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Supreme Court of California
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No. S277510

IN THE
SUPREME COURT OF CALIFORNIA

CALIFORNIA CAPITAL INSURANCE COMPANY, et al.,
Plaintiff / Respondent,

v.

CORY MICHAEL HOEHN,
Defendant / Appellant.

Court of Appeal, Third Appellate District,
Case No. C092450

Placer County Superior Court
Case No. SCV0026851, Hon. Michael Jones

APPLICATION TO FILE BRIEF AND BRIEF OF AMICI CURIAE UC BERKELEY CENTER FOR CONSUMER LAW & ECONOMIC JUSTICE, BAY AREA LEGAL AID, ONEJUSTICE, COMMUNITY LEGAL AID SOCAL, EAST BAY COMMUNITY LAW CENTER, IMPACT FUND, LEGAL AID ASSOCIATION OF CALIFORNIA, LEGAL ASSISTANCE FOR SENIORS, LOS ANGELES CENTER FOR LAW AND JUSTICE, MENTAL HEALTH ADVOCACY SERVICES, NEIGHBORHOOD LEGAL SERVICES OF LOS ANGELES COUNTY, PUBLIC COUNSEL, AND WESTERN CENTER ON LAW AND POVERTY IN SUPPORT OF APPELLANT

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APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as amici curiae in support of Appellant Cory Michael Hoehn.

This application is timely made within 30 days of the filing of the reply brief on the merits. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the brief other than the amici curiae, their members, or their counsel in the pending appeal.

I. INTERESTS OF AMICI CURIAE

Amici curiae are a group of 13 nonprofit organizations that represent and advocate on behalf of low and moderate-income California consumers facing debt collection lawsuits. Each year tens of thousands of debt collection suits brought against consumers, including those that amici represent, result in default judgments because the consumers are never properly served with the lawsuit. Only years later, when they discover their wages are being garnished to satisfy the judgment, do they learn about the lawsuit at all. An interpretation that Code of Civil Procedure 473, subdivision (d), only permits a void judgment to be set aside within two years vitiates what is often the only viable remedy for consumers to

challenge the judgment against them and escape from a debt that, because of interest, has often spiraled into multiples of the principal amount. Permitting that limit would also undermine fundamental due process safeguards by essentially affirming improper and, in debt collection cases, routinely fraudulent service.

The **Center for Consumer Law & Economic Justice** is a research and advocacy center housed at the UC Berkeley School of Law. Through participation as amicus in this Court, in the United States Supreme Court, and in other major cases around the state and throughout the nation, the Center seeks to develop and enhance protections for consumers and to foster economic justice. The Center appears in this proceeding to emphasize the need for a clear statement that California consumers have a reasonable time after they discover the existence of a lawsuit against them to move to set aside a default judgment if they were not properly served—regardless of when the judgment was entered.

Bay Area Legal Aid (BayLegal) is the largest poverty law firm in the Bay Area—serving seven counties. BayLegal's Consumer Justice Unit has been providing legal services to low-income consumers facing debt collection lawsuits and unfair collection practices since 2012. In 2022, the six-attorney Consumer Justice Unit served more than 800 consumers through 6 separate monthly self-help clinics and dozens more through limited and full-scope representation. The Unit regularly meets with and

assists consumers who learn of default collection judgments only years after entry, when judgment creditors or debt buyer assignees garnish their wages or levy their bank accounts.

OneJustice works to ensure a thriving, effective legal services sector that advances a just and equitable society. We advance justice and equity by equipping the sector with skills and tools to maximize impact, championing robust and reliable legal service resources, convening the sector to harness its wisdom and power; and sharing analyses and insights about systemic trends and challenges. OneJustice works with legal services organizations across California that represent low-income consumers in debt collection cases, ensuring the staff have the resources necessary to provide high-quality, effective representation, and that the consumers receive the due process and access to justice that they deserve.

The mission of **Community Legal Aid SoCal** (CLA SoCal) is to provide civil legal services to low-income individuals and to promote equal access to the justice system through advocacy, legal counseling, innovative self-help services, in-depth legal representation, economic development, and community education. Improper service is one of the most common problems raised by CLA SoCal's consumer clients. Many clients learn that judgments existed against them only when there is a wage garnishment or a bank levy. Many of the cases are years—or even decades—old and beyond the time limit to set aside judgments.

The **East Bay Community Law Center** is a woman of color led and woman of color centered organization. We believe that when we invest in the vision, strategies, and solutions of women of color, we center dignity, uplift families, and advance systems-change work that transforms all communities. Based on our experience working with low-income consumers, we strongly disagree with the Court of Appeal's ruling, which would essentially perpetuate the fraud of sewer service and create a statute of limitations on due process.

The **Impact Fund** is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party and amicus counsel in major civil rights cases brought under federal, state, and local laws, including actions challenging employment discrimination; unequal treatment of people of color, people with disabilities, and LGBTQ people; and limitations on access to justice. Through its work, the Impact Fund seeks to ensure that all Californians retain equal access to the justice system.

The **Legal Aid Association of California** (LAAC) is a statewide membership association of over 100 non-profit public interest law organizations, all of which provide free civil legal services to or systemic

advocacy on behalf of low-income persons and communities throughout California. The mission of LAAC—a nonprofit—is to provide an effective and unified voice for its members on issues of concern to the statewide justice community. LAAC member organizations provide legal assistance to people throughout California, including individuals navigating civil consumer issues like those at issue here. LAAC's interest in this matter stems from the fact that the case directly impacts LAAC's work and that of its member organizations.

Legal Assistance for Seniors (LAS) works to ensure the independence and dignity of seniors by protecting their legal rights through education, counseling, and advocacy. LAS provides free legal services to seniors throughout Alameda County, including legal advice and information, representation in court and administrative hearings, referrals to other community resources, and community education and training on legal issues. The issue in this brief matters to LAS because seniors are a population affected by the practice of using "sewer service" to obtain default judgments for old, settled, etc. debt.

The **Los Angeles Center for Law and Justice** (LACLJ) is nonprofit law firm with a mission to secure justice for survivors of domestic violence, sexual assault, and human trafficking and empower them to create their own futures. LACLJ provides free legal services, including representation and other extensive services to survivors throughout Los Angeles County.

Domestic violence cases often involve economic abuse, which can range from controlling finances and preventing victims from gaining economic agency to fraud or coercion involving identity theft/use of victims' identities to incur debt and/or coerced purchases or credit lines. Limiting relief available to these already vulnerable clients and saddling them with debt deters them from obtaining a clean slate and a path to independence and stability.

Mental Health Advocacy Services (MHAS) is a private, nonprofit organization established in 1977 to provide free legal services to people with mental health disabilities. MHAS assists both children and adults with an emphasis on obtaining government benefits and services, protecting rights, and fighting discrimination. MHAS also serves as a resource to the community by providing training and technical assistance to attorneys, mental health professionals, consumer and family member groups, and other advocates. Consumer law and credit reparation is a common area of service across MHAS' programs serving low-income clients with mental health disabilities. MHAS partners with our clients to end or reduce debt collection, enforce fair debt collection laws, resolve credit reporting errors, prevent negative consumer reporting, and resolve financial disputes with landlords, businesses, and public agencies. MHAS also helps our clients combat financial exploitation by unscrupulous individuals and corporations and enforces mental health consumer rights.

Neighborhood Legal Services of Los Angeles County (NLSLA) is a full-service, multi-lingual nonprofit regional law firm that has been changing lives and transforming communities since 1965, when it began as part of the War on Poverty. NLSLA remains a steadfast advocate for low-income individuals, families, and communities throughout Los Angeles County. Through a combination of individual representation, high impact litigation and public policy advocacy, NLSLA combats both the immediate and long-lasting effects of poverty and expands access to justice in and throughout Los Angeles' diverse neighborhoods. NLSLA provides self-help assistance and legal representation to debtors facing collection actions. In that context, we regularly speak with litigants who learn of a judgment against them more than two years after entry, often when the judgment is renewed or when their wages are garnished. An implied two-year statute of limitation to move under Code of Civil Procedure 473, subdivision (d) severely disadvantages such debtors.

Public Counsel is a nonprofit public interest law firm dedicated to advancing civil rights and racial and economic justice, as well as to amplifying the power of our clients through comprehensive legal advocacy. Founded on and strengthened by a pro bono legal service model, our staff and volunteers seek justice through direct legal services, promote healthy and resilient communities through education and outreach, and support community-led efforts to transform unjust systems through litigation and

policy advocacy in and beyond Los Angeles. Our Consumer Rights & Economic Justice team regularly assists debtors in dealing with default judgments; in many of those cases, the underlying lawsuits were not served properly, or at all.

Western Center on Law and Poverty advocates on behalf of low-income Californians in every branch of government—from the courts to the Legislature. Through the lens of economic and racial justice, we litigate, educate and advocate around health care, housing, public benefits, and economic justice. Ensuring low-income Californians are afforded due process and are protected from predatory debt collection is critical to Western Center's anti-poverty mission.

II. NEED FOR FURTHER BRIEFING

The proposed amici curiae, organizations with a proven history of working for and on behalf of consumers in debt collection cases, believe that further briefing will assist the Court by providing background on the epidemic of improper service in debt collection cases and the devastating consequences that practice has had for low- and moderate-income consumers. Further briefing will also demonstrate why due process and fundamental fairness militate against applying a two-year time limit to set aside default judgments in these cases.

