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December 20, 2022

Honorable Tani Cantil-Sakauye,
Chief Justice, and Associate Justices
Supreme Court of California
via Truefiling

Re: *California Capital Ins. Co. v. Hoehn,* S277510
Letter in support of Petition for Review, CRC 8.500 (g)

Honorable Justices:

On behalf of the Consumer Attorneys of California and the American Association for Justice, counsel submits this letter[1] in support of the petition for review of Cory Michael Hoehn. (Cal. Rules of Court, rule 8.500, subd. (g).) In 2020, Hoehn brought a motion to vacate a 2010 judgment against him that was void because he had never been served with process. In affirming the trial court's determination that Hoehn's motion was untimely under Code of Civil Procedure section 473, subdivision (d), the Court of Appeal misinterpreted the principles of fundamental jurisdiction established by the Court.[2] A judgment rendered by a court lacking fundamental jurisdiction is void and is subject to direct or collateral attack *at any time*. Moreover, the Court of Appeal perpetuated a conflict among

[1] No party has participated in the preparation of this letter and no party has provided any funding for it.

[2] *People v. Lara* (2010) 47 Cal.4th 216, 224-225 (*Lara*), accord *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 340 (*Kabran*).

the Courts of Appeal on this question.[3] These are important questions of law the Court should settle. (Rule 8.500, subd. (b)(1).)

Interest of CAOC and AAJ as Amici Curiae

Founded in 1962, CAOC is a voluntary nonprofit membership organization representing more than 6,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the courts and the Legislature.

The American Association for Justice is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. For more than 75 years, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

A judgment rendered by a court lacking fundamental jurisdiction is void.

No one disputes the basic principle, founded in due process, that a court lacking jurisdiction over the parties or the subject matter of the dispute lacks the power to render a valid judgment.

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[3] Compare Opn. at 6-7, *Trackman v. Kenny* (2010) 187 Cal.App.4th 175, 180-181 (*Trackman*) with *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 830, *Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 526 (*Deutsche Bank*).

> Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. (Citation.) Familiar to all lawyers are such examples as these: . . . A court has no jurisdiction to render a personal judgment against one not personally served with process within its territorial borders, under the rule of *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565. . . .

(*Abelleira v. Dist. Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 288.)

"'Failure to give notice violates 'the most rudimentary demands of due process of law.'(Citation.)" (*Peralta v. Heights Medical Center, Inc.* (1988) 485 U.S. 80, 83.[4])

The Court has hewn consistently to this principle, distinguishing those situations where:

> a court may have jurisdiction in the strict sense but nevertheless lack jurisdiction (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.

(*Lara, supra*, 47 Cal.4th at p. 224.)

Here, the plaintiff attempted to serve Hoehn by substituted service on a purported member of his household. (Code Civ. Pro., § 415.20, subd. (b), AA 50.) Hoehn presented evidence establishing that the person with whom the process was left was not a member of his household, that he was never served with process and that the declaration of substituted service was incorrect. (AA 23-24.)

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[4] *Peralta* held that a party was entitled to set aside a judgment void for lack of personal service without any showing of a meritorious defense. This Court anticipated *Peralta* by 99 years. (*Hill v. City Cab & Transfer Co.* (1889) 79 Cal. 188, 190.)

> Where the defendant:
>
> Establishes that he or she has not been served as mandated by the statutory scheme, no personal jurisdiction by the court will have been obtained and the resulting judgment will be void as violating fundamental due process. (See *Peralta*, *supra*, 485 U.S. at p. 84, 108 S.Ct. 896.)

(*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1227 (*Gorham*).)

Without personal jurisdiction over Hoehn, the trial court's fundamental jurisdiction to issue a judgment never attached. As such, the judgment was void.[5]

No basis exists to limit a statutory attack on a void judgment to one that is "void on its face."

"When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.' (Citation)." (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660 (*American Contractors*).) To this straightforward rule, some courts have attached limitations as to the means of attack, including the Court of Appeal here, holding that a direct attack by motion, under section 473, subdivision (d) or under the court's inherent powers must be made within two years if the voidness does not appear "on the face" of the judgment. These courts have adopted, by "analogy" the two-year limitation found in Code of Civil Procedure section 473.5, even though subdivision (d) is silent as to any time limit. (Opn. 8, *Trackman, supra,* 187 Cal.App.4th at p. 181.)

