No. _____

In the
Supreme Court of the United States

WAYSIDE CHURCH, et al.,
Petitioners,

v.

VAN BUREN COUNTY, MICHIGAN, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When Wayside Church fell behind on the property taxes for its youth camp, Van Buren County foreclosed and sold the youth camp for $206,000. After satisfying the church's $16,750 in penalties, taxes, and fees with the proceeds from the sale, the County pocketed the remaining 91% of the property's value as a windfall required by Michigan's property tax law. Likewise, the County kept the surplus when it seized and sold Myron Stahl's land and Henderson Hodgens's home to pay their small tax debts. Because there is no clear state court remedy for dispossessed property owners to recover the surplus proceeds from tax sales, the church, Stahl, and Hodgens filed a Fifth Amendment takings claims in federal court. But a divided Sixth Circuit panel held that *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), the Tax Injunction Act, and comity barred federal jurisdiction.

The questions presented are:

1. Does a local government violate the Takings Clause when it takes and sells tax delinquent property and keeps the surplus profit as a windfall?

2. Should the Court overrule or limit the portion of *Williamson County* that requires a property owner to sue in state court to "ripen" a federal takings claim, as suggested by many Justices of this Court? *See Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. San*

Francisco, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in judgment).

3. Do the Tax Injunction Act and comity bar a federal court from hearing a claim that challenges the uncompensated retention of funds that exceed a tax debt but does not challenge the taxes or debt itself?

LIST OF ALL PARTIES

The parties to the judgment from which review is sought are the Petitioners, Wayside Church, Henderson Hodgens, and Myron W. Stahl, and the Respondents, Van Buren County and Karen Makay. All were parties in the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Wayside Church, an Illinois not-for-profit (ecclesiastical) corporation, has no parent corporation or corporate stock.

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PETITION FOR A WRIT OF CERTIORARI

Wayside Church, Henderson Hodgens, and Myron Stahl respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is reported at *Wayside Church v. Van Buren County*, 847 F.3d 812 (6th Cir. Feb. 10, 2017), and is attached here as Appendix (App.) A. The opinion of the District Court was not reported, and is attached here as App. B. The order denying rehearing *en banc* is attached as App. C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 1983 and the Fifth Amendment to the United States Constitution. The Court of Appeals for the Sixth Circuit entered judgment on February 10, 2017. App. A. That court denied Petitioners' petition for rehearing *en banc* on March 15, 2017. App. C. This Court granted an extension to file the Petition for a Writ of Certiorari to and including July 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The Tax Injunction Act (TIA), 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The pertinent portions of the General Property Tax Act of the State of Michigan, Mich. Comp. Laws § 211.1, *et seq.*, are reproduced in Appendix D.

INTRODUCTION

This case challenges a gross injustice in the administration of Michigan's tax laws—the local governments' practice of filling their coffers with the surplus proceeds from the sale of tax delinquent homes and other properties. By keeping profits from property tax sales far beyond what is actually owed in taxes, local governments reap a windfall while the subject owners lose their property and any excess value—equity—that accrued during their ownership.

The Takings Clause can and should provide a "just compensation" remedy for this taking of private equity. Yet, in this case, the lower court refused to provide that remedy, wrongly believing that this Court's precedent bars federal judicial review of this takings challenge without prior state court litigation.

The dispute stems from the implementation of Michigan's General Property Tax Act (Act). The Act requires local governments to seize title to tax delinquent properties, sell the property, and keep all the profits—no matter how valuable the property or how small the tax debt. *See, e.g.*, *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546, at *2 (E.D. Mich. June 4, 2015). Each year, Michigan counties use this authority to take thousands of valuable properties, the sale of which produces great profits exceeding the underlying tax debts. *See* Plaintiffs' Statement of Material Facts Not in Dispute, No. 1:14:cv-01274-PLM, ECF No. 16-2, ¶¶ 18-20. There is no procedure in the Act allowing people to recover the excess tax sale proceeds from the sale of their properties.

Michigan's Act is out of step with some states that protect distressed property owners, requiring that after paying the taxes, penalties, interest, and fees, local governments refund the remainder of sale proceeds to the former landowners.[1] But, more importantly, it is out of step with the Takings Clause's "just compensation" mandate. Because this

[1] *See, e.g.*, Ala. Code § 40-10-28; Fla. Stat., § 197.582; Ga. Code Ann. § 48-4-5; Me. Rev. Stat. tit. 36, § 949; 72 Pa. Stat. § 1301.19; 72 Pa. Cons. Stat. Ann. § 1301.2; S.C. Code Ann. § 12-51-130; Tenn. Code Ann. § 67-5-2702; Va. Code Ann. § 58.1-3967; Wash. Rev. Code Ann. § 84.64.080.

constitutional guarantee should ensure that Michigan property owners receive tax sales proceeds that are rightfully theirs (while the government gets what it is owed), Petitioners filed a takings claim in federal court. But Petitioners were tossed out of court when the Sixth Circuit concluded their takings claim for return of their equity was not ripe under *Williamson County*, 473 U.S. at 194-96. That precedent generally requires federal takings plaintiffs to sue for compensation in state courts before raising a federal takings claim. *Id.*

Justices of this Court have soundly criticized *Williamson County*'s "state litigation" rule on several occasions and called for its reconsideration. *See Arrigoni Enterprises*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment). A dissenting judge in this case echoed that position, while emphasizing that the governmental action challenged here is akin to "theft." App. A-21, 24-25 (Kethledge, J., dissenting).