The brief that the proposed amici offer the Court describes the impact of default judgments in debt collection litigation, which are not only

dismayingly common but also frequently infected by proofs of service that are facially plausible but, in context, factually impossible. The proposed brief explains why defendants who were never properly served and lacked actual notice of the lawsuit against them must be afforded a reasonable time to set aside default judgments, and why the two-year limit applied by some courts incorrectly borrows from standards that apply in materially different circumstances. The brief explains why the practice in California courts—as well as federal courts and many states—of allowing defendants a reasonable time to set aside judgments void for improper service is the proper procedure. Finally, the brief explains why motions to set aside void default judgments are efficient mechanisms for obtaining justice for improperly served defendants, and why alternative procedures proffered by debt collectors are impractical and inequitable.

III. CONCLUSION

For the foregoing reasons, the proposed amici curiae respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: July 17, 2023 Respectfully submitted,

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INTERESTS OF AMICI

Amici curiae are 13 nonprofit organizations that represent and advocate on behalf of low and moderate-income California consumers facing debt collection lawsuits. Each year tens of thousands of debt collection suits brought against consumers, including those that amici represent, result in default judgments because the consumers are never properly served with the lawsuit. Only years later, when they discover their wages are being garnished to satisfy the judgment, do they learn about the lawsuit at all. An interpretation that Code of Civil Procedure 473, subdivision (d)[1], only permits a void judgment to be set aside within two years vitiates what is often the only viable remedy for consumers to challenge the judgment against them and escape from a debt that, because of interest, has often spiraled into multiples of the principal amount. Permitting that limit would also undermine fundamental due process safeguards by essentially affirming improper and, in debt collection cases, routinely fraudulent service.

Statements of interest of individual amici curiae are available in the accompanying application. (Cal. Rules of Court, rule 8.520(f).)

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[1] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

INTRODUCTION AND SUMMARY OF ARGUMENT

Debt collection cases are overwhelming California's courts.[2] Of even greater concern, a startling proportion of these cases result in default judgments, and the vast majority of defendants that do appear are unrepresented.[3] The consequences of a default judgment on the life of an alleged debtor can be catastrophic. Garnishing wages can mean a person is left without sufficient income to pay for food, shelter, childcare, or other necessities.[4] Seizing the contents of a bank account can mean a family no longer has the money to pay rent and can end up without a home.[5]

Given the severe consequences of a judgment in a debt collection suit, the overall lack of scrutiny afforded to cases that end in a default is profoundly concerning. Yet with hundreds of thousands of cases filed every

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[2] Johnson Raba, Going Remote: Due Process and Self-Represented Debt Collection Defendants During the COVID-19 Pandemic (Nov. 2021) SSRN, p. 3 <https://perma.cc/A5HF-9SY8> (as of July 13, 2023); Pew Charitable Trusts, How Debt Collectors Are Transforming the Business of State Courts (May 2020) p. 8 <https://perma.cc/54YK-9AAT> (as of July 1, 2023) (hereafter Pew).

[3] Barnard et al., Center for Responsible Lending, Court System Overload: The State of Debt Collection in California after the Fair Debt Buyer Protection Act (Oct. 2020) pp. 6, 25 <https://perma.cc/3Q9R-PD9T> (as of July 2, 2023).

[4] See Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1477 (2021-2022 Reg. Sess.) April 5, 2022; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 501 (2015-2016 Reg. Sess.) July 4, 2015, p. 8.

[5] See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 616 (2019-2020 Reg. Sess.) as amended May 24, 2019, p. 2.

year, judges are hard-pressed to conduct searching review—especially when only a fraction of the cases include an appearance by the defendant, and almost none involve defense counsel.[6] Without any challenge to the validity, amount, or even proof of the debt, these proceedings scarcely resemble the fully litigated case that serves as the model for due process in this state. To the contrary, while meaningful judicial review in these circumstances becomes more critical, the likelihood of that review ebbs away.

It is against that backdrop that this case involving basic questions of due process arises. A collections lawsuit was filed against an alleged debtor. The defendant, Mr. Hoehn, was not properly served. He was not otherwise given notice of the existence of the case. A default judgment was entered against him. When he learned of the judgment, he acted within a reasonable time to move to set it aside. Yet the Court of Appeal, borrowing a two-year limitations period from a statute governing a materially different situation, refused to allow Mr. Hoehn to reopen the case and tell his side of the story. That decision is a fundamental miscarriage of justice. No statute may require a defendant to respond to a lawsuit of which he has no notice

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[6] Barnard, *supra*, at pp. 25-27 (noting that that in 98 percent of all debt collection actions, the defendants are not represented by counsel, and two-thirds of all civil cases result in default judgment).

whatsoever. The Due Process Clause of the California Constitution (Cal. Const., art. I, § 7) does not permit it.

Unfortunately, utter lack of notice in the context of debt collection lawsuits is all too common.[7] Either by negligence or by intent, many debt collectors do not effect proper service. As a result, by definition, the defendant should not have to respond and a court should not enter a judgment—and if a court mistakenly does so, there should be no fixed limitations period on the defendant's ability to set aside the judgment and litigate the case. That is true whether the infirmity was visible on the face of the proof of service or not; that is, whether the name of the person served does not match that of the defendant (which a court would catch immediately), or whether the process server uses four different signatures and claims to have been in two places 100 miles apart simultaneously (which a court could not identify without extrinsic evidence). The remedy in each instance should be the same: setting aside the default judgment.

A defendant like Mr. Hoehn who is given no notice of a lawsuit against him must be afforded a reasonable time after he finally learns of the case to try to set the judgment aside and get his day in court. That is the standard followed in the federal courts and indeed in many California courts.

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[7] Barnard, *supra*, at p. 25; Pew, *supra*, at p. 16.

Thousands or even tens of thousands of Californians every year confront financial catastrophe arising from lawsuits they have never previously heard of and debts that they may not owe. This case may determine whether they have a chance to make those claims to a court. By clarifying the proper standard, this Court may provide these individuals some measure of justice and due process.

BACKGROUND

I. An Epidemic of Improper Service in Debt Collection Cases.

Untold numbers of California consumers each year, including Mr. Hoehn and the clients with whom amici work, discover that they are the subjects of debt collection judgments entered years ago without their knowledge. Yet under the Court of Appeal's cramped interpretation, these financially insecure individuals are too late to attempt to set aside the judgments. Their experiences are the consequence of the nationwide epidemic of improper service, including what is sometimes called "sewer service," in debt collection cases.[8] Consumer debt collection lawsuits are the single most common form of civil litigation nationwide, amounting to a

[8] "Sewer service" describes a practice whereby "the server throws the documents 'down the sewer' and then falsifies its affidavit of service." (Jon Leibowitz et al., Fed. Trade Comm'n, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010) p. 8, fn. 22 <https://perma.cc/B5UC-FSLG> (as of July 15, 2023); see also *Freeman v. ABC Legal Services, Inc.* (N.D.Cal. 2011) 827 F.Supp.2d 1065, 1068, fn.1 [defining sewer service].)

quarter of all civil cases.[9] California figures mirror national data. In the past decade, 20 percent of all cases filed in California—and 34 percent of the limited civil docket—were debt collection matters.[10] Problems with debt collection are the second-highest source of complaints from California consumers to the Consumer Financial Protection Bureau.[11] The California and nationwide debt collection dockets also feature significant racial disparities, as consumers of color are far more likely than white consumers to face debt collection lawsuits and judgments.[12]

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[9] Pew, *supra*, at p. 8.

[10] Johnson Raba, *supra*, at p. 3.

[11] Consumer Financial Protection Bur., *Consumer Complaint Database* (last updated June 29, 2023) <https://perma.cc/EP4E-GSAU> (as of July 2, 2023). Californians filed 18,835 complaints about debt collection products in the previous three years, surpassed only by complaints about credit reports. (*Ibid.*)

[12] Barnard, *supra*, at p. 6 (citing studies finding 27 percent of debt collection cases filed in San Francisco, Alameda, and Sacramento Counties were against Spanish speakers, versus 16 percent against English speakers, and that 31 percent of people living in communities of color have debt in collections, versus 19 percent of people in predominately white communities); Nat. Consumer Law Center, California: Debt Collection Fact Sheet (2018) <https://perma.cc/QW75-XXTH> (as of July 10, 2023) (finding that 35 percent of Californians in predominantly nonwhite areas have debt in collections compared to 21 percent of Californians in predominantly white areas).

For national data pointing out similar trends, see, for example, Aspen Inst., A Financial Security Threat in the Courtroom: How Federal and State Policymakers Can Make Debt Collection Litigation Safer and Fairer for Everyone (2021) p. 11 <https://perma.cc/LU7X-NQAR> (as of July 2, 2023); Mich. J. for All Com., Advancing Justice for All in Debt Collection Lawsuits: Report and Recommendations (2022) p. 2

Although superior courts in California have jurisdiction over limited civil cases demanding up to $25,000, the consumers who seek free legal services—that is, the clients seen by amici here—are more likely to be sued on amounts under $5,000 or even $2,500. Debt buyers and other collection plaintiffs do not and cannot fully litigate the massive volume of cases they file. Indeed, it makes no economic sense for them to do so. Rather, they rely on a model in which they use California courts as an "assembly line" for collecting default judgments—converting unenforceable accounts into enforceable judgments bearing the imprimatur of the state's courts that are collectable, with interest, through government-approved wage garnishment, levy, and lien.[13]

There is an enormous imbalance of resources and familiarity with the courts between sophisticated creditors and professional debt buyers, on the one hand, and ordinary borrowers, on the other. Add the prevalence of sewer service (and ineffective if proper service), and it is no surprise that two-thirds of debt collection cases in California result in default

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<https://perma.cc/DQM7-QKNQ> (as of July 1, 2023); Pew, *supra*, at p. 17; Kiel & Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, ProPublica (Oct. 8, 2015) <https://perma.cc/34Q7-AB6R> (as of July 2, 2023) (analyzing five years of court judgments from St. Louis, Chicago, and Newark and finding that debt collection judgments were twice as high in mostly Black neighborhoods as in mostly white ones).

