No. _____

In The
Supreme Court of the United States

OHIO EX REL. ELLIOT FELTNER,

Petitioner,

v.

CUYAHOGA COUNTY BOARD OF REVISION, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Cuyahoga County confiscated Elliot Feltner's land worth $144,500 for an unpaid tax debt of $65,189. The County bypassed the usual sale and refund of surplus proceeds to former owners and instead gifted the property to the County's land bank. The County provided no process by which Feltner could recover the surplus equity in his property. In *Nelson v. New York*, 352 U.S. 103, 109 (1956), this Court declined to decide whether a property owner suffers a taking by government's "retention of [tax-delinquent] property . . . far exceeding in value the amounts due" because, in that case, the state provided a procedure by which the former owner could recover the "surplus proceeds of a judicial sale." The Court reserved for a future day the question of whether the same action would have been constitutional where state law "absolutely precludes an owner from obtaining the surplus proceeds." *Id.* at 110. This case squarely presents that question. In Ohio and a dozen other states, local governments can extinguish a property owner's title and all equity to collect overdue tax and utility bills, with no opportunity for the owner to recover the surplus value above the amount owed plus lawfully charged penalties, interest, and costs.

The Question Presented is:

When confiscating property to satisfy a delinquent debt, does it violate the Takings Clause for government to take property worth far more than what is owed, keeping the surplus value of that property as a windfall for the public?

LIST OF ALL PARTIES

Petitioner is Elliot G. Feltner, who was the plaintiff/relator in the Ohio Supreme Court.

Respondents, who were also respondents in the Ohio Supreme Court, are Cuyahoga County Board of Revision, Cuyahoga County, Cuyahoga County Treasurer W. Christopher Murray II, Executive of Cuyahoga County Armond Budish, Cuyahoga County Council Member Michael Gallagher, and Fiscal Officer of Cuyahoga County Michael W. Chambers.

The Ohio Attorney General and Cuyahoga County Land Revitalization Corporation were dismissed as respondents below, and the dismissal of these parties is not challenged here.

RULE 14.1(b)(iii) STATEMENT

The proceeding in the Supreme Court of Ohio was directly related to the above captioned case and was known as *State ex rel. Feltner v. Cuyahoga County Board of Revision*, No. 2018-1307.

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The March 20, 2019, decision of the Ohio Supreme Court denying the just compensation claim petitioned here is available at *State ex. rel. Feltner v. Cuyahoga County Board of Revision*, 119 N.E.3d 431 (Ohio 2019) and attached as Appendix A. The court's March 20, 2019, corrected entry of the decision is attached as Appendix B. The May 28, 2020, decision of the Ohio Supreme Court, which disposed of all other claims (not at issue in this petition) is reported at *State ex. rel. Feltner v. Cuyahoga County Board of Revision*, __N.E.3d__, 2020 WL 2758696 (Ohio 2020), and is attached as Appendix C. This case was filed directly in the Ohio Supreme Court and therefore there are no trial or appellate decisions.

JURISDICTION

The order denying Feltner's takings claims issued on March 20, 2019. Pet. App. A-1. The Ohio Supreme Court issued a final decision disposing of the remainder of the case on May 28, 2020. Pet. App. C-1. Under this Court's March 19, 2020 order adjusting deadlines because of the coronavirus, this Petition is timely. This Court has jurisdiction under 28 U.S.C. § 1257. *See Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (final-judgment rule satisfied when nothing "further remains to be determined by a State court").

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

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.

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend XIV.

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 pertinent portions of the Ohio statutes at issue in this case are reproduced in Appendix E.

RULE 29.4(c) STATEMENT

28 U.S.C. § 2403(b), which allows a State to intervene to defend the constitutionality of a state statute, may apply.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the application of the Takings Clause to foreclosure actions in which local governments confiscate excess private property in the course of debt collection. The issue splits state and federal courts, many of which have decided the question in conflict with this Court's precedent.

In more than a dozen states, statutes allow local governments to satisfy delinquent property taxes or utility bills by confiscating all title and "any equity [the owner] has accrued in the [subject] property, no matter how small the amount of taxes due or how large the amount of equity." *Tallage Lincoln, LLC v. Williams*, No. SJC-12847, 2020 WL 4811678 (Mass. Aug. 19, 2020). *See Crane v. C.I.R.*, 331 U.S. 1, 7 (1947) (The term "equity" in this context means the value of the property that exceeds all encumbering debts.). In these states, equity is frequently taken without just compensation or any procedure for the former owner to recover the surplus value of the property.

The result is often shocking, depriving vulnerable owners of homes, land, and farms of their entire interest in the property over debts as small as $8. *See, e.g.*, *Rafaeli, LLC v. Oakland County*, __N.W.2d__, 2020 WL 4037642, at *5 (Mich. 2020) (county confiscated a suburban home as payment for an $8 property tax debt). Individually, the loss for struggling property owners can be devastating; collectively, they lose hundreds of millions of dollars in equity every year. *See, e.g.*, Ralph Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L.

Rev. 274 (2018) (localities in Massachusetts alone took $56 million in equity from property owners in just one year); Ashton Nichols, *Taxpayers Lose Out on at Least $11.25 Million, Homeowners and Banks Lose up to $80 Million in Little-known Foreclosure Process That Skips Sheriff's Sales*, Eye on Ohio: Ohio Center for Journalism (Mar. 3, 2020), https://eyeonohio.com/taxpayers-lose-out-on-at-least-11-25-million-homeowners-and-banks-lose-up-to-80-million-in-little-known-foreclosure-process-that-skips-sheriffs-sales/.

In Feltner's case, the Cuyahoga County Board of Revision, Cuyahoga County, and the named county officials (collectively County) took title to his land and autobody shop worth $144,500, taking from him approximately $80,000 more than he owed in back taxes, interest, penalties and costs. Pet. App. C-13. The County then gave it to the county-sponsored land bank, which requested the property for purported economic development. Ordinarily, Ohio law requires a public sale of tax-delinquent property and a refund of surplus profits. Ohio Rev. Code §§ 323.73, 5721.20. But because the land bank wanted Feltner's property, the County confiscated it without a public sale and without payment to Feltner for his surplus equity. Pet. App. D-9; Ohio Rev. Code §§ 323.78(B), 5721.20 (permitting direct confiscation to benefit the land bank without payment). This predatory process deprived Feltner of the equity in his property without compensation. *See* Pet. App. D-10.

The Takings Clause can and should provide just compensation for this taking of Feltner's equity interest. The law has long recognized equity as a discrete interest in property, imposing a duty on foreclosing parties to sell the property and refund to

the former owner the surplus proceeds of property confiscated to satisfy a debt. *Martin v. Snowden*, 59 Va. 100, 137 (1868), *aff'd sub nom. Bennett v. Hunter*, 76 U.S. 326 (1869) (describing the practice in England, the colonies, and early America). Failure to abide by that duty violates a deeply rooted property right, requiring compensation under this Court's takings precedents.

Two Ohio Supreme Court justices thought this argument deserved serious consideration in Feltner's case. Pet. App. C-14. This Court also recognized, but did not resolve, the takings question at issue in this case in *Nelson v. City of New York*, 352 U.S. 103, 110 (1956). In *Nelson*, the City of New York foreclosed on two properties to satisfy delinquent debts, taking property that was worth far more than the debt owed. *Id.* at 106. The former owners argued that the city was not entitled to the windfall and sought just compensation for the surplus equity in their properties. The Court rejected their claims, however, because the owners failed to use a procedure available under state law to receive the surplus proceeds from a judicial sale of the property. *Id.* (rejecting takings claim "in the absence of timely action to . . . recover[ ] any surplus"). This Court declined to answer whether the city's retention of the windfall would be a taking where state law "precludes an owner from obtaining the surplus proceeds of a judicial sale." *Id.* This is the question presented by Feltner's case. Since *Nelson*, state and federal courts have split on the answer to that question.

This Court should grant the petition to settle the important question of whether the government unconstitutionally takes private property when it

forecloses on property worth more than a government lien and keeps the excess equity as a windfall.

STATEMENT OF THE CASE

A. Cuyahoga County Board of Revision Takes Feltner's $144,500 Property as Payment for $65,189 in Taxes, Penalties, and Interest

In 2009, Elliot G. Feltner's wife, Linda, inherited a small Cleveland auto body shop from her father. Soon after, she was diagnosed with cancer that eventually took her life. After his wife passed, Feltner discovered that the autobody shop he inherited was encumbered by a large past due tax bill that he could not afford to pay. The property was worth substantially more than the debt, however, and so he began a process to sell it and use the proceeds to clear the debt. His efforts were delayed when he was struck with spinal problems in 2015 while traveling to Kentucky, requiring two surgeries and an extended absence from Ohio until early 2017. Agreed Statement of Facts, No. 2018-1307, Exh. 1 at 217 (Apr. 9, 2019) (affidavit of Elliot Feltner for motion to vacate foreclosure). Consequently, the Board's summons and other notices sent to Feltner's Ohio home warning him of an impending administrative foreclosure of the tax-delinquent property failed to reach him while he was out of state. *See* Pet. App. D-10.

Under Ohio law, property that is foreclosed for delinquent property taxes will ordinarily be sold to the highest bidder in a public auction. Ohio Rev. Code §§ 323.25, 323.73. The proceeds pay the delinquent taxes, interest, penalties, and collection costs. Ohio Rev. Code § 323.73. And consistent with the duty to pay just compensation for excess property taken, any

remainder is returned to the former owner. Ohio Rev. Code § 5721.20. But different rules apply when Cuyahoga County's land bank wants to acquire tax-delinquent property. The relevant statutes allow the County to skip the auction, shorten the time period for Feltner to save his property to 28 days from the foreclosure decision, *see* Ohio Rev. Code § 323.65, and allow the land bank to keep the surplus value of the property. Ohio Rev. Code § 323.78(B) (also applies when county, town or school district wants property).

Feltner learned of the County's foreclosure action on his property in 2017 during a title search performed for a prospective buyer. Pet. App. D-10. Feltner did not understand the process, however, and did not attend a final administrative hearing on the matter on June 21, 2017. *Id*. At the hearing, a County official testified the fair market value of the property at $144,500. Pet. App. C-13, D-10. Feltner owed $65,189.94 in property taxes, penalties, interests, and costs. *Id*. More than $25,000 of that debt was penalties and interest. The Board of Revision ordered a foreclosure without an auction, which became final a month later when it transferred title to the Cuyahoga County land bank. Pet. App. D-11. Accordingly, Feltner's attempt to sell the property failed, and he lost his property, including his surplus equity, to the County. Less than a month after receiving title, the County's land bank transferred the property to a private third party (an adjacent automotive repair shop) for the significantly discounted sum of $15,000. Agreed Statement of Facts, Exh. 13, Affidavit of Gus Frangos ¶ 20, No. 2018-1307 (Apr. 9, 2019). Neither the Board nor the land bank compensated Feltner for his lost equity of $79,310.06. Pet. App. C-13. Moreover, because the Board foreclosed without a

judicial sale, the County did not receive one penny of the taxes, interest, or penalties owed.

B. Feltner Files Takings Claim Seeking Just Compensation for His Equity

On September 17, 2018, Feltner filed a complaint in the Supreme Court of Ohio seeking, in part, a writ of mandamus to require the County to hold proceedings to provide just compensation for his roughly $80,000 in lost equity. *See State ex. rel. Duncan v. Mentor City Council*, 826 N.E.2d 832, 834 (Ohio 2005) ("Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged."); *State ex rel. Pressley v. Indus. Comm'n*, 228 N.E.2d 631, 642 (Ohio 1967) (mandamus actions seeking just compensation may be filed directly in the Ohio Supreme Court). Feltner challenged the foreclosure and subsequent transfer of property without just compensation for his surplus equity as a violation of the takings clauses of the United States and Ohio Constitutions. Pet. App. D-16–18.