Other courts have rejected such a limitation. Where the defendant "established through extrinsic evidence that the default judgment was void for

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[5] Neither the trial court nor the Court of Appeal determined Hoehn's showing failed to demonstrate lack of service or notice to him of the pending proceedings.

want of personal jurisdiction over him, it had the same effect as if it had been void on its face and the court had the inherent power to set it aside even though any statutory periods had run."

(*Gorham, supra*, 186 Cal.App.4th at p. 1231 [citing *Thompson v. Cook* (1942) 20 Cal.2d 564, 569, *Munoz v. Lopez* (1969) 275 Cal.App.2d 178, 182-183, *City of Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726 732], see also *Deutsche Bank, supra*, 13 Cal.App.5th at p. 526.)

The origin of the notion that a time limit might exist on a statutory challenge to a void judgment traces to statehood.

> Under the effect of the decisions heretofore made by this Court, we think it must be considered as settled in this State that no motion can be entertained by a District Court to set aside a judgment on any ground, including that of want of jurisdiction over the person of the defendant in the action in which the judgment was entered, after the expiration of the term in which it was entered, unless its jurisdiction is saved by some motion or proceeding at the time, except in the case provided for by the sixty-eighth section of the Practice Act.[6]

(*Bell v. Thompson* (1862) 19 Cal. 707, 708–709, see also *Baldwin v. Kromer* (1852) 2 Cal. 582, 583.)

Although the Legislature abolished terms of court (*Norton v. Atchison, T. & S.F.R. Co.* (1893) 97 Cal. 388, 392), the rule that a void judgment, valid on its face, could not be attacked unless brought within a specified time limit persisted. "[A]s to motions such as the one here made, based on the ground that no service of process was made on the defendant, it is expressly held that in no case can the time of making them be extended beyond the time limit specified in section 473 for

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[6] Now section 473. (*English v. IKON Bus. Solutions, Inc.* (2001) 94 Cal.App.4th 130, 138.)

making similar motions under that section." (*Smith v. Jones* (1917) 174 Cal. 513, 516 (*Smith*).)

> Section 473 of the Code of Civil Procedure, heretofore referred to, provides that motions made under its provisions to set aside a judgment shall be made within six months after it is taken, save when the motion is on the ground that from any cause the defendant has not been personally served with summons, when one year is allowed within which to make it.

(*Smith, supra,* 174 Cal. at p. 516.)

This was the state of the law in 1933 when the Legislature undertook to amend section 473 to add what is now subdivision (d).

What did the Legislature do? It split section 473, placing the provision to set aside a judgment for lack of personal service into section 473a (now § 473.5). (Stats. 1933, ch 744, §§ 34, 35, pp. 1851-1852.) And it added the language to section 473 at issue here, empowering a court "upon motion of either party after notice to the other party, set aside any void motion or order." (*Id.* at § 34, p. 1852.) It joined that language to other language in the same paragraph authorizing a court to "correct clerical mistakes" so as to "conform to the judgment entered."

What the Legislature did not do was set a time limit on making such a motion. As to clerical mistakes, the common law was then settled. "[A] court of record has the inherent right and power at any time to correct or amend its judgment, which has been entered as the result of clerical error or misprision, in order to make it conform to the judgment which was actually rendered by the court, and so as to speak the truth in that respect." (*City and County of San Francisco v. Brown* (1908) 153 Cal. 644, 650.) The Legislature codified that power *and* the power to vacate void judgments in the same paragraph. Although time limits were provided for relief based on excusable mistake and for relief

based on lack of personal service, none was put into this paragraph. Such a motion could be made at any time.

The Court of Appeal's interpretation (and that of the other Courts of Appeal) of subdivision (d), that the 1933 Legislature intended the time limitations on setting aside a judgment for lack of personal service to be applied by "analogy" to a trial court's new statutory powers, makes no sense. The Legislature *separated* those very provisions from section 473 at the same time it added the language that became subdivision (d). As petitioner Hoehn demonstrates, the Court of Appeal's decision contravenes every rule of statutory interpretation.

"The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1039.) Chapter 744 of the 1933 statutes was part of a massive revision to the Code of Civil Procedure along with chapters 740, 741, 742, 743 and 745. No inference can exist except that the Legislature intended to do what its language indicates–create a means of attacking a void judgment at any time without the cumbersome and expensive proceedings of an independent action in equity.

Moreover, "[t]he Legislature is presumed to draft limitations periods in light of the 'hornbook law that limitations periods are 'customarily subject to 'equitable tolling.'(Citation.)" (*Saint Francis Memorial Hospital v. State Department of Public Health* (2020) 9 Cal.5th 710, 722.) An absolute limit on the time to bring a statutorily-authorized motion to set aside a void judgment flies in the face of this rule. Nothing in the record suggests Hoehn was dilatory once he learned of the judgment. He was well within two years of his discovery of the adverse judgment.