This case accordingly raises several important constitutional issues. The core issue is whether the Takings Clause permits governments to pocket the excess proceeds of property tax sales. This Court recognized this issue and reserved it for resolution, *see Nelson v. City of New York*, 352 U.S. 103, 110 (1956), but has to yet to decide it. It should do so after first addressing the persistent, vexing issue of whether property owners must prosecute a suit in state court before seeking to protect their federal "just compensation" rights in federal court. Finally, there

is an issue, on which courts conflict, of whether the TIA and related principles bar federal courts from hearing challenges to the taking of excess proceeds from tax sales. All three are worthy of review.

STATEMENT OF THE CASE

A. Van Buren County Takes Petitioners' Property Pursuant to State Law

1. The Petitioners

The Petitioners—a church and two individuals—experienced financial problems during the last recession, and lost their properties as a result. Based in Chicago, Wayside Church is a small church that owned a parcel of land in Western Michigan. It traditionally used the parcel for a youth camp. Myron Stahl owned a residential lot in Paw Paw, Michigan, where he intended to build his retirement home. Henderson Hodgens, a bus driver, owned a home and small farm in Geneva Township, the same Michigan community in which he was raised. All fell on hard times and could not pay their 2011 property taxes. The County subsequently took the properties pursuant to Michigan's General Property Tax Act (Act), so it could sell them and collect the delinquent taxes. App. A-3-4.

2. Sale of the Properties Under the Act and the Retention of Excess Proceeds

Under the Act, a landowner's property becomes "delinquent" if he fails to pay taxes levied in the previous year. Mich. Comp. Laws § 211.78a(2). If the landowner fails to pay the outstanding taxes, fees, and penalties, then one year later, the state declares the property "forfeited," although the delinquent property owner keeps title and all rights of possession. Mich.

Comp. Laws § 211.78g(1). If all taxes are not paid one more year later, the county will foreclose, and then auction the property. *Id.* The Act prohibits local governments from refunding to the former owner any excess proceeds from tax sales. *See* Mich. Comp. Laws § 211.78m(8).[2]

On August 5, 2014, the County sold Petitioners' properties at a tax foreclosure sale. The sales generated significantly more cash than the debts owed on each of the properties. The County sold Wayside Church's parcel for $206,000 to satisfy a $16,750 debt, including all penalties, taxes, and fees. App. A-4. It sold Stahl's property for $68,750 to pay a $25,000 debt. *Id.* It sold Hodgens's property for $47,750 to pay a $5,900 debt. *Id.*

In all, the County took in $274,850 in after-tax debt profits from the sale of Petitioners' properties. It did not refund this money to the former property owners; it kept it. *See* Mich. Comp. Laws § 211.78m(8). This is not an uncommon situation.[3]

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[2] The Act requires the surplus to be paid into the delinquent tax revolving fund, which pays for administration, fees, and litigation costs arising from all tax foreclosures in the County. Mich. Comp. Laws § 211.78m(8)(a)–(*l*). Surplus funds may later be transferred to the County's general fund. Mich. Comp. Laws § 211.78m(8)(h).

[3] *See, e.g*, *Town of Barnstable v. Unknown Owners*, 62339, 2004 WL 2191215, at *2 (Mass. Land Ct. Sept. 30, 2004); *Rafaeli*, 2015 WL 3522546, at *2; Emily L. Mahoney & Charles T. Clark, *Arizona owners can lose homes over as little as $50 in back taxes*, The Arizona Republic, June 12, 2017 http://www.azcentral.com/story/money/real-estate/2017/06/12/tax-lien-foreclosures-arizona-maricopa-county/366328001/; Les Christie, *The other foreclosure crisis: Losing a home over $400 in back taxes*, CNN Money, July 11, 2012,

Each year, the Act compels thousands of Michigan property owners to cede all equity in excess of their tax debt to the government upon the forced sale of their property. *See* Plaintiffs' Statement of Material Facts Not in Dispute, ECF No. 16-2, ¶¶ 18-20. Several other states have similar tax statutes that allow government to confiscate excess proceeds from tax sales. *See* Ariz. Rev. Stat. § 42-18303; Minn. Stat. Ann. § 280.29; Mont. Code Ann. § 15-17-322; N.D. Cent. Code Ann. § 57-28-20; *Kelly v. City of Boston*, 204 N.E.2d 123, 125 (Mass. 1965).

B. Petitioners Seek Relief in Federal Court

Objecting to the County's appropriation of the excess tax sale proceeds, Petitioners challenged the County's actions as an unconstitutional taking of private property. Because Michigan law indicated that constitutional damages claims arising from the Act may not be remedied in state court,[4] Petitioners

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http://money.cnn.com/2012/07/10/real_estate/tax-liens/index/ht index.htm; David, Murray, *Profiting on misfortune: Tax liens, home loss and county finance*, Great Falls Tribune, Sept. 29, 2016, http://www.greatfallstribune.com/story/news/local/2016/09/30/profiting-misfortune-tax-liens-home-loss-county-finance/91308830/; Michael Sallah, et al., *Left With Nothing*, The Washington Post, Sept. 8, 2013 http://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/?utm_term=.3b0d3c3cc326 (describing effect of D.C.'s law prior to recent legislative amendments).

[4] The Act appears to grant the Michigan Court of Claims with exclusive jurisdiction over an action seeking monetary compensation for a tax foreclosure under the tax statute. Mich. Comp. Laws § 211.78*l*(2) (whenever a party seeks monetary compensation for a tax foreclosure under the Act, "the court of claims has original and exclusive jurisdiction"). Likewise, the

filed their takings claims in the U.S. District Court for the Western District of Michigan.