The County made two primary arguments against the takings claims. First, it urged dismissal on the grounds that a writ of mandamus was the wrong procedure, arguing that Feltner should have raised his claims in an appeal of the administrative foreclosure within 14 days of the Board's June 26, 2017, Adjudication of Foreclosure. *See* County Mot. to Dismiss at 5, 24–25 (Oct. 11, 2018); Ohio Rev. Code § 323.79. According to the County, the 14-day appeal deadline operates as a limitation period for takings claims. If true, however, it would mean that Feltner's takings claims expired weeks before the taking

actually occurred, since the County did not take title and extinguish his interest until July 28, 2017.

Second, the County argued that Feltner could not state a claim for a taking since he was deprived of the surplus equity through tax foreclosure proceedings rather than an eminent domain proceeding. Thus, the County argued, no takings claim could arise from the foreclosure or subsequent transfer to a private third party. *Id.* at 27.

The Supreme Court of Ohio issued a perfunctory order granting the motions to dismiss both the federal and state takings claims on March 20, 2019, while allowing two non-takings claims to proceed (alleging that the Board's judicial function violated separation of powers required by state law). Pet. App. A-1, B-1. The court provided no explanation or reasoning in support of its dismissal but was clear that it was a dismissal on the merits. *See* Pet. App. A-1 ("On the Merits"); Ohio Civ. R. 41(B)(3) (unless otherwise specified, a dismissal is on the merits). Justice Fischer dissented from the dismissal of the takings claims. *Id.* On May 28, 2020, the court denied Feltner's remaining non-takings claims, holding that the Board acted with presumptively valid statutory authority when it foreclosed on the property. Pet. App. C-7.

Justice Fischer, joined by Chief Justice O'Connor, concurred in that final judgment but wrote a separate opinion expressing their view that the dismissal of Feltner's takings claims was inappropriate. They opined that Feltner's takings claims might have merit if the government received "a windfall at Feltner's expense." Pet App. C-8, 13–14. Justice Fischer considered "disconcerting" the allegations that the Board foreclosed on Feltner's entire property worth

approximately $80,000 more than Feltner owed. Pet. App. C-13. The concurrence particularly noted the transfer of the property to the land bank without sale and "without remitting the remaining value of the property to Feltner." *Id.* Justice Fischer said the court should have heard the takings claims noting, "[t]he whole scheme is unsettling and just seems wrong." Pet. App. C-13–14.

Unless this Court grants his petition, Feltner will be unable to vindicate his federal constitutional right to just compensation. He is barred by principles of res judicata from seeking relief for the uncompensated taking in federal district court. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019) (claim preclusion prohibits re-litigation of takings claim after loss in state court); *see also State Ex Rel. Superamerica Group v. Licking County Board of Elections*, 685 N.E.2d 507, 510 (Ohio 1997).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW RAISES THE IMPORTANT QUESTION OF WHETHER THE TAKINGS CLAUSE DEMANDS COMPENSATION WHEN GOVERNMENT TAKES PROPERTY TO COLLECT A DEBT AND KEEPS AN EQUITY WINDFALL

By allowing the County to extinguish Feltner's equity without payment, the Supreme Court of Ohio violated well-settled property rights and stands against principles embodied by this Court's takings decisions. Ohio is not alone in this practice: local governments in a dozen other states also take a windfall of equity when collecting delinquent taxes.

The Court should grant the petition to settle the important federal question of whether equity is protected by the Takings Clause under these circumstances.

A. The Decision Below Ignores Deeply Rooted Property Rights in Equity

When government confiscates property worth more than an outstanding debt and fails to compensate the owner for the surplus value, it invades and unconstitutionally takes an equity interest. That is true even where a statute, such as the tax foreclosure statute in Ohio, does not expressly recognize the right to surplus equity. The property right in equity is protected by other sources. The law has long recognized equity as a discrete and valuable interest in property in other common debt-collection contexts, and mandated the return of surplus value in a foreclosed property to the former owner. *See, e.g., Grand Teton Mountain Invs., LLC v. Beach Props., LLC*, 385 S.W.3d 499, 502 (Mo. Ct. App. 2012) ("[A] foreclosure sale surplus 'retains the character of real estate for purposes of determining who is entitled to receive it . . . . Such surplus represents the owner's equity in the real estate."); Restatement (Third) of Property (Mortgages) § 7.4 (1997) ("The surplus stands in the place of the foreclosed real estate, and the liens and interests that previously attached to the real estate now attach to the surplus."); 72 Am. Jur. 2d State and Local Taxation § 911 (1974) ("Any surplus remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner."); *Villas at East Pointe Condo. Ass'n v. Strawser*, 142 N.E.3d 1200, 1205 (Ohio Ct.

App. 2019) (acknowledging lien-holder's equitable interest in surplus proceeds).[1]

Consistent with that principle, tax collectors traditionally have been required to refund any surplus proceeds after the sale of tax-delinquent property to the former owner. *Rafaeli*, 2020 WL 4037642 at *16–17 (tracing the history of this protection to Magna Carta); *see, e.g., McDuffee v. Collins*, 23 So. 45, 46 (Ala. 1898) (tax collector must follow "well-known general rule of law" by paying surplus proceeds in order of priority). Sir William Blackstone wrote that when officials seized property for delinquent taxes, "they are bound, by an implied contract in law" to return it if the debt is paid before sale, or to sell it and "render back the overplus." 2 William Blackstone, Commentaries on The Laws of England *452 (internal citation omitted). Officials who took more property than necessary or who failed to sell and refund the surplus profits were liable in trespass or trover, or for a taking. *See, e.g., Cone v. Forest*, 126 Mass. 97, 101 (1879); *see also Knick*, 139 S. Ct. at 2176 ("Until the 1870s," takings claims were typically brought as "common law trespass action[s] against the responsible corporation or government official."); *Griffin v. Mixon*, 38 Miss. 424, 436–37 (Miss. Err. & App. 1860) (raising takings claim).

For over 100 years after the founding, the states and courts were in apparent accord in protecting the

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[1] This understanding of property equity in the context of mortgages arose to protect debtors from harsh agreements that would have forfeited valuable property over much smaller debts. *Rafaeli*, 2020 WL 4037642, at *34–36 (Viviano, J., concurring) (discussing the history of mortgage foreclosures and the right to property equity).

equity interest of property-tax debtors. *See, e.g., Martin v. Snowden*, 59 Va. at 137, *aff'd sub nom. Bennett*, 76 U.S. 326 (discussing common law, English land tax statute, and early colonial laws); Thomas M. Cooley, A Treatise on the Law of Taxation 343 (1876) (noting the belief that a tax debt only authorized the government to take as much property as the taxes owed and author was unaware of any jurisdiction that failed that duty). So secure was that right, that when Congress passed a statute partly aimed at "suppressing rebellion" in Confederate states and that appeared to forfeit title and all equity in tax-delinquent property, this Court twice chose a less natural statutory interpretation to avoid that outcome. *Bennett*, 76 U.S. at 335, 337 (avoiding the takings question by interpreting "forfeit" as meaning the owner was merely in danger of a tax sale and could still redeem the property until sale, because it is "proper" to avoid such a "highly penal" provision where milder construction is possible); *United States v. Taylor*, 104 U.S. 216, 219, 221–22 (1881) (relying on *Bennett* and noting the purpose was tax collection, not "confiscation" in construing the same statute to hold former owner entitled to $2,929.50 in surplus proceeds from the sale of his tax delinquent property).

Today, most states still protect equity by requiring surplus proceeds of a foreclosure sale to be paid to the former owner.[2] Even Ohio law ordinarily

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[2] *See, e.g.*, Ark. Code § 26-37-209; Conn. Gen. Stat. § 12-157(h); Del. Code tit. 9 § 879; Fla. Stat §§ 197.522, 197.582; Ga. Code Ann. § 48-4-5; Idaho Code § 31-608(2)(b); Kan. Stat. § 79-2803; Ky. Rev. Stat. § 426.500; Mo. Rev. Stat. § 140.340; Nev. Rev. Stat. § 361.610.5; Ohio Rev. Code § 5723.11; 72 Pa. Cons. Stat. Ann. § 1301.19; 72 Pa. Cons. Stat. Ann. § 1301.2; S.C. Code Ann. § 12-51-130; S.D. Code § 10-22-27; Tenn. Code Ann. § 67-5-2702;

allows debt collectors to take only as much as they are owed, requiring the property to be sold and the remainder returned to the former owner. *See, e.g.*, Ohio Rev. Code §§ 5721.20, 2329.44, 1309.615, 1311.49. But Ohio changed the rules when it wanted the property for itself. Ohio Rev. Code §§ 323.78(B), 5721.20. Here, because the County's land bank wanted Feltner's property, the County extinguished Feltner's $80,000 in equity without just compensation or any right or process to recover it. By straying from the traditional protection for equity, the County took without compensation a private property right that preexists the tax statute. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426–27 (2015) (Takings Clause protects property interests recognized by Magna Carta and Founders); *Farnham v. Jones*, 19 N.W. 83, 85 (Minn. 1884) (Regardless of what state tax laws say, "the right to the surplus exists independently of such statutory provision."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 629–30 (2001) (property rights arise from a variety of sources, including common law).

The traditional recognition that government may only collect as much as it is owed flows from a basic understanding that though owners should pay their taxes, failure to do so is not a criminal[3] (or moral)

Va. Code Ann. § 58.1-3967; Wash. Rev. Code Ann. § 84.64.080; Wyo. Stat. § 39-13-108(d)(4).

[3] Consequently, the County's arguments raised below that *Bennis v. Michigan*, 516 U.S. 442, 455 (1996), justifies its action must fail. Unlike *Bennis* and this Court's related civil forfeiture precedent, the property here was not an instrumentality of crime. *See Rafaeli*, 2020 WL 4037642, at *10; *Martin*, 59 Va. at 142-143 (1868), *aff'd sub nom. Bennett*, 76 U.S. at 326 ("[T]he land of a delinquent tax-payer . . . is neither the instrument nor the fruit of any offence.").

failing that somehow justifies government taking more than what is owed.[4] *See Slater v. Maxwell*, 73 U.S. 268, 276 (1867) (tax sales and foreclosure proceedings "should be closely scrutinized" and set aside or treated as being held in trust for the owner "whenever . . . characterized by fraud or unfairness"). Owners are "generally ignorant of [tax sales] until [it is] too late to prevent it." *Id. See, e.g.*, *In re Application of the County Collector for Judgment v. Lowe*, 867 N.E.2d 941, 951 (Ill. 2007) (hospitalized woman lost home over $110); *In re Petition of Cass County Treasurer for Foreclosure v. Lands Described*, No. 324519, 2016 WL 901700, at *2 (Mich. App. 2016) (wealthy owner ignorant of a $14,743 delinquent tax debt on his $3.5 million vacation property that had just finished construction).

