisions citied with approval by the California Supreme Court in *Azure*, held that the Controller need not provide any notice

to property owners before their property is seized and sold for use by the State, while these same courts determined that the Controller is not even required to follow notice provisions contained in the UPL, at all. This Court can see that common sense and the United States Constitution require proper notice and due process to all property owners before their property rights are disturbed under this UPL statutory scheme.

D. The Controller Does Not Return Or Allow Owners To Even Access Their Private Property Through A Constitutional Claim Process.

The Controller is required by law to hold property and funds in trust for the benefit of the owners and to allow the owner to step forward and claim the property or funds. (*Taylor I*, 402 F.3d at 931, *supra*; *Bank of America v. Cory*, *supra*, 164 Cal. App. 3d at 74; Sections 1347, 1361, 1540, 1541.)

The Controller is also required by law to promulgate and to publish written regulations that explain the various rules that she creates as part of her claim process pursuant to California's Administrative Procedures Act, Government Code sections 11340, *et seq*. ("APA"). The California Supreme Court held:

> "The APA applies to the exercise of *any quasi-legislative power* conferred by *any statute* heretofore or hereafter enacted, and the APA's provisions shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

(*Tidewater Marine Western v. Bradshaw* (1996) 14 Cal 4th 557, 570 ("*Tidewater*").)

The Controller never promulgated *any* regulations pursuant to the Administrative Procedures Act ("APA"), Government Code sections 11340, *et seq.* (Deerings 2021) to explain what she: (1) expects from companies that are audited and otherwise required to transfer property to the state agency; or (2) used to guide her claim process; in other words, as to this second point, what the Controller requires of a claimant to prove up or to "perfect" a UPL claim. (1 CT 16-17 [Com. at ¶ 18(c), at pp. 8-9].)

The Court may readily see in the Plaintiff's RFJN Vol. I, No. 10 (1 CT 211-262) and Vol. II, No. 19 (2 CT 452-532), the process is subjective, arbitrary, and capricious – identically situated claimants are treated differently – the proceeds from the seizure are returned to some citizens, while not to others. The Controller's policies are "verbal" and arbitrary. (1 CT 211-262 [RFJN Vol. I, No. 10] and 2 CT 452-532 [Vol. II, No. 19 – sworn Controller PMK testimony].) In *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal 4th 557, 568-577 ("*Tidewater*"), the California Supreme Court held that an Agency's actions are "void" for failure to adopt written regulations pursuant to public rulemaking under the APA. Cooper Johnson describes the illegal process in his accompanying declaration.

The Controller's failure to promulgate claim (and audit) regulations pursuant to the APA means that her process is "void" as a matter of law according to the State's Supreme Court. (*Id.*) There are no APA regulations; instead, the Controller posts hundreds of

pages of ever-changing guidelines, bulletins, and random rule-change notices on her website.[28]

The APA establishes the procedures by which all state agencies, such as the Controller's agency, may adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov. Code §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code § 11346.2, subds. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code § 11346.8); respond in writing to public comments (Gov. Code §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code §§ 11349.1, 11349.3).

One purpose of the APA is to ensure that those persons or entities who may be impacted by a regulation will have a voice in its creation (*see Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 202 ("*Armistead*")), as well as notice of the law's requirements so that they can conform their conduct accordingly. (*See Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583, 588.)

The California Legislature wisely perceived that the party subject to regulation is often in the best position and has the greatest incentive to inform the agency about possible unintended consequences of a

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[28] *See* Controller Website:
http://sco.ca.gov/upd_msg.html

proposed regulation. (*Tidewater*, *supra*, 14 Cal. 4th at 569.)

In this case, the 300+ pages of miscellaneous guidelines, bulletins, forms, and notices that the Controller has written as posted on the Controller's internet website (*see, e.g.*, 1 CT 188-210) are "void" as a matter of law, because they were not adopted in accordance with the APA. (*Id.*, at 576.) It is unclear what criteria the Controller uses to perfect a claim for an amount below $50, or one of the aggregated sums (with no names) belonging to many owners, when she does not ask for the name(s) of the owner(s) or maintain any records of the property specifics, and there are no APA regulations to guide these citizens through the claim process.