Petitioners' lawsuit, a putative class action, alleged that the County effected an unconstitutional taking when it kept the surplus proceeds from the sale of foreclosed private properties. Wayside Church, Stahl, and Hodgens sought declaratory relief and damages pursuant to 42 U.S.C. § 1983. Petitioners' suit did not object to the foreclosure and sale of their homes to pay their penalties, late taxes, interest, and fees. Rather, it objected to the County taking and keeping more than necessary to satisfy their tax debts.

C. The Decisions of the District Court and Sixth Circuit

The district court granted the County's motion to dismiss the case. The court agreed with Petitioners that the takings claims were ripe under the state exhaustion prong of *Williamson County*, because Michigan does not provide "'reasonable, certain and

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Michigan Court of Claims Act sends all statutory or constitutional claims against any subdivision or instrumentality of the state to the Court of Claims. Mich. Comp. Laws § 600.6419(1)(a); *Lim v. Mich. Dep't of Transp.*, 423 N.W.2d 343, 345 (Mich. Ct. App. 1988); *see, e.g., Wayne Cty. Bd. of Comm'rs v. Wayne Cty. Airport Auth.*, 658 N.W.2d 804, 828 (Mich. Ct. App. 2002) (counties are instrumentalities of state); *Pomann, Callanan & Sofen*, 419 N.W.2d 787, 789 (Mich. Ct. App. 1988) (court of claims has exclusive jurisdiction over "all claims against the state and its instrumentalities for money damages") (citation omitted). The Court of Claims Act, however, sends claims with federal constitutional remedies to federal court. Mich. Comp. Laws § 600.6440 ("No claimant may be permitted to file a claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts . . . .").

adequate [procedures] . . . at the time of the taking to seek compensation.'" App. B-10–11 (quoting *Williamson County*, 473 U.S. at 186, 194) (brackets and ellipses in original). For the same reason, the court held that the TIA and comity did not bar Petitioners' takings claims. *See* App. B-14.

Nevertheless, the district court concluded that Petitioners failed to state a viable takings claim on the merits. The court specifically held that Petitioners, "as delinquent taxpayers, have no 'property interest' under state law for any surplus equity at the time of the tax sale." App. B-19. In other words, Petitioners could not invoke the Takings Clause against retention of excess tax proceeds, because the court believed their property and related interests ceased to be private at an earlier time—when they failed to pay their taxes and suffered foreclosure. *See id*.

Petitioners appealed the district court's decision to the Sixth Circuit and the County cross-appealed. By a 2-1 vote, the Sixth Circuit panel affirmed the lower court decision, but on procedural grounds, rather than on the merits. The court held that *Williamson County,* the TIA, 28 U.S.C. § 1341, and comity principles barred litigation of Petitioners' takings claims in federal court. App. A-12–13.

With considerable effort, the court initially construed several conflicting state remedial provisions to allow a takings suit against the Act in state court. App. A-17–18. With this mistaken premise in place, the court then held that Petitioners could and should have sued in state court under *Williamson County*'s ripeness doctrine and that failing to do so rendered their claims unripe in the federal court. *Id*. at 9-11. Although the Sixth Circuit

recognized that it could decline to apply *Williamson County*'s state litigation doctrine, given this Court's characterization of the doctrine as a prudential and not a jurisdictional ripeness hurdle, the court below refused to do so because it believed the state litigation rule "serve[s] important federalism interests." App. A-10.

The Sixth Circuit panel also held that the TIA and comity barred Petitioners' takings claims. App. A-20. The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Although Petitioners made clear they were not challenging tax obligations under the Act or the collection of taxes, but only retention of surplus proceeds from tax sales, the court held that the TIA applied and barred federal jurisdiction. *See* App. A-4, 20

Judge Kethledge dissented, calling the County's confiscation of tax sale profits the "sort of behavior [that] is called theft." App. A-20. He rejected the conclusion that Petitioners' federal takings claim was not proper in federal court, stating, "Congress has granted us jurisdiction over that claim. We have a strict duty to exercise that jurisdiction." App. A-21. In so doing, Judge Kethledge specifically objected to the majority's preclusive application of *Williamson County*. App. A-21. In addition to concluding that such an application was improper in this case due to uncertainty about state remedies, Judge Kethledge suggested that the entire *Williamson County* doctrine is flawed. App. A-21–25. In his view, it needlessly "undermine[s] the adjudication of federal takings

claims against states and local governments." App. A-25.

By refusing jurisdiction, the panel decision allows local governments to continue reaping a financial windfall at the expense of thousands of ordinary foreclosed homeowners, leaving those owners without a certain judicial avenue to vindicate their constitutional rights. It elevates process over substance, and benefits neither the courts nor litigants.

Wayside Church, Stahl, and Hodgens therefore respectfully petition this Court for a writ of certiorari to review the decision below.

REASONS FOR GRANTING THE PETITION

I

THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER GOVERNMENT MAY CONSTITUTIONALLY POCKET THE EXCESS PROCEEDS OF HOME SALES DESIGNED TO SATISFY A TAX DEBT

The fundamental issue in this case is whether local government violates the Fifth Amendment's Takings Clause when it keeps the surplus funds generated from the sale of foreclosed and tax-indebted homes. This sort of government action is a nationwide issue and the constitutional takings issues it raises are important and fit for review. Although the Court's takings precedent indicates that such a scheme is indeed unconstitutional, lower courts are in conflict on the issue. It is time for the Court to directly address the issue of whether the government unconstitutionally takes private property when it

keeps the excess proceeds from the sale of tax-indebted properties. The outcome will affect the lives and livelihoods of countless financially struggling property owners.