Sometimes owners suffer from cognitive problems, illness, simple poverty, or do not understand the consequences of allowing a property to be foreclosed for delinquent taxes, which are dramatically worse than other types of liens. *Tallage Lincoln*, 2020 WL 4811678 at *1 (delinquent property owners typically cannot afford counsel and the law is difficult even for "experienced attorneys" to understand, leading to "catastrophic" results for property owners). Elderly property owners are especially susceptible to losing their property in this way because they move into senior living or medical

[4] Any government loss or legitimate interest in motivating people to pay their taxes is more than satisfied by the substantial penalties and interest and by selling the property paying the debt out of the proceeds. Tax debts typically grow at 12-18% interest, and often with added penalties and costs. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 755–56, 760, 767–77 (2000).

facilities, children's homes, or are otherwise displaced and consequently often miss notices. *See* Jennifer C.H. Francis, Comment, *Redeeming What is Lost: The Need to Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 Geo. Mason U. Civ. Rts. L.J. 85 (2014). In *Coleman*, an elderly veteran with dementia lost his $200,000 home over a $133 deficiency, plus approximately $5,200 in penalties, interest, fees, and costs. *Coleman through Bunn v. District of Columbia*, 70 F. Supp. 3d 58, 62, 64 (D.D.C. 2014) (*Coleman I*). Similarly, Feltner was displaced by debilitating back problems, followed by out-of-state back surgeries and rehabilitation. Exh. 1 at 217 to Agreed Statement of Facts, No. 2018-1307 (Apr. 9, 2019) (affidavit to motion to vacate foreclosure). Although he found a buyer, the sale failed to close in time. *See id.*; Pet. App. D-10.

By extinguishing Feltner's equity interest for the purportedly public purposes of the land bank, the County not only acted unfairly, it took more than was due and violated the Takings Clause's command of just compensation.

B. The Decision Below Conflicts with Decisions of This Court That Require Government To Compensate Owners When It Takes Discrete and Legally Cognizable Interests in Property

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for a public use without paying just compensation. U.S. Const. amend. V. When government seizes protected property, it effects a classic, *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982);

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) ("direct appropriation" of property or the "functional equivalent" is a classical taking). The Constitution protects a wide range of interests. Consequently, this Court has found a violation of the Takings Clause when government takes without payment financial interests including money, interest on money, land, liens, and mortgages. *See, e.g.*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 601–02 (1935) (Takings Clause protects "substantive rights in specific property," including the right to collect on a debt in a timely manner by seizing and selling that property); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 613 (2013) (Takings Clause protects money and "a right to receive money that is secured by a particular piece of 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). Similarly, the Court has held that where a statute requires property to be sold to pay debts and the surplus proceeds returned, the Takings Clause protects the former owner's rights 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 . . . take his property for public use without just compensation.").

Government may not use legislation to take an established property right without compensation. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 158–59 (1980), this Court held that government violated the Takings Clause by keeping the interest earned on private funds deposited with a court. The Court explained that the Takings Clause cannot be avoided by statutorily redefining private

funds as 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. Likewise in *Phillips*, 524 U.S. at 167, this Court rejected similar attempts to redefine property by statute, explaining "at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests." *See also 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 traditionally private property as public property).

State laws that purport to convert surplus equity in tax-indebted properties into public property violate the Takings Clause in the same way. The Takings Clause will not permit such a state-authored transformation of a traditional private interest to public property. *Webb's Fabulous Pharmacies*, 449 U.S. at 164. Government cannot "by ipse dixit . . . transform private property into public property without compensation." *Id.*

The taking of Feltner's equity interest in his property bears analogy to the injustice considered by this Court in *Armstrong*, 364 U.S. 40. In that case, a shipbuilder contracted by the United States defaulted on its obligation to build ships, and the United States took title to the unfinished boats and materials, pursuant to contractual and common law rights. *Id.* Material suppliers claimed the United States had unconstitutionally extinguished their liens on the unfinished boats and supplies and refused to compensate the suppliers. *Id.* This Court agreed,

holding that property rights in liens do not simply disappear when the government takes title to the subject property. *Id.* at 48. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id.* The government could only take the underlying property subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id.* at 49.

Despite *Armstrong*, a dozen states and Ohio extinguish the entire equity and all private liens when foreclosing on tax-delinquent property.[5] The windfall to the government often comes at the expense of society's most vulnerable members. For example, a Nebraska county took a million-dollar farm from an elderly widow who was living in a nursing home over

[5] Ariz. Rev. Stat. § 42-18205; Col. Rev. Stat. § 39-11-115; Me. Rev. Stat. Ann. tit. 36 § 949; Minn. Stat. Ann. § 280.29; Ore. Rev. Stat. § 312.100; 35 Ill. Comp. Stat. §§ 200/22-40, 200/21-90; Mont. Code Ann. §§ 15-18-211, 15-18-219 (issuing a deed to whoever holds a tax lien, but requiring sale and a return of surplus proceeds only for certain residential properties); Neb. Stat. 77-1837–38; Tex. Tax. Code § 34.051 (allows property to be sold at discount for economic development or affordable housing, even though state law normally protects the surplus, *see* Tex. Tax. Code § 34.03); *Tallage Lincoln*, 2020 WL 4811678 (describing Massachusetts system which sometimes takes a windfall for cities and sometimes for private investors); *Ritter v. Ross*, 558 N.W.2d 909, 910 (Wis. Ct. App. 1996); *Winberry Realty P'ship v. Borough of Rutherford*, No. A-3846-13T4, 2015 WL 10765151, at *2 (N.J. Super. App. Div. May 4, 2016) (walking through New Jersey statutes that allow private investor who purchases tax lien for amount of tax debt to foreclose and take full title without sale); Ala. Op. Atty. Gen. No. 2019-033 (Apr. 24, 2019).

$50,000 in property taxes, interest, and costs.[6] The county gave the full windfall to a private investor without any payment for the widow's equity. In Wisconsin, officials took title to farmland worth $38,000 as payment for an $84 property tax debt.[7] In Massachusetts, a homeowner recently lost title to a $120,000 home as payment for approximately $10,000 in taxes and $5,000 in interest. *See Tallage Lincoln, LLC v. Gardzina*, No. 17 TL 001084, Judgment in Tax Lien Case (Mass. Land Ct. Nov. 7, 2019). The state law extinguished both the owner's equity interest and a substantial lien held by a small nonprofit. *See id*.

In such cases, "the government for its own advantage destroy[s] the value of [any] liens" and the owner's equity, which should require just compensation. *See Armstrong*, 364 U.S. at 48. Even though the government has only a limited interest in the property, it takes everything. This transformation of private property for public use is a taking. The government thus has the "constitutional obligation to pay just compensation" or to return the excess property it takes. *See id.* at 49. This Court should grant the petition to clarify that the same Takings Clause protections that apply to liens and interest on money also apply to a debtor's equity.

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[6] *Wisner v. Vandelay Investments, L.L.C.*, 916 N.W.2d 698, 708 (Neb. 2018); Response Brief, Wisner, No. S-16-000451, 2018 WL 659770, at *30 (Jan. 4, 2018).

[7] *Ritter*, 558 N.W.2d at 910.

II. STATE AND FEDERAL COURTS CONFLICT ABOUT WHETHER GOVERNMENT MUST PAY JUST COMPENSATION WHEN IT TAKES PROPERTY TO COLLECT A DEBT AND KEEPS A WINDFALL

Five state courts of last resort and two federal district courts hold that when tax-delinquent property is foreclosed to pay the debt, the government must pay just compensation. Federal and state courts in six other states have held that no taking occurs, usually interpreting *Nelson* too broadly to hold that the right to compensation exists only if required by statute. And several courts have avoided the constitutional question by reading their state's statutes to require the return of surplus proceeds of tax sales to the former owner. This Court's review would bring clarity to the matter and harmony to the lower courts.

The high courts of Michigan, New Hampshire, Vermont, Mississippi, and Virginia, and some federal district courts recognize that a property owner's equity in property is a discrete and legally cognizable interest, and hold that government effects a taking without just compensation when it takes more than it is owed. *Griffin*, 38 Miss. at 436–37; *Martin*, 59 Va. at 142–43 (violates due process by taking more than owed); *Rafaeli*, 2020 WL 4037642 at *5; *Bogie v. Town of Barnet*, 270 A.2d 898, 900, 903 (Vt. 1970) (citing *Lawton*, 110 U.S. 146, and holding retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation"); *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); *King v. Hatfield*, 130 F. 564, 579 (C.C.D.W. Va. 1900); *Pung v. Kopke*, No. 1:18-cv-01334-RJJ-PJG, Opinion and Order (W.D. Mich. Sept. 29, 2020) (ECF No. 119, Page ID.1357–58); *see also Coleman I*, 70 F. Supp. 3d at 80 (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman through Bunn II*, No. 13-1456, 2016 WL 10721865 *2–3 (D.D.C. June 11, 2016) (recognizing district law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits).

Acknowledging the disagreement among courts on whether the federal Takings Clause protects equity in tax-delinquent property, the state supreme courts of Michigan and New Hampshire chose to protect it under their state constitutions, declining to answer the federal question. *See Rafaeli*, 2020 WL 4037642 at *14 n.65, *22 (noting disagreement in other jurisdictions and "look[ing] for guidance in the decisions of the United States Supreme Court regarding surplus proceeds and the federal Takings Clause" in interpreting the Michigan takings Clause); *Thomas Tool*, 761 A.2d at 441–442. Nevertheless, by holding that state property law protects a delinquent owner's equity interest from an uncompensated taking, these states make clear that equity is a discrete property interest under state law, triggering federal takings protection as well. *Pung*, No. 1:18-cv01334-RJJ-PJG (ECF No. 119, Page ID.1357–58). *See, Lawton*, 110 U.S. at 150 (a taking where applicable law requires a return of the surplus); *Phillips*, 524 U.S. at 164 (Constitution protects property rights property interests recognized by state law).

The state supreme courts of Indiana, North Dakota, Texas, and Alaska have also criticized the idea that government could legitimately extinguish equity or liens on tax-delinquent properties and have interpreted tax sale statutes to avoid that result. *Lake Cty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004) (noting it would "produce severe unfairness" and likely violate the Takings Clause); *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191–92 (Tex. 1995), as amended (June 22, 1995) ("Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit."); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981) (refusing to interpret the law as confiscating the surplus); *Shattuck v. Smith*, 69 N.W. 5, 12 (1896) (noting statute would likely be unconstitutional "if [it] contained no provision that the surplus should go to the landowner").

And like the two justices below in the instant Ohio case, federal judges who did not reach the merits for jurisdictional reasons have noted the extreme injustice and the potential takings problem raised by such laws. *See, e.g.*, *Wayside Church v. Van Buren County*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting), *reopened under Rule 60*, No. 14-cv-01274, ECF No. 64 (identifying potential takings concerns and noting, "[i]n some legal precincts that sort of behavior is called theft"); *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546 (E.D. Mich. 2015) (raising concerns about the injustice and potential constitutional problems caused by the taking of a valuable home as payment for a delinquent $8 property tax underpayment); *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 5831013 at *2 (E.D. Mich. 2018) *rev'd* __F.3d__, 2020 WL 5814503 (Sept. 30,

2020) (calling the uncompensated taking of surplus equity "unconscionable").

On the other side of the split, courts in Arizona, Illinois, Maine, Oregon, and Wisconsin join Ohio in rejecting takings claims against tax statutes that extinguish surplus equity. *See, e.g., City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Me. 1974); *Ritter*, 558 N.W.2d at 912 n.7; *Balthazar v. Mari Ltd.*, 301 F. Supp. 103, 105 n.6 (N.D. Ill., 1969) ("Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue."), *summarily aff'd* 396 U.S. 114 (1969);[8] *Automatic Art, LLC v Maricopa County*, 2010 WL 11515708, at *5–6 (D. Az., Mar. 18, 2010); *Reinmiller v. Marion County, Oregon*, No. CV-05-1926-PK, 2006 WL 2987707, at *3 (D. Or. 2006). These decisions have mostly hinged on a confused analysis of this Court's decision in *Nelson*, reading it broadly to mean "retention of any surplus from a tax auction is constitutional [where] there was no violation of plaintiffs' right to [procedural] due process." *See Miner v. Clinton Cty., N.Y.*, 541 F.3d 464, 475 (2d Cir. 2008).