[13] See Wilf-Townsend, *Assembly-Line Plaintiffs* (2022) 135 Harv. L.Rev. 1704, 1745; Leibowitz, *supra*, at pp. 5-6.

judgments.[14] That extraordinary amount is a sobering indictment of measures designed to guarantee the participation and opportunity to be heard of all persons who are haled into court. (See *Mullane v. Central Hanover Bank & Tr. Co.* (1950) 339 U.S. 306, 314 [stating that due process has "little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest"].) Numerous studies indicate that the extraordinarily high default rate is attributable in part to consumers being unaware of the lawsuit against them because they were never properly served.[15] And of those

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[14] For California-specific data, see, for example, Barnard, *supra*, at p. 25 (reporting a default judgment rate in California of 66.3 percent for cases brought by debt buyers and 63.7 percent for other cases). One recent analysis found that in San Diego County, debt collection cases accounted for a third of all civil lawsuits filed in 2022 and *half* of all civil cases the year before. (Harper, *A California debt collector has sued thousands of people—some of them never knew*, KPBS (Apr. 6, 2023) <https://perma.cc/Q7DT-VJB7> [as of July 10, 2023].)

The statistics are similar on a national level. (See, e.g., Mich. J. for All Com., *supra*, at p. 22 [noting that "data in other states indicate that once service is accomplished, approximately 70% of debt collection cases result in default judgment"]; Pew, *supra*, at p. 16 [same]; Leibowitz, *supra*, at p. 7 [reporting estimates of some 60 to 95 percent of consumer debt collection lawsuits result in defaults nationwide].)

[15] Barnard, *supra*, at p. 25; Pew, *supra*, at p. 16 (pointing to evidence of "inadequate notice" resulting in default judgments); Leibowitz, *supra*, at pp. 7-9; see also Greenberg & Cherney, RAND Corp., Discount Justice: State Court Belt-Tightening in an Era of Fiscal Austerity (2017) p. 35 <https://perma.cc/PG97-2AZY> (as of July 2, 2023) (suggesting that the "there are high rates of default in civil matters, simply because people do not realize that they are supposed to show up and do not understand the kind of matters that they are involved in").

consumers who are apprised of the suit against them, nearly all are unable to defend themselves because they cannot find or afford legal representation.[16]

Debt collection judgments, even for relatively low amounts, can pose devastating consequences for consumers. These judgments are enforceable for ten years, and until last year could be renewed an unlimited number of times.[17] The court can award debt collectors pre- and post-judgment interest on the debt, which until a recent prospective change meant ten percent per year.[18] With interest and penalty fees accruing continuously, even originally modest debts can spiral into unmanageable amounts.[19] Judgments can also be freely assigned to debt buyers and other collectors and, critically, may immediately be enforced through wage

[16] Barnard, *supra*, at p. 27 (finding that less than 2 percent of consumers facing debt collection lawsuits are represented by attorneys and only another 5 percent appear to represent themselves); Johnson Raba, *supra*, at p. 5 (finding similar patterns); see also Greenberg & Cherney, *supra*, at p. 22 (noting the uptick in self-represented litigants in state court in recent years).

[17] Code Civ. Proc., § 683.020; *id.*, § 683.110, subd. (c)(2); *id.*, § 683.120, subd. (c) (as amended by Stats. 2022, ch. 883, §§ 2-3) (limiting renewals in most cases to one 5-year term).

[18] Aspen Inst., *supra*, at p. 5; Pew, *supra*, at p. 17; see Code Civ. Proc., § 685.010 (as amended by Stats. 2022, ch. 883, § 6) (limiting interest on new judgments to 5 percent per year).

[19] Barnard, *supra*, at p. 28; Aspen Inst., *supra*, at p. 5; Pew, *supra*, at pp. 17-18.

garnishments and bank levies.[20] These extreme measures, backed by the force of court-issued writs and executed by sheriffs' offices, hit low-income household budgets "like a bomb."[21] Because consumers subject to these judgments are trapped in spiraling debt, they cannot build wealth or credit, pay for household necessities or pay off other debts, and regularly endure anxiety and depression.[22] And in two-thirds of debt collection cases in California, that "bomb" goes off after a default judgment, without the borrower ever having been able to challenge the amount at issue or whether she actually owes the debt.

Meanwhile, as the Legislature has identified and as this Court is aware, debt collection cases continue to swamp California's court system. Debt collection cases are not traditional, balanced, two-party pieces of

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[20] Pew, *supra*, at p. 18. Researchers in California found that one in four cases ended in wage garnishment. (Barnard, *supra*, at p. 28.)

[21] Kiel & Waldman, *supra*.

[22] Aspen Inst., *supra*, at pp. 5-6.

The Legislature has repeatedly taken note of the detrimental effects of wage garnishments and bank levies on low-income Californians. (See, e.g., Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1477, *supra* ["Wage garnishment . . . is particularly harmful to low-income people as there is little or no leeway in their budgets. This means that a garnishment likely results in forgoing necessities like food, medicine, or rent]; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 616, *supra*, at p. 2 [proposing an automatic exemption to bank levies because "people need access to a baseline, liquid amount of funds to meet life needs," and "without this bill, it is unclear how one could . . . ensure a speedy return of necessary funds to low-income debtors—before their rent check bounces or they need to pay for groceries"].)

litigation. Instead, more often than not, they are a means of swiftly placing the imprimatur of the court system on creditor and debt collector claims. That process frequently involves sloppy, negligent, or even fraudulent practices by debt collectors, debt buyers, and their attorneys and process servers.[23] The upshot of these tactics: lawsuits that are "riddled with fundamental errors" that deprive consumers of basic legal protections.[24]

One foundational due process right in particular is far too frequently absent from collection cases: borrowers' right to be properly informed of the case against them. Studies from researchers, courts, and legislatures

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[23] The proponents of the 2013 Fair Debt Buying Practices Act identified this rampant practice:

> California's courts are swamped with debt collection lawsuits at a time when our judicial system is facing unprecedented budget challenges, and debt buyers . . . are largely driving this crisis by filing thousands of lawsuits against consumers each month to collect their purchased debts. Proponents further contend that many of these lawsuits are simply unsubstantiated by facts necessary to determine, among other things, that the debt buyer actually owns the debt at issue, that the defendant is the person who owes the debt, or that the debt is not time-barred.

Assem. Com. on Judiciary, Analysis of Sen. Bill. No. 233 (2013-2014 Reg. Sess.) June 17, 2013, p. 1; see also Barnard, *supra*, at p. 22; The Legal Aid Society et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers (2010) p. 6 <https://perma.cc/2586-FMUS> (as of July 2, 2023) (hereafter Debt Deception) ("civil courts across the country have been overwhelmed by surges in debt collection filings").

[24] Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Jan. 20, 2016) <https://perma.cc/JB3G-LH4P> (as of July 2, 2023).

have repeatedly concluded that improper or fraudulent service of process is ubiquitous within the debt collection industry.[25] First, process servers in debt collection cases often do not make the mandatory effort to personally serve defendants.[26] Instead, they engage in a parody of substitute service that involves, for example, delivering the summons and complaint to an old address and listing as a "member of household" a relatively generic person who bears no resemblance to any actual member of the defendant's family.[27] In other instances, process servers have been found to falsify

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[25] See Aspen Inst., *supra*, at p. 13; Pew, *supra*, at p. 16; Leibowitz, *supra*, at pp. 8-9; Appleseed, Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases (2010) p. 12 <https://perma.cc/2KQ8-GTXG> ("Consumer debt litigants, court personnel, and judges all confirm that the number of default judgments entered because the defendant was not actually served is unacceptably high. Several interviewees maintain that defective service is the most prominent issue in consumer debt litigation"). One study conducted by New York legal aid organizations found that 71 percent of defendants in debt collection cases were either not served or served improperly. (Debt Deception, *supra*, at p. 2.)

[26] Human Rights Watch, *supra*; see California Courts, Self-Help, *Service of Court Papers* (2023) <https://perma.cc/E68N-8ATK> (as of July 10, 2023).

[27] See Gotshall, *Solving Sewer Service: Fighting Fraud with Technology* (2018) 70 Ark. L.Rev. 813, 818 (explaining that "[t]he most malicious practice occurs when a process server blatantly lies about ever serving an individual with documents. The affidavit incorrectly reflects either that the server personally served the defendant, or that a resident at the defendant's home was served via substitute service. In some cases, the so-called 'resident' is a fictitious character that never existed"); Appleseed, *supra*, at pp. 12-13 (finding that process servers in New York debt collection cases that end in default judgment regularly used substitute service, also described as "Nail and Mail" service). California permits substitute service of the summons by leaving a copy at the defendant's home, usual place of

affidavits of service and never actually serve any documents at all.[28] Debt buyers and original creditors have also been found to engage in "robo-signing," using multiple or automated signatures on sworn state court affidavits without actually verifying the information they purport to have carefully reviewed.[29]

The State of California has known about the epidemic of improper service for at least half a century. A 1969 report commissioned by the California Assembly Judiciary Committee on improving access to justice found that "[c]onsumers sued by merchants or finance companies face the abuses of sewer service."[30] Observing that "most of the judgments against low-income defendants are entered by default," the report determined that often "consumers fail to appear in court because they were never served with process. Some process servers simply throw away the summons and

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business, or usual mailing address in the presence of a person over 18 years old. (Code Civ. Proc., § 415.20, subd. (b).) A copy must then be mailed to the same location. (*Ibid*.)

[28] Barnard, *supra*, at p. 25; Pew, *supra* at p. 16; Human Rights Watch, *supra*.

[29] Barnard, *supra*, at pp. 22-23; Consumer Financial Protection Bur., *CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents* (July 18, 2015) <https://perma.cc/SLJ9-SRAU> (as of July 10, 2023).