A. Retention of Surplus Tax Sale Proceeds, i.e., Private Equity, Violates Modern Takings Principles

As previously noted, this Court acknowledged a takings issue arising from retention of surplus tax proceeds in *Nelson*, but declined to address it. In *Nelson*, the City of New York took the plaintiffs' valuable property via state tax-sale procedures to pay relatively small overdue water bills. *See* 352 U.S. at 105-06. The dispossessed owners brought a takings challenge, because the City kept the excess proceeds from these sales. *Id.* at 109. The Court held that no taking occurred, because the New York statute provided dispossessed owners with the opportunity to recover the surplus proceeds by raising a claim for the surplus in the foreclosure proceedings, and the plaintiffs failed to avail themselves of that. *Id.* at 110. In so holding, the *Nelson* Court reserved the question raised here, of whether government effects a taking if the statute fails to provide a means to reimburse surplus funds. *See id.*; *Coleman through Bunn v. D.C.*, 70 F. Supp. 3d 58, 77-78 (D.D.C. 2014) (*Nelson* "expressly reserved" the question at issue here).

Since *Nelson*, the issue of governmental appropriation of excess tax sale proceeds has not abated. At the same time, the Court has developed a robust body of physical takings precedents indicating that laws like Michigan's are entirely inconsistent with the Takings Clause and the principles of justice that underlie it.

1. Takings Law

The Takings Clause prohibits the government from taking private property for a public use without paying just compensation. U.S. Const. amend. V. When government action invades a protected property interest, courts focus on the nature of the governmental action to determine whether the action effects a taking. While regulatory actions that restrict the use of property are weighed under a balancing test, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), actions that physically invade or occupy a property interest are subject to a strict, *per se* test. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). An uncompensated physical taking violates the Constitution, regardless of the circumstances of the taking or its economic impact. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

The most obvious example of a *per se* physical taking occurs when the government takes actual possession of property. But it also occurs when the government redefines a pre-existing private interest as public property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Government may regulate property rights, but it cannot "by *ipse dixit* . . . transform private property into public property without compensation." *Id.*; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("[T]he government's power to redefine" property rights is "necessarily constrained" by the Constitution.).

2. The Confiscation of Windfall Tax Profits Conflicts With Takings Precedent

When the government applies a law, like the Act in this case, to retain funds from foreclosed property sales that exceed outstanding tax debts, it invades and unconstitutionally takes a protected property interest.

The Takings Clause protects more than just real property. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2425 (2015). Indeed, this Court has held that it applies to a diverse array of interests, including personal property, money, interest on money, liens, mortgages, and homes. *See, e.g.*, *Horne*, 135 S. Ct. at 2426 (personal property); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2601 (2013) (money and real property); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 168 (1998) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (mortgages). This Court has also held that the Takings Clause protects the surplus proceeds produced from a tax sale in cases where a statute recognizes entitlement to those proceeds. *United States v. Lawton*, 110 U.S. 146, 150 (1884) ("To withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and deprive him of his property without due process of law or take his property for public use without just compensation.").

The property interest at issue here is privately generated and owned equity. "Equity" is, by definition, the fair market cash value of the property after deduction of all encumbering debts (like tax debts). *See Stewart v. Gurley*, 745 F.2d 1194, 1195

(9th Cir. 1984). Ultimately, "equity" is money directly tied to the use and enjoyment of private property. And, as noted above, this Court has clearly indicated such interests are protected by the Takings Clause. *Koontz*, 133 S. Ct. at 2600; *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 529 (1998) (taking where government inflicts retroactive monetary liability on company) (O'Connor, J., announcing decision of Court); *Phillips*, 524 U.S. at 172 (money and interest accrued thereon is property within the meaning of the Takings Clause); *Lawton*, 110 U.S. at 150.

No one challenges the government's ability to sell foreclosed properties to collect a valid tax debt. That debt is the government's to collect. But the government has no legitimate entitlement or claim to equity that exceeds the owner's tax debt. That equity was created during and through private ownership of the subject property and is rightly treated as private property. *Phillips*, 524 U.S. at 168; *Farnham v. Jones*, 19 N.W. 83, 85 (Minn. 1884) ("[T]he right to the surplus exists independently of such statutory provision . . . ."). Thus, when the government confiscates the surplus proceeds from a tax sale, it causes a quintessential *per se*, physical taking. *See Webb's Fabulous Pharmacies*, 449 U.S. at 164; *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (confiscation of privately owned interest is a taking).

The system challenged here is also inconsistent with a line of takings cases from this Court holding that governments violate the Fifth Amendment when they define away pre-existing property interests. In *Webb's Fabulous Pharmacies*, 449 U.S. at 158-59, the Court considered whether it was a taking for a state

to keep the interest earned on private, principal funds which had been deposited with a court. It answered in the affirmative, and in so doing held that the Takings Clause cannot be avoided by the expedient of converting private funds into public funds: "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. To the same effect is *Phillips*, 524 U.S. at 167 ("at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests"), and *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) (states effect a taking when they re-characterize private property as public property).

In this case, the district court seemed to believe that there could not be a taking of private property because surplus equity in tax-indebted properties became "public" property at the time of foreclosure and thus it retained no *private* funds. *See* App. B-18–19. Yet, this is exactly the sort of state-authored transformation of a private interest to public property that the Court has said the Takings Clause will not permit. *Id.*; *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

Ultimately, the scheme at issue here violates the "fairness and justice" principles at the heart of the Takings Clause. *Armstrong*, 364 U.S. at 49. Justice is the government collecting only what it was owed. Fairness is the return of any excess equity monies to those who have had their properties taken and sold. Neither exists here. As a result, the County wrongly

appropriates a windfall from financially struggling property owners for no legitimate reason—swallowing up life savings to collect smaller debts. The Court should take the case to confirm that the Takings Clause forbids the government from leveraging the tax collection system to keep private monies that are not part of any legitimate tax debt.

