21-CV-0795

In The
District of Columbia Court of Appeals

The Corcoran Gallery of Art and the Trustees of the Corcoran Gallery of Art,

Appellants,

v.

Susanne Jill Petty, Trustee of the Alice C. Tyler Art Trust,

Appellee.

On Appeal from the Superior Court of the District of Columbia

BRIEF OF APPELLANTS

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The above parties and their respective counsel are before the Superior Court of the District of Columbia in the case below, except for Stephen B. Kinnaird, who did not appear below. There are no intervenors or amici curiae in this appeal or in the Superior Court proceedings below.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation that owns 10% or more of the Corcoran. The Trustees of the Corcoran Gallery of Art is a corporation formed by Act of Congress. 16 Stat. 139. It has no parent entity and no shareholders but is exclusively a charitable entity.

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JURISDICTION

This Court has jurisdiction over an appeal arising from a final order of the Superior Court of the District of Columbia under District of Columbia Code § 11-721(a)(1). The Superior Court entered a final order denying the Corcoran's motion for relief from enforcement of foreign judgment on September 13, 2021. *See* Joint Appendix ("JA") 46–58. The Corcoran timely filed its notice of appeal from the order on October 5, 2021. *See* JA2; D.C. App. R. 3–4.

INTRODUCTION

In 1994, through a donation agreement between the Trustees of the Corcoran Gallery of Art and the then-trustees of the Alice C. Tyler Art Trust, the Corcoran acquired ownership of about 100 plus glass works by the artist Pascal. Under the same agreement, the Corcoran also received a $1 million cash gift, funded by a separate trust. The Agreement provided that the Corcoran Gallery would accept ownership of the works and would maintain and display some of the works in its gallery in Washington, D.C. The Corcoran Gallery did so for twenty years.

Unfortunately, by 2014, the Corcoran was no longer fiscally sustainable. The Corcoran sought *cy pres* relief from the District of Columbia Superior Court that would allow it to distribute all works owned or controlled by the Corcoran to other institutions in the District. The solution was the best and only option consistent with the mission of William Wilson Corcoran to "encourage[e]

American Genius, in the production and preservation of works pertaining to the 'Fine Arts,' and kindred objects." JA256.[1]

The Superior Court granted the requested relief. It did so in an order and nearly fifty-page memorandum opinion. *See The Trustees of the Corcoran Gallery of Art v. Dist. of Columbia*, No. 2014 CA 003745 B, 2014 WL 5080058, at *23 (D.C. Super. Ct. Aug. 18, 2014) ("*Cy Pres* Order"); JA248–51; JA 252–300. Under the court's comprehensive order and incorporated side agreements, the Corcoran was "effectively dissolve[d]," "leaving behind only an untethered Board of Trustees to advise GW and NGA on future plans." JA297–98. The Corcoran's principal assets were transferred; the National Gallery of Art received custody of the works of art and The George Washington University received the Corcoran Gallery building and the College. JA298. The *Cy Pres* Order provided that "the Corcoran Deed of Trust *and any other applicable instrument* is deemed to be revised to the extent necessary to permit the Trustees to perform and implement the Agreements according to their terms." JA249.

Current and former students, faculty, and staff, as well as donors and friends of the Corcoran, sought to intervene in the well-publicized *cy pres* proceedings.

[1] The Corcoran named the District of Columbia as Respondent to represent the public interest. Under the Court's order and an agreement with the Attorney General of the District, works could be distributed outside of the District only by agreement of the Attorney General or a separate order of the Court.

JA253–54. Their motion was granted in part, and nine current students, faculty, and staff participated in the proceedings. *Id.* They offered several "amorphous and aspirational" proposals, JA297, none of which the court found to be a better path forward. Susanne Jill Petty, allegedly a remaining trustee of the Tyler Art Trust, chose not to participate. JA246; JA66. Petty never petitioned the D.C. Court to modify the *Cy Pres* Order; she instead filed in the probate division of the Superior Court of Los Angeles County, which had no jurisdiction over the Corcoran, a D.C. institution.

Petty never properly served the Corcoran and failed to comply with local rules to enable the probate hearing to proceed. The Corcoran, having been advised by the probate court's notes that no hearing was to occur, did not participate in a July 30, 2018 hearing in which the court surprisingly rendered an order granting Petty's petition in full. *See* JA153–61. The probate court made no real inquiry into service and thus jurisdiction, and it demonstrated no awareness of the controlling *Cy Pres* Order. Perhaps most troubling, the Court then entered judgment despite the Corcoran's pending motion for reconsideration, JA153–61, later admitting that it was oblivious to the motion's existence! *See* JA209 ("[F]rankly I didn't even see your motion . . . ."). This procedure did not afford the Corcoran the "full and fair" adjudication that would merit full faith and credit. And the California appellate court's attempt to fix the probate court's mistakes *ex*

post could not remedy the underlying judgment's constitutional failures.

This Court is thus faced with a conflict. On the one hand, it is has a *fully* litigated *Cy Pres* Order, where the Corcoran did what the law should hope a charitable institution does when faced with financial distress: It sought the law's help to come up with the next best alternative. On the other hand, it has a default judgment entered in California over a party who was never properly served, over whom jurisdiction was improper, and for whom the merits were never meaningfully considered. In the face of all of this, Petty says: ignore the *Cy Pres* Order and go with the default judgment. Such result is not just fundamentally inequitable, it cannot be squared with the controlling law.

Rather, Petty's claim was settled by the *cy pres* proceedings eight years ago. There is nothing unique about Ms. Petty, the Pascal works, or the Donation Agreement that entitles this one donor among thousands to upset the *Cy Pres* Order's careful balancing and to harvest the constrained financial remains of the Corcoran. To enforce the erroneous and unconstitutional California judgment in D.C. would defeat the purpose of this *cy pres* proceeding and set a dangerous precedent for others seeking *cy pres* relief. Moreover, it would subject the Corcoran to conflicting legal obligations as the bulk of the Corcoran's assets now belong to other institutions, and the removal of any formerly Corcoran art from D.C. requires the permission of the District of Columbia Attorney General. This

Court should decline to enforce the judgment of the California court, which wrongly disregarded the D.C. Superior Court's 2014 *Cy Pres* Order—the first final judgment governing these assets—and which had no jurisdiction over the Corcoran in the first place.

ISSUES

I. Whether the California probate court had personal jurisdiction over the Corcoran at the time of its order granting Petty's probate petition, and if not, whether the probate order should be enforced.

II. Whether the California probate order was consistent with the D.C. Superior Court's *Cy Pres* Order, and if not, whether the probate order should be enforced.

STATEMENT OF THE CASE

Appellee Susanne Jill Petty, allegedly a trustee of the Alice C. Tyler Art Trust, filed a Petition for Order in the Probate Division of the Superior Court of Los Angeles County on April 5, 2018. JA59–74. On July 30, 2018, the probate court orally granted Petty's request and ordered the Corcoran to deliver to Petty over 100 artworks and $1 million in cash. JA153–61. The Corcoran, having never been properly and timely served, understood from the probate court's notes that the hearing was not to occur and thus did not specially appear. *See* JA90 (recognizing that the unresolved notes warranted a continuance). Yet the hearing did occur, and

the probate court granted Petty's request by default. JA159. On August 13, the Corcoran filed a motion for reconsideration, JA330–41, on which the trial court never ruled, JA209 n.12, before entering judgment on August 15, JA303–28.

On December 12, 2019, Petty filed in the District of Columbia Superior Court a request to enforce the California judgment. JA4–45. While proceedings in the District of Columbia were ongoing, the California Court of Appeal affirmed the judgment of the Los Angeles probate court on August 20, 2020. JA195–231. In the D.C. Superior Court, the Corcoran filed a Motion for Relief from Enforcement of Foreign Judgment on August 4, 2021. JA46–58. In a September 13, 2021 order, the Superior Court denied the Corcoran's motion for relief from enforcement. This is an appeal from that order.

STATEMENT OF FACTS

I. BACKGROUND

The Trustees of Corcoran Gallery in the District of Columbia ("the Corcoran") was established in 1869 as an institution dedicated to Art and "American Genius, in the production and preservation of works pertaining to the 'Fine Arts,' and kindred objects." JA256. It exists under a statutory charter granted by an act of the United States Congress. 16 Stat. 139.