[30] Goldfarb & Singer, Problems in the Administration of Justice in California, Rep. to Assem. Comm. on Judiciary (Jan. 17, 1969) pp. 4-5 (recommending "changes in legal procedures that would make the administration of justice more responsive to the needs of the unsophisticated people who come in contact with the [legal] system").

then swear it was delivered; the defendant loses his case without ever having gotten to court or even knowing about his case."[31] The report adduced out-of-state evidence that "[s]ome process servers have sworn that they have personally delivered summonses to non-existent addresses and to different places at the same time," and observed that "[l]egal services attorneys in the state strongly suspect that the practice exists" in California as well.[32] The report called on the Legislature to conduct hearings and consider adopting a specific consumer protection statute to address sewer service.[33] Forty-four years later, the Legislature determined that the validity of evidence—or lack thereof— submitted in support of default judgments remains a "significant focus of public concern," particularly in the context of high-volume, "assembly-line" consumer collection litigation by debt buyers. That finding helped lead to the passage of the 2013 California Fair Debt Buying Practices Act (FDBPA).[34] But it did not stop the problem of improper service.

Over the past decade, the State of California and consumers advocates have identified increases in fraudulent service and other deceptive tactics employed in debt collection cases. In 2015, the California

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[31] *Id.* at p. 75.

[32] *Ibid.*

[33] *Id.* at pp. 75-76.

[34] Stats. 2013, ch. 64, § 1.

Attorney General, along with the federal Consumer Financial Protection Bureau, obtained $50 million in restitution on behalf of consumers in a settlement against J.P. Morgan Chase for its debt collection practices that included robo-signing and other fraud that resulted in default judgments against tens of thousands of Californians.[35] Consumers have also brought actions that successfully alleged fraudulent service practices such as submission of a falsified affidavit of service as violations of the federal Fair Debt Collection Practices Act (FDCPA).[36] For example, in 2022 amicus Bay Area Legal Aid ("BayLegal") filed a lawsuit against a debt buyer, law firm, and associated entities and individuals after its investigation uncovered their use of fraudulent proofs of service to obtain hundreds of default collection judgments across California. The defendants filed false proofs of service, signed with an "X" by a fictious process server,

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[35] Dep't of Justice, Press Release, Attorney General Kamala D. Harris Announces Settlement with JPMorgan Chase for Unlawful Debt Collection (Nov. 2, 2015) <https://perma.cc/3CCH-M42P> (as of July 2, 2023).

[36] See, e.g., *Freeman*, *supra*, 827 F.Supp.2d at pp. 1072-1073 (finding that plaintiff adequately alleged that process server composed and produced false proofs of service to support default judgments in debt collection cases over forty times in California in the previous year and advertised those services to debt collectors, thereby forfeiting the process server exemption under FDCPA); accord *Rubio v. LVNV Funding, LLC* (N.D.Cal. July 21, 2015, No. C 14-05395 JSW) 2015 WL 13650046, *8-9; *Holmes v. Elec. Document Processing, Inc.* (N.D.Cal. 2013) 966 F.Supp.2d 925, 932-934; see also *Sykes v. Harris* (S.D.N.Y. May 24, 2016, No. 09 CIV. 8486 (DC)) 2016 WL 3030156 (approving settlement brought by certified class of 15,000 consumers against debt collectors who submitted fraudulent service documents to obtain default judgments in New York state court).

containing virtually identical descriptions of individuals allegedly served. The fictitious process server claimed to have served separate defendants who lived miles apart at the same time or in impossibly short intervals. BayLegal learned of these defendants' conduct only after a judgment debtor received a notice of the lawsuit from the superior court and sought help.[37] One can only imagine how many of the hundreds of thousands of *uncontested* debt collection lawsuits suffer from the same infirmity.

Yet despite widespread and longstanding awareness among courts, policymakers, and advocates about the epidemic of sewer service[38], the

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[37] The complaint alleges:

> When Defendants file collection lawsuits based on these debts, they intentionally fail to serve the defendants in those actions with a copy of the summons and complaint. Defendants nevertheless file proofs of service and falsely attest (under penalty of perjury) that the defendant consumers have been properly served. Defendants then seek, and usually obtain, default judgments. Their motions for default judgments are supported by the perjured proofs of service and on false or misleading declarations and unauthenticated documents. [¶] These practices enable Defendants to obtain default judgments based on woefully insufficient evidence without consumer defendants learning about the lawsuits against them until after a judgment has been entered.

Compl., *Bay Area Legal Aid v. Achievable Solutions, Inc.* (Super. Ct. Alameda County, Mar. 16, 2022, No. 22CV008464) ¶¶ 42-43; see also Harper, *supra* (describing the lawsuit and finding through independent investigation the same widespread pattern of fraud by the defendants).

[38] See, e.g., Mich. J. for All Com., *supra*, at p. 3 (recommending "[m]odernizing serving of process rules to help ensure that consumers receive notice of the lawsuit filed against them"); Aspen Inst., *supra*, at p. 23 (recommending that states "[e]stablish a system that allows courts to

problem has not been solved. Consumers still regularly go for years without knowing that they have an ever-ballooning judgment against them. Only once they are notified that their wages are being garnished or bank accounts levied do they find out about the judgment and the (asserted) long-ago debt. Compounding the difficulties, even if these consumers manage to engage an attorney (or, more likely, proceed self-represented) and seek to vacate the judgment in court, their efforts may be stymied by the constructive two-year time limit imposed by some California courts. That is, consumers are being told that they can no longer challenge a lawsuit of which they were never properly notified.

That is the backdrop against which this proceeding reaches this Court, and the context in which any decision by this Court will play out.

II. The Impact of Improper Service on Individual Litigants.

The legal aid provider signatories to this brief routinely encounter improper service in debt collection cases brought against their clients. Indeed, amicus curiae BayLegal routinely encounters consumers who were fraudulently served with proofs of service containing comically inaccurate descriptions. In a notable example, the proof of service misgendered the

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handle service to ensure it is properly completed"); Leibowitz, *supra*, at p. 10 (in Federal Trade Commission report convening advocates, judges, and other stakeholders, recommending "efforts to improve service of process in debt collection litigation . . . at the state and local level").

client (a cisgender woman with a traditionally male name) and listed a brazenly incorrect height estimate. After discovering the lawsuit from a debt settlement firm's mailer and filing a successful motion to quash service of summons, the client was fraudulently served again when she was not home. That time, the proof of service included a bizarre parenthetical from the process server ("Wow. I thought [client] was a male")—presumably a thinly veiled attempt to cover-up the first fraudulent proof of service—and once again misrepresented her height by over half a foot (despite BayLegal providing her correct height on the prior motion to quash). BayLegal frequently observes other flagrant errors, such as misidentifying race or ethnicity, misstating hair color, and describing substituted service on an individual who does not match any member of the household. Another consumer, for instance, was "personally served" at her home while she was out of the country. Yet another consumer went to the property management office in his apartment building and reviewed security camera footage to confirm that no process server ever attempted to go to his unit. These discrepancies are not honest mistakes or isolated incidents; rather, they are emblematic of a pervasive pattern and practice of non-service in the debt collection industry.

Examples further abound of debt buyers trying to enforce a judgment—even a judgment that has already been paid—far later than two

years after that judgment was entered. For example, Evelyn Thomas[39] cosigned a car loan for her daughter. The car was later repossessed, though Ms. Thomas was unaware of that fact because the creditor only sent notices and documents to her daughter, the primary borrower. The debt collector later sued Ms. Thomas for an additional $5,000, falsely claiming to have served her at an address where she had never lived, and obtained a default judgment. Ten years later, the creditor renewed the judgment, which had grown to nearly twice the original amount, despite not having made any attempt to collect it during the first 10-year period or to notify Ms. Thomas. Ms. Thomas only learned of the judgment 13 years after it was first entered when the debt collector began garnishing her wages, leaving her barely enough income to make ends meet.

Similarly, in 2021, Lucy Rodriguez received a notice from her employer that a debt collector would be garnishing her wages for an old judgment she knew nothing about. Ms. Rodriguez's first language is Spanish, and she speaks limited English. The legal aid attorney that she went to for help discovered that a debt buyer had obtained a judgment against her for approximately $16,000 in 2008, which had ballooned to $52,000. Ms. Rodriguez did not recognize the plaintiff debt buyer, and there

[39] All individual examples provided here are drawn from the experiences of California-based clients of amici curiae. Their names have been changed to protect client confidentiality.

were no documents available online to help her understand what (if any) actual debt the lawsuit was about. The only description of the debt in the complaint was the name of the supposed original creditor, but her only account with that creditor had been paid off years before the lawsuit was filed. Ms. Rodriguez was never served with the complaint. However, the debt buyer filed a proof of service claiming to have served her personally (at an address where she did not live), and thereafter requested and received a default judgment from the court. In 2018, the debt buyer renewed the judgment, ineffectually mailing Ms. Rodriguez notice at the same address she had left more than a decade before.

Once defendants discover years later about these default judgments against them, they face immense hurdles to challenge them, even despite evidence they might have of fraudulent service of the summons. For example, after Brian Chen received a notice that his bank account had been levied, he investigated and discovered that he had been sued several years earlier by a debt collector. Having examined the proof of service, Mr. Chen determined that he was home at the time of the alleged substitute service. His wife had had surgery just before he was allegedly served, and he had not left his house in the days after the surgery, including at the times that the process server purportedly attempted to personally serve him. By the time the debt collector tried to collect on the judgment, Brian's wife had passed away, so no one could corroborate his declaration that service was

improper and that he never had notice of the lawsuit. Even though the declaration of service and the resulting judgment appeared facially valid—so that the court that entered the default judgment would not have known service had been improper—the proof of service was in fact fraudulent. Yet though he could testify personally that he was at home during those "failed" attempts at personal service, he could not proffer additional third-party testimony to corroborate his story and dispute the process servicer's report.