In *Nelson*, the City of New York took the plaintiffs' property assessed at $6,000 to collect a $65 unpaid water bill, sold it for $7,000, and kept all the proceeds.

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[8] A few courts upholding tax sale statutes against constitutional challenges also rely on this Court's summary affirmance of *Balthazar*, 396 U.S. 114 (1969). But summary affirmance "carrie[s] little more weight than denials of certiorari." *Hohn v. United States*, 524 U.S. 236, 260 (1998) (Scalia, J., dissenting) (summary). That is especially true with *Balthazar*, where there may have been procedural problems with the underlying claims. *See Coleman I*, 70 F. Supp. 3d at 79 (noting the affirmance could have been because the government was not a party to the claim for just compensation).

Id. The city took the plaintiffs' other property assessed at $46,000, to collect an $814 water bill, and retained title to the property. *Id.* at 106. The dispossessed owners brought a due process challenge for lack of notice, and in their reply brief before this Court suggested that failure to vindicate their right to due process would also effect an uncompensated taking. *Id.* at 109. The Court denied their due process claim (because their bookkeeper had actual notice of the foreclosure) and briefly disposed of the takings argument. The New York statute provided the dispossessed owners with the opportunity to recover the surplus proceeds by raising a claim for the surplus during the foreclosure proceedings. *Id.* This Court held there had been no taking because the plaintiffs failed to claim the surplus using that procedure. *Id.* at 110 (The New York statute did not "preclude[] an owner from obtaining the surplus proceeds of a judicial sale.") (internal citation omitted). In so holding, the *Nelson* Court reserved the question raised here: Whether government effects a taking if the statute fails to provide a means to reimburse surplus funds. *See id.*; *Coleman I*, 70 F. Supp. 3d at 79 ("*Nelson* . . . expressly reserved the question whether a tax sale law with no avenue for recovery of the surplus would be constitutional.").

Nelson tells us only that a party who fails to use a state procedure to claim the surplus proceeds cannot bring a takings claim.[9] "*Nelson* do[es] not tell us . . .

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[9] Essentially, *Nelson* held that the state court hearing where the plaintiff could seek and potentially obtain compensation was a suitable substitute for the actual payment of money for a taking. But this Court has recently rejected the notion that that a "taking does not give rise to a federal constitutional right to just compensation at that time, but instead gives a right to a state

what occurs when the statutes governing foreclosure make no mention of, or expressly preclude, a divested property owner's right" to the equity or surplus proceeds from a tax sale, but the owner establishes that right through another "source, such as the common law." *Rafaeli*, 2020 WL 4037642 at *14.

This Court should grant the petition to resolve the discord among the state and federal courts on the question whether the owner of tax-delinquent property is owed just compensation when government takes property worth far more than what is owed and retains the windfall for the public.

CONCLUSION

This Court should grant the petition.

DATED: October 2020.

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law procedure that will eventually result in just compensation." *Knick*, 139 S. Ct. at 2171. While certainly government may use limitations periods on the ability to make a takings claim after the taking occurs, it is not reasonable for a court require a plaintiff to stake a takings claim before the taking actually occurs. Nor does a procedural opportunity to request compensation before the taking occurs satisfy the constitutional mandate that government pay just compensation. *See id.* at 268.

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SUPREME COURT OF OHIO

STATE EX REL. FELTNER
v.
CUYAHOGA CTY. BD. OF REVISION
2018-1307
March 20, 2019

CASE ANNOUNCEMENTS

MERIT DECISIONS WITHOUT OPINIONS

In Mandamus and Prohibition. Sua sponte, alternative writ granted as to counts I and III against respondents Cuyahoga County Board of Revision, Armond Budish, Dennis G. Kennedy, and Michael Gallagher. The motion to dismiss of the Cuyahoga County Respondents is granted as to all remaining counts in the complaint. The following briefing schedule is set for presentation of evidence and filing of briefs as to counts I and III pursuant to S.Ct.Prac.R. 12.05: The parties shall file any evidence they intend to present within 20 days, relator shall file a brief within 10 days after the filing of the evidence, respondents shall file briefs within 20 days after the filing of relator's brief, and relator may file a reply brief within 7 days after the filing of respondents' briefs. Motions to dismiss of respondents Cuyahoga County Land Reutilization Corporation and Mike DeWine, Ohio Attorney General, and motion to dismiss of Cuyahoga County Respondents as to W. Christopher Murray II, and Cuyahoga County, are granted and these respondents are dismissed as parties from the case. Sua sponte, case to be scheduled for oral argument before the full court.

O'Connor, C.J., and Kennedy, French, and Donnelly, JJ., concur.

Fischer, J., would also grant an alternative writ as to counts V and VI.
DeWine, J., dissents and would grant respondents' motions to dismiss in full.
Stewart, J., not participating.

FILED
MAR 20 2019
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio, ex rel. Elliott G. Feltner	Case No. 2018-1307
v.	IN MANDAMUS AND PROHIBITION
Cuyahoga County, Ohio Board of Revision, et al.	(CORRECTED) E N T R Y

This cause originated in this court on the filing of a complaint for writs of mandamus and prohibition.

Upon consideration thereof, it is ordered by the court, sua sponte, that an alternative writ is granted as to counts I & III against respondents Cuyahoga County Board of Revision, Armond Budish, Dennis G. Kennedy, and Michael Gallagher. The motions to dismiss of respondents Cuyahoga County Board of Revision, Armond Budish, Dennis G. Kennedy, and Michael Gallagher, are granted as to all remaining counts in the complaint. The following briefing schedule is set for presentation of evidence and filing of briefs as to counts I and III pursuant to S.Ct.Prac.R. 12.05:

The parties shall file any evidence they intend to present within 20 days of the date of this entry; relator shall file a brief within 10 days of the filing of the evidence; respondents shall file a brief within 20 days after the filing of re1ator's brief; and relator may file a reply brief within 7 days after the filing of respondents' brief.

It is further ordered that the motions to dismiss of respondents, Cuyahoga County Land Reutilization Corporation, Mike DeWine, Ohio Attorney General, W. Christopher Murray, II, and Cuyahoga County are granted, and these respondents are dismissed as parties from this case.

It is further ordered, sua sponte, that this case be scheduled for oral argument before the full court.

/s Maureen O'Connor
Maureen O' Connor
Chief Justice

Official Case Announcement can be found at http://www.supremecourt.ohia.gov/ROD/ docs/

SUPREME COURT OF OHIO

SLIP OPINION NO. 2020-OHIO-3080

THE STATE EX REL. FELTNER v. CUYAHOGA COUNTY BOARD OF REVISION, ET AL.

Prohibition—R.C. 323.66—Writ sought to invalidate a foreclosure adjudication by a county board of revision—Board of revision did not patently and unambiguously lack jurisdiction—Writ denied.

(No. 2018-1307—Submitted November 13, 2019—Decided May 28, 2020.)

IN PROHIBITION.

FRENCH, J.

{¶ 1} R.C. 323.66(A) authorizes boards of revision to adjudicate foreclosures involving certain tax-delinquent abandoned land. In this original action, an owner whose property was the subject of a board-of-revision foreclosure seeks a writ of prohibition to invalidate the foreclosure adjudication. The owner contends that the board of revision lacked authority to foreclose on his property because the statutes under which the board proceeded are unconstitutional. We deny the writ because the board of revision did not patently and unambiguously lack jurisdiction when it proceeded in the foreclosure action at issue.

Background

{¶ 2} In 2006, the General Assembly passed legislation authorizing boards of revision to adjudicate tax-foreclosure actions involving abandoned land. *See* 2006 Sub.H.B. No. 294, 151 Ohio Laws, Part IV, 7334. These proceedings are designed to be an expeditious alternative to conventional judicial foreclosures. *See* R.C. 323.67(B)(1) and (C). Among other things, the law allows a board of revision, under certain circumstances, to order the sheriff to transfer property directly to a county land-reutilization corporation (or some other statutorily eligible political subdivision), without the need for an appraisal and public auction. R.C. 323.65(J), 323.71(A)(1), 323.73(G), 323.78.

{¶ 3} In June 2017, respondent Cuyahoga County Board of Revision ("BOR") entered a judgment of foreclosure concerning real property owned by relator, Elliott G. Feltner. After its judgment, the BOR transferred Feltner's property to the Cuyahoga County Land Reutilization Corporation ("the Land Bank") under R.C. 323.78. The Land Bank later transferred the property to a third party.

{¶ 4} More than a year later, Feltner filed this original action, asserting multiple prohibition and mandamus claims against the BOR, its members,[1] the Cuyahoga County treasurer, Cuyahoga County, the Land Bank, and the Attorney General. We previously dismissed the Cuyahoga County treasurer, Cuyahoga County, the Land Bank, and the Attorney General as

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[1] The members of the BOR are respondents Armond Budish, Michael Gallagher, and Michael Chambers, who is substituted automatically for former board member Dennis G. Kennedy as a party to this action. S.Ct.Prac.R. 4.06(B).

parties. 155 Ohio St.3d 1403, 2019-Ohio-943, 119 N.E.3d 431. But we granted an alternative writ of prohibition as to two of the claims against the BOR and its members. *Id.* Those claims present the question whether the statutes under which the BOR proceeded violate the separation-of-powers doctrine or the due-process clauses of the United States and Ohio Constitutions.

{¶ 5} The case is now ripe for our final determination.

Analysis

{¶ 6} To be entitled to a writ of prohibition, a relator ordinarily must prove that a lower tribunal is about to exercise judicial or quasi-judicial power without authority and that there is no adequate remedy in the ordinary course of the law. *State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, ¶7. This standard reflects the well-established rule that prohibition "is a preventive rather than a corrective remedy, and issues only to prevent the commission of a future act, and not to undo an act already performed." High, *Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto and Prohibition*, Section 766, at 606 (2d Ed.1884).

{¶ 7} The BOR is not about to exercise power concerning the property Feltner once owned—Feltner commenced this prohibition action more than a year after the BOR entered its final judgment. The BOR and its members contend that this fact alone precludes us from granting the writ in this case.

{¶ 8} But in *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 285 N.E.2d 22 (1972), paragraph two of the syllabus, we recognized an exception to the

general rule, holding that a writ of prohibition may issue correctively to arrest the continuing effects of an order when there was "a total want of jurisdiction" on the part of the lower tribunal. A few years after *Gusweiler*, we began to associate the exception with the modifying phrase "patent and unambiguous." *See State ex rel. Gilla v. Fellerhoff*, 44 Ohio St.2d 86, 87-88, 338 N.E.2d 522 (1975). We also began using that term with respect to a related exception adopted in *Gusweiler* at 329—namely, that the availability of an adequate remedy is immaterial when a tribunal patently and unambiguously lacks jurisdiction. *See, e.g.*, *State ex rel. Koren v. Grogan*, 68 Ohio St.3d 590, 595, 629 N.E.2d 446 (1994). Over time, we have issued writs of prohibition to correct the results of unauthorized exercises of authority, notwithstanding the availability of an appeal, if the tribunal patently and unambiguously lacked jurisdiction to enter the judgment at issue. *See, e.g.*, *State ex rel. V.K.B. v. Smith*, 142 Ohio St.3d 469, 2015-Ohio-2004, 32 N.E.3d 452, ¶ 8. And so, the narrow issue before us is whether the BOR patently and unambiguously lacked jurisdiction to adjudicate the foreclosure of Feltner's property.