In 1994, the Corcoran received and took title to a collection of over 100 glass works by the artist Suzanne Regan Pascal and a separately funded $1 million

cash gift to maintain that collection. JA75–79. It obtained the Pascal works in connection with the Agreement between the Corcoran Trustees and the then-trustees of the Tyler Art Trust, under which the Corcoran Gallery of Art agreed to exhibit the Pascal works and to keep at least one on display. JA76. The $1 million cash gift was made by a different trust, the Alice C. Tyler Charitable Trust. JA77. In full performance of the Agreement, the Corcoran properly expended the funds to construct the Tyler Gallery and to maintain the Pascal works. JA80. When the funds were exhausted, the Corcoran continued to secure and maintain the exhibition of the Pascal works with its own funds. JA334.

The Corcoran Trustees, since the inception of the Corcoran Gallery and until late 2014, operated a major gallery of art open to the public and a major school of art, the Corcoran College of Art + Design. Unfortunately, the financial burden of operating the gallery and the school grew and in 2014 overwhelmed the financial resources available to the Corcoran Trustees. JA259–63. The financial pressures were unrelated to the Pascal works or the Agreement. The Corcoran Trustees, after a full consideration of the issues and many efforts to redress the financial concerns, JA261; JA263; JA264–66, sought the District of Columbia Superior Court's approval under the *cy pres* doctrine to enter certain agreements with the National Gallery of Art ("NGA") and The George Washington University ("GW") on June 17, 2014. Under the proposed agreements, NGA would take custody of 18,000

artworks owned or controlled by the Corcoran, and GW would acquire the Corcoran College. The Corcoran informed Petty of its intent to enter the NGA agreements, but she did not participate in the *cy pres* proceedings. JA80; JA66.

The Superior Court held a ten-day hearing with nearly a dozen fact and expert witnesses and ultimately granted the *cy pres* relief requested. The court issued an order approving the agreements with NGA and GW along with a lengthy memorandum opinion. *See* JA248-51; JA252–300. Under the *Cy Pres* Order, all works owned or controlled by the Corcoran would be placed initially in the custody of the National Gallery of Art, which would have a preferential right to accession works from the Corcoran's collection; remaining works would be distributed to appropriate institutions agreed upon by the Corcoran and the NGA, favoring institutions within the District of Columbia or within a 50-mile radius of the District—striving to effectuate Mr. Corcoran's original intent. JA268–69; JA 297 n.30. Distribution of outside the District would require written permission of the District's Attorney General or would be subject to further *cy pres* proceedings. *Id.* To facilitate these transfers, the court ordered that "any other applicable instrument is deemed to be revised to the extent necessary to permit the Trustees to perform and implement the Agreements according to their terms." JA249.[2]

[2] After the conclusion of the *cy pres* proceedings, Petty wrote to Judge Okun regarding the Pascal works. Petty's letter does not appear in the record, but Judge Okun's response does: "I cannot take any action on your request because it is

II. PROCEEDINGS BELOW

A. Proceedings in Los Angeles Superior Court

Before and after the *cy pres* proceedings, the Corcoran attempted to work with Petty to accommodate her preferences regarding possible institutions to receive, display, and maintain the Pascal works. *See, e.g.*, JA80; JA334. Despite the Corcoran's efforts, on April 5, 2018, Petty filed a petition not in the District, but in the probate division of the Los Angeles Superior Court. JA59–74. Petty demanded the Corcoran transfer to Petty the Pascal works and $1 million. *Id.*

Under the California Probate Code, Petty was required to serve notice and her petition to the Corcoran "in the manner provided" by the California Code of Civil Procedure at least 30 days before the initial hearing on June 14, 2018. Cal. Prob. Code 851(a). The court "may not shorten" the 30-day notice requirement. *Id.* § 851(d). "Until statutory requirements are satisfied, the court lacks jurisdiction over a defendant." *Ruttenberg v. Ruttenberg*, 62 Cal. Rptr. 2d 78, 82 (Cal. Ct. App. 1997). Accordingly, the 30-day window provides critical due process.

Under local rules, the L.A. Superior Court publishes "Probate Notes" for each matter when the court has outstanding questions or concerns. *See* L.A. Super.

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outside the scope of the [*Cy Pres* Order]." JA81. It is unclear from Judge Okun's response what exactly Petty requested and why it was outside the scope of the court's order. Regardless, *ex parte* correspondence does not establish the meaning of the *Cy Pres* Order.

Ct. L.R. 4.4 ("Local Rules"). In the Probate Notes, there may be "Matters To Clear" that "inform[] the parties of additional documents that are necessary to justify approval of the petition." Local Rule 4.4(b). The "Matters To Clear" must be resolved "no later than 3:30 p.m. of the second court day preceding the hearing date." *Id*. "If the Probate Notes are not timely cleared, the court will continue the hearing, place the matter off calendar, deny the matter without prejudice, or take other action it deems necessary." Local Rule 4.4(c).

1. June 14, 2018 Probate Hearing. Prior to the initial June 14, 2018 hearing on the matter, Petty had admittedly failed to serve process upon the Corcoran in accordance with the Probate Code. JA84. Petty requested and received a 45-day continuance to cure the notice issues. JA84–85. The Corcoran's participation was limited to expressing its intention "to file a written objection." JA86. The Corcoran in no way addressed the merits of the matter or otherwise recognized the jurisdiction of the court to proceed. The Court then scheduled a second hearing for Monday, July 30, 2018.

2. July 30, 2018 Probate Hearing. Petty again failed to serve the Corcoran with proper notice of the petition at least 30 days prior to the scheduled July 30 hearing. The Court's "Matters To Clear" in the Probate Notes reflected Petty's failed attempts at service. By Petty's own admission, JA97–98, service was not completed on any Corcoran party before July 13, 2018 at the earliest, and

the Corcoran disputes service was effective even then. Petty attempted service on Attorneys Charles Patrizia and Valerie Marek, but they promptly notified Petty that they were not authorized to receive service on the Corcoran's behalf. Under California law, a summons must be served on someone authorized to receive it on behalf of the party. Cal. Code. Civ. Proc. § 416.10. Petty also attempted to serve Ronald Abramson, who was no longer a registered agent for service. Service on David Julyan and Harry Hopper was also ineffective. Someone unauthorized accepted and signed a mail receipt intended for Julyan, and the mail receipt purporting to show service on Hopper was unsigned. JA141–42; JA337–39.

By 3:30 p.m. on Thursday, July 26, Petty had not resolved the Matters To Clear in the Court's Probate Notes because Petty could not provide proof of service. Counsel for the Corcoran even relayed to Petty the specific reasons the notice requirements had not been satisfied in time to have a hearing. JA141–42. As service had not been effectuated 30 days before the hearing date (so the hearing was not properly noticed under Probate Code Section 851(d)) and Petty had outstanding Matters To Clear, the Corcoran understood that the hearing would be continued—at a minimum. Accordingly, the Corcoran's attorneys did not ultimately appear for the hearing.

Petty had not cleared the Probate Notes on the second court day before the hearing and instead filed an untimely supplement to her petition on Friday, July 27,

2018. JA335–36. The supplement conceded that even the attempted service upon Julyan and Hopper had not been completed (if ever) until halfway through July. JA97–98. Nonetheless at the hearing, Petty conveyed to the probate court a false and mistaken sense of urgency by representing "[o]n information and belief" that the Pascal works would be soon be transferred to the Katzen Art Center. JA99. Even on Petty's mistaken understanding that the works would be moved by the end of the year, the situation was not urgent in July. But in fact, the designation of a possible recipient was only an initial step in completing agreements for the transfer and display of the works and other implementing steps.

Perhaps because of Petty's urging, the probate court held the hearing on July 30, 2018 without the Corcoran and despite the service problems, the outstanding Matters To Clear, and the Corcoran's earlier stated intention to file written objections (upon proper service). The probate court granted Petty's petition based on default: "With no appearance by the respondents . . . I'm clearing the notes in total on this matter [and] [t]he court is going to grant the petition as requested." JA159. The Court granted the petition in its entirety, ordering the Corcoran to deliver the Pascal works and transfer $1 million to Petty.

3. The Corcoran's Post-Order Motion. The Corcoran promptly moved for reconsideration on August 13, 2018, on the grounds that: (i) it had not been properly served and never submitted to the court's jurisdiction; (ii) Petty did

not timely clear the Probate Notes before the hearing; (iii) the *Cy Pres* Order does not allow the Pascal works to be removed from the District absent the express authorization of the District's Attorney General; and (iv) the Corcoran had relied on representations that the Tyler Art Trust was no longer in existence. JA330–41. Yet on August 15, 2018, without ruling on the Corcoran's motion, the court entered judgment on its order. JA303–28. The court's entry of judgment deprived the probate court of jurisdiction to consider the motion. *See APRI Ins. Co. S.A. v. Super. Ct. of L.A. Cty.*, 90 Cal. Rptr. 2d 171, 180 (Cal. Ct. App. 1999) ("[T]he trial court may not grant reconsideration after judgment has been entered.").