The experiences of people like Ms. Thomas, Ms. Rodriguez, and Mr. Chen illustrate the fatal flaws in debt collectors' contentions that a facially compliant proof of service provides an adequate guarantee of legitimacy, and that time or evidentiary limitations on a defendant's ability to challenge service—and therefore to access due process—are warranted. In fact, improper service of debt collection lawsuits is closer to the rule than to the exception, and defendants commonly do not learn of the existence of these lawsuits until years after entry of judgment. These lawsuits are fundamentally infirm from the start, which also demonstrates why defendants must not be precluded from seeking relief from default judgments that should never have been granted in the first place.

ARGUMENT

Service of process is a foundational prerequisite of fairness in litigation. Properly effected, it ensures that defendants have an opportunity to defend themselves against legal action and that the court has jurisdiction

to entertain the dispute. But neither of these principles is satisfied when the summons is not properly served. Therefore, when a default judgment has been rendered in a case where service was improper, it makes no sense for defendants to be held to an arbitrary time limit for setting aside the judgment under Code of Civil Procedure section 473, subdivision (d). Instead, they should be afforded a reasonable time, as they would be in federal court, to challenge these deficient default judgments via motion and to litigate their cases on the merits. Some California courts have nevertheless allowed plaintiffs' asserted interest in finality to defeat defendants' far stronger interest in due process. Those decisions should be disapproved. The courts of this state are not an arm of the collections industry; they are institutions of justice. Individuals who have been denied due process though improper service and lack of notice are entitled to the chance to state their case.

I. Defendants Who Have No Notice Of A Lawsuit Against Them May Not Be Required To Respond To It, And Once They Are Informed Of The Suit Must Be Provided A Reasonable Time To Set Aside The Judgment.

When defendants learn of a default judgment entered against them years earlier, and they had no prior knowledge of the lawsuit, fundamental fairness and justice dictate that they should have the opportunity to reopen the case. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 232-233 [stating that a court's power to grant relief from judgment should be exercised "to

subserve and not to impede or defeat the ends of substantial justice"].) For this reason, where relief is available, "there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982.) These policy goals are especially compelling where, as the evidence from debt collection cases shows, default judgments are regularly entered on the basis of inadequate or even fraudulent service. Improper service circumvents courts' "gatekeeper" function in connection to the default process, which "ensur[es] that only the appropriate claims get through." (*Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1012 [explaining that a default judgment should be entered "only if the plaintiff has precisely followed certain procedures that ensure that the defendant received sufficient notice of the pending action"].) The potentially severe financial consequences of a judgment, coupled with the defendant's absence, militate for scrupulous adherence to procedural requirements in default judgment cases. Allowing defendants who were not properly served a reasonable time to seek relief after they finally learn about the lawsuit accords with basic notions of justice and fairness as well as constitutional guarantees of due process.

A. Due Process and Fundamental Fairness Require That a Defendant Who Was Not Properly Served And Who Did Not Have Actual Notice of the Case Must Be Allowed the Opportunity to Set Aside a Default Judgment.

Because improper service deprives a court of jurisdiction, any default judgment that the court issues in the matter is void and can be set aside in accordance with section 473, subdivision (d). The statute's plain text imposes no temporal restriction: "The court . . . may, on motion . . . , set aside any void judgment or order." (Code Civ. Proc., § 473, subd. (d).)

Void judgments include those that were issued without jurisdiction. (*People v. Am. Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660.) A court can exercise jurisdiction over a defendant only once service of the summons is accomplished, which ensures that the defendant has "constitutionally adequate notice of the court proceeding." (*Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co.* (2020) 9 Cal.5th 125, 138.) Therefore, as this Court ruled over a century ago and courts have routinely reiterated since, a default judgment entered against a defendant who was not properly served is void. (*Hill v. City Cab & Transfer Co.* (1889) 79 Cal. 188, 191; see, e.g., *Kremerman v. White* (2021) 71 Cal.App.5th 358, 371; *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444.) A void judgment is "worthless," as are "all proceedings founded upon it." (*Bennett v. Wilson* (1898) 122 Cal. 509, 513-514 [reversing default judgment obtained without proper service on

judgment debtor and with "alleged fraudulent collusion between the judgment creditor and the sheriff who made return of service"].)

As a result, California has long recognized that void judgments, including those that are void for lack of jurisdiction, can be challenged "at any time." (*Am. Contractors*, *supra*, 33 Cal.4th at p. 660; *In re Estrem's Estate* (1940) 16 Cal. 2d 563, 573 [explaining that both before and after the Legislature revised section 473 in 1933, "it was well established that the superior court had jurisdiction at any time to set aside a judgment or order void on its face"].) The authority to set aside a void judgment is vested by statute as well as in the court's inherent powers. (*Olvera v. Grace* (1942) 19 Cal.2d 570, 573-574; see *People v. Codinha* (June 26, 2023, D080633) __ Cal.Rptr.3d __ [2023 WL 4199435] *6 [citing cases].) Because void judgments include those that are defective because of improper service (see, e.g., *Kremerman*, *supra*, 71 Cal.App.5th at p. 370), those judgments may also be set aside at any time.

Due process requires that a default judgment issued without jurisdiction remain open to challenge. (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 54 ["The due process clauses of the United States and California Constitutions require that a party be given reasonable notice of a judicial proceeding"]; *Brown v. Williams* (2000) 78 Cal.App.4th 182, 186 fn. 4 [noting a court's power to set aside a void judgment "because the summons and complaint were not properly served . . . or otherwise because

the judgment or order violated a party's due process rights"]; Rest.2d Judgments, § 65, com. b ["When the person against whom judgment was rendered did not have adequate notice, then the judgment is unjust because there was a denial of a fair opportunity to defend the action"].)

When the plaintiff attempts notice through a means other than personal service, such as substitute service, the due process and fairness considerations for the defendant are particularly high. (See *Farmers & Merchants Nat. Bank v. Super. Ct.* (1945) 25 Cal.2d 842, 845; *Calvert v. Al Binali* (2018) 29 Cal.App.5th 954, 961-963 [vacating default judgment as void because plaintiffs failed to correctly effect service by publication].) As the U.S. Supreme Court ruled in a case seeking collection of an unpaid medical debt, a default judgment entered without notice or service is "constitutionally infirm" and violates due process. (*Peralta v. Heights Medical Ctr., Inc.* (1988) 485 U.S. 80, 84.) In *Peralta*, the high court set aside a default judgment issued by a Texas state court in which a consumer contended that service of the underlying lawsuit was defective and he had no actual notice of the collections suit. (*Id*. at pp. 82, 86.)[40]

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[40] These due process considerations are largely satisfied when a defendant has actual notice of the lawsuit notwithstanding service that did not adhere to strict statutory requirements. Accordingly, California courts regularly place limitations on vacating default judgments in those circumstances. (See, e.g., *Ellard v. Conway* (2001) 94 Cal.App.4th 540, 548; *Gibble v. Care-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 312-313; see also Judicial Council of Cal., 1969 Rep. to the Governor and the Leg. (1969) p.

Allowing defendants a reasonable time to file a motion to set aside once they have learned of the lawsuit and judgment against them therefore accords with fundamental due process and fairness concerns. Because jurisdictional defects are not cured by the passage of time, void judgments do not become valid as they age. (*People v. Davis* (1904) 143 Cal. 673, 675 ["The power of a court to vacate a judgment or order void upon its face is not extinguished by lapse of time, but may be exercised whenever the matter is brought to the attention of the court"].) Fundamental fairness militates that, as long as defendants act "promptly" upon receiving notice of a judgment against them, their motion should be entertained. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) Those fairness concerns are especially pronounced in debt collection cases. Consumers may only find out about the judgment once they are informed that their wages are being garnished. They also may face obstacles in gathering evidence to challenge the default judgment and in securing legal representation.[41]

An open-ended, reasonable timeframe gives defendants a chance to challenge judgments that should never have been entered in the first place. It also allows courts to exercise their discretion to evaluate all the evidence

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56 (hereafter Judicial Council Rep.) ["Jurisdiction depends on the fact of service, rather than the proof thereof"].) That situation is wholly different when the defendants did not have any knowledge of the proceedings against them, as in the plethora of debt collection lawsuits described above.

[41] See footnote 16, *supra*.

of notice or lack thereof—from the long-ago occasion when the complaint was ostensibly served to the more recent point when the defendant actually learned about the lawsuit. (See *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 255-256 [noting that the "discretionary relief provision of section 473" should be "liberally construed"].)[42] Defendants are already required to act diligently once they are apprised of a default judgment against them. (*Kramer v. Traditional Escrow, Inc.* (2020) 56 Cal.App.5th 13, 37 ["diligence is measured from when the party discovers the default or default judgment"].) No additional time limitation is necessary. If the Legislature sees fit, it can of course impose an explicit timeframe to file motions after notice is obtained. (See, e.g., Code Civ. Proc., § 473, subd. (b) [six months for motions for relief from judgment due to mistake, inadvertence, surprise, or excusable neglect]; *id.*, § 473.5(a) [two years after entry of judgment where notice of default judgment was properly served but resulted in no actual notice]; *id.*, § 1788.61, subd. (a)(2) [six years after entry of default or 180 days after first actual notice in specific cases by debt buyers].)[43] But where, as here, the Legislature has not acted and the need for equitable flexibility is great, courts need not and

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[42] As discussed in Section I.B.1, *infra*, the circumstances giving rise to a motion under section 473.5 are distinguishable.

[43] While the Fair Debt Buying Practices Act provides some relief to consumers, its scope is limited. (See Section II.B.2, *infra*.)

should not impose an express restriction beyond the requirements of reasonableness and diligence.