{¶ 9} We typically will not hold that a tribunal patently and unambiguously lacked jurisdiction if the tribunal "had at least basic statutory jurisdiction to proceed." *Gusweiler* at 329. Therefore, in prohibition cases involving statutorily created tribunals of limited jurisdiction, we ordinarily ask whether the General Assembly gave the tribunal authority to proceed in the matter at issue. *See, e.g.*, *State ex rel. Goldberg v. Mahoning Cty. Probate Court*, 93 Ohio St.3d 160, 162, 753 N.E.2d 192 (2001); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.*, 55 Ohio St.3d 98, 100, 562 N.E.2d 1383 (1990).

{¶ 10} Here, the legislature clearly gave the BOR statutory authority to proceed. *See* R.C. 323.25 and 323.65 through 323.79. But this case presents a more complicated issue because Feltner contends that the BOR's statutory authority is unconstitutional. The question, then, is the extent to which we may consider the merit of Feltner's constitutional challenge in deciding whether the BOR patently and unambiguously lacked jurisdiction.

{¶ 11} To date, we have not squarely explained what constitutes a patent and unambiguous lack of jurisdiction when a relator seeks to undo a final judgment by challenging the constitutionality of a lower tribunal's statutory authority. But our case law includes numerous examples in which we held that a tribunal did not patently and unambiguously lack jurisdiction under the specific law or facts at the time of the challenged proceedings. Most notably, in *Sliwinski*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, at ¶ 21, we declined to resolve a constitutional challenge to legislation in view of the rule that a statute is presumed to be constitutional. In other cases, we indicated that a tribunal cannot patently and unambiguously lack jurisdiction if the absence of jurisdiction is not clear under *then-existing* law. *See State ex rel. Worrell v. Athens Cty. Court of Common Pleas*, 69 Ohio St.3d 491, 496, 633 N.E.2d 1130 (1994) (common pleas court's lack of jurisdiction was not patent and unambiguous prior to enactment of new statute conferring exclusive jurisdiction on the Court of Claims); *Natalina Food Co.*, 55 Ohio St.3d at 100, 562 N.E.2d 1383 (relator could not demonstrate tribunal's patent and unambiguous lack of jurisdiction in the absence of any statutory or constitutional authority that "definitively" prevented its exercise of jurisdiction); *State ex rel. Henry v. Britt*, 67 Ohio St.2d 71, 75, 424 N.E.2d 297 (1981) (court's lack of jurisdiction was not patent and unambiguous

when the underlying jurisdictional question was "not well settled"). And in *State ex rel. McSalters v. Mikus*, 62 Ohio St.2d 162, 163, 403 N.E.2d 1215 (1980), we declined to hold that a tribunal patently and unambiguously lacked jurisdiction because the jurisdictional question turned on the specific facts of the case. Importantly, we did not suggest in these prohibition cases that the claims presented were incapable of resolution or that they could not be resolved at the appropriate time in an appropriate forum. We simply concluded that the respondents named in each did not obviously lack jurisdiction under the law at the time.

{¶ 12} Cases in which we *have* found an obvious lack of jurisdiction support the idea that we must examine then-existing law (e.g., a statute, a rule, or precedent) when determining whether a tribunal patently and unambiguously lacked jurisdiction. *See, e.g.*, *State ex rel. Sanquily v. Lucas Cty. Court of Common Pleas,* 60 Ohio St.3d 78, 80, 573 N.E.2d 606 (1991) ("Although R.C. 2305.01 gives common pleas courts original jurisdiction in civil matters generally, R.C. 2743.02(F) patently and unambiguously takes it away from them in a specific class of civil cases"); *Ohio Dept. of Adm. Servs., Office of Collective Bargaining v. State Emp. Relations Bd.*, 54 Ohio St.3d 48, 52-53, 562 N.E.2d 125 (1990) (holding that a court lacked jurisdiction to hear an appeal under existing precedent interpreting a statute); *State ex rel. Safeco Ins. Co. of Am. v. Kornowski*, 40 Ohio St.2d 20, 21-22, 317 N.E.2d 920 (1974) (holding that a rule of appellate procedure patently and unambiguously did not confer jurisdiction on a court).

{¶ 13} In this light, the answer to the narrow question before us becomes clear. When a relator in a prohibition action seeks to undo a final judgment by challenging the constitutionality of the statutory

authority under which a lower tribunal acted, a court may consider only whether the authorizing statute was clearly unconstitutional under precedent existing at the time of the lower tribunal's judgment in determining whether the lower tribunal patently and unambiguously lacked jurisdiction. This rule is consistent with our caselaw, which recognizes that the limited purpose of a writ of prohibition is to police exercises of "ultra vires jurisdiction" by lower tribunals. *State ex rel. Nolan v. ClenDening*, 93 Ohio St. 264, 112 N.E. 1029 (1915), paragraphs three and four of the syllabus. In reality, a different rule—one that would allow for the issuance of a writ of prohibition to undo the outcome of a proceeding even when a tribunal exercised authority under a presumptively valid statute—would expand the writ beyond its limited purpose.

{¶ 14} In this case, at the time of its judgment, the BOR acted with apparent (and presumptively valid) statutory authority. We cannot conclude that the BOR patently and unambiguously lacked jurisdiction to proceed under these circumstances. We therefore have no authority to undo the BOR's final judgment and need not consider the merit of Feltner's constitutional challenge. *See Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 54 ("courts decide constitutional issues only when absolutely necessary").

Writ denied.

DONNELLY and HENDRICKSON, JJ., concur.

KENNEDY, J., concurs in judgment only.

FISCHER, J., concurs in judgment only, with an opinion joined by O'CONNOR, C.J.

DEWINE, J., concurs in judgment only, with an opinion.

ROBERT A. HENDRICKSON, J., of the Twelfth District Court of Appeals, sitting for STEWART, J.

FISCHER, J., concurring in judgment only.

{¶ 15} I agree with the lead opinion's conclusion that we should deny the writ of prohibition against respondents Cuyahoga County Board of Revision ("BOR"), Armond Budish, Michael Chambers, and Michael Gallagher, albeit for different reasons. Therefore, I respectfully concur in judgment only.

{¶ 16} I also write to express my concerns with this court's decision to dismiss counts V and VI alleged in the complaint filed by relator, Elliott G. Feltner. *See State ex rel. Feltner v. Cuyahoga Cty. Bd. of Revision*, 155 Ohio St.3d 1403, 2019-Ohio-943, 119 N.E.3d 431.

I. Patent and Unambiguous Lack of Jurisdiction

{¶ 17} In his petition for a writ of prohibition, Feltner alleged that the BOR patently and unambiguously lacked jurisdiction because R.C. 323.65 et seq., which gives a board of revision the ability to adjudicate tax-foreclosure proceedings, violates the separation-of-powers doctrine and that a conflict of interest created by the interplay between the statutory scheme and the Cuyahoga County Charter deprived him of due process.

{¶ 18} The lead opinion avoids the constitutional issues presented by Feltner by concluding simply that the BOR did not patently and unambiguously lack jurisdiction to enter a judgment of foreclosure on the real property owned by Feltner because the statutory scheme, which provided the BOR with the ability to adjudicate a tax foreclosure, had not been held unconstitutional by existing precedent at the time that the BOR held its hearing. I agree with the other opinion concurring in judgment only to the extent that the reasoning in the lead opinion is circular: this court's consideration of the issue is informed by the Ohio Constitution, and a lack of jurisprudence on an issue should not bar this court from determining matters related to another branch of government's alleged use of judicial power, which is reserved to the courts under Article IV, Section 1 of the Ohio Constitution. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 467, 715 N.E.2d 1062 (1999) (the court must "jealously guard the judicial power against encroachment from the other two branches of government").

{¶ 19} Therefore, I believe that the constitutional issues in this case cannot and should not be avoided. I believe that this court should address Feltner's claims that the BOR patently and unambiguously lacked jurisdiction based on a violation of the separation-of-powers doctrine and his due-process rights.

A. Separation of Powers

{¶ 20} The separation-of-powers doctrine is implicitly embedded in the Ohio Constitution. *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159, 503 N.E.2d 136 (1986). And all judicial power is conferred on the courts of this state pursuant to Article IV, Section 1 of the Ohio Constitution.

{¶ 21} The Ohio Constitution prohibits the General Assembly from encroaching upon the courts' judicial power. Article II, Section 32, Ohio Constitution; *see Ohio Academy of Trial Lawyers*, 86 Ohio St.3d at 467, 715 N.E.2d 1062. The General Assembly cannot confer upon tribunals, other than courts, powers that are strictly and conclusively judicial. *Fassig v. State ex rel. Turner*, 95 Ohio St. 232, 116 N.E. 104 (1917), paragraph one of the syllabus, *overruled in part on other grounds by Griffin v. Hydra-Matic Div., Gen. Motors Corp.*, 39 Ohio St.3d 79, 529 N.E.2d 436 (1988).

{¶ 22} To facilitate the collection of taxes, the General Assembly has empowered boards of revision to foreclose on certain tax-delinquent properties and to order direct transfers to qualified parties, in this case, the Cuyahoga County Land Reutilization Corporation ("Land Bank"). *See* R.C. 323.66(A) and 323.78. The issue that we must resolve is whether the adjudication of tax foreclosures is *strictly* and *conclusively* an exercise of judicial power.

{¶ 23} There is no exact rule for determining what powers may or may not be assigned by law to each branch of government. *State ex rel. Atty. Gen. v. Harmon*, 31 Ohio St. 250, 258 (1877). In order to determine what constitutes judicial power within the meaning of our Constitution, we look to the common law and the history of our institutions as they existed before and at the time of the adoption of our Constitution. *Id.*

{¶ 24} The courts of this state have always held the power to adjudicate matters in equity, like foreclosures. *See St. Clair v. Morris*, 9 Ohio 15, 17 (1839). However, the power to tax is reserved for the legislative branch. *Bank of Toledo v. Toledo*, 1 Ohio St.

622, 701 (1853) (the right of taxation is a branch of the legislative authority); *see also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 281, 15 L.Ed. 372 (1856), and *Musser v. Adair*, 55 Ohio St. 466, 45 N.E. 903 (1896) (citing *Murray's Lessee* favorably). Thus, the statutory scheme at issue creates a unique intersection of judicial and legislative power. Because of this unique intersection of power, it is difficult to determine that the adjudication of tax foreclosures is strictly and conclusively an exercise of judicial power.

{¶ 25} Therefore, Feltner has not clearly and convincingly established that the BOR patently and unambiguously lacked jurisdiction to adjudicate the tax foreclosure based simply on the separation-of-powers issue.

B. Due Process

{¶ 26} Feltner also raised a due-process claim in arguing that the BOR patently and unambiguously lacked jurisdiction to adjudicate the foreclosure of his property. He contends that many of the individuals who participated in this tax foreclosure and the transfer of his property to the Land Bank had aligned interests: (1) the county treasurer prosecuted the action under R.C. 323.25, and because the county executive appointed the treasurer, their interests are aligned, (2) the county executive and county fiscal officer sit on the BOR, and because the county executive appointed the fiscal officer, their interests are aligned, (3) the county treasurer invoked the alternative right-of-redemption period under R.C. 323.78, thus allowing for a direct transfer of the property to the Land Bank, and (4) because the county executive and county treasurer are on the Land Bank's board, they have an interest in prosecuting and deciding tax-foreclosure cases that result in direct

transfers to the Land Bank. Feltner maintains that because the prosecutor's, the adjudicative body's, and the beneficiary of the adjudication's interests in his property overlapped, his due-process rights were violated.