B. Proceedings in the California Court of Appeal

The Corcoran timely appealed, and the Court of Appeal affirmed. *Petty v. Corcoran Gallery of Art*, No. B293796, 2020 WL 4877542 (Cal. Ct. App. Aug. 20, 2020); JA195–231. The Court of Appeal found no error in the probate court's oral order granting the petition because "Corcoran forfeited its ability to argue that Petty's petition lacked merit because Corcoran never made that argument in the probate court." *Petty*, 2020 WL 4877542, at *6. The Court then determined (without reference to the *cy pres* proceedings) that the Corcoran had breached its agreement with the Tyler trust. *Id.* at *7.

The Court never addressed the impropriety of the July 30, 2018 hearing because Petty had failed to serve proper notice 30 days in advance in conformity

with California Probate Code § 851(a), a notice requirement that the California Probate Court could not waive, *id.* § 851(d). Although the hearing was also improper under Los Angeles Superior Court Local Rule 4.4(c) because of Petty's failure to timely serve the supplement clearing the probate notes, the Court of Appeal held that the Probate Court was entitled to waive the rule in the interest of justice because the Corcoran had not filed a motion to quash (even though the Probate Court merely disregarded the rule without advance notice to the Corcoran (rather than waived it), and even though a motion to quash was not yet due). *Petty*, 2020 WL 4877542, at *12–13.

The Court also found no error in the probate court's entry of judgment despite the Corcoran's pending motion for reconsideration, which it determined to be an improper vehicle. *Id.* at *8–9. Although the Court adjudged the Corcoran's post-order motion to be not "legitimate" and not "reviewable," the Court decided that it constituted consent to jurisdiction, thus waiving any objections to notice, service, or personal jurisdiction. *Id.* at *9–12. Finally, the Court decided that the probate order does not conflict with the *Cy Pres* Order. *Id.* at *13–14.

The California Supreme Court denied review.

C. Proceedings in the District of Columbia Superior Court

On December 12, 2019, Petty filed in the District of Columbia Superior Court a request to enforce the California judgment. JA4–45. On August 4, 2021,

the Corcoran filed a Motion for Relief from Enforcement of Foreign Judgment. JA46–58. The Corcoran's motion argued (1) that the California courts unconstitutionally failed to accord full faith and credit to the *Cy Pres* Order, and (2) that the California courts lacked personal jurisdiction over the Corcoran,

On September 13, 2021, the Superior Court denied the Corcoran's motion for relief from enforcement. Order, *Petty v. The Corcoran Gallery of Art, et al.*, 2019 CA 8131 F, (D.C. Super. Ct. Sept. 13, 2021). The Superior Court considered *de novo* whether the Corcoran consented to the jurisdiction of the California courts, ultimately relying on the fact that "more than the issue of jurisdiction was raised by the Corcoran" on appeal in California. JA55. The Court also decided that because "the Collection at issue here was not accessioned by the National Gallery," *id.* at 12, it was not subject to the *Cy Pres* Order and thus not in conflict with the California judgment.

SUMMARY OF ARGUMENT

The California judgment against the Corcoran was void *ab initio* and should not be enforced. The California courts could not and did not properly exercise personal jurisdiction over the Corcoran.

Before enforcing a foreign state judgment, the Superior Court must determine whether the judgment is "entitled to full faith and credit." D.C. Code § 15-351(2); *see also* U.S. Const. art. IV, § 1. In turn, the judgment cannot be

entitled to full faith and credit unless the rendering court had jurisdiction. *Durfee v. Duke*, 375 U.S. 106, 110 (1963). Where as here the question of personal jurisdiction was not fully and fairly litigated in the probate court that rendered the judgment, the Superior Court must consider *de novo* whether the California court could exercise personal jurisdiction over the Corcoran and, if it finds jurisdiction wanting, refuse to enforce the judgment.

The D.C. Superior Court never addressed the proper question of whether the Corcoran consented to the jurisdiction of the probate court and did not find that either the June 14, 2018 appearance or the motion for reconsideration constituted a general appearance. It instead improperly found that the *California courts* had jurisdiction because of the combination of those two acts in conjunction with an appeal addressing the merits. But an appeal after a merits judgment has nothing to do with the consent to the probate court's jurisdiction over the person. The June 14, 2018 appearance, where the Corcoran simply stated that it would file objections to a not-yet served petition, was not an acquiescence to the probate court's authority over the person. And the Superior Court agreed with the Corcoran that the motion for reconsideration was not itself a general appearance because it was disregarded. Additionally, the Court below relied upon actions taken by the Corcoran—a motion for reconsideration and an appeal—*after* the probate court had already exercised jurisdiction and entered an order granting

Petty's petition (despite defects in service of process), and in the case of the appeal, after judgment as well. This is reversible error. Under California law and fundamental principles of Due Process, a defendant's later actions cannot retroactively bestow jurisdiction that was lacking at the time. *See, e.g.*, *In re Marriage of Smith*, 185 Cal. Rptr. 411, 412 (Cal. Ct. App. 1982). And for good reason: On the alternative theory, the Corcoran, facing a default judgment, could preserve its jurisdictional challenge *only* by waiving all arguments on the merits (because any such argument would constitute a general appearance, on this view).

Additionally, the California judgment is at odds with the D.C. court's careful distribution of the Corcoran's assets, which was entitled to full faith and credit in California. Because the two judgments cannot be reconciled and subject the Corcoran to conflicting legal obligations, this Court must decide whether to give effect to the *Cy Pres* Order or to the California judgment. This Court should choose the D.C. court's lawful *Cy Pres* Order rather than the default judgment that exceeded the probate court's jurisdiction.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN ACCORDING FULL FAITH AND CREDIT TO A FOREIGN JUDGMENT BY A COURT THAT LACKED PERSONAL JURISDICTION OVER THE CORCORAN.

To domesticate a foreign judgment in the District of Columbia, it is not enough to bring the judgment to the Superior Court's attention. Rather, under

D.C.'s Uniform Enforcement of Foreign Judgments Act ("UEFJA"), the court must first determine whether the foreign judgment is "entitled to full faith and credit." D.C. Code. § 15-351(2); *see, e.g.*, *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank*, 98 A.3d 998 (D.C. 2014).

Thus, to enforce the California judgment at issue here, the judgment must be *entitled* to full faith and credit, else the UEFJA does not apply.

A. A foreign judgment is not entitled to Full Faith and Credit unless the original court had jurisdiction.

A "consistently recognized" "caveat" to the Full Faith and Credit Clause is that a judgment in one state does not bind a court in another if the former "did not have jurisdiction over the subject matter or the relevant parties." *Underwriters Nat'l Assurance Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 (1982). Put another way, a judgment will have preclusive effect in other states "only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment." *Durfee*, 375 U.S. at 110.

The Supreme Court has applied this element of its Full Faith and Credit jurisprudence time and time again. *See, e.g.*, *Estin v. Estin*, 334 U.S. 541, 549 (1948) (denying Nevada judgment full faith and credit in New York because the Nevada court lacked personal jurisdiction); *Clarke v. Clarke*, 178 U.S. 186, 195 (1900) (affirming rejection of another state's probate decision on the ground that it lacked jurisdiction). Federal courts today continue to apply this line of cases as a

necessary prerequisite to the enforcement of foreign judgments. *See, e.g.*, *Jerez v. Republic of Cuba*, 775 F.3d 419, 423 (D.C. Cir. 2014) ("And if the issuing court 'did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given.'" (quoting *Underwriters*, 455 U.S. at 705)).

And this Court has followed suit by applying the crucial caveat of *Durfee*. *See, e.g.*, *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1005; *Nader v. Serody*, 43 A.3d 327, 334 (D.C. 2012); *Vickery v. Garretson*, 527 A.2d 293, 299 n.4 (D.C. 1987); *Frank E. Basil, Inc. v. Guardino*, 424 A.2d 70, 73–74 (D.C. 1980).

The rule can be summarized simply: A court asked to enforce a default judgment "*must* entertain an attack on the jurisdiction of the court that issued the judgment." *Jerez*, 775 F.3d at 422 (emphasis added). "If it finds that the issuing court lacked jurisdiction, it *must* vacate the judgment." *Id.* (emphasis added).