The Controller's "Underground Regulations" do not explain how a claimant can possibly make such a claim for property which is not listed on the Controller's website and for which the Controller maintains no identifying information, such as all amounts under $50 and the aggregated sums. (*See*, *e.g.*, 2 CT 305-306.) The Controller is likewise unable verify the payment, and in what amount it is to be made to the citizens, since the Controller does not know the owner's name, or the exact amount owed to any particular owner. It is impossible for the Controller to enforce the UPL, as she is required to do, under these circumstances and in a constitutional manner. (*See Taylor I-III*; *Suever I*; *Bank of America v. Cory, supra*.) Thus, the application of this UPL "claim process" is patently unconstitutional.

The California Supreme Court states, "...if an agency simply ignores the APA, it ceases to be

responsive to the public, and its regulations are vulnerable to attack in the courts." (*Id.*) Where an agency fails to comply with the APA, its decisions are to be afforded "no deference" by a reviewing court, such as this one. (*Id.*, at p. 577).

The State of California's Office of Administrative Law's homepage[29] declares that a California regulation must conform to certain minimum procedural requirements for its adoption, amendment or repeal, including adequate notice and a general statement of the reasons for adoption or amendment. (*See* Govt. Code §11346; *Naturist Action Committee v. California State Dept. of Parks & Recreation* (2009) 175 Cal. App.4th 1244, 1250.)

Regulations such as those found in the Controller's website must be submitted to the Office of Administrative Law for review (Govt. Code §§11343, 11349), filed with the Secretary of State (Govt. Code §11343) and published in the California Code of Regulations (Govt. Code §11344). All legitimate regulations are then subject to judicial review. (Govt. Code §11350.)

In *Tidewater*, the California Supreme Court has held:

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[29] "The Office of Administrative Law is responsible for reviewing administrative regulations proposed by over 200 state agencies for compliance with the standards set forth in California's Administrative Procedure Act (APA), for transmitting these regulations to the Secretary of State and for publishing regulations in the California Code of Regulations." http://www.oal.ca.gov/

> The APA provides that "[*n*]*o state agency* shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." The APA applies "to the exercise of *any quasi-legislative power* conferred by *any statute* heretofore or hereafter enacted," and the APA's provisions "shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

(*Tidewater*, *supra,* 14 Cal 4th at 570 (citations to Govt. Code omitted; emphasis added by Court.)

The "guidelines" and "forms," "notices" and "bulletins" that the Controller periodically writes and posts (and then removes) to and from her website[30] are "*void"* as a matter of law, because they were not adopted in accordance with the APA. (*See Tidewater*, *supra*, 14 Cal. 4th at 576.) As the Controller's *verbal* policy indicates (*see* 1 CT 211-262 [RFJN Vol. I, No. 10] and 2 CT 452-532 [Vol. II, No. 19 – sworn Controller PMK testimony]), it is unclear what "criteria" the Controller uses to "perfect" a claim, this

[30] *See* Controller's Website found at: https://www.sco.ca.gov/upd_msg.html.

is particularly the case when the Controller does not know the name of the owner and there are no proper regulations. If the Court were to ask the Controller to explain the claim process, just as was asked in a sworn PMK deposition (*see* 1 CT 211-262 [RFJN Vol. I, No. 10]), the Court would find the verbal claim process to be absurd and baffling.

There are no names attached to many records, no constitutional notice was ever conveyed, and the records are unsearchable on the Controller's website. Included in the records on appeal are three (3) examples (of hundreds of thousands – *see* 1 CT 121-122 [A. Hashim Decl. at ¶ 7]) taken directly from the Controller's website. The entries carry no identifying owner information.[31] (*See* 1 CT 91-118 [Expert Witness declaration of Ryan Stevens which avers that the Controller's website is broken and inoperable].)