B. Courts Should Not Circumscribe the Time to Challenge Judgments That Are Void for Improper Service by Borrowing Standards That Apply in Materially Different Circumstances.

The Court of Appeal in this proceeding, and courts in a number of earlier cases, improperly "analogized" default judgments based on improper service either to those (1) that were properly served but did not result in actual notice—the necessary conditions for vacating a judgment under section 473.5—or (2) that appear sound "on their face" but were void because service was incorrect. The actual experience of defendants underscores why these analogies are misplaced.

1. Default judgments that are properly served but do not effect actual notice are not relevant to the present case.

When the Legislature adopted a two-year time limit on motions brought under section 473.5, it was addressing a separate scenario: where the plaintiff fulfilled the service requirements, but the service nonetheless did not actually apprise the defendant of the lawsuit. In that situation, the Legislature, acting to balance the plaintiff's interest in closure when it had met its obligations under the law with the defendant's interest in being made aware of the lawsuit, imposed a two-year time limitation on filing a motion to set aside and a 180-day limit when service of the entry of judgment was also proper. (Code Civ. Proc., § 473.5, subd. (a).) But that

situation is materially different from the present scenario: here, the plaintiff can have no judicially cognizable interest in closure because it has not properly fulfilled its own obligations under the law. Put differently, the judgment in a case governed by section 473.5 is not void because the plaintiff's accomplishment of proper service of the summons gives the court jurisdiction over the matter. In the situation here, by contrast, because service was improper the court never had jurisdiction, which means the ensuing judgment *was* void.

The legislative history of section 473.5 confirms that the statute was meant to apply only to judgments where service of the complaint was properly effected. The Legislature enacted the statute in 1969 as part of a broad modernization of the laws governing service of process and jurisdiction recommended by the Judicial Council.[44] The Judicial Council's proposal was motivated by a desire to "give defendants, wherever possible, a better notice of the proceedings" and adopted service practices that were already "widely used in the federal courts and sister states."[45] Section 473.5

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[44] Stats. 1969, ch. 1610; see Gex, *Code of Civil Procedure Section 473.5: Setting Aside Defaults and Default Judgments* (1970) 21 Hastings L.J. 1291, 1292, fn. 5); Sen. Donald L. Grunsky, letter to Governor Reagan regarding Sen. Bill 503 (1969 Reg. Sess.) Aug. 1, 1969, Governor's chaptered bill files, ch. 1610 (letter from lead sponsor of the bill explaining that it was "introduced . . . on behalf of the Judicial Council of California and the State Bar of California and . . . was passed by the Legislature without opposition")..

[45] Judicial Council Rep., *supra*, at p. 29.

therefore was intended to apply to the situation where the defendant "received, through no inexcusable fault of his own, no actual notice of the action in time to appear and defend, and had not made a general appearance in the action."[46] The Judicial Council differentiated new section 473.5 from section 473 because section 473.5 was intended to apply only when the defendant "had no timely knowledge of an action against him through service."[47]

The "analogy" described by some courts between judgments issued with proper service and those without it, even if both resulted in no actual notice (see, e.g., *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180; *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1122 (collectively, *Trackman/Rogers*)), erroneously conflates scenarios animating different statutes with different underlying fairness concerns. The two-year time limit under section 473.5 meets the requirements of due process because in the contemplated scenario the plaintiff properly satisfied its obligations to notify the defendant of the lawsuit through constructive notice. (See *City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 927 [acknowledging "due process does not require . . . actual notice," quoting *Jones v. Flowers* (2006) 547 U.S. 220, 226]; *Pasadena Medi-Center Associates v. Super. Ct.* (1973)

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[46] *Id*. at p. 63.

[47] *Id*. at p. 64.

9 Cal.3d 773, 778 [calling for liberal construction of California's service of process laws to "eliminate unnecessary, time-consuming, and costly disputes over legal technicalities, without prejudicing the right of defendants to proper notice of court proceedings"].) On the other hand, where defendants were never served or service was improper, due process warrants providing them with an opportunity to challenge judgments entered against them. The law does not acknowledge any countervailing procedural interest that the plaintiff may have in finality or efficiency because the plaintiff did not fulfill its own due process obligations. As such, the two-year time limit from section 473.5 should not be imported to section 473, subdivision (d).

2. Default judgments that are void but "facially valid" are a mischaracterization.

The Plaintiff and the Court of Appeal nevertheless attempt to impose a two-year time limit by creating an arbitrary and essentially false dichotomy between a judgment that is valid and one that is valid "but for" improper service. That distinction finds support in a peculiar line of appellate decisions. (See, e.g., *Trackman*, *supra*, 187 Cal.App.4th at p. 181 [rejecting assertion that "judgment, although facially valid, is void for lack of service"]; *Rogers*, *supra*, 216 Cal.App.3d at p. 1121 [referring to a "default judgment valid on its face but otherwise void because service was improper"].) But whatever its merits when first drawn (see, e.g., *Estrem's*

Estate, *supra*, 16 Cal.2d at p. 572), that distinction simply does not reflect current law or the realities of default judgments today.

First, the judgment roll in a default judgment case incorporates the proof of service. (Code Civ. Proc., § 670, subd. (a).) Accordingly, a flawed proof of service represents a jurisdictional defect that renders the judgment void per se. (*Dill*, *supra*, 24 Cal.App.4th at p. 1441.) A judgment grounded in improper service from the start therefore can never be void "although facially valid."

Second, the *Trackman/Rogers* line of cases rests in part on a mischaracterization of early precedent on default judgments. Those decisions form a nearly century-long chain of authority for the proposition that a judgment "void, not on its face, but because of want of jurisdiction over the person of a defendant who had at no time been present in the proceedings" can be set aside only within a certain period after judgment. (*Estrem's Estate*, *supra*, 16 Cal.2d at pp. 571-572; see also *F.E. Young Co. v. Fernstrom* (1938) 31 Cal.App.2d Supp. 763, 765 [same].)[48] Yet, critically, decisions of both this Court and a lower court that the *Trackman/Rogers*

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[48] The Court of Appeal's decision below relied on *Trackman*, *supra*, 187 Cal.App.4th at p. 180, which relied in part on *Rogers*, *supra*, 216 Cal.App.3d at pp. 1120-1124, which itself relied on *People v. One 1941 Chrysler 6 Tour Sedan* (1947) 81 Cal.App.2d 18, 21-22. *One 1941 Chrysler*, which was decided before section 473.5 was enacted, pointed to the analysis by this Court in *Estrem's Estate* and by the appellate department in *F.E. Young*. (*Ibid.*)

line purports to rely on explain that a motion to set aside a judgment void for improper jurisdiction is time-limited only *insofar as the defendant was properly served without fraud* (*Estrem's Estate*, *supra*, at p. 572 [the court "cannot, after time for appeal has elapsed, set aside a judgment or order on the ground that the court lacked jurisdiction, when ... *all adverse parties were properly served with notice and had the opportunity to present their objections*," emphasis added]; *F.E. Young*, *supra*, 31 Cal.App.2d Supp. at p. 766 [allowing for a limit "except in the case of bad faith on the part of the process server or person responsible for the actual making of the return of service"].) Neither decision suggests that the time limit should vary if the defaulting defendants were not present in the proceedings through no fault of their own and who never even knew about the lawsuit because of the improper service. Both decisions also preceded the current statutory regime authorizing motions for default judgment adopted in 1969[49] and, crucially, were handed down in an era when personal service alone was the standard mechanism for service.[50]

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[49] See Stats. 1969, ch. 1610, §§ 22-23 (enacting Code Civ. Proc., § 473.5 and repealing former Code Civ. Proc., § 473a).

[50] See Comment, *Service of Process* (1949) 37 Cal. L.Rev. 80, 82-83 (*Comment*). Earlier decisions from that time that also imposed a time limit to set aside judgments void for lack of personal service were criticized as "very harsh where the existence of the order or judgment is not discovered by the party against whom it has been given in time for him to make his application." (Recent Decisions, *Judgments: Power of Court to Vacate:*

Third and perhaps most importantly, the realities faced today by consumers subject to default judgments in debt collection cases illustrate the absurdity of imposing a time limit on motions to set aside even if the proof of service and complaint are not "void on their face." What difference should it make whether the information in the proof of service is immediately identifiable as false or more skillfully doctored so that establishing its falsity requires external evidence? If the proof of service says personal service was perfected on someone whose name and address do not match the defendant's, any default judgment in that case, absent later proper service or actual notice, will be void. And, for instance, if the proof of service claims substitute service was made on the defendant's 20-year-old daughter but the defendant is able to establish that the only other resident of his home is his 6-year-old son, then any default judgment, absent later proper service or actual notice, will also be void. (See *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1226 ["Although courts have often also distinguished between a judgment void on its face, i.e., when the defects appear without going outside the record or judgment roll, versus a judgment shown by extrinsic evidence to be invalid for lack of

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Requirement That Power Be Exercised Within a Reasonable Time (1935) 23 Cal. L.Rev. 205, 218.) The author instead recommended that "the provision should be applied subject to the qualification that the discovery be made within the period, or that the defendant have a reasonable time after such discovery to act." (*Ibid.*)

jurisdiction, the latter is still a void judgment with all the same attributes of a judgment void on its face"].)

Under the reasoning adopted by the Court of Appeal, however, the outdated and meaningless distinction between a proof of service "void on its face" and one void only through extrinsic evidence would control the amount of time a defendant had to challenge any resulting default judgment. A default judgment where the process server clearly did not follow correct procedures to effect substitute service could be challenged at any time. (See, e.g., *Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1441-1442 [default judgment against corporation vacated where proof of service failed to properly identify any individual served on behalf of the corporation as required for substitute service, meaning that judgment roll "fail[ed] on its face"].) On the other hand, had the same process server blatantly lied on the proof of service or not bothered to actually serve the lawsuit, the defaulting defendant would have only two years to assail the judgment.