More than one hundred years ago, the Court stated the rule that must control. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all

proceedings founded upon it are equally worthless. It neither binds nor bars any one." (*Bennett v. Wilson* (1898) 122 Cal. 509, 513–514.) It is subject to attack "at any time." (*American Contractors, supra,* 33 Cal.4th at p. 660.) The societal interest in the "stability of judgments" (Opn. 6, fn. 5) cannot outweigh due process. (*Peralta*, *supra*, 485 U.S. at p. 84.)

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A young individual, unaware of a ruinous judgment against him, learns of it a decade later when his wages are garnished. He moves promptly to set the judgment aside only to be told, "you're too late," solely because he must dispute the piece of paper that says his girlfriend was served. This cannot be the law.

In 1933, the Legislature gave Hoehn the remedy he invokes. The judicial interpretation of that remedy by the Courts of Appeal is a confused jumble. The Court should grant the petition for review to resolve the conflict in the appellate courts and to decide this important question.

Respectfully,

/s *A. Charles Dell'Ario*

Alan Charles Dell'Ario

STATUTES OF CALIFORNIA

FIFTIETH SESSION OF THE LEGISLATURE,

1933.

Began on Monday, January second, and adjourned on Wednesday, July twenty-sixth, nineteen hundred thirty-three.

New section.

SEC. 32. A new section is hereby added to the Code of Civil Procedure, to be numbered section 472a and to read as follows:

Answer may be filed with demurrer.

472a. A demurrer is not waived by an answer filed (or entered in the justice's docket) at the same time. When the demurrer to a complaint, or to a cross-complaint, is overruled, and there is no answer filed (or entered), the court may, upon such terms as may be just, allow an answer. If a demurrer to the answer be overruled, the action must proceed as if no demurrer had been interposed, and the facts alleged in the answer must be considered as denied to the extent mentioned in section 462 of this code.

When a demurrer is sustained, the court may grant leave to amend the pleading and shall fix the time within which such amendment or amended pleading shall be filed, or entered in the docket.

Code Amdts. 1873-4, p 379

SEC. 33. Section 476 of the Code of Civil Procedure is hereby renumbered 472b, and is amended to read as follows:

Time for pleading after ruling on demurrer.

472b. When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order, unless such notice is waived in open court, and the waiver entered in the minutes or docket.

Stats. 1917, p 242

SEC. 34. Section 473 of the Code of Civil Procedure is hereby amended to read as follows:

Pleadings may be amended

473. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this Code.

Continuance

When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

Relief from judgment taken by mistake, etc

The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken.

The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed,

and may, on motion of either party after notice to the other party, set aside any void judgment or order.

New section.

SEC. 35. A new section is hereby added to the Code of Civil Procedure, to be numbered 473a and to read as follows:

Answer of defendant not served

473a. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action.

New section

SEC. 36. A new section is hereby added to the Code of Civil Procedure, to be numbered 477 and to read as follows:

Provisional remedies not available in justices' courts.

477. Except as otherwise expressly provided, the provisional remedies, deposit in court, injunction and receivers, may not be had in justices' courts.

Code Amdts 1880, p

SEC. 37. Section 480 of the Code of Civil Procedure is hereby amended to read as follows:

Order for arrest

480. An order for the arrest of the defendant must be obtained from a judge or justice of the court in which the action is brought

Code Amdts 1873-4, p 279

SEC 38. Section 481 of the Code of Civil Procedure is hereby amended to read as follows:

When order shall be made

481. The order may be made whenever it appears to the judge or justice, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 479. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk or with the justice where there is no clerk.

Code Amdts 1873-4, p 279

SEC. 39. Section 482 of the Code of Civil Procedure is hereby amended to read as follows:

Undertaking

482. Before making the order, the judge or justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking.

Such undertaking shall be in a sum to be fixed by the judge or justice, not less than three hundred dollars. The undertaking must be filed with the clerk, or with the justice if there is no clerk.

Justification of sureties

At any time after the making of the order of arrest, but not later than five days after the execution thereof, the defendant may notify the plaintiff that he does not accept the sureties on such undertaking. If he fails to do so, he shall be deemed to have waived all objections to such sureties. Within five days after the receipt of such notice the plaintiff may give to the defendant notice of the justification of such sureties, or other sureties, specifying the places of residence and occupations of