B. The Superior Court was required to determine independently whether the California probate court had jurisdiction.

Although the D.C. Superior Court incorrectly held that the Corcoran consented to jurisdiction, the court was right to review jurisdiction *de novo*. *See* JA51; JA56. When asked to enforce a foreign default judgment, District courts the jurisdiction of the foreign tribunal *de novo*. *Tom Brown & Co. v. Francis*, 608 A.2d 148, 150–51 (D.C. 1992); *Frank E. Basil, Inc.*, 424 A.2d at 73–74.

De novo review is also warranted where the issue of jurisdiction was not "fully and fairly adjudicate[d]" by the foreign court. *Vickery*, 527 A.2d at 299 n. 4.

This Court should not automatically accord full faith to a sister-state court's judgment if jurisdiction was not fully and fairly litigated—a crucial limitation emphasized by each of the cases cited the Superior Court.

While *Durfee*, for example, states that a foreign judgment is entitled to full faith and credit "even as to questions of jurisdiction," those questions must have been "*fully and fairly litigated* and finally decided in the court which rendered the original judgment." 375 U.S. at 111 (emphasis added). The Supreme Court has underscored this important rule in more recent cases as well: "*Durfee* stands *only* for the proposition that a state court's final judgment determining its own jurisdiction ordinarily qualifies for full faith and credit, *so long as the jurisdictional issue was fully and fairly litigated* in the court that rendered the judgment." *Marshall v. Marshall*, 547 U.S. 293, 314 (2006) (emphasis added). "'[P]rinciples of res judicata apply to jurisdictional determinations' . . . [b]ut those principles apply not to default judgments but only to *contested* cases, where the defendant 'had an opportunity to litigate the question of . . . jurisdiction.'" *Jerez*, 775 F.3d at 422 (citations omitted; emphasis added).[3]

Here, there can be no question that the California judgment was not "fully and fairly" litigated in the probate court for the simple reason that it granted

[3] The Supreme Court has demarcated judgments entitled to full faith and credit by language such as having one's "day in court" or being "fully heard." *E.g.*, *Sherrer v. Sherrer*, 334 U.S. 343, 348 (1948); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

complete relief by default, without any adversarial adjudication of the propriety of service, personal jurisdiction, or the merits. *See Fodge v. Trustmark Nat'l Bank* 945 F.3d 880, 882 n.1 (5th Cir. 2019) ("Default judgment' generally means 'a judgment entered by the Court as a penalty against a party for failure to appear or otherwise to perform a procedurally required act.") (quotations omitted). Petty never properly served the Corcoran the notice of the hearing with a copy of the petition in compliance with California Probate Code § 851(d) and untimely served her supplement, allegedly showing proof of service, after close of business the Friday before a Monday hearing. At that hearing, despite Petty's noncompliance with the Probate Code and local rules (which led Corcoran to believe there would be no hearing), the L.A. probate court granted Petty's petition by default because of the Corcoran's absence: "With no appearance by the respondents . . . [t]he court is going to grant the petition as requested." JA159. Before doing so, however, the probate court should have enquired into the propriety of service. Cal. Code Civ. Proc. § 585, 585(b) ("Judgment may be had, if the defendant fails to answer the complaint . . . if the defendant has been served . . . ."). The court then entered judgment, depriving the court of jurisdiction, without hearing a single argument from the Corcoran; the court later conceded that it had no knowledge of the Corcoran's pending motion for reconsideration, JA209 n.12. The Corcoran was never heard—much less "fully heard"—before Petty's petition was granted.

Consequently, the probate court's exercise of jurisdiction is owed no deference in D.C. *Durfee*, 375 U.S. at 111.[4]

In one recent decision, for example, the Supreme Court of Rhode Island refused to afford full faith and credit even where the Utah court that rendered the judgment in question found that the plaintiff "had made a *prima facie* showing of sufficient facts to establish the Utah court's personal jurisdiction." *Hawes v. Reilly*, 184 A.3d 661, 668 (R.I. 2018). "It is clear from our law that, '[i]f a defendant fails to appear after having been served with a complaint filed against him in another state and a default judgment is entered, he may defeat subsequent enforcement in another forum by showing that the judgment was issued from a court lacking personal jurisdiction.'" *Id.* at 665–66 (quoting *Goetz v. LUVRAJ, LLC*, 986 A.2d 1012, 1016 (R.I. 2010)). Here, Petty did not make even a *prima facie* showing of facts that would support personal jurisdiction over the Corcoran in California, relying only on mistaken notions of consent.

Even if the California probate court had explained the basis for its assertion of jurisdiction, such a finding would not be entitled to full faith and credit as it was not litigated. *See, e.g.*, *Bloodworth v. Ellis*, 267 S.E.2d 96, 99 (Va. 1980); *Walzer*

[4] Multiple treatises and out-of-state authorities concur that a judgment—especially one entered by default—may be collaterally attacked on jurisdictional grounds. *See* Restatement (Second) of Judgments § 81; *id.* § 81 cmt. a; Restatement (Second) of Conflict of Laws § 104.

v. Walzer, 376 A.2d 414, 419 (Conn. 1977). This Court should not enforce a default judgment against a D.C. institution that was not fully and fairly litigated before entry. The California Court of Appeal's (erroneous) findings of consent to jurisdiction cannot cure the deficit. Because the issue was not litigated in the probate court, this Court should decide (for the first time) whether the California probate court could properly exercise jurisdiction over the Corcoran.

C. The Superior Court improperly found that the Corcoran retroactively consented to jurisdiction.

"Personal jurisdiction . . . represents a restriction on judicial power . . . as a matter of individual liberty" protected under the Due Process Clause. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (internal quotation marks omitted). "[A] party may insist that the limitation be observed, or he may forgo that right, effectively consenting to the court's exercise of adjudicatory authority." *Id.* at 584. "[A] waiver of constitutional rights in any context must, at the very least, be clear." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972). "[A]bsent consent, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1556 (2017). "While it is fundamental that [D.C.] courts may inquire into the jurisdiction of a foreign court before enforcing [its] judgment . . . the jurisdictional standards to be applied are not our own but those of the foreign forum, if [its] standards comply with constitutional due process." *Frank E. Basil, Inc. v. Guardino*, 424 A.2d 70, 73

(D.C. 1980) (citing *Varone v. Varone*, 296 A.2d 174, 177 (D.C. 1972)).

In California, a general appearance "operates as a consent to jurisdiction." *Titus v. Superior Court*, 100 Cal. Rptr. 477, 484 (Cal. Ct. App. 1972). The Corcoran did not generally appear in the California case. "A general appearance must be express or arise by implication from the defendant's seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only." *Botsford v. Pascoe*, 156 Cal. Rptr. 177, 180 (Cal. Ct. App. 1979) (internal quotation marks omitted). "Whether there has been a general appearance will often depend upon an examination of all the circumstances." *Bottsford*, 156 Cal. Rptr. at 180. In these circumstances, the record discloses that the Corcoran objected to the exercise of personal jurisdiction and did not "recognize the authority of the court to proceed." *Dial 800 v. Fesbinder*, 12 Cal. Rptr. 3d 711, 726 (Cal. Ct. App. 2004).

Instead of focusing on what acts constituted a general appearance in the probate court, the Superior Court improperly framed the issue as whether "the California *courts*"—both the probate court and the court of appeal—"properly exercised jurisdiction over Defendants." JA53. It did not resolve whether the Corcoran's appearance at the June 14, 2018 probate hearing constituted a general appearance; it found the transcript to indicate only that Petty had acknowledged the

failure to serve the petition and requested for a continuance to do so and that the Corcoran would file written objections. JA52. The Superior Court "g[a]ve the Corcoran the benefit of the doubt as to whether the Probate Motion for Reconsideration constituted a general appearance that submitted the Corcoran to the jurisdiction of the California courts because the Probate Motion for Reconsideration was never actually ruled on." JA54–55. Instead, the Superior Court decided that the combination of those acts with *an appeal* that included merits issues in combination constituted consent to the California courts (plural): "the Corcoran submitted to the jurisdiction of the *California courts* by failing to raise jurisdictional arguments at the June 14, 2018 probate hearing, arguing beyond the issue of jurisdiction to the merits of the petition in its Probate Motion for Reconsideration, and appealing to the California Court of Appeals on issues of both jurisdiction and the merits of the probate petition." JA56 (emphasis added).

That is clear error. The foreign judgment registered in the District and for which Petty seeks execution is the judgment of the California probate court. That judgment is void if the court that rendered it lacked jurisdiction. *Kammerman v. Kammerman*, 543 A.2d 794, 799 (D.C. 1988). Actions on appeal, and in particular raising merits issues in an appeal of a default merits judgment, have nothing to do with whether the Corcoran consented to jurisdiction in the California probate court.