Neither logic nor fairness could countenance such a result.

C. Federal Practice Allowing Defendants a Reasonable Time After Judgment to Set Aside Judgments Void for Improper Service Provides an Appropriate Model for California.

Federal courts apply a straightforward rule that confirms the standard adopted in many California courts: a defendant who was not

properly served and did not have actual notice of the lawsuit can move to vacate the default judgment at any reasonable time after judgment. In federal courts, as in California courts, judgments issued without proper service are void for lack of jurisdiction and must be set aside. (See, e.g., *S.E.C. v. Ross* (9th Cir. 2007) 504 F.3d 1130, 1138-1139 ["Without a proper basis for jurisdiction, or in the absence of proper service of process, the district court has no power to render any judgment against the defendant's person or property"].)[51] Federal Rule of Civil Procedure 55(d) authorizes a district court to set aside a default judgment for the reasons enumerated in Rule 60(b), including void judgments under Rule 60(b)(4). A Rule 60(b)(4) motion to set aside a void judgment must be brought "within a reasonable time," without any limitation. (Fed. Rules Civ.Proc., rule 60(c)(1); compare *ibid.*; Fed. Rules Civ. Proc., rule 60(b)(1)-(3) [setting explicit time limits for the filing of a motion to set aside a judgment in specified circumstances].)

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[51] Accord, *Bell v. Pulmosan Safety Equipment Corp.* (8th Cir. 2018) 906 F.3d 711, 714-715 ("If service was not proper, the district court lacked jurisdiction, and the default judgment is void"); *In re Worldwide Web Systems, Inc.* (11th Cir. 2003) 328 F.3d 1291, 1299 ("Generally, where service of process is insufficient, the court has no power to render judgment and the judgment is void"); *Harper Macleod Solicitors v. Keaty & Keaty* (5th Cir. 2001) 260 F.3d 389, 393 ("[A] district court *must* set aside a default judgment as void if it determines that it lacked personal jurisdiction over the defendant because of defective service of process," emphasis in original); *Gold Kist, Inc. v. Laurinburg Oil Co., Inc.* (3d Cir. 1985) 756 F.2d 14, 19 ("A default judgment entered when there has been no proper service of the complaint is, a fortiori, void, and should be set aside").

Federal courts and treatises agree that "Rule 60(b)(4) motions are not governed by a reasonable time restriction," meaning a motion to vacate a void judgment is always timely. (*Bell Helicopter Textron, Inc. v. Islamic Republic of Iran* (D.C. Cir. 2013) 734 F.3d 1175, 1179-1180 & fn. 1 (*Bell Helicopter*) [citing cases from other circuits]; see also *Meadows v. Dominican Republic* (9th Cir. 1987) 817 F.2d 517, 521 ["There is no time limit on a Rule 60(b)(4) motion to set aside a judgment as void," citing 11 Wright & Miller, Federal Practice & Procedure, § 2862]; 12 Moore, Federal Practice – Civil (2023) §§ 60.44[5][c], 60.65[1] ["because of the unique considerations applicable to void judgments, a motion brought many years after the judgment was obtained may nevertheless be within a 'reasonable' time"].) These motions have "very generous timing considerations" in light of the "jurisdictional and due process concerns" present. (*Stansell v. Revolutionary Armed Forces of Colombia* (11th Cir. 2014) 771 F.3d 713, 738.)

Federal Rule 60(b)(4) and caselaw interpreting it "strike[] a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute." (*United Student Aid Funds, Inc. v. Espinosa* (2010) 559 U.S. 260, 276.) On one hand, parties who have no notice of the lawsuit against them must be afforded a chance to defend themselves on the merits. (See *Bell Helicopter*, *supra*, 734 F.3d at p. 1180 ("'no public purpose is served by protecting a

[default] judgment' arising from a 'proceeding that was infected by fundamental error,' quoting Rest.2d, Judgments, § 65 com. b); *Meadows*, *supra*, 817 F.2d at p. 521 ["since Rule 60(b) is remedial in nature, it must be liberally applied" and resolved favorably if defendant has a "meritorious defense"].) Like California courts, a federal court also does not belatedly obtain jurisdiction over an improperly served matter after some amount of time to challenge it has lapsed. (See *Jackson v. FIE Corp.* (5th Cir. 2002) 302 F.3d 515, 523 ["[T]he mere passage of time cannot convert an absolutely void judgment into a valid one"].) On the other hand, for fairness purposes, when a defendant has actual notice of the suit despite improper service but declines to challenge the judgment in the first instance, federal courts will not allow a "second bite at the apple." (See *Espinosa*, *supra*, at pp. 275-276 [denying Rule 60(b)(4) relief to bankruptcy creditor that was not served with summons but had actual notice of the filing and did not timely object, because the party "has been afforded a full and fair opportunity to litigate"]; but see *Bell Helicopter*, *supra*, at p. 1179 [distinguishing *Espinosa* as applying when the defendant "submits to the court's jurisdiction, never objects to a non-jurisdictional error, and subsequently in a collateral challenge raises that error"].) Defendants also bear the evidentiary burden to contradict an affidavit of service (*S.E.C. v. Internet Solutions for Business* (9th Cir. 2007) 509 F.3d 1161, 1166), although that burden is not insurmountable. (See, e.g., *United States v.*

Cannon (N.D.Cal. Dec. 19, 2013, No. CV11-06461-KAW) 2013 WL 6700254, *4 [in case involving unpaid student loan debt, vacating default judgment because defendant adequately established that she did not live at the address where she was supposedly served via substitute service and that she knew no one who fit the process server's description of the person served]; *Baker v. Joseph* (S.D.Fla. 2013) 938 F. Supp. 2d 1265, 1268-1269.) These safeguards help maintain finality of judgment while permitting defendants a chance to attack, with evidence, default judgments in cases where they were named as a party but never properly informed of the suit.[52]

II. Once They Are Made Aware Of The Lawsuit Against Them, Consumers Who Were Not Properly Served Must Be Able To Set Aside The Default Judgment Expeditiously And Effectively.

Defendants who were served improperly (or not at all) and who have no knowledge of the lawsuit against them cannot be required to respond to the lawsuit. Once they do receive actual notice of the suit—all too often by

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[52] Moreover, many states have adopted federal Rule 60(b)(4) for their own rules governing motions for relief from void judgments, and courts in those states similarly have held that a motion to set aside a default judgment that is void for improper service can be brought at any time, including many years after entry of judgment. (See, e.g., *Turner v. Turner* (Tenn. 2015) 473 S.W.3d 257, 277-279 [holding that a motion to vacate default judgment based on defective service by publication was timely filed more than eight years after judgment and citing federal and state cases]; *First Select Co. v. Mastromattei* (Mass.App.Div. 2007) 2007 Mass.App.Div.77, p. *2 [vacating default judgment in improperly served debt collection suit six years later]; *Greisel v. Gregg* (Fla.Ct.App. 1999) 733 So.2d 1119, 1121 [vacating default judgment filed nearly seven years after judgment].)

having their wages or bank account garnished—they need a mechanism to move quickly and effectively to set aside a default judgment that may have been entered. A motion to set aside the judgment provides that mechanism in a form far superior to any available alternative. Therefore, access to that motion must not be curtailed at some arbitrary time, but rather made meaningfully available to defendants however long after entry of judgment they learn of the suit against them. (See *Grappo*, *supra*, 11 Cal.App.5th at p. 1012 [“When the plaintiff fails to comply with these [notice] procedures, the defendant need not suffer the consequences of a default judgment”].)

A. Motions to Set Aside are an Efficient Mechanism for Disputing Default Judgments Infected by Improper Service.

Unscrupulous debt collectors and debt buyers have not only helped bring about the current overcrowding of California state court dockets,[53] but they also can—and do—readily take advantage of that overcrowding to try to move their cases along the “assembly line” as quickly as possible. One simple way for courts to counter debt collectors’ emphasis on “do process” rather than due process is to allow consumers to dispute fraudulent default

[53] Assem. Com. on Judiciary, Analysis of Sen. Bill. No. 233, *supra*, at p. 4 (noting the “overwhelming burden placed on our courts by thousands of debt collection lawsuits, many of them unsubstantiated” and the “cost of unsubstantiated debt litigation [that] falls upon courts that must expend resources processing collection claims”).

judgments at any reasonable time after they discover that there is a case against them.

A motion to set aside a default judgment can be a "convenient and expeditious" mechanism to help root out fraudulent or defective service, so long as it can be filed at any time after judgment. (*Estudillo v. Security Loan & Tr. Co* (1906) 149 Cal. 559, 563-565 [describing motions to vacate judgments as a "plain, speedy, and adequate remedy"].) Defendants can proffer affidavits with their motion to counter the proof of service—for instance, to establish that the person who was ostensibly served through substitute service was not actually present, that the person served was a minor, or that the defendant did not actually live at the address where the summons was served and mailed thereafter. (See Code Civ. Proc., § 415.20, subd. (b); *Kremerman*, *supra*, 71 Cal.App.5th at p. 374 [setting aside default judgment for improper substitute service after evaluating proof of service and defendant's declarations]; see also "Background" § II, *supra* [describing Brian Chen's experience of being home when he was purportedly served despite the proof of substitute service indicating otherwise].) Although consumers in debt collection suits face hurdles in obtaining these affidavits many years after service of the lawsuit[54], at least

[54] That burden is compounded by the near impossible task for them to obtain counsel. (See footnote 16, *supra* [noting that nearly all defendants in these cases lack legal representation].)

theoretically they only need provide minimal independent testimony to show that service was fraudulent. (*Shamblin*, *supra*, 44 Cal.3d at p. 478.)[55] Should they succeed, the court has the discretion to reopen the case and allow the suit to be litigated on the merits. In so ruling, the court fulfills its gatekeeper duty to guard against, among other things, the fraud that accompanies sewer service.