B. The Court Should Take This Case To Settle a Split Among Federal and State Courts

Michigan is hardly the only state with laws that allow government entities to keep the excess proceeds derived from the forced sale of tax-indebted property. Arizona, Minnesota, Massachusetts, North Dakota, and Oregon have similar confiscatory laws. Ariz. Rev. Stat. § 42-18303; Minn. Stat. Ann. § 280.29; Mont. Code Ann. § 15-17-322; N.D. Cent. Code Ann. § 57-28-20; *Kelly v. City of Boston*, 204 N.E.2d at 125.

Unfortunately, courts reviewing such schemes have failed to reach a consensus as to their constitutionality. Courts in New Hampshire, Vermont, Idaho, Texas, and the District of Columbia have held that local government effects a taking without just compensation when it confiscates more property than owed in taxes, penalties, and fees.[5]

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[5] *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) (statute granting government surplus proceeds from tax sales violates state constitution's Takings Clause); *Bogie v. Town of Barnet*, 270 A.2d 898, 903 (Vt. 1970) (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation, contrary to . . . Vermont Constitution"); *Moore v. Rogers*, 99 S.W. 1023, 1024 (Tex. 1907) (excess belonged to former property owner); *Bailey v. Napier*, 117 S.W. 948, 949 (Ky. 1909) ("[I]f a horse worth $50 is

But courts in Oregon, Maine, and Wisconsin have rejected similar takings claims. *See, e.g.*, *Reinmiller v. Marion County, Oregon*, No. cv-05-1926-PK, 2006 WL 2987707, at *3 (D. Or. 2006); *City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Me. 1974); *Ritter v. Ross*, 558 N.W.2d 909, 912 n.7 (Wis. App. 1996). In so doing, many of these courts misconstrued this Court's opinion in *Nelson*.[6] As discussed above, *Nelson* did not hold that laws confiscating excess tax proceeds are constitutional; only that they pass muster *if* they allow reimbursement, 352 U.S. at 110, a condition that does not apply to Michigan's Act and most other suspect tax sale statutes.

This Court should take this case to resolve the confusion among the lower courts on whether the

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levied on for a tax bill of $5, the sheriff or tax collector may sell the horse, and out of the proceeds pay the taxes and return to the owner of the horse the remainder."); *Anderton v. Bannock County*, No. 4:14-CV-00114-BLW, 2015 WL 428069, at *5 (D. Idaho 2015) (plaintiffs may plead takings claim where government keeps surplus proceeds from tax sale); *Moore v. Rogers*, 99 S.W. at 1024; *Coleman*, 70 F. Supp. 3d at 80 (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman II,* No. 13-01456, ECF 60 at 8 (June 11, 2016 Order) (recognizing district law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits).

[6] A few courts upholding tax sale statutes against constitutional challenges also relied on *Balthazar v. Mari Ltd.*, 396 U.S. 114 (1969). But it is also inapposite. That decision was a summary affirmance of a lower court decision dealing with a different tax sale scenario—the sale of property for less than market value. It has no precedential value here. *Hohn v. United States*, 524 U.S. 236, 260 (1998) (Scalia, J., dissenting) (summary affirmance "carrie[s] little more weight than denials of certiorari"); *Coleman*, 70 F. Supp. 3d at 79.

Takings Clause permits states to keep the excess proceeds—private equity—generated by the sale of tax delinquent properties.

II

THIS CASE RAISES AN IMPORTANT ISSUE AS TO WHETHER THE COURT SHOULD RECONSIDER *WILLIAMSON COUNTY*'S DEMAND THAT PROPERTY OWNERS EXHAUST STATE COURT PROCEDURES TO RIPEN FEDERAL TAKINGS CLAIMS

Despite the clear injustice of this case, the Sixth Circuit refused to decide the merits of the Petitioners' federal takings claims, electing to dismiss the controversy under *Williamson County*'s state-litigation requirement. App. A-18. This application of *Williamson County*'s oft-criticized[7] ripeness doctrine robs property owners like Wayside Church, Stahl, and Hodgens of the rights laid out in the Takings Clause and recognized by Congress in 42

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[7] Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 Touro L. Rev. 297, 300-01, 318 (2014) (state litigation requirement has caused a "mess" as lower courts disagree about how to apply it and property owners lose their rights through procedural tricks or sheer exhaustion); Gideon Kanner, *"(Un)equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 Loy. L.A. L. Rev. 1065, 1078 (2007) (the state litigation rule subjects property owners to unparalleled "judicial jiggery-pokery"); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989 (1986) (Outside of *Williamson County*, "[n]o authority supports" state litigation doctrine).

U.S.C. § 1983, to seek just compensation for takings in federal courts. More generally, *Williamson County*'s state litigation ripeness requirement confuses, distorts, and harms judicial review of takings claims, denying property owners any forum for their claims or causing delay and waste of party and court resources.

While this Court has recognized a few, minor limitations on the state litigation rule—holding it is prudential and applies only when state law provides an adequate remedy—those limits fail to stem the confusion and unfairness arising from *Williamson County*. As multiple members of this Court have recognized, this Court should reevaluate the state-litigation rule created by *Williamson County*, because the requirement is "'suspect, while its impact on takings plaintiffs is dramatic.'" *Arrigoni Enterprises*, 136 S. Ct. at 1409 (Thomas, J., dissenting from denial of cert., joined by Kennedy, J.) (quoting *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment). Review is also warranted because lower courts are in conflict on whether and when they can avoid the jurisdictional problems resulting from *Williamson County* by declining to apply the doctrine for prudential reasons. The Court should take this case to resolve the festering problems with *Williamson County*. *See* App. A-25 (Kethledge, J., dissenting).

