

No. 24-158

IN THE
Supreme Court of the United States

ALISON COLE-KELLY,

Petitioner,

v.

MALIA M. COHEN, IN HER OFFICIAL CAPACITY
AS STATE CONTROLLER OF CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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REASONS FOR GRANTING REHEARING

Pursuant to Rule 44.2 of this Court's Rules, Petitioner Alison Cole-Kelly petitions the Court for rehearing of the denial of her Petition for Writ of Certiorari on the following two grounds:

1) Petitioner Cole-Kelly's Petition for Writ of Certiorari presented the issues of whether California's unclaimed property statute (California Code of Civil Procedure §1540(c))—which prohibits the state's payment of interest to the owners of unclaimed property for California's use of their unclaimed property—is a Fifth Amendment takings without just compensation claim and even if it is, whether the State of California has Eleventh Amendment sovereign immunity from such a Fifth Amendment claim.

Cole-Kelly's Petition for Writ of Certiorari was denied on October 7, 2024.

Presently pending before this Court is the Petition for Writ of Certiorari in *Gerlach v. Rokita*, Case No. 24-21. The *Gerlach* Petition presents the almost identical Fifth Amendment constitutional takings without just compensation claim and Eleventh Amendment sovereign immunity defense, with regard to the non-payment of interest to owners of unclaimed property under Indiana's former unclaimed property statute, as were presented in Cole-Kelly's Petition for Writ of Certiorari¹.

1. Cole-Kelly filed her Petition for Writ of Certiorari in Case No. 24-158 on August 12, 2024. Her Petition for Writ of Certiorari was distributed on September 11, 2024 for Conference of September 30, 2024.

On September 18, 2024, the Court requested the Indiana Attorney General in the *Gerlach* case to file a response to the *Gerlach* Petition for Writ of Certiorari and therefore did not rule, and has not yet ruled, on the *Gerlach* Petition for Writ of Certiorari at the September 30, 2024 conference.

This Court considered Cole Kelly’s Petition for Writ of Certiorari at the September 30, 2024 Conference and denied it, before the Court received further briefing of the *Gerlach* Petition for Writ of Certiorari. The Court’s request for responsive briefing in the *Gerlach* case suggests that the Fifth Amendment takings claim and Eleventh Amendment sovereign immunity defense raised in the *Gerlach* Petition merit a grant of certiorari.

If, *as it should*, this Court does grant certiorari in the *Gerlach* case—to decide, essentially, whether a state’s use of unclaimed property without compensating the owner for its use of his/her unclaimed property is a Fifth Amendment takings violation and if so, whether Eleventh Amendment sovereign immunity bars such a claim—that would be an intervening circumstance of a substantial effect which would warrant a rehearing and reconsideration of the denial of the Cole-Kelly Petition for Writ of Certiorari, since the constitutional issues relating to the unclaimed property statutes in *Gerlach* are similar to the constitutional issues relating to the unclaimed property statutes in the Cole-Kelly case. Rehearing should be granted so that California unclaimed property owners should have the Fifth Amendment rights as Indiana unclaimed property owners.

The *Gerlach* Petition for Writ of Certiorari was filed on July 3, 2024 and on August 7, 2024, was distributed for Conference on September 30, 2024 as well.

Where there is a possible intervening decision by this Court, rehearing of a prior denial of a writ of certiorari is warranted. *Flynn v. United States* 75 S. Ct. 285, 287, 89 L. Ed. 1298 (1955); *Gondek v. Pan American World Airways, Inc.* 382 U.S. 25, 27, 86 S. Ct. 153, 154-155 (1965) [different result in a subsequent case involving similar issue, warranted rehearing of the earlier denial of the petition for writ of certiorari, in the interest of justice].

2) Rehearing of the Cole-Kelly Petition for Writ of Certiorari is also warranted, in light of this Court's recent decision in *Tyler v. Hennepin County, Minnesota* 598 U.S. 631, 647, 143 S. Ct. 1369, 1380 (2023) which undercuts the entire justification for California's unclaimed property statute barring the state from paying interest to owners of unclaimed property for the state's use of the unclaimed property.

California Code of Civil Procedure §1540(c) is predicated on the fallacy that unclaimed property has been "constructively abandoned" by its owners and therefore they are not the owners of that property while it is held by the state in custody for them. Consequently, as non-owners, they are not entitled to the interest earned on, or the value of the use of, that unclaimed property by the state. However, this Court in *Tyler* supra 598 U.S. 631 at 647, held that "[a]bandonment requires the surrender or relinquishment or disclaimer of all rights in the property . . . it is the owner's failure to make any use of the property—and for a lengthy period of time—that causes the lapse of the property right", quoting from *Texaco Inc. v. Short* 454 U.S. 516 at 530.

In California, and most other states, unclaimed personal property that is not used for three years is *non-permanently* escheated to the state, which then holds it in custody for the real owner in perpetuity unless and until the state brings legal proceedings, after at least five (5) years of custody, to permanently escheat it to the state. Thus, the pretext that the owner of the unclaimed property has “constructively abandoned” it as soon as it “temporarily escheats” to the state, is pure fiction. The owner retains ownership and can reclaim his/her unclaimed property at any time before the state brings judicial proceedings to have it permanently escheated to the state. Since the owner can reclaim his/her unclaimed property held by the state in custody for the owner, it is the owner’s property, not the state’s, and the interest on (or time value of) that “unclaimed” property is also the owner’s, not the state’s. *Taylor v. Wesley* 402 F.3rd 924, 930-931 (9th. Cir. 2005).

California’s refusal to pay the owner interest it earns on the unclaimed property (or the time value for its use of the owner’s unclaimed property) is a taking without just compensation in violation of the owner’s Fifth Amendment rights.

Cole-Kelly did not cite the *Tyler* holding or argue, except in passing, that California’s “constructive abandonment” theory, as justification for not paying owners for the taking and use of their “unclaimed” property, is a Fifth Amendment taking violation. However, this Court’s decision in the *Tyler* case is another substantial ground not previously presented by Cole-Kelly to rehear her Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth above, this Court should rehear Cole-Kelly's meritorious Petition for Writ of Certiorari, along with its consideration of the pending meritorious *Gerlach* Petition for Writ of Certiorari in Case No. 24-21, so that these important and far-reaching Fifth Amendment takings claims and Eleventh Amendment sovereign immunity defenses, currently applicable to California's and nearly every other state's unclaimed property statutes, can be considered and uniformly resolved.

Respectfully submitted,

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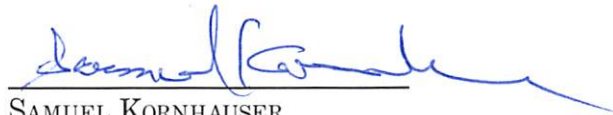
Counsel for Petitioner

DATED: November 1, 2024

CERTIFICATION OF COUNSEL

Pursuant to Rule 44.2, Counsel for the Petitioner certifies that the Petition is restricted to the grounds specified in the Rule including the substantial grounds not previously presented. Counsel further certifies that this Petition is presented in good faith and not for delay.

Respectfully submitted,



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