{¶ 27} I agree with Feltner that the interplay between the Cuyahoga County Charter and the statutory scheme at issue presents a troubling scenario. The similar interests of the state, the BOR, and the Land Bank—prosecutor, judge, and beneficiary—may create an appearance of impropriety and partiality. Such an appearance could cause the public to lose confidence in the integrity of this adjudicative process, regardless of whether all procedures were followed by the parties involved. The appearance of impropriety and partiality is always a concern of the judiciary when we decide cases, *see* Jud.Cond.R. 1.2 and 2.2, and I do not see why it would not also be a concern for a board of revision in a quasi-judicial proceeding. It is difficult to imagine how Ohioans can have due process of law in tax-foreclosure proceedings when there is even a slight question of impropriety or partiality due to a conflict of interest created by the interplay between the statutory scheme and a county charter.

{¶ 28} But while I am sympathetic to Feltner's situation, this possible conflict of interest does not demonstrate that the BOR patently and unambiguously lacked jurisdiction to adjudicate the tax foreclosure. Rather, Feltner raises a due-process claim that comes too late, a claim that could have been and should have been addressed—if he had requested to have the proceeding transferred "to a court of competent jurisdiction to be conducted in accordance with the applicable laws," R.C. 323.69(B)(2). *See also* R.C. 323.691(A)(1) and 323.70(B). Therefore, I would conclude that Feltner has not demonstrated by clear

and convincing evidence that the BOR patently and unambiguously lacked jurisdiction based upon a possible conflict-of-interest issue. But I would reiterate that this is likely an issue that needs to be reviewed further by the General Assembly or Cuyahoga County so that Ohioans have full confidence in the fundamental fairness of these foreclosure proceedings.

II. Dismissal of Unauthorized-Taking Counts

{¶ 29} This court has previously dismissed counts V and VI of Feltner's complaint, both of which raised issues related to an unauthorized taking of property by the government. *See Feltner*, 155 Ohio St.3d 1403, 2019-Ohio-943, 119 N.E.3d However, I would have granted an alternative writ on those counts and ordered briefing. *Id.*

{¶ 30} I did not write a dissenting opinion to the order dismissing these claims, but on further review, it has become apparent that the dismissal of those claims is exceedingly bothersome. There is no doubt that the facts alleged by Feltner in this case are disconcerting, especially in light of the fact that his allegations in counts V and VI had to be taken as true. *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 418, 650 N.E.2d 863 (1995) (when reviewing a motion to dismiss, all material allegations in the complaint must be construed as true). While I express no opinion on the merits of Feltner's takings claims, after reviewing the record and the parties' briefs, I wonder if the claims would have had merit.

{¶ 31} I recognize that there were arguably some procedural issues with Feltner's takings claims, such as whether Feltner had properly asserted a claim in mandamus. But I would have welcomed briefing on the issue, because I am bothered by the possibility that the BOR foreclosed on Feltner's property, which

was worth around $144,500 and on which he owed $65,189.94 in taxes, and then transferred that property to the Land Bank, all without providing him notice of the final judgment and without remitting the remaining value of the property to Feltner. Indeed, Feltner claims that the property was not sold but was merely transferred to a third party after the Land Bank received the deed to the property. The whole scheme is unsettling and just seems wrong. Thus, although I previously voted to grant an alternative writ in regard to counts V and VI, after reviewing the evidence and the briefs that have now been submitted, I renew my objection to this court's failure to address those claims. I believe that the court should have granted an alternative writ in regard to those counts, if only to have peace of mind that Feltner received some due process and that the government did not receive a windfall at Feltner's expense.

III. Conclusion

{¶ 32} Because Feltner has not demonstrated that the BOR patently and unambiguously lacked jurisdiction to adjudicate his tax foreclosure, and because he had an adequate remedy at law, I concur in the judgment denying his petition for a writ of prohibition. To fully adjudicate the issues before this court, I believe that an alternative writ should have been granted in regard to counts V and VI of Feltner's complaint. I encourage the General Assembly and Cuyahoga County to evaluate this process to ensure transparent and impartial proceedings, because the right to private property is an original right and is one of the primary and most sacred objects of the government to secure and protect, *see Bank of Toledo*, 1 Ohio St. at 632. Therefore, I respectfully concur in judgment only.

O'CONNOR, C.J., concurs in the foregoing opinion.

DEWINE, J., concurring in judgment only.

{¶ 33} The lead opinion would deny the writ on the ground that the Cuyahoga County Board of Revision did not patently and unambiguously lack jurisdiction. It reaches this conclusion because there was clear statutory authority for the board's actions and none of our prior case law had established that the statutory grant of authority was unconstitutional. It thereby avoids addressing the constitutional challenges Feltner raises to the board's actions in this case. As I explain, I do not agree that we can avoid the constitutional issues. But because I do not believe that Feltner's constitutional challenges have any merit, I concur in the judgment denying the writ.

{¶ 34} The lead opinion rightly notes that for us to undo the board's actions through a writ of prohibition, Feltner must establish that the board patently and unambiguously lacked jurisdiction over the tax-foreclosure proceedings. And the lead opinion also rightly emphasizes that we normally do not address constitutional questions in extraordinary writ actions when there is a remedy at law—that is, when those questions could have been addressed through the normal process in the courts of common pleas or the courts of appeals. *See State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 22.

{¶ 35} But in this case, Feltner brings a separation-of-powers claim, arguing that the statute that ostensibly gives the board power over the foreclosure proceeding unconstitutionally usurps a

judicial function. Unlike many other kinds of constitutional claims, a separation-of-powers claim goes to the basic authority of a government entity. Feltner is not arguing simply that the legislature enacted a statute that exceeded its authority but rather that the tribunal that heard his case lacked the authority to act. Thus, the challenge he brings is akin to those we typically consider in original writ actions when we determine if there is a patent and unambiguous lack of jurisdiction.

{¶ 36} Thus, unlike the lead opinion, I would proceed to the next question: is Feltner right? Did the tribunal that decided his case lack the authority to act? Do the authorizing statutes unconstitutionally usurp judicial functions? The lead opinion sensibly notes that to assess whether a tribunal patently and unambiguously lacks jurisdiction, we must look to then-existing law—that is, the law at the time that the tribunal acted. One would think that this would require an examination of the statutes and constitutional provisions in effect at the time of a tribunal's decision. But instead the lead opinion says what really matters is whether there is any *precedent* establishing that a tribunal's action is unconstitutional. Indeed, the lead opinion suggests that "a court may consider only whether the authorizing statute was clearly unconstitutional under precedent existing at the time of the lower tribunal's judgment in determining whether the lower tribunal patently and unambiguously lacked jurisdiction." Lead opinion at ¶ 13. This reasoning turns the judicial role on its head. Whether a tribunal lacks jurisdiction under the Ohio Constitution hinges not on what this court has said but on what the Constitution requires. We are subservient to the Constitution. It is not subservient to us. I therefore do not think that Feltner's constitutional challenges can be avoided in the way that the lead opinion proposes.

In order to assess whether there is a patent and unambiguous lack of jurisdiction, we must address Feltner's separation-of-powers arguments.

{¶ 37} Feltner's arguments come in two varieties. The first seeks to establish that the statute violates the separation-of-powers doctrine because it involves an improper consolidation of executive and judicial functions in the board. This argument fails because the statutory scheme allows independent judicial assessment by transferring the case to a court prior to an administrative hearing under R.C. 323.70(B) or by de novo appeal to the court of common pleas under R.C. 323.79. We have held that the availability of an appeal to a court is sufficient to avoid an unconstitutional consolidation of powers. *See Stanton v. State Tax Comm.*, 114 Ohio St. 658, 664, 681-682, 151 N.E. 760 (1926). Independent de novo review by the judiciary means that governmental powers are not functionally consolidated in one branch of government or in one entity.[2]

{¶ 38} The second line of argument is not so much concerned with the consolidation of multiple functions as with the usurpation of the judicial function by an executive agency. On this line of reasoning, the objection is that the board is doing a kind of activity—adjudication—that it cannot constitutionally do. This argument faces an uphill climb since it has never been the case that judicial,

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[2] Feltner protests that he was never notified of the board's decision and that this deprived him of his right to appeal. Whether or not that argument is sound, it doesn't bear on the jurisdiction of the board, and hence, cannot be used to support Feltner's claim for a writ of prohibition.

executive, and legislative functions are cleanly separated in our constitutional scheme. *See Fairview v. Giffee,* 73 Ohio St. 183, 186, 76 N.E. 865 (1905). And there are a host of constitutionally permissible activities performed by executive units that are quasi-judicial in nature. *See, e.g., State ex rel. Stewart v. Clinton Cty. Bd. of Elections*, 124 Ohio St.3d 584, 2010-Ohio-1176, 925 N.E.2d 601, ¶ 16. So, one cannot argue that an activity is judicial and hence improperly exercised by the executive branch merely by pointing out that the executive activity has some of the characteristics that are paradigmatic of judicial activity—taking evidence, hearing claims and arguments, etc. *See Fassig v. State ex rel. Turner*, 95 Ohio St. 232, 116 N.E. 104 (1917), paragraph two of syllabus. Rather, Feltner must show that the specific type of quasi-judicial proceeding at issue here may not be conducted by the executive branch.

{¶ 39} Does the Constitution prohibit the administrative handling of a tax proceeding like this one? As a general rule, the Constitution is to be "interpreted with reference to the usages and customs * * * at the time of its adoption." *De Camp v. Archibald*, 50 Ohio St. 618, 625, 35 N.E. 1056 (1893). As noted above, there are no clean conceptual boundaries to draw around the kinds of activities that are exclusively judicial, executive, or legislative. Thus, in separation-of-powers cases, it is especially important to look to historical practice. *See Zivotofsky v. Kerry*, 576 U.S. ___, 135 S.Ct. 2076, 2091, 192 L.Ed.2d 83 (2015). The problem for Feltner is that when the Ohio Constitution was adopted in the middle part of the 19th century, tax-levy and foreclosure matters were handled by the executive branch. An 1856 case makes this point clear. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 282, 15 L.Ed. 372 (1856). As the United States Supreme Court explained, tax recovery from tax debtors could

proceed through a summary-administrative process. This is because "there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy." *Id.*; *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum.L.Rev. 559, 589-590 (2007) (noting that the "traditional power of taxation enabled the government to take authoritative actions adverse to core private rights without any 'judicial' involvement").

{¶ 40} Similarly, the Supreme Court rejected the argument that the levy and sale of property to secure payment of a tax debt violated due-process protections because it was done through an administrative process. *Springer v. United States*, 102 U.S. 586, 592-594, 26 L.Ed. 253 (1880). The court reasoned that with regard to tax proceedings, "[t]he idea that every tax-payer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected." *Id.* at 594. And around the same time, this court observed that

> [t]he people of this country, in their colonial and subsequent history, have always collected taxes through the agency of administrative officers. The courts have remained open to those who could show that they had been aggrieved; but, that the state should resort to the courts for the purpose of making collections * * * has not been allowed * * *.

Adler v. Whitbeck, 44 Ohio St. 539, 570, 9 N.E. 672 (1887).

{¶ 41} The statutory scheme for tax collection in the middle part of the 19th century also supports the conclusion that tax proceedings like this one could permissibly be given over to executive authorities. In an 1832 case, this court explained the statutory process for a land sale associated with a tax lien. *Carlisle's Lessee v. Longworth*, 5 Ohio 368, 371-373 (1832), citing 23 Ohio Laws 89. That procedure included the following steps: (1) the tax collector would give the county auditor a list of delinquent taxpayers and certify under oath as to its veracity, (2) the county auditor would make a list of all lands noted as delinquent and would impose a penalty and publish the tax bill plus interest and penalty, (3) the auditor would then record and certify the publication, (4) the county collector would then hold a sale of the lands mentioned in the advertisement and still delinquent. *Id.* In short, it was a procedure that occurred outside the courts.