The California Supreme Court flatly states, "…if an agency simply ignores the APA, it ceases to be responsive to the public, and its regulations are vulnerable to attack in the courts." (*Tidewater, supra,* 14 Cal. 4th at 576.)

In *City of West Covina v. Perkins*, 525 U.S 234, 240-241 (1999) the Highest Court held that although government agents must give notice to property owners that their property has been taken "so that the

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[31] Call Kurtis Investigates: *State Can Keep Your Unclaimed Money Under Bill Meant To Close Loophole*. http://sacramento.cbslocal.com/2013/06/06/call-kurtis-investigates-state-can-keep-your-unclaimed-money-under-bill-meant-to-close-loophole/#.UbJVXKCsoJE.email

owner[s] can pursue available remedies for [the] return" of their property, individualized notice of the remedies for return is not required where those remedies are "established by published, generally available state statutes and case law." (*Id.*, at 241.) The Supreme Court held that property owners can turn to these readily available "public sources" for specific instructions on how to reclaim their property. (*Id.*; *see also Butler v. Castro*, 896 F.2d 698, 703 (2d Cir.1990) (Supreme Court held that where New York City's procedures for returning seized property in its administrative scheme violated the basic notice requirements of the due process clause).) There is no such published procedure in California.

E. Plaintiff And Class Members Are Entitled to Interest on The Funds Generated From The Unconstitutional Seizure (And in Some Instances Sale) of Their Property.

Plaintiff is entitled to recover his own private property (as opposed to damages) with interest and other substantive due process rights under the 5th and 14th Amendments. The law requires just compensation and interest at California's *alternative borrowing rate*, which is the amount of interest the State avoids when it uses the illegally seized property instead of funds borrowed on the open market. (*See Webbs Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 162 (1980); *United States v. $277,000 of United States Currency*, 69 F.3d 1491, 1495-96, (9th Cir. 1995); *United States v. $133,735.30 Seized from U.S. Bancorp Brokerage Account No. 32130630*, 139 F. 3d 729 (1998) (relying on and affirming *$277,000, supra*); *United States v. $515,060.42 in United States Currency*, 152 F.3d 491, 504-05 (6th Cir. 1998) (same);

Brooks v. United States, 980 F. Supp. 321, 322 (E.D. Mo. 1997) (finding government liable for interest actually accrued, or if seized funds were placed in Treasury account, the constructively earned interest at the government's alternative borrowing rate from the time seized until its return); *contra Suever II*

The California Supreme Court held in *Holt v. Kelly* (1978) 20 Cal.3d 560, 562 and in *Minsky v. City of Los Angeles* (1974) 11 Cal. 3d 113, 121, that: "A claim for the specific recovery of property has never been considered a claim for money or damages."

F. Permanent Injunction Must Issue to Halt Unconstitutional Conduct When The Undisputed Facts Demonstrate Ongoing Irreparable Harm to Citizens.

Plaintiff reviewed each of the constitutional violations above in Argument Sections A-E, *supra.* The unnoticed property seizures from citizens are occurring at the approximate rate of 21,000 accounts per day.

1. General Statutory Authority Supports The Issuance of a TRO And Injunction.

The "bible" for injunctions pending trial is Sections 525-533, and particularly Section 527, which, together with California Rules of Court, Rules 3.11 50 – 3.1152, provide the basic legal framework. (*See generally*, Weil & Brown, California Practice Guide: Civil Procedure Before Trial (Rutter Group 2021) ("Weil & Brown") §§ 9:500-9:968.) Any local court rules or policies in this area are preempted by Rule 3.20(a) of the California Rules of Court.

Specific statutes that apply to this particular case further authorize issuance of an injunction according to criteria specified in the statutes, i.e., without having to satisfy the rules developed by case law discussed below. Statutes expressly cited in the Plaintiff's Complaint focus on the illegal expenditure of public funds (Section 526a; *see generally* Weil & Brown at ¶ 9:526); while fraudulent transfer of assets of "known" owners as unknown are implicitly noted. (*See* Cal. Code Civ. Proc. § 3439.07; *see generally* Weil & Brown at ¶ 9:707.20).