Neither the June 14 appearance nor the motion for reconsideration

constituted a general appearance in the probate court. Moreover, the motion for reconsideration (and *a fortiori* the Corcoran's irrelevant appeal arguments) cannot constitute consent to a jurisdiction already exercised by the probate court.

1. The Corcoran's counsel's attendance at a June 14, 2018 probate hearing was not a general appearance.

Neither the California Court of Appeal nor the D.C. Superior Court held that the Corcoran generally appeared at the June 14, 2018 probate hearing, and for good reason.[5] The hearing lasted only a few minutes. Petty conceded her failure to serve the petition and asked for a continuance. JA85–86. Counsel for the Corcoran made no substantive merits arguments, a fact the California Court of Appeal effectively acknowledged. *Petty*, 2020 WL 4877542, at *6 ("[The Corcoran] forfeited its ability to argue that Petty's petition lacked merit *because Corcoran never made that argument in the probate court*." (emphasis added)). Further, the Corcoran did not take any action at the hearing that recognized the court's jurisdiction, instead expressing only the Corcoran's desire to file written objections. Other than introductions and a question about timing, the following exchange is the *entirety* of the Corcoran's participation in the hearing:

> **Ms. Marek [Counsel for the Corcoran]:** Respondents don't object to that timeline as we, too, would prefer to file a written objection.

[5] The California Court of Appeal suggested but did not decide that the Corcoran may have generally appeared at the hearing. *Petty*, 2020 WL 4877542, at *10. The D.C. Superior Court likewise did not find the June 14, 2018 appearance to constitute consent to jurisdiction. *See* JA53.

The Court: So, Ms. Marek, you're anticipating objections to be filed?
Ms. Marek: Yes, we would like to file our written objections by that time.

JA86.

While Corcoran counsel did not in this short colloquy specify the nature or form of the ***future*** objections (which would have been jurisdictional) in regard to a ***future*** properly served petition, it is undisputable that the Corcoran did not engage in "seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only." *Botsford*, 156 Cal. Rptr. at 180. The Corcoran did not "raise[] any other question, or ask[] for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person." *Cal. Overseas Bank v. French Am. Banking Corp.*, 201 Cal Rptr. 400, 403 (Cal. Ct. App. 1984) (quoting *Olcese v. Justice's Court*, 103 P. 317 (Cal. 1909)).

California case law recognizes that a statement of intent to file a future pleading is not tantamount to a general appearance. A party "who merely seeks an extension of time to plead cannot reasonably be deemed to make a general appearance. His purpose may be to obtain adequate time to determine whether or not to object to the jurisdiction of the court." *Blank v. Kirwan*, 703 P.2d 58, 72 (Cal. 1985) (citations omitted). For the same reason, here, a party who merely agrees with an extended timeframe and expresses an intent to file an objection within that timeframe cannot reasonably be deemed to make a general appearance.

Moreover, the lack of specificity as to the nature of the future objections cannot constitute a general appearance because California permits defendants to maintain objections to personal jurisdiction at the same time it raises merits objections, provided that it does so in a separate pleading. Cal. Code Civ. Proc. § 418.10(e). Thus, any ambiguity about the character of the Corcoran's future objections is not sufficient to constitute a general appearance because it does not necessarily "recognize[] the authority of the court to proceed." *City of Riverside v. Horspool*, 167 Cal. Rptr. 3d 440, 450 (Cal. Ct. App. 2014).

Any other conclusion would make no practical (or legal) sense: Had the Corcoran consented to the court's jurisdiction at that hearing, then Petty would not have needed to serve the petition. *See* Cal. Code Civ. Proc. § 410.50(a). The probate court clearly and properly understood that Petty needed to serve the petition and directly required Petty to give the required 30 days' notice required under California Probate Code Section 851. JA86.

2. The Corcoran's motion for reconsideration was not a general appearance.

The Superior Court properly refused to rely on the Motion for Reconsideration as itself a general appearance, "giv[ing] the Corcoran the benefit of the doubt as to whether the Probate Motion for Reconsideration constituted a general appearance that submitted the Corcoran to the jurisdiction of the California courts because the Probate Motion for Reconsideration was never actually ruled

on." JA54–55. Indeed, its decision is compelled by this Court's decision in *Tom Brown & Co. v. Francis*. *Tom Brown* involved an action to enforce a foreign default judgment in which the defendant had twice filed papers unrelated to jurisdiction, including an answer to the complaint. 608 A.2d at 150–51. But this Court focused upon the nature of the judgment, which described the defendant's answer as untimely and unmeritorious and then "treated the case as though [the defendant] had never appeared." *Id.* Likewise, the California probate court "treated the case as though [the Corcoran] had never appeared," *id.*, by entering an order and judgment without any knowledge that the Corcoran had filed a motion for reconsideration, JA209 n.12. Under *Tom Brown*, there was no general appearance in this case even if the Corcoran had raised merits arguments at some point in the proceedings. What matters is how the court receives the litigant, i.e., whether the court *hears* his arguments. The probate court never did.

The motion for reconsideration is inadequate grounds for consent for another reason: It occurred only *after* the probate court had exercised jurisdiction and entered an order granting the petition (i.e., the ultimate relief) and thus cannot be deemed consent for the order in the first instance (particularly when it was not ruled on). Under California law, "a defendant who was defectively served with summons did not make that service retroactively valid by entering a general appearance after judgment was entered." *In re Marriage of Smith*, 185 Cal. Rptr.

at 412. In other words, the focus of the analysis *must* be on whether service was accomplished *prior* to the adverse order. *Id.* Jurisdiction is not just a question of contacts (which are lacking here) but also of service: "Personal jurisdiction over a nonresident defendant depends upon the existence of essentially two criteria: first, a *basis* for jurisdiction must exist due to defendant's minimum contacts with the forum state; second . . . jurisdiction must be *acquired* by service of process in strict compliance with the requirements of our service statutes." *Ziller Elecs. Lab GmbH v. Superior Ct.*, 254 Cal. Rptr. 410, 413 (Cal. Ct. App. 1988).

In *Smith*, the court explained in no uncertain terms that a defendant's later general appearance—even by such actions as taking a deposition—does not cure defects in jurisdiction arising from improper service *prior* to the entry of a negative default order. 185 Cal. Rptr. at 414, 416 (deriding the prior alternative view as "judge-made" and "entirely nonstatutory").

The California Court of Appeal and the D.C. Superior Court should have applied *Smith*. For the same reason that the constitutional requirement of notice cannot be cured retroactively, a court must have personal jurisdiction at the time the court purports to exercise it. *See, e.g.*, *Kory v. Lynch*, No. B267794, 2019 WL 211104, at *4 (Cal. Ct. App. Jan. 16, 2019) (agreeing to review challenge "to the jurisdiction of the court at the time of entry of the initial judgment").

The Corcoran acknowledges that the California Court of Appeal attempted

to distinguish *Smith* in a footnote, but its analysis is difficult to elliptical and difficult to follow. *Petty*, 2020 WL 4877542, at *12 n.16 (citing *In re Marriage of Obrecht,* 199 Cal. Rptr. 3d 438, 446–47 (Cal. Ct. App. 2016); "*In re Marriage of Smith* is distinguishable because it concerned a "general appearance after judgment was entered.") For one, the Corcoran's alleged general appearance occurred after the probate court's order was entered—just as in *Smith*. If the California Court of Appeal intended to distinguish *Smith* on the ground that the entry of a dispositive order is different than the entry of a judgment, the court failed to explain the materiality of such a distinction. The probate court exercised personal jurisdiction on the day that it ordered the Corcoran to deliver the Pascal works and $1 million before the Corcoran had an opportunity to object to jurisdiction. And the appellate court's citation to *In re Marriage of Obrecht* does nothing to save the probate court's unconstitutional arrogation. Nowhere in *Obrecht* did the court decide that a subsequent general appearance retroactively provides jurisdiction. *Obrecht* instead relied on the defendant's waiver of jurisdiction:

> If [the defendant] means that the court lacked a substantive basis on which to exercise jurisdiction over him, in that he lacked sufficient contacts with California, his argument fails because that issue was never tendered for determination until [three months after the defendant] had rendered it moot by making a general appearance and thereby submitting to the court's jurisdiction. If he were correct that he might have been able to establish an absence of jurisdiction when the prior order was made, the method by which to raise that issue would have been a motion to set aside that order. Having failed to bring such a motion—instead challenging the court's jurisdiction

> over the entire action—he has not laid the groundwork for this court to entertain his retroactivity argument.