B. No Viable Alternatives Exist for Consumers to Challenge Default Judgments in Debt Collection Cases Where Service Was Improper.

The alternative mechanisms to challenge defaults after the time limit has lapsed offer little hope to defendants, especially given that almost all defendants in debt collection cases lack financial resources and legal representation.

1. Independent actions in equity and collateral attacks are inefficient and in practice unavailable to unrepresented consumers.

Although void judgments are theoretically vulnerable to challenge via an independent equitable action[56] or a collateral attack at any time (see

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[55] In practice, however, defendants routinely must amass significant evidence to overcome the presumption that the affidavit of service is valid. (See Gotshall, *supra*, at pp. 834-835 [explaining that at the hearing, "the defendant 'must prove a negative—that he was not served'—despite the process server's assertions to the contrary. This results in a 'he said, she said' type of hearing"].)

[56] An independent equitable action is one form of direct attack, in addition to filing a motion in the original action and an appeal. (*OC Interior*

Am. Contractors, *supra*, 33 Cal.4th at p. 660), actual practice demonstrates that these mechanisms are generally unavailable to consumers seeking to challenge default judgments. The difficulty of securing legal representation in the first place makes affirmative litigation effectively impossible for the overwhelming majority of people facing debt collection cases. Both independent actions in equity and collateral attacks require filing separate state court actions, which is a time- and resource-intensive endeavor.

For instance, in 2018, Marco Juarez, a limited English proficient homeowner in Oakland, was surprised to learn about a lien on his home stemming from a 2010 debt collection judgment. Mr. Juarez was never served with the underlying lawsuit. The 2010 judgment was based on a proof of service claiming service at an address where Marco no longer lived, on a "John Doe" who did not match anyone in Mr. Juarez's household. A community legal assistance organization helped Mr. Juarez prepare a pro se complaint to collaterally attack the judgment. Even though his claims were meritorious, Mr. Juarez struggled to prosecute his collateral attack case. Three years after filing the case, Mr. Juarez obtained a default judgment against the debt collector. And even then, the judgment omitted the requisite language to set aside the void judgment. Amicus curiae

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Services, LLC v. Nationstar Mortgage, LLC (2017) 7 Cal.App.5th 1318, 1328.)

BayLegal had to assist Mr. Juarez with a motion to correct the judgment, and later with a notice of entry of order in the original collections case before Mr. Juarez could finally vacate the void judgment. This result required over three years of litigation, two separate state court cases, and assistance from two different legal services organizations—an infeasible pathway for a self-represented consumer.

Furthermore, lawyers generally cannot be awarded attorneys' fees in these types of cases, meaning that if a consumer lacks the means to pay an attorney an up-front fee, their only realistic options are a legal services organization or self-representation. Given the low chance of success with an affirmative case or a collateral attack, few attorneys are willing to take on a case with the slim chance of being able to fight the case on the merits. Most attorneys and advocates at legal services organizations also lack the time or resources to take on the significant investigation required to demonstrate fraudulent service.[57] Low-income and self-represented litigants also do not have the knowledge or resources to undertake such investigations themselves.

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[57] For example, an attorney in Washington, D.C., had to comb through court records to show the court that one process server signed multiple proofs of service demonstrating that he was serving people in locations that were across town within minutes of each other—"an impossible feat." (See Gotshall, *supra*, at pp. 814-816.)

Even those defaulted defendants who can secure counsel or navigate the rigorous legal and procedural requirements of affirmative litigation on their own still face significant risks and obstacles in pursuing their case. As discussed above, defendants who have not been served must often contest years later what is presumed to be a valid affidavit of service, and bench officers are inclined to trust a registered process server over the word of a self-represented (or sometimes even represented) litigant.[58] Those same evidentiary problems of gathering competent evidence that successfully rebuts the affidavit of service and that may be years old can frustrate attempts to prove extrinsic fraud.

Independent equitable lawsuits or collateral attacks may face additional legal hurdles. In some cases, courts effectively construe an affirmative case or collateral attack as a motion to set aside under sections 473, subdivision (d), or 473.5 and have applied the two-year time limit, essentially undermining a principal reason to file a separate action instead of a motion. (See, e.g., *Dong v. First Nat. Bank of Omaha* (Super. Ct. Santa Clara County, Mar. 24, 2022, No. 20CV370960) [granting summary judgment to debt collector under *Trackman*, *supra*, 187 Cal.App.4th, where default judgment was challenged via independent equitable action four years later].) Attorneys for debt collectors also widely file anti-SLAPP

[58] Gotshall, *supra*, at pp. 834-835.

motions, alleging that all aspects of collection litigation, even the filing of fraudulent proofs of service, are protected activities under the state's anti-SLAPP law, which would entitle the collectors to dismissal and sanctions. The defendants in BayLegal's sewer service lawsuit described above, for instance, responded to the complaint by filing an anti-SLAPP motion seeking dismissal along with costs and attorneys' fees. This strategy is common and apparently reflects the collections industry's view that otherwise illegal conduct may be shielded from liability if conducted in the course of litigation. Although BayLegal defeated the motion, it is unreasonable to suppose that the innumerable, almost entirely self-represented, defendants affected by sewer service would be able to navigate an anti-SLAPP motion and establish their right to due process through filing an affirmative case.

The obstacles described here demonstrate that filing a motion to set aside is a far more effective and efficient way for defendants to challenge void default judgments.

2. The Fair Debt Buying Practices Act affords relief only to certain consumers who were properly served.

Finally, 2015 amendments to the Fair Debt Buying Practices Act, which extend the time for consumers to challenge certain default judgments, do not apply to all types of cases infected with insufficient documentation or fraudulent service. The FDBPA, which applies only to

debt buyers, now provides that a consumer must act "within a reasonable time" to set aside a default judgment that was properly served but that resulted in no actual notice. "Reasonable time" is defined as either six years after the default judgment is entered or 180 days after the defendant receives actual notice of the action. (Code Civ. Proc., § 1788.61, subd. (a)(2).)[59] Concerned with the fact that "consumer debt is repeatedly sold and resold without reliable documentation evidencing its origin," the drafters of the original FDBPA intended to incentivize debt buyers to "provide all required information to the court prior to pursuing a default judgment."[60] Two years after passage of the original Act, the Legislature amended it to extend the time limit to set aside default judgments and permit challenges to older judgments obtained before the Act was passed.[61]

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[59] The law exempts debt collection cases resulting from identity theft from the six-year limit. (Code Civ. Proc., § 1788.61, subd. (a)(3).)

[60] Assem. Com. on Judiciary, Analysis of Sen. Bill. No. 233, *supra*, at pp. 4, 8.

[61] As a committee analysis reported:

> Although the FDBPA has made great strides in reforming debt collection litigation, it has no effect on default judgments entered before January 1, 2014. It's these default judgments—ones obtained before the FDBPA was signed into law—that SB 641 will affect. Moreover, it now appears that at least certain debt buyers are purposely waiting for the two-year mark to pass after having obtained a default judgment and only then seeking a garnishment order, leaving consumers no recourse to challenge the validity of the debt.

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 641 (2015-2016 Reg. Sess.) Apr. 20, 2015.

However, the law excludes most default judgments entered prior to January 1, 2010 and only applies to debt buyers, meaning that older judgments and those based on debts that were never sold are not covered. (*Id.*, § 1788.61, subds. (a)(1), (d).) In addition, the law expressly applies "notwithstanding Section 473.5 of the Code of Civil Procedure," (*ibid.*) and so may apply only to situations in which service has been properly effected.

Section 1788.61 provides no relief for Mr. Hoehn or the thousands of California consumers who face similar circumstances every year.

C. Consumers Subject to Negligently or Deliberately Concealed Collections Actions Should Be Provided a Reasonable Time After Discovery of the Lawsuit to File a Motion to Set Aside the Default Judgment.

This case presents the Court with the opportunity to confirm that motions to vacate judgments that are void for improper service under section 473, subdivision (d), are timely so long as the defendant has acted within a reasonable time after discovering the existence of the lawsuit. A consumer who has not been properly served is, for purposes of California law, a stranger to the action. There can be no justice in requiring someone who has no reason to know of a lawsuit to respond to it.

Assembly-line debt collection lawsuits currently overwhelm the dockets of California's courts, making it difficult for judges to review them with the required care and subjecting low-income consumers to wage and bank account seizures that may upend their lives. An overarching solution

to the crisis will need to await later cases or legislative action. But in the meantime, this Court can confirm the commonsense rule that those consumers who have never been properly served and who have no knowledge of an action against them need not respond to the lawsuit. Once they become aware of the suit and default judgment against them, they need only act within a reasonable time to file a motion to set aside the judgment. In other words, the Court can underscore the basic principle that before consumers may be subjected to the machinery of the legal system, they must have their day in court.

Due process, fairness, and justice demand nothing less.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: July 17, 2023 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and volume limitations set forth in California Rules of Court, rule 8.204(c)(1). The brief has been prepared in 13-point Times New Roman font. The word count is 12,697 words based on the word count of the program used to prepare the brief.

Dated: July 17, 2023

By: /s/ *David S. Nahmias*
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CERTIFICATE OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, reside in Oakland, California, and not a party to the within action. My business address is the University of California, Berkeley, School of Law, 308 Law Building, Berkeley, CA 94720-7200.

On the date set forth below, I caused a copy of the following to be served:

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By: /s/ *David S. Nahmias*
David S. Nahmias

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 7/18/2023 by LaNae Brooks, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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7/17/2023

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