In *Azure* (at page 1336), the California Supreme Court held: "Requiring compliance with the UPL—i.e., ensuring that the owners are in fact unknown and the property is in fact unclaimed—furthers the purpose of protecting unknown owners. Moreover, the state has no legitimate interest in receiving and using property that is not unclaimed." Plaintiff seeks an order that requires compliance with the UPL and the Constitution.

Injunctions issue in cases such as this one to prevent enforcement of unconstitutional statutes, or valid statutes sought to be enforced illegally (i.e., to regulate conduct beyond the reach of the statute), where their enforcement causes irreparable injury. (*See Novar Corp. v. Bureau of Collection & Investigative Services* (1984) 160 Cal. App. 3d 1, 5.) If the primary purpose of the UPL statutory scheme is to protect property owners, and the misapplication of the law is actually harming those property owners, then this conduct must be halted.

2. The Legal Remedy is Inadequate.

Section 526(a) lists many of the traditional equity considerations and requirements re granting of injunctions. Inadequacy of the legal remedy is listed only 4th and 5th ("(4) when pecuniary compensation would not afford adequate relief;" and "(5) where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief"). Injunctions must be granted where a suit for damages does not provide a clear remedy. (*See Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp*. (1967) 255 Cal. App. 2d 300, 307; *Pacific Decision Sciences Corp. v. Sup. Ct. (Maudlin)* (2004) 121 Cal. App. 4th 1100, 1110.) Further, injunctive relief must be granted where a damages remedy is precluded by law, as in this case against the Controller. (*See Department of Fish & Game v. Anderson-Cottonwood Irrig. Dist*. (1992) 8 Cal. App. 4th 1554, 1564 (Statute prohibited damages award against State for activity enjoined [operating water diversion facility in manner destroying endangered fish].)

3. There is Irreparable Harm to The Citizens in This Case.

Section 526(a)(2) lists the traditional consideration of "irreparable harm." Irreparable harm is often related to the above "inadequate legal remedy" (i.e., the damages remedy is inadequate because some immeasurable harm is threatened). One need only review the Cooper Decl. filed herewith. (1 CT 70-90.) The undisputed facts show that the property owners (at the approximate rate of 21,000 per day) are hurt in a way that cannot be later repaired. (*See* 2 CT 439-451 [Federal Injunction Order, RFJN Vol. II, No. 18]; *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981) 118 Cal.

App. 3d 863, 870-871; *see also* A. Hashim Decl., and Stevens Decl.)

Further, Plaintiff is not required to wait until he (and the citizens Cooper seeks to protect) have suffered more actual harm before applying for an injunction, he is entitled to seek this injunctive relief against further threatened infringement of their rights. (*See Maria P. v. Riles* (1987) 43 Cal. 3d 1281, 1292; *Costa Mesa City Employees' Assn v. City of Costa Mesa* (2012) 209 Cal. App. 4th 298, 305-306.) And as noted, a party such as the Controller may be enjoined from obtaining funds to which it is not entitled. (*See Mitsui Manufacturers Bank v. Texas Commerce Bank-Fort Worth* (1984) 159 Cal. App. 3d 1051, 1057-1058 (beneficiary of letter of credit enjoined from negotiating the instrument to obtain funds to which it was not entitled).)

4. The Balancing of Equities Weigh in Favor of The Plaintiff And Class.

The Court must exercise its discretion "in favor of the party most likely to be injured . . . If denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." (*Robbins v. Sup.Ct. (County of Sacramento)* (1985) 38 Cal. 3d. 199, 205.) The Court evaluates two interrelated factors when ruling on a request for a preliminary injunction: (1) the likelihood that the Plaintiff and Class will prevail on the merits at trial; and (2) the interim harm that the Plaintiff and Class would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary

injunction were issued. (*See Smith v. Adventist Health System/West* (2010) 182 Cal. App. 4th 729. 749; *White v. Davis* (2003) 30 Cal. 4th 528, 554.)