199 Cal. Rptr. 3d at 447.

The *Obrecht* defendant's actions bear no resemblance to the Corcoran's. First, the defendant waived jurisdiction by making a general appearance *months* prior to raising jurisdiction; the Corcoran, by contrast, had not generally appeared before it raised jurisdiction in its motion for reconsideration.

Second, the *Obrecht* defendant lodged his jurisdictional objection to contest orders rendered *after* the initial order that he alleged was improper. In contrast, the Corcoran precisely followed the teaching of *Obrecht* by "rais[ing] [the jurisdictional] issue . . . [in] a motion to set aside [the challenged] order." 199 Cal. Rptr. 3d at 447. The Corcoran briefed jurisdiction in its first substantive filing.

The Corcoran's reading of *Smith* and *Obrecht* is consistent with the structure of California civil procedure more generally. Although a general appearance is "equivalent to personal service of summons," the court has jurisdiction over a party only "from the time summons is served." *See* Cal. Code Civ. Proc. § 410.50(a). If consent is the predicate for jurisdiction, the court has jurisdiction only from the time consent is given. The California Rules of Civil Procedure elaborate that "[j]urisdiction of the court over the parties . . . continues throughout *subsequent* proceedings in the action." *Id.* § 410.50(b) (emphasis added).

For these reasons, neither case cited by the Superior Court—*Cal. Overseas*

Bank v. French Am. Banking Corp., 201 Cal. Rptr. 400 (Cal. Ct. App. 1984), and *Knoff v. City etc. of San Francisco*, 81 Cal. Rptr. 683 (Cal. Ct. App. 1969)—supports the court's conclusion. Both cases were decided at a time when the state's waiver rule "was accurately described as a quagmire filled with traps for the unwary." *State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 104 Cal. Rptr. 3d 573, 581–82 (Cal. Ct. App. 2010) (internal quotation marks omitted).[6]

Even if the California Court of Appeal were correct *under California law* that the motion for reconsideration constituted a general appearance (and it did not), that would not suffice. When considering whether to enforce a foreign court's judgment, this Court may apply the foreign forum's jurisdictional standards only "if [its] standards comply with constitutional due process." *Frank E. Basil, Inc.*, 424 A.2d at 73 (citations omitted). "Therefore, [this Court's] task is to

[6] Bringing the state into closer conformity with federal practice, California courts now deem a defendant's actions to constitute a general appearance only *after* the court has resolved pending jurisdictional issues: "A party may answer, demur, move to strike and perform other actions related to the merits without fear of accidentally waiving a potentially meritorious attack on personal jurisdiction" because "recognition of a defendant's general appearance is triggered by the denial of the motion challenging jurisdiction." *Id.* at 582, 582 n.13. Here, the Corcoran had no opportunity to file a motion challenging jurisdiction where it had not been properly served before the Court *exercised* jurisdiction and granted the petition. The California Court of Appeal suggested that the Corcoran failed to file a timely motion to quash, *see* Petty, 2020 WL 4877542, at *11. But such a motion is not due until 30 days after service, which Petty never accomplished. Cal. Code Civ. Proc. §§ 418.10(a), (e)(3), 430.40(a). The probate court had already granted relief before any motion to quash was due. Hence, no general appearance could be "triggered" because the jurisdictional issue was never "finally resolved." *See id.*

determine, de novo, whether the California court's exercise of jurisdiction in this case is consistent with both California and Federal constitutional law regarding due process." *Id.* at 74; *see also Nader*, 43 A.3d at 334.

Due Process is a federal constitutional right governed by federal standards. "No local rule of practice can prevent [a litigant] from laying the appropriate foundation for the enforcement of its constitutional right by making a seasonable motion." *Michigan Cent. R. Co. v. Mix*, 278 U.S. 492, 496 (1929); *see also Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."). Consent is a constitutional requirement for a court to exercise jurisdiction over a defendant that is otherwise forbidden by the Due Process Clause. *Ruhrgas AG*, 526 U.S. at 584. Thus, jurisdiction cannot be exercised before consent is given. *See Burton v. Schamp*, No. 18-1174, 2022 WL 322883, at *8 (3d Cir. Feb. 10, 2022) (post-judgment consent to magistrate judge "puts the cart before the horse"; court must have "decision-making authority" by consent "at the time a judgment was entered"). Indeed, it is axiomatic that one cannot consent to something that has already occurred. *See, e.g.*, *United States v. Johnson*, 875 F.3d 1265, 1278 n.7 (9th Cir. 2017) (consent to Fourth Amendment search "after the search had already occurred, did not retroactively establish valid consent"); *In re Baltimore Emergency Servs. II, Corp.*, 432 F.3d 557, 563 (4th Cir. 2005)

("Consent is the sine qua non in derivative suits of this type. If such suits are to be allowed at all, the consent must occur before, not after, the action is filed.").

Furthermore, the theory of the California Court of Appeal places defendants on the horns of an impossible dilemma: (1) move for reconsideration of a merits order and waive the right to challenge jurisdiction, or (2) object to jurisdiction only and forfeit relief from the default judgment on the merits.[7] How can a defendant's choice in such a predicament be fairly called "consent" to jurisdiction that had already been exercised?

This Court should not enforce a judgment arising from a procedure at odds with Due Process, as a litigant should not be forced to give up his whole case to preserve the liberty right not to be hauled into a foreign court that has no personal jurisdiction over him. The motion for reconsideration (and *a fortiori* the appellate briefing) do not constitute consent to a jurisdiction already exercised.

Finally, a finding of consent would be particularly unfair in these circumstances. Petty was required to give notice with a properly served petition 30 days in advance of the hearing, and the probate court lacked power to waive that 30-day period. Cal. Prob. Code § 851(a), 851(d). Yet, no timely service occurred, and the probate court acted anyway. Second, Petty's failure to timely serve the

[7] *See, e.g.*, *Quiles v. Parent*, 239 Cal. Rptr. 3d 664, 674 (Cal. Ct. App. 2018) (challenges not raised below are forfeited on appeal)

supplement clearing the probate notes by local rule meant that the court was required to "continue the hearing, place the matter off calendar, deny the matter without prejudice, or take other action it deems necessary." Local Rule 4.4(c). The California Court of Appeal said that the probate court has authority to waive local rules, but the probate court did not waive the rule; it ignored it. And it is improper to find after-the-fact waiver after the Corcoran relied upon that rule to its prejudice. For all these reasons, the motion for reconsideration cannot be deemed retroactive consent to the jurisdiction that the probate court had already exercised.

D. The Corcoran is not subject to personal jurisdiction in California.

Tellingly, neither Petty nor any court that has reviewed this case has ever shown that a California court can properly exercise personal jurisdiction over the Corcoran. In fact, Petty did not even argue in the Superior Court that the Corcoran is subject to personal jurisdiction in California, aside from relying on the faulty general appearance reasoning described above. This Court must address the jurisdictional question *de novo* and answer it in the negative.

The Corcoran and the Trustees of the Corcoran were created by Congress and are resident only in the District. They are not residents of California. "[T]he paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). The

Corcoran, as a nonresident with no ties to California, can hardly be regarded as "essentially at home" in the state. *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011). Nor does it have the substantial, continuous, and systematic contacts required to support an exercise of specific jurisdiction.

Where the defendant is not "at home," "the forum State may exercise jurisdiction in only certain cases." *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1025 (2021). There must be an "affiliation between the forum and the underlying controversy." *Id.* (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017)). Although the Corcoran entered into the Agreement with the trustees of a California trust, a nonresident's agreement with a California resident does not by itself establish the requisite minimum contacts. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 478–79 (1985). Additionally, the Corcoran never availed itself of the benefits and protections of California law that would suffice for personal jurisdiction. For example, the Corcoran never agreed to litigate in California. Precisely the opposite: the parties to the 1994 Donation Agreement *crossed out* the California forum selection clause. JA78. This Court should decline enforcement of the foreign judgment for want of jurisdiction.

II. FULL FAITH AND CREDIT SHOULD HAVE BEEN GIVEN TO THE *CY PRES* ORDER.

If this Court finds that the California probate court had personal jurisdiction,

it still must address whether a judgment that conflicts with the *Cy Pres* Order can be squared with the Full Faith and Credit Clause. *See* U.S. Const. art. IV, § 1. Although Petty attached the *Cy Pres* Order and accompanying memorandum opinion to her original petition in the L.A. probate court, the probate court demonstrated no awareness of its existence. The probate court did not refer to the *Cy Pres* Order at the July 30, 2018 hearing or in its August 15, 2018 final order.