A. *Williamson County*'s State-Litigation Requirement Creates Numerous Regressive, Unjust, and Needless Jurisdictional Problems

1. The *Williamson County* Opinion

In *Williamson County*, this Court created an unprecedented procedural hurdle to plaintiffs seeking to vindicate their Fifth Amendment right to be free from an uncompensated taking. In dicta, the Court declared that a Fifth Amendment taking claim is not "ripe" for review in federal court until the plaintiff first unsuccessfully seeks just compensation in state court. *See* 473 U.S. at 194, 197; *see also Stop the Beach Renourishment*, 560 U.S. at 742 (Kennedy, J., concurring) (state-litigation rule was "dicta"). The Court justified the state litigation requirement by claiming that the Fifth Amendment only prohibits takings "without just compensation," and it does not "require that just compensation be paid in advance of, or contemporaneously with, the taking." *Williamson County*, 473 U.S. at 194, 196.

Although this "state litigation" requirement was presented as a temporary hurdle to judicial review of a takings claims, it has turned out to be a far more rigid and permanent barrier to takings litigation. *Arrigoni Enterprises*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.). Far from ripening a federal claim, when a plaintiff unsuccessfully litigates for compensation in state court to comply with *Williamson County*, res judicata rules prevent that same plaintiff from going to federal court with the supposedly now ripened federal claim. *See San Remo*, 545 U.S. at 346-47. State court litigation ripens nothing for federal review; it destroys that review.

Arrigoni Enterprises, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of cert.) (state litigation rule "dooms plaintiffs' efforts to obtain federal review of a federal constitutional claim"); *see also San Remo*, 545 U.S. at 346-47; *DLX, Inc. v. Kentucky*, 381 F.3d 511, 519-20 (6th Cir. 2004).

In short, *Williamson County* strips plaintiffs of the right to bring a takings claim in federal court under the United States Constitution or 42 U.S.C. § 1983, and leaves them with a state court option that often proves illusory. *See San Remo*, 545 U.S. at 346-47. This outcome is in manifest conflict with Congress's intent and purpose in enacting Section 1983 to provide citizens with a federal forum for vindicating federal civil rights. App. A-21, 24–25 (Kethledge, J., dissenting); *see also Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (Congress "intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law."); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("purpose of [42 U.S.C.] § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights"). No other constitutional right is burdened by a similar requirement that relegates constitutional claims to state courts. *Arrigoni Enterprises*, 136 S. Ct. at 1411; Kanner, *supra*, at 1078. Thus, *Williamson County*'s state litigation doctrine has "downgraded the protection afforded by the Takings Clause to second-class status." *Id.* (citing *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (There is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or

Fourth Amendment, should be relegated to the status of a poor relation.")).

2. In Conjunction With Removal Jurisdiction, the State Litigation Rule Also Destroys State Court Review, Causing Forum Loss, Litigation Delay, and Confusion

The state litigation requirement not only works to deny property owners a day in federal court, it also often prevents state court review. This occurs in connection with removal jurisdiction, the principle that a government defendant may remove a "federal question" case to federal court. *See* 28 U.S.C. § 1441; *Arrigoni Enterprises*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

When a plaintiff files a federal takings claim in state court per *Williamson County*, government attorneys can remove the suit to federal court. *Id.* But once in federal court, the claim collides with *Williamson County*'s state court exhaustion doctrine. *Id.*; *see, e.g.*, *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013). Because the claim was removed, state litigation was never finished. Faced with such a removed takings claim, many federal courts dismiss the claim as unripe under *Williamson* precisely because removal short-circuited exhaustion of state remedies. *Arrigoni Enterprises*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *see, e.g., Koscielski v. Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (approving of the dismissal of a removed takings claim for lack of finished state-court procedures). This leaves takings claimants without either a federal or state forum. They have to start out in state court due to *Williamson County*, but they

cannot stay there because of a federal removal action that leads them right back into the clutches of *Williamson County* and dismissal. Thus "clever state-government attorneys" can game *Williamson County* to deny plaintiffs any day in court, or at least, to delay litigation and drain resources, as the parties are kicked back and forth between state and federal courts. *Arrigoni Enterprises*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

Williamson County has shipwrecked far too many takings claimants, and repeatedly prolonged and complicated otherwise straightforward takings claims. *See, e.g.*, *Perfect Puppy, Inc. v. City of E. Providence*, 807 F.3d 415, 421 (1st Cir. 2015) (lawsuit remanded by federal court to state court pursuant to *Williamson County*, after already having been removed from state court to federal court); *Arrigoni Enterprises, LLC v. Town of Durham*, 629 Fed. Appx. 23, 25 (2d Cir. 2015) (affirming district court's dismissal as unripe under *Williamson County*, where plaintiff alleged no state remedy available) (citing *Arrigoni Enterprises, LLC v. Town of Durham*, 606 F. Supp. 2d 295 (D. Conn. 2009)). It is time for the Court to end this once and for all.