{¶ 42} The upshot of all of this is that as a matter of historical practice, tax assessment was handled by the executive branch of government and did not require judicial involvement. The result is that there cannot be a separation-of-powers problem with the administrative process at issue here. For that reason, Feltner has not shown that the board lacks jurisdiction over this matter. I therefore concur only in the judgment denying the writ.

The Dann Law Firm Co., L.P.A., Marc E. Dann, Whitney Kaster, and Brian D. Flick; and Andrew M. Engel Co., L.P.A., and Andrew M. Engel, for relator.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Charles E. Hannan and

Adam Jutte, Assistant Prosecuting Attorneys, for respondents.

Dave Yost, Attorney General, Benjamin M. Flowers, State Solicitor, and Michael J. Hendershot, Chief Deputy Solicitor, urging denial of the writ for amicus curiae Ohio Attorney General.

Roetzel & Andress, L.P.A., and Stephen W. Funk, urging denial of the writ for amici curiae Cuyahoga County Land Reutilization Corporation and Ohio Land Bank Association.

Julia R. Bates, Lucas County Prosecuting Attorney, and Suzanne Cotner Mandros, Assistant Prosecuting Attorney, urging denial of the writ for amicus curiae Ohio Prosecuting Attorneys Association.

Herman Law, L.L.C., and Edward F. Herman, urging denial of the writ for amicus curiae County Treasurers Association of Ohio.

Frances Shaiman Lesser; and Pappas & Associates and Thomas P. Pappas, urging denial of the writ for amicus curiae County Auditors' Association of Ohio.

Supreme Court of Ohio Clerk of Court –
Filed September 17, 2018 - Case No. 2018-1307

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, ex rel. ELLIOTT G FELTNER 907 EAST 214TH ST CLEVELAND, OH 44119	*	CASE NO.
RELATOR	*	Original Action in Prohibition and Mandamus
-vs-	*	
CUYAHOGA COUNTY, BOARD OF REVISION 2079 East Ninth Street Cleveland, OH 44115	*	
and	*	
DENNIS G KENNEDY, FISCAL OFFICER OF CUYAHOGA COUNTY, OHIO 2079 East Ninth Street Cleveland, OH 44115	*	
and	*	
MICHAEL GALLAGHER CUYAHOGA COUNTY COUNCIL MEMBER 2079 East Ninth Street Cleveland, OH 44115	*	

and *

W. CHRISTOPHER MURRAY II, TREASURER OF CUYAHOGA COUNTY, OHIO * 2079 East Ninth Street Cleveland, OH 44115 *

and *

CUYAHOGA COUNTY LAND REUTILIZATION CORPORATION * 812 Huron Road E, Suite 800 * Cleveland, OH 44115 *

CUYAHOGA COUNTY, OHIO 2079 East Ninth Street * Cleveland, OH 44115 *

and *

MIKE DEWINE, ATTORNEY GENERAL OF THE STATE OF OHIO * 30 E. Broad St., 14th Floor * Columbus, OH 43215 *

RESPONDENTS *

COMPLAINT FOR WRITS OF PROHIBITION AND MANDAMUS WITH SUPPORTING AFFIDAVIT

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INTRODUCTION

Relator used to own a parcel of commercial property in Cleveland. The Cuyahoga County Fiscal Officer valued the property at $144,500.00. He doesn't own that property any more. It was transferred by Sheriff's Deed to the Cuyahoga County Land Reutilization Corporation pursuant to an order of foreclosure issued by the Cuyahoga County Board of Revision. The deed was not issued because the Cuyahoga County Land Reutilization Corporation purchased the property at a foreclosure sale. Rather, title to Relator's property was directly transferred because the Cuyahoga County Land Reutilization Corporation asked for it. No money changed hands; the County collected no real estate taxes.

But the Cuyahoga County Land Reutilization Corporation wasn't the entity that ultimately benefited from the foreclosure case. Soon after it received title to Feltner's property, the Cuyahoga County Land Reutilization Corporation deeded the property to East Side Automotive Service, Inc., a

privately held corporation. East Side Automotive Service, Inc. apparently paid nothing for the property. Thus, after the dust settled, Feltner no longer owned the real estate; East Side Automotive Service, Inc. did. And Cuyahoga County collected no tax dollars.

The Board of Revision's exercise of judicial power in hearing and deciding a tax foreclosure case and the manner in which Feltner's case was handled, violate well-established constitutional principles of this state. Thus, the entirety of the Board of Revision proceedings is a nullity. Relator, Elliott G. Feltner ("Feltner"), files this Complaint seeking a writ of prohibition against the Respondent Cuyahoga County Board of Revision ("Board of Revision") and its members, Respondents Armond Budish, Dennis G. Kennedy, and Michael Gallaher ("Budish," "Kennedy," and "Gallagher," respectively, or "Members," collectively), relating to their exercise of judicial power against Feltner under the auspices of R.C. 323.65, et seq.

Further, Mr. Feltner's property was appropriated by governmental entities without compensation in violation of the Fifth Amendment to the United States Constitution and Article I Section 19 of the Ohio Constitution. A governmental agency cannot simply take someone's land and give it to another private party. Therefore, Feltner also seeks a writ of mandamus against Respondents W. Christopher Murray II ("Murray"), Cuyahoga County, Ohio ("County") and the Cuyahoga County Land Reutilization Corporation ("Land Bank") directing them to institute appropriation proceedings in accordance with law to compensate Feltner for the value of the real property taken from him and granted to the Land Bank in violation of Art. I, Sec. 19 of the Ohio Constitution.

For his Complaint, Feltner says as follows:

JURISDICTION AND PARTIES

1. This Court has jurisdiction over this matter pursuant to Art. IV, Sec. 2(B)(l)(b) and (d) of the Ohio Constitution and Ohio Revised Code § 2731.01 et seq.

2. Feltner was the defendant in *Treasurer, Cuyahoga County, Ohio v. Elliott G Feltner, et al.*, Cuyahoga County Board of Revision Case No. BR 010620 ("Board of Revision Case"), which was an expedited tax foreclosure case commenced and prosecuted by Murray, as Plaintiff, in the Board of Revision pursuant to R.C. 323.65, et seq. to foreclose the lien for delinquent real estate taxes owed on real property located at 18927 St. Clair Ave., Cleveland, Ohio.

3. At the time of the commencement of the Board of Revision Case, Feltner owned 18927 St. Clair Ave., Cleveland, Ohio (the "Property"). The Property, located in Cuyahoga County, Ohio, is identified as Permanent Parcel No. 114-26-004 and is a roughly 0.63 acre commercial property.

4. The Board of Revision is an administrative board of Cuyahoga County, Ohio, formed and operated pursuant to R.C. 5715.01, et seq. and the Charter of Cuyahoga County (the "Charter"), Sec. 6.02. Upon information and belief, the current members of the Board of Revision are Budish, Kennedy, and Gallagher.

5. Budish is the duly elected County Executive of Cuyahoga County, Ohio and possesses such powers and duties as are provided by the

Charter and the general law of Ohio. Budish is a member of the Board of Revision. Budish is also a member of the Board of Directors of the Land Bank. Budish is named as a defendant herein solely in his official capacities.

6. Kennedy is the appointed Fiscal Officer of Cuyahoga County, Ohio and possesses such powers and duties as are provided by the Charter and the general law of Ohio. Under the Charter, the Fiscal Officer has, inter alia, all the powers granted to, and duties imposed on, county auditors. Kennedy was appointed Fiscal Officer by Budish and serves in that position at the pleasure of Budish. Kennedy is a member of the Board of Revision. Kennedy is named as a defendant herein solely in his official capacities.

7. Gallagher is a member of the Cuyahoga County Council and possesses such powers and duties as are provided by the Charter of Cuyahoga County and the general law of Ohio. Gallagher is a member of the Board of Revision as the representative of the Cuyahoga County Council. Gallagher is named as a defendant herein solely in his official capacities.

8. Murray is the appointed Treasurer of Cuyahoga County, Ohio and possesses such powers and duties as are provided by the Charter of Cuyahoga County and the general law of Ohio. Murray was appointed Treasurer by Budish and serves in that position at the pleasure of Budish. Murray is also a member of the Board of Directors of the Land Bank. Murray is named as a defendant herein solely in his official capacities.

9. The Land Bank is an Ohio not-for-profit corporation incorporated by the County in 2009 pursuant to Revised Code Chapter 1724. The Land Bank is operated as a county land reutilization corporation for the essential governmental purposes provided for under Revised Code Chapters 1724 and 5722. Budish and Murray are permanent members of the Board of Directors of the Land Bank, as is a member of the Cuyahoga County Council.

10. The formation of the Land Bank was authorized by a resolution adopted by the Cuyahoga County Board of Commissioners on April 9, 2009 which found the need for "the implementation of a land reutilization program to foster either the return of such nonproductive land to tax revenue generating status or the devotion thereof to public use." The resolution went on to state that the formation of the Land Bank was in furtherance of the implementation of the County's land reutilization program.

11. The County is a body politic and corporate organized under Chapter 302 of the Revised Code and possesses and exercises such powers as are granted by the Charter of Cuyahoga County and the general law.

12. Mike DeWine is the Attorney General of the State of Ohio and is named for notice purposes only because this suit challenges the constitutionality of several statutes of the State of Ohio.

BOARD OF REVISION FORECLOSURES

13. County boards of revision are statutorily created and charged with hearing complaints regarding real estate valuations by the County Auditor.

14. Under R.C. 5715.02, the members of a board of revision are the county auditor, county treasurer, and a member of the county commission. That statute also provides that a board of revision "may provide for one or more hearing boards when they deem the creation of such to be necessary to the expeditious hearing of valuation complaints. Each such official may appoint one qualified employee from the official's office to serve in the official's place and stead on each such board for the purpose of hearing complaints as to the value of real property only, ... "

15. Cuyahoga County, Ohio has adopted an alternative form of county government pursuant to R.C. 302.01, and under its county charter, the members of the Board of Revision are (1) the County Executive, (2) the County executive's choice of either the county fiscal office or county treasurer, and (3) a member of the county council.

16. The Charter of Cuyahoga County (the "Charter") prohibits the actual Board of Revision Members from presiding over real estate valuation matters. Rather, the Charter provides that the Board of Revision may appoint one or more three-person hearing panels to hear and decide real estate valuation complaints. The Charter does not authorize hearing panels to hear foreclosure cases

brought in the Board of Revision under R.C. 323.66. Under the Charter, the members of hearing panels serve at the pleasure of the Board of Revision.

17. In 2008, the General Assembly enacted a statutory scheme which granted to county boards of revision the authority to preside over expedited tax foreclosure cases involving unoccupied lands. R.C. 323.65-.79.

18. Foreclosures relating to unoccupied lands are like any other tax foreclosure with a few notable exceptions:

    A. They can be had only on property deemed unoccupied, as defined by R.C. 323.65.

    B. They may be commenced and prosecuted in county boards of revision.

    C. Foreclosures filed in the board of revision are not heard by a judge. They are heard by the members of the board of revision.

    D. The Rules of Civil Procedure do not apply to board of revision foreclosures, except for those rules relating to service of process. But even with respect to those rules, the statutes modify the methods for service of process. Also, individual county boards of revision can adopt rules of procedure to be applied to these foreclosures.

    E. Upon judgment of foreclosure, a sale of the property is not required. Rather, the property may be transferred directly to an electing municipality or county land reutilization corporation. If a direct transfer

of property is ordered, all taxes, assessments and other impositions on the property are waived by the county.