On appeal, the California Court of Appeal at least acknowledged the existence of the *cy pres* but erroneously concluded that there was no conflict between the *Cy Pres* Order and the probate court's default judgment. Instead, in a brief discussion, the appellate court asserted that "there was no conflict between the District of Columbia order and the probate court's judgment" because the Corcoran had not shown that the Distribution Agreement was another "applicable instrument" with the *Cy Pres* Order. *Petty*, 2020 WL 4877542, at *13–14. For this reason and others, the court *explicitly* declined to "reach [the] Corcoran's argument under the full faith and credit clause." *Id.* Despite the fact that the Court of Appeal declined to reach the Full Faith and Credit argument, or that the probate court did not mention it, the D.C. Superior Court concluded that the Corcoran's argument that the California courts did not accord the *Cy Pres* Order full faith and credit was "without merit." JA57. The Corcoran respectfully disagrees.

The effect of the *Cy Pres* Order is a question of District of Columbia law.

See, e.g., *Roche v. McDonald*, 275 U.S. 449, 451–52 (1928) (explaining that full faith means the effect a judgment would have in the state that rendered it).[8]

The base conflict with the *Cy Pres* Order is not difficult to understand. The *Cy Pres* Order deals with the distribution and disbursement of the Corcoran's gallery assets, and in particular, compels that Corcoran artworks remain in the District absent the meeting of certain conditions. The California judgment, by contrast, requires certain pieces of the same art governed by the *Cy Pres* Order to be delivered to California. Corcoran is thus faced with conflicting orders and judgments.

A. The 2014 *Cy Pres* Order and the California probate court's order cannot be reconciled.

The Corcoran starts with the undisputed facts. The D.C. Superior Court's 2014 *Cy Pres* Order "effectively eliminate[d] the Corcoran as an independent institution." JA297. The Superior Court issued the *Cy Pres* Order pursuant to D.C. Code Section 19-1304.13, which provides that courts may modify or terminate a trust under *cy pres* when its charitable purpose "is or becomes unlawful, impracticable, impossible to achieve, or wasteful." *Id.* The Superior Court may implement the goals of the *cy pres* laws "by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with

[8] The trial court's interpretation of the *Cy Pres* Order is a legal issue and so is reviewed *de novo*, *Maddox v. United States*, 745 A.2d 284, 289 (D.C. 2000).

the settlor's charitable purpose." *Id.* Indeed, the chief reason the Corcoran sought *cy pres* relief was its severe financial condition. JA258–60; JA279–82.

The D.C. Superior Court agreed that *cy pres* relief was warranted and exercised its equitable power to "eliminate[]" and "dissolve[] the Corcoran as an independent entity." JA297–98. This sweeping and comprehensive remedy required revising the Corcoran's original deed and "any other applicable instrument" "to the extent necessary" to effectuate the Corcoran's agreements with the National Gallery of Art and The George Washington University. JA249.

The Petty Trust has argued that the Donation Agreement is not within the *Cy Pres* Order's reference to "other applicable instruments" (which the California Court of Appeal also suggested), but that result makes little sense. The "other applicable instrument[s]" *must* include the Corcoran's then-existing liabilities and obligations related to its ownership and use of twenty-thousand artworks. The alternative is the absurdity that the Corcoran—which no longer exists as an independent entity, *see* JA297–99—must somehow continue to exhibit certain works in certain wings at certain times or otherwise continue as a going concern.

As a result of the *cy pres*, the NGA has custody of the Pascal works and GW owns the gallery building; the Corcoran could not display the works without further agreements from these institutions to do so. Thus, the 1994 Agreement between the Corcoran and the Tyler trust was one of the many agreements revised

by the *Cy Pres* Order. Appellee Petty has never explained why the Pascal donation, among numerous donations to the Corcoran, should be carved out of the *cy pres* and afforded some special status. Nor has any court. Indeed, other donors understood the role of the *cy pres*, which is why they sought to intervene and have their concerns addressed in the *Cy Pres* Order—not in satellite litigation.

Moreover, only the Corcoran's view of the 2014 proceedings is consistent with the goals and purpose of *cy pres* doctrine. As discussed, the reason for an institution to seek and for a court to grant *cy pres* relief is that the institution cannot continue to operate. *See generally* Allison Anna Tait, *Keeping Promises and Meeting Needs: Public Charities at a Crossroads*, 102 Minn. L. Rev. 1789 (May 2018). Here, because of its existing obligations, the Corcoran was running a budget deficit almost every year for over a decade. JA280. The *Cy Pres* Order accordingly transferred, modified, and/or extinguished the Corcoran's obligations, revising "any other applicable instrument" as necessary to realize the requested relief. JA249. If the Corcoran's prior obligations, such as the 1994 Donation Agreement, including with respect to not just the art but the return of funds, were enforced against the Corcoran, the institution would be no better off than if it had never sought *cy pres* relief in the first place.

Another major purpose of the *cy pres* proceeding was to unwind the Corcoran in an orderly and comprehensive manner. In light of its dire financial

situation, the Corcoran could have instead raised equitable defenses to enforcement actions as they arose, haphazardly litigating against every potential creditor one-by-one outside the purview of the District. But the Corcoran properly sought and received a comprehensive, government-approved solution—transferring its assets primarily to two D.C.-area institutions and then "effectively dissolv[ing]," ceasing to exist "as an independent entity." JA298.

A second provision of the D.C. court's *Cy Pres* Order strongly supports the Corcoran's view of its obligations today. The court explicitly considered then-operative restrictions on the Corcoran's assets and ordered the following:

> Pending the closing of the Agreements [with the National Gallery and George Washington University], the Trustees shall continue to operate the Corcoran Gallery of Art and the Corcoran College of Art + Design in a manner consistent with the restrictions applicable to the relevant assets, as they have been understood and implemented previously by the Trustees.

JA249–50. On the theory Petty espouses, the Corcoran retained all of its contractual obligations to former donors, making this provision redundant at best.

If the Corcoran's duties to operate the Corcoran Gallery were unchanged by the *Cy Pres* Order, then there was no need for the D.C. court to order that the Corcoran continue to fulfill those duties pending the ratification of the side agreements with the National Gallery. *Id.* The better reading is that the Corcoran's obligations to comply with donor restrictions on its assets were extinguished by the *Cy Pres* Order's approval of the side agreements. The court

needed to specify what should happen in the interim precisely because the *Cy Pres* Order upon ratification would override those prior agreements.

The California Court of Appeal concluded there was no conflict with the *Cy Pres* Order because the 1994 Donation Agreement, it concluded, could not be described by the term "any other applicable instrument" in the *Cy Pres* Order, *see Petty*, 2020 WL 4877542, at *14, because the Tyler trust was not a party to the *cy pres* proceeding. *Id*. The court below agreed. JA56–58. But this analysis shows a misunderstanding of the controlling DC law. The *Cy Pres* Order affected the legal rights and duties of multiple entities that were not parties to the *cy pres*, including, of course, the National Gallery and George Washington University.[9] D.C.'s procedures for *cy pres* do not require donors to be made parties. Under D.C.'s procedure, the institution seeking *cy pres* relief files a petition in Superior Court, naming the District of Columbia (through its Attorney General) as the respondent. D.C. Code § 19-1304.13. The Attorney General represents the public interest and that of donors. Under D.C. law, if a particular charitable purpose "becomes unlawful, impracticable impossible to achieve or wasteful" upon the court's

[9] Again, the D.C. Superior Court accepted the California court's faulty reasoning, stating "[t]here is no indication in the docket of the 2014 *cy pres* proceedings that the Trust was ever before this Court." JA57. But there was no need to look at the *cy pres* docket; the Corcoran has not argued that the trust appeared in the *cy pres* action because that fact has no bearing on the Corcoran's argument that the *cy pres* resolved its contractual obligations, such as its alleged duties to the Tyler trust.

determination, the trust property does not revert, and the court may "apply cy pres to modify or terminate the trust." D.C. Code § 19-1304-13. Here, the Superior Court, after full trial, determined to apply *cy pres* and applied the determination to all property owned or held by The Corcoran.