3. The *Williamson County* Doctrine Is Entirely Unnecessary for Adjudication of Takings Claims

Perhaps the most frustrating part of *Williamson County*'s state litigation doctrine—and the confusion it has caused—is that it is completely unnecessary for takings litigation. Once a government entity engages in a final decision or invades private property without paying or guaranteeing compensation, the action is "without compensation" and a constitutional takings

claim is fit for federal review. *Horne*, 133 S. Ct. at 2062 n.6 (A takings "'Case' or 'Controversy' exists once the government has taken private property without paying for it."). Asking a state court to confirm a lack of compensation does nothing to "ripen" the claim. *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) ("a concrete takings injury can occur without state litigation"). It simply piles on an exhaustion of state remedies requirement that serves to do nothing except confuse, delay, and sometimes completely bar judicial review of concrete federal takings claims. Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 Loy. L.A. L. Rev. 1065, 1077-78 (2007).

This case provides one example of how *Williamson County* needlessly prevents judicial review of a perfectly fit claim. There is no dispute in this case that the County has taken and kept funds derived from the sale of Petitioners' property that greatly exceed their tax debt. There is no requirement or mechanism in the underlying legal authority (the Act) for return of the excess funds and there is no mechanism providing or guaranteeing compensation. The County refused Petitioners' pleas for reimbursement. The taking is thus complete and the lack of compensation apparent. At this point, a takings case and controversy exists—one that is appropriate and justiciable in any court of competent jurisdiction, including federal court. *Horne*, 133 S. Ct. at 2062 n.6.

Yet, *Williamson County* scuttles the prompt rendition of justice to Petitioners by demanding they

leave federal court and start a new suit in state court, under state law, before they can (ostensibly) bring their federal just compensation claims before the federal court. Court and party resources are wasted and the claim is not made any more concrete by additional state litigation. There is no good reason for this. The state court is not the entity that has taken the property or that is responsible to compensate Petitioners; the County is, and it has made clear that it will not or cannot. *Williamson County*'s state litigation doctrine serves no useful jurisdictional purpose and this is an appropriate case for the Court to reconsider it. *San Remo Hotel*, 545 U.S. at 352 ("In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.") (Rehnquist, J., concurring).

B. The Lower Courts Are Split on Whether and When Courts May Waive *Williamson County*'s State Litigation Requirement

The need for the Court to address *Williamson County* is heightened by the failure of the federal courts to identify any reasonable and predictable method for mitigating the worst consequences of the doctrine. Since 1992, this Court has attempted to "recast the state-litigation rule as a 'prudential' rather than jurisdictional requirement." *Arrigoni Enterprises*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.) (citing *Lucas*, 505 U.S. at 1012 & n.3; *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-734 (1997)); *see also Stop the Beach*

Renourishment, 560 U.S. at 729; *Horne*, 133 S. Ct. at 2062 (exhaustion of state remedies doctrine "is not, strictly speaking, jurisdictional"). Unfortunately, some courts have not received the message and the prudential re-framing has done little to stabilize takings jurisdiction. Indeed, lower courts are in conflict on how to apply *Williamson County*'s state litigation rule—despite the "prudential" label—and whether and when to waive it, resulting in unpredictable outcomes.

Some circuits clearly treat *Williamson County*'s state litigation rule as a flexible (non-mandatory) prudential concept. The Fourth, Fifth, Sixth, and Ninth Circuits are among this class. *Sansotta*, 724 F.3d at 545; *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88-89 (5th Cir. 2011); *Wilkins v. Daniels*, 744 F.3d 409, 418 (6th Cir. 2014); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010).

But not all circuits have adopted this approach. The First, Eighth, and Eleventh Circuits apply the litigation rule as a constitutionally-based barrier to jurisdiction. *Marek v. Rhode Island*, 702 F.3d 650, 653-54 (1st Cir. 2012) ("It follows inexorably that the plaintiff would have had to pursue this procedure fully in a state court before a federal court could exercise jurisdiction over his takings claim."); *Snaza v. City of Saint Paul*, 548 F.3d 1178, 1182 (8th Cir. 2008) ("[W]e have held that *Williamson County* is jurisdictional."); *Dahlen v. Shelter House*, 598 F.3d 1007, 1010 (8th Cir. 2010) ("Failure to satisfy this [state litigation] requirement alone means that their claim is not ripe and that federal courts lack jurisdiction to entertain their claim."); *Busse v. Lee County*, 317 Fed. Appx.

968, 972 (11th Cir. 2009) ("[B]ecause he has not alleged that he sought and was denied compensation through available state procedures . . . [w]e . . . conclude that the district court did not err in finding that it lacked subject matter jurisdiction over Busse's Takings Clause claim.").

The law in the remaining circuits is unclear. The Third Circuit says *Williamson County* imposes prudential *and* jurisdictional (constitutional) requirements. *County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) ("The ripeness doctrine serves to determine whether a party has brought an action prematurely and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine." (internal quote marks omitted)). The Second, Seventh, and Tenth Circuits are inconsistent, sometimes claiming the rule is prudential and other times treating it as jurisdictional. *Compare Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005) (jurisdictional), *with Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014) (prudential); *compare Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) (prudential view), *with Everson v. City of Weyauwega*, 573 Fed. Appx. 599, 600 (7th Cir. 2014); *Hendrix v. Plambeck*, 420 F. App'x 589, 591-92 (7th Cir. 2011) (applying a strict, jurisdictional approach); *compare Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011) (prudential), *with Gose v. City of Douglas*, 561 Fed. Appx. 723, 725 (10th Cir. 2014) (absence of state litigation is a "jurisdictional defect").

The differences have important consequences. Circuits that follow a prudential view may waive *Williamson County*'s state litigation requirement in certain circumstances (thus avoiding the jurisdictional problems associated with the doctrine). *See, e.g.*, *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir. 2013). On the other hand, jurisdictional circuits strictly require exhaustion of state court remedies and thereby ensure plaintiffs will face *Williamson*'s res judicata and removal traps. *See, e.g.*, *Perfect Puppy,* 807 F.3d at 421. A property owner's ability to vindicate federal just compensation rights accordingly depends greatly on whether he or she happens to live in a prudential or jurisdictional circuit.