Under the two-prong analysis, first, Plaintiff on behalf of himself and Class Members clearly suffers greater injury from denial of the injunction than the Defendant is likely to suffer if it is granted. (*See Shoemaker v. County of Los Angeles* (1995) 37 Cal. App. 4th 618, 633.) The Controller's role within the statutory scheme's primary purpose is to protect the property owners' rights, and not to destroy private property rights. The Controller's open misuse of the UPL as a "cash cow" (*see* 1 CT 45-46 [Illustrations 1 and 2, *supra,* at pp. vii and viii]) is a potential fiscal disaster to the State of California.[32] Second, the probable outcome at trial favors the Plaintiff who will prevail on the merits. (*See Robbins v. Sup.Ct. (County of Sacramento), supra,* 38 Cal. 3d at 206, 211.)

The Court's determination must be guided by a "mix" of the potential-merit and interim-harm factors: The greater a plaintiff's showing on one, the less must be shown on the other to support an injunction. (*See Butt v. State of Calif*. (1992) 4 Cal. 4th 668, 678; *King v. Meese* (1987) 43 Cal. 3d 1217, 1226-1228 (A court has discretion to issue preliminary junction where plaintiff demonstrates high likelihood of success on

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[32] *See* Taylor, Mac, "Unclaimed Property: Rethinking the State's Lost & Found Program, Legislative Analyst's Office (LAO)" (February 10, 2015) at pp. 16-17

found at: http://www.lao.ca.gov/reports/2015/finance/Unclaimed-Property/unclaimed-property-021015.pdf

merits even if plaintiff unable to show balance of harm tips in his or her favor); *SB Liberty, LLC v. Isla Verde Assn, Inc.* (2013) 217 Cal. App. 4th 272, 280.)

5. This Court Will be "Doing Equity" by Protecting The Property Owners.

The requirement that a party seeking an injunction "do equity" is a frequent consideration with temporary restraining orders and preliminary injunctions. The Courts object is to preserve the *status quo* pending hearing or trial, Plaintiff and Class as well as the Defendant should expect to be required to "stand still" pending trial. The avowed purpose of a preliminary injunction is to preserve the status quo pending a trial on the merits. (*See Continental Baking Co. v. Katz* (1968) 68 Cal. 2d 512, 528; *SB Liberty, LLC v. Isla Verde Ass'n, Inc.* (2013) 217 Cal. App. 4th 272, 280.)

VII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the lower court's interlocutory orders and judgment be vacated, and the action remanded with instruction for entry of a permanent injunction and for disposition consistent with this Court's decision.

Dated September 22, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

PURSUANT TO RULE 8.20(c)(1) OR 8.360(B)(1) OF THE CALIFORNIA RULES OF COURT FOR CASE NUMBER A147670

I certify that:

__x__ 1. Pursuant to Rule 8.20(c)(1) or 8.360(b)(1) the attached brief is:
Proportionately spaced, has a typeface of 13 points or more, and contains 13,974 words;

or is

_____ 2. Monospaced, has 12 or fewer characters per inch.

Dated this 22nd day of September 2021,

PALMER LAW GROUP, a PLC

By: *_____/s/ William W. Palmer*
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STATEMENT OF RELATED CASES

Pursuant to California Rules of Court Rule 3.300, Appellant submits this Statement of Related Cases:

1. *Hashim v. Betty T. Yee*, 2019 Cal. App. Unpub. LEXIS 5888 (September 4, 2019).

2. *Hashim v. Betty T. Yee*, California Court of Appeal First Appellate Case Number A161478.

3. *Jan Peters v. Betty T. Yee*, U.S. District Court Central District of California Case No. CV 21-4929-JFW(ASx).

4. *Lisa Salvato v. Kevin D. Walsh*, U.S. District Court of New Jersey Case No. 3:21-cv-12706.

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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San Francisco Superior Court
Attn: Hon. Judge Ethan P. Schulman
400 McAllister St.
San Francisco, CA 94102

DATED: September 22, 2021

By: */s/ William W. Palmer*
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