Another suggestion from the California appellate court was that the side agreements accompanying the *Cy Pres* Order stated that the National Gallery would adhere to certain restrictions applicable to the artworks. *Petty*, 2020 WL 4877542, at *14. Yet the California Court's inference—that the Corcoran must therefore send the Pascal works to Susanne Jill Petty and pay one million dollars—is factually mistaken and flawed. As discussed above, the *Cy Pres* Order "deemed to be revised" any instrument at odds with the side agreements, which comprehensively specified the distribution process for works owned by the Corcoran. The *Cy Pres* Order specifically notes that under the approved agreements, "any existing donor restrictions that are applicable to the particular assets will remain in place and be fulfilled by NGA or GW." JA269 (internal quotation mark omitted). Further, a supplement to the Accession Agreement with the National Gallery of Art expressly barred the removal of any works without the permission of the D.C. Attorney General. *Id.* This contract provision was incorporated into the *Cy Pres* Order when the court approved the Corcoran's agreements with the National Gallery. The distribution of art and other Corcoran

assets is governed, in other words, by the *Cy Pres* Order and the agreements with the National Gallery. At a minimum, the Corcoran is prohibited from removing the artworks at issue from Washington, D.C., absent the express authorization of the D.C. Attorney General, which means the Corcoran cannot simultaneously comply with the *Cy Pres* Order and the erroneous California judgment.[10]

For its part, the Court below here repeated the California court's brief treatment of the Cy Pres Order, asserting without elaboration that the 1994 Agreement was not among the instruments revised by the *Cy Pres* Order. *See* JA57–58. The Court then stated incorrectly that the Pascal works were not subject to the *Cy Pres* Order because they had not been accessioned by the NGA. *Id.*[11] First, the *Cy Pres* Order included all works owned or controlled by the Corcoran, whether they had been accessioned by the Corcoran at the time of the *cy pres* (more than 1,700 were not) or were to be accessioned by the NGA thereafter. Under the Order, many works controlled by the Corcoran were to be distributed to

[10] The court below suggested in passing that the conflict between the *Cy Pres* Order and the California judgment is moot because the Attorney General does not oppose removal of the works. *See* JA58 n.5. This is incorrect. The AG must formally authorize the removal of the artworks from the District, JA269; JA292; JA297, n.30, and there is no evidence that he has. Further, even if the AG were to approve, it would not cure the fundamental conflict between the *Cy Pres* Order and the California judgment which also included a stiff monetary component.

[11] Even if the court's view of the *Cy Pres* Order were correct, this argument would entail that the Pascal *works* are not governed by the *Cy Pres* Order, but it would have no implications for the cash gift.

other institutions. The Superior Court's reasoning entails that the *Cy Pres* Order purported to dissolve and unwind the Corcoran as an independent entity, "leaving behind only an untethered Board of Trustees to advise," JA297, yet somehow failed to decide the fate of thousands of artworks that were not accessioned by the NGA specifically. Of course, the *cy pres* court's thoughtful and comprehensive dissolution of the Corcoran and distribution of its assets did no such thing. *See* JA267–69. A core point of the *Cy Pres* Order was to deal with all the works held or controlled by the Corcoran. *Id.*

All told, the California courts and the Court below have yet to meaningfully address the conflict between the *Cy Pres* Order and the California judgment. One (the *Cy Pres* Order) bars the removal of paintings from the District absent the meeting of certain conditions whereas the California judgment requires it. The California probate court failed to even mention the *Cy Pres* Order; the California Court of Appeal declined to consider the issue but offered passing thoughts that failed to take seriously the conflicting obligations its affirmance put the Corcoran in. The point of the *cy pres* laws and the import of the *Cy Pres* Order was to deal with the distribution of the art (via *cy pres* distribution to other District museums); the California judgment does the same (by ordering the art returned to California). Subjecting the Corcoran to the California court's judgment would therefore undermine the authority of D.C. courts to modify a charitable trust under the

Uniform Trust Act of 2003, D.C. Code § 19-1304.13; *see* JA272.

In sum, the California judgment conflicts with at least three provisions of the D.C. court's order: (1) the provision revising all other legal instruments, (2) the provision ordering the Corcoran to honor its commitments in the interim period before ratifying its agreement with the National Gallery, and (3) the provisions ordering compliance with the side agreements, specifying that the Attorney General (or another *cy pres*) ultimately controls the distribution of the Corcoran's works. Thus, this Court must decide whether to enforce the D.C. Superior Court's *Cy Pres* Order or the erroneous and conflicting California judgment.

B. This Court should hold that the D.C. Superior Court's *Cy Pres* Order exhaustively determined the Corcoran's obligations and decline to enforce a subsequent conflicting foreign judgment.

Forced to choose whether to enforce the lawful *Cy Pres* Order of the D.C. Superior court or the conflicting default judgment of the California probate court, this Court should choose the former. A collateral attack in a foreign state probate court is not an appropriate mechanism to undo the orderly resolution of a D.C. trust. *See, e.g.*, *Israel v. Nat'l Bd. of Young Men's Christian Ass'n*, 369 A.2d 646, 651 (R.I. 1977) (holding that a litigant could not contest the merits of a New York *cy pres* order in Rhode Island courts); *Union Pacific R. Co. v. Bolton*, 840 F. Supp. 421, 426 (E.D. La. 1993) (assigning error to court that issued a ruling in conflict with a prior adjudication by a foreign court). This Court should reject what is

effectively an appeal of the 2014 *Cy Pres* Order nearly a decade later.

"Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted." *Alaska Packers Ass'n v. Indus. Acc. Comm'n*, 294 U.S. 532, 547 (1935); *id.* at 550 ("No persuasive reason is shown for denying to [a State] the right to enforce its own laws in its own courts . . . ."). This basic principle of state sovereignty applies no less to a state's enforcement of the court orders of its own judicial system. Thus, for Petty's California judgment to have "the force of a judgment in [D.C.], it must be made a judgment there, and can only be executed in the latter *as its laws may permit*." *Lynde v. Lynde*, 181 U.S. 183, 187 (1901) (quoting *McElmoyle, for Use of Bailey v. Cohen*, 38 U.S. 312, 325 (1839)) (emphasis added). As argued above, the law of D.C., which permitted the *cy pres* proceeding and gives the resultant order full effect, does not permit the Corcoran to obey the California judgment.

In the context of conflicting state court judgments specifically, "[t]he rule of primacy to the first final judgment is a necessary incident to the requirement of full faith and credit." *Hanson v. Denckla*, 357 U.S. 235, 256 (1958). Faced with conflict between a domestic and a foreign judgment, courts apply the rule that "[a] foreign judgment will not be given greater effect tha[n] a domestic judgment on the same issue." *Porter v. Porter*, 416 P.2d 564, 569 (Ariz. 1966). No countervailing precedent in D.C. says otherwise. Here, the first final judgment was the 2014 *Cy*

Pres Order. It would undermine the fundamental purpose of the Full Faith and Credit Clause if the California probate court could ignore the *Cy Pres* Order through a default judgment, and yet have that that default judgment trump the *Cy Pres* Order in the forum that issued it. *See id.* ("In determining the correctness of Delaware's judgment we look to *what Delaware was entitled to conclude* from the Florida authorities at the time the Delaware court's judgment was entered." (emphasis added)). Rather than bring suit in California, Petty should have petitioned the Superior Court for modification of the *Cy Pres* Order or at least a determination that her contract clam is outside the Order and may be enforced.

The California probate court was constitutionally required to accord full faith and credit to the D.C. *Cy Pres* Order, which was fully litigated and finally decided. Even if the California courts would have resolved the Corcoran's existing contractual obligations differently, the California courts were required to defer to the merits determinations in the *Cy Pres* Order. *See, e.g.*, *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) ("But, as the jurisdiction of the [State A] court is not open to dispute, the judgment cannot be impeached in [State B] even if it went upon a misapprehension of [State B] law."). The L.A. probate court, perhaps unaware of the *Cy Pres* Order, failed to follow both black-letter constitutional law and California law according full faith and credit to foreign judgments. *See* Cal. Civ. Code § 1913 ("The effect of a judicial record of a sister state is the same in this

state as in the state where it was made."); *see also R.S. v. PacifiCare Life & Health Ins. Co.*, 128 Cal. Rptr. 3d 1, 6–7 (Cal. Ct. App. 2011); *In re Estate of Hart*, 209 Cal. Rptr. 272, 275 (Cal. Ct. App. 1984). Because the probate court flouted the D.C. Superior Court's *Cy Pres* Order in violation of the Full Faith and Credit Clause, this Court should refuse to enforce the unconstitutional order and instead give full effect to the lawful one of the D.C. Superior Court.

CONCLUSION

This Court should reverse the Superior Court's order and hold that the California probate court's judgment ordering the transfer of the Pascal works and $1 million is unenforceable.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served via the court's e-filing system this 3rd day of March, 2022.

/s/Charles A. Patrizia
Charles A. Patrizia

March 3, 2022

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

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21-CV-0695

March 3, 2022
Date