Further compounding the inconsistency, prudential courts conflict on exactly what circumstances justify exempting plaintiffs from *Williamson County*'s state litigation rule. *See, e.g.*, *Toloczko*, 728 F.3d at 399 (considering potential for piecemeal litigation); *Sansotta*, 724 F.3d at 545 (considering fairness and waiver); *Guggenheim*, 638 F.3d at 1118 (considering waste of resources and previous state court litigation); *Villa Montechino, L.P. v. City of Lago Vista*, No. A-17-CA-00287-SS, 2017 WL 2198172, at *3 (W.D. Tex. May 18, 2017) (considering "fitness of the issues of judicial decision and the hardship to the parties of withholding court consideration").

This case highlights the confusion on how to apply *Williamson County* as a prudential concept. The Sixth Circuit recognizes that the state litigation requirement is only prudential in nature. App. A-10. As the dissent in the court below pointed out, this

would seem to be an appropriate case to waive *Williamson County* pursuant to prudential discretion, because of uncertainty as to the nature and existence of any state court remedy and to promote judicial economy. App. A-21-22. Yet, the panel below refused to weigh prudential considerations like sound process, fairness, and judicial economy. Ultimately, it strictly applied the state litigation rule, despite its prudential nature, for "federalism" reasons." App. A-10; *Compare, e.g.*, *Sansotta*, 724 F.3d at 545 (considering fairness); *Toloczko*, 728 F.3d at 399 (considering potential for piecemeal litigation).

The decision below confirms that *Williamson County*'s state litigation concept remains an unintelligible "ripeness" rule, despite this Court's recasting of it as a prudential doctrine. In plain terms, the state litigation rule does not help claims become "ripe" or promote efficient litigation. It destroys both. The Court should grant review to reconsider and overturn it. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (reconsideration justified "when governing decisions are unworkable") (citation omitted).

III

THIS CASE PRESENTS A CONFLICT ABOUT WHETHER THE TAX INJUNCTION ACT BARS CLAIMS SEEKING A REFUND OF PROPERTY TAKEN IN EXCESS OF A TAX DEBT

This case raises a final issue as to whether the TIA and principles of comity bar federal jurisdiction over a takings claim which challenges the retention of excess tax proceeds. The court below held that it does.

App. A-18-20. That decision expands the reach of the TIA and comity, and creates a circuit split.

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" when there is an adequate state court remedy. 28 U.S.C. § 1341.2. The TIA only bars jurisdiction in "cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Hibbs v. Winn*, 542 U.S. 88, 107 (2004). Similarly, comity sometimes bars taxpayers from raising constitutional claims against tax systems when doing so "would halt its operation." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 115 (1981).

As thus understood, neither comity nor the TIA bar the claims here, because the Petitioners do not challenge a tax or seek to stymie its collection. *See Hibbs v. Winn*, 542 U.S. at 107. They seek compensation for a taking of property that was greater than the taxes, penalties, fees, and interest levied on them under state law. App. A-4. If the Petitioners prevail and the Court determines that the County effected an unconstitutional taking of surplus equity, the decision would not halt or impede the administration of the state's tax scheme. The County would continue to collect property taxes, interest, penalties, and fees, and sell homes to obtain payment. It would only be compelled to avoid taking more equity than what is owed, or to pay compensation when it does so. *See generally*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37 (2005).

Unfortunately, the court below did not engage in this straightforward analysis. In so doing, it created a conflict among the lower courts on the application of

the TIA and comity in this area. The Second Circuit and the U.S. District Court for the District of Columbia have held that the TIA and comity do not bar federal jurisdiction in cases where property owners challenge the taking of property beyond any taxes, penalties, and fees owed. *See Luessenhop v. Clinton County*, 466 F.3d 259, 268 (2d Cir. 2006) (federal jurisdiction where plaintiffs agreed to pay full tax debts, but challenged foreclosure of homes);[8] *Coleman*, 70 F. Supp. 3d at 66-69 ("challenge to the District's taking of the surplus equity . . . above and beyond the amounts the District has defined as the 'tax,' is not barred by the Tax Injunction Act" or by comity); *see also Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975) (Congress did not intend the TIA to include a "case where a taxpayer contended that an unusual sanction for nonpayment of a tax admittedly due violated his constitutional rights.").

The Sixth Circuit's broad holding that the TIA and comity bar federal jurisdiction over a challenge that indirectly involves a tax system, but which does not impede tax collection, *see* App. A-18-20, conflicts with the decisions of the Second Circuit and with the D.C. District Court's decision in *Coleman*. This Court should grant review and settle this split.

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[8] Although the Second Circuit did not explicitly discuss comity in its opinion, the court reversed two district courts' opinions that held comity barred federal jurisdiction over the taxpayers' suits. *See Bouchard v. Clinton Cty., N.Y.*, No. 8:06-CV-418, 2006 WL 1133221, at *6 (N.D.N.Y. Apr. 25, 2006), *vacated sub nom. Luessenhop*, 466 F.3d 259; *Baechle v. Town of Mendon*, No. 1:05-CV-204, 2005 WL 3334708, at *1 (D. Vt. Dec. 8, 2005), *vacated sub nom. Luessenhop*, 466 F.3d 259.

CONCLUSION

The Petitioners request that the Court grant their petition for writ of certiorari, reverse the decision of the Sixth Circuit, and enter judgment in their favor.

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Respectfully submitted,

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