F. A direct transfer of the property may be ordered in two circumstances: (I) when the amount of the impositions (i.e. taxes, assessments, etc. owed on the property) exceed the value of the property, or (2) when the Treasurer elects the employ the alternative redemption period, in which case the property owner may redeem the prope1iy within 28 days of the adjudication of foreclosure. If the property is not timely redeemed, then the sheriff issues a deed to the electing municipality or land reutilization corporation without consideration.

THE BOARD OF REVISION CASE

19. Murray, as Plaintiff, commenced the Board of Revision Case against Feltner on November 9; 2015 pursuant to 323.66, et seq. to collect delinquent real estate taxes owed on the Property.

20. At the time suit was commenced, certified delinquent taxes on the Property were $9,353.25, and total taxes owed relative to the Property were $42,785.26.

21. At the time suit was commenced, the market value of the Property, as set by the Cuyahoga County Fiscal Officer, was $144,500. Aside from the lien for real estate taxes, the property was unencumbered.

22. The initial complaint filed by Murray did not allege that the Property was vacant or abandoned. Nor did it allege the presence of any of the factors set forth in R.C. 323.65(F). The complaint did, however, mention R.C. 323.65-.78 as a possible statutory basis for the lawsuit. The complaint also mentioned that the relief requested might include direct transfer of the Property under R.C. 323.78.

23. On August 1, 2016, Murray filed an amended complaint. The amendment corrected the spelling of Feltner's first name. Like the initial complaint, the amended complaint did not allege that the Property was vacant or abandoned. Nor did it allege the presence of any of the factors set forth in R.C. 323.65(F). Further, the amended complaint did not mention R.C. 323.65-.79 or request a direct transfer of the property pursuant to the alternative right of redemption found in R.C. 323.78. In fact, the only relief requested in the amended complaint was for the property be sold at sheriff sale.

24. Soon after commencement of the Board of Revision Case, the Land Bank, through its staff attorney, executed an affidavit, ostensibly on behalf of the City of Cleveland, that stated that the Land Bank had determined that the acquisition of the Property was "eligible for the implementation of an effective land reutilization program." The affidavit did not mention any of the factors set forth in R.C. 323.65(F). The affidavit went on to assert that the City of Cleveland did not want to acquire the Property for its land reutilization program but that the Land Bank did want to acquire the Property.

25. Feltner was never properly served with the summons and complaint in the Board of Revision Case. He learned of the Board of Revision Case from a title agency who had performed a title search for a prospective buyer of the Property. The case proceeded to final hearing on June 21, 2017. Feltner was not aware of the date for the final hearing and did not attend.

26. The matter was not heard by the actual Members of the Board of Revision. Rather, the foreclosure case was heard and decided by a hearing panel appointed pursuant to the Charter to hear valuation complaints.

27. At the final hearing, the hearing panel called the case, and the prosecutor called a witness, identified only as "Ms. Smith." No exhibits were offered into evidence, but the witness testified that the "Cuyahoga County Land Bank is interested in the parcel." She also testified that "the impositions do not exceed the fair market value, therefore the property will transfer via the alternative right of redemption to the County Land Bank" The witness then testified that the estimated impositions on the Property were $65,189.94 and the fair market value of the Property was $144,500.00.

28. At the end of Ms. Smith's testimony, the hearing panel (a) found in favor of Murray on the foreclosure claim, (b) found that the Land Bank had "petitioned to acquire the property," (c) ordered that the alternative redemption period of R.C. 323.65(J) and 323.78 apply, and (d) ordered the Sheriff to issue a deed to the Property directly to the Land Bank at the expiration of the alternative redemption period.

29. At the direction of the Board of Revision hearing panel, a sheriff's deed was issued transferring the Property to the Land Bank on July 28, 2017.

30. As a result of the direct transfer of the Property to the Land Bank, all taxes, assessments, and impositions owed to the County were waived pursuant to R.C. 323.78(B). The County received nothing through the foreclosure process.

31. On August 21, 2017, the Land Bank issued a Quit Claim deed for the Property to East Side Automotive Services Inc. Upon information and belief, no consideration was given by East Side Automotive Services, Inc. for the Property. Upon information and belief, East Side Automotive Service, Inc. now uses the Property as an automotive repair facility.

32. Feltner has received no compensation for the Property.

33. On November 3, 2017, Feltner filed a *Motion to Vacate Judgment* the Board of Revision Case for lack of service of process. No response has been filed to the Motion, and the Board of Revision has taken no action on the motion.

Count I
Prohibition

34. Art. IV, Sec. I of the Ohio Constitution vests all judicial power of the State of Ohio in Ohio's courts.

35. Through enacting R.C. 323.65-.79, the General Assembly impermissibly granted judicial power

to an executive branch board in violation of Art. IV, Sec. I of the Ohio Constitution.

36. Because the General Assembly exceeded its constitutional power, the enactment of R.C. 323.65-.79 is void, and all actions taken thereunder are a nullity.

37. The Board of Revision hearing panel exercised jurisdiction in the Board of Revision Case that it patently and unambiguously lacked.

38. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

39. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count II
Prohibition

40. Feltner restates the allegations of paragraphs 1 through 39 above as if fully rewritten herein.

41. The authority to foreclose the state's lien for taxes granted by R.C. 323.66, is limited to those delinquent lands that are abandoned, as that term is defined in R.C.323.65.

42. Because county boards of revision are creations of the legislature, they possess only those powers that the General Assembly expressly grants to them.

43. In order for a county board of revision to possess the power to order the foreclosure of delinquent property, there must be a finding by the board

of revision that the property is abandoned, as that term is defined in R.C. 323.65.

44. Because there was no allegation in the Complaint or the Amended Complaint that the Property was abandoned, the jurisdiction of the Board of Revision was not invoked by the filing of the Complaint or Amended Complaint.

45. Because no evidence was presented at any time that tended to prove that the Property was abandoned, the Board of Revision lacked the statutory power granted in R.C. 323.65-.79 to foreclose the state's lien on the Property.

46. As a result, the Board of Revision hearing panel exercised jurisdiction in the Board of Revision Case that it patently and unambiguously lacked.

47. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

48. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count III
Prohibition

49. Feltner restates the allegations of paragraphs I through 48 above as if fully rewritten herein.

50. Under both the Charter and the general law of Ohio, Murray is required to be the plaintiff in all tax foreclosure cases commenced in the Board of Revision.

51. Pursuant to R.C. 323.78, Murray alone has the power to invoke the alternative redemption period which permits the direct transfer of real property to the Land Bank.

52. Because Murray was appointed by, and serves at the pleasure of, Budish, Murray's interest in prosecuting board of revision tax foreclosures is the same as Budish's.

53. Because Kennedy was appointed by, and serves at the pleasure of, Budish, Kennedy's interest in deciding board of revision tax foreclosure cases is the same as Budish's.

54. Because Budish and Murray are permanent members of the board of directors of the Land Bank, they have an interest in prosecuting and deciding Board of Revision tax foreclosure cases in a manner that results in the property being directly transferred to the Land Bank.

55. The result of these relationships is that Budish effectively controls both the plaintiff who prosecutes and the Board of Revision hearing panel that decides all tax foreclosure cases commenced in the Board of Revision. Further, Budish and Murray are members of the board of directors of the organization that directly benefits from the orders issued by the Board of Revision.

56. The proceedings in the Board of Revision Case are void because the statutes controlling such cases are structured so as to violate the separation-of-powers among the branches of county government and to deny defendants in such cases due process of law.

57. The hearing panel that decided the Board of Revision Case patently and unambiguously lacked jurisdiction to do so.

58. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the hearing panel.

59. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count IV
Prohibition

60. Feltner restates the allegations of paragraphs I through 59 above as if fully rewritten herein.

61. The Board of Revision Case was heard and decided by a hearing panel created and empowered by the Cuyahoga County Charter.

62. Neither the Charter nor the general law of Ohio grants to board of revision hearing panels the power to hear and decide foreclosure cases prosecuted under R.C. 323.65-.79.

63. The hearing panel that decided the Board of Revision Case patently and unambiguously lacked jurisdiction to do so.

64. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

65. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count V
Prohibition

66. Feltner restates the allegations of paragraphs I through 65 above as if fully rewritten herein.

67. The power purportedly granted to boards of revision under R.C. 323.78 -to directly transfer private real property to an electing municipal corporation, township, county, school district, community development corporation, or county land reutilization corporation without the showing of a public need - is contrary to and irreconcilable with Art. I, Sec. 19 of the Ohio Constitution, which limits the power of Ohio government to take private property only for public use.

68. Because of this conflict, the Board of Revision hearing panel patently and unambiguously lacked jurisdiction to order the transfer of the Property to the Land Bank.

69. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

70. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count VI
Prohibition

71. Feltner restates the allegations of paragraphs 1 through 70 above as if fully rewritten herein.

72. The power purportedly granted to boards of revision under R.C. 323.78 – to directly transfer private real property to an electing municipal

corporation, township, county, school district, community development corporation, or county land reutilization corporation, without first requiring payment of compensation – is contrary to and irreconcilable with Art. I, Sec. 19 of the Ohio Constitution, which limits the power of Ohio government to take private property only after payment or deposit of such compensation.

73. Because of this conflict, the Board of Revision hearing panel patently and unambiguously lacked jurisdiction to order the transfer of the Property to the Land Bank.

74. Prohibition is needed to correct the results of the jurisdictionally unauthorized actions of the Board of Revision hearing panel.

75. Feltner has no plain and adequate remedy in the ordinary course of the law.

Count VII
Mandamus

76. Feltner restates the allegations of paragraphs 1 through 75 above as if fully rewritten herein.

77. The direct transfer of the Property to the Land Bank constitutes a taking of private property under Art. I, Sec. 19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

78. The Land Bank and the County are agencies as defined in R.C. 163.01.

79. Through their actions, Murray, the Land Bank, and the County deprived Feltner of title and possession to real property, the value of which far exceeded the amount owed in taxes. In fact, the Property was taken without regard for the tax liability owed on the Property.

80. The Land Bank and the County deprived Feltner of the Property with the intent to subsequently transfer the Property to a private person, for private use, and for no or little consideration.

81. The Land Bank and the County have failed to fulfill their statutory duty to commence an appropriation proceeding, to prove the propriety of the taking, and to pay just compensation for the taking of Feltner's property.

82. Feltner has no plain and adequate remedy in the ordinary course of the law to obtain a jury assessment of compensation for the Property.

83. Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 19 of the Ohio Constitution, and Ohio Revised Code Chapter 163, the Land Bank and the County are liable to Feltner for the fair market value of the Property.

84. Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 19 of the Ohio Constitution, Ohio Revised Code Chapter 2731, 42 U.S.C. § 1988(b), and 42 U.S.C. § 1983, the Land Bank and the County are liable to Feltner for the attorneys' fees Feltner incurred in

vindicating his constitutional right to just compensation.

CONCLUSION

Pursuant to Supreme Court Practice Rule 12.02(B), affidavits supporting the statement of facts upon which the claim for relief is based are attached hereto.

WHEREFORE, Relator requests relief from this Court as follows:

1) Issue a Peremptory Writ of Prohibition invalidating, in their entirety, the proceedings before the Cuyahoga County, Ohio Board of Revision in Case No. BR 010620;

2) Issue an Alternative Writ pursuant to S.Ct.Prac.R. 12.05, to order Respondents to show cause why a Peremptory Writ should not be issued;

3) Issue a Peremptory Writ of Mandamus compelling Respondents Cuyahoga County, Ohio and the Cuyahoga County Land Reutilization Corporation to initiate appropriation proceedings pursuant to Ohio Revised Code Chapter 163;

4) Issue an Alternative Writ pursuant to S.Ct.Prac.R. 12.05, to order Respondents Cuyahoga County, Ohio and the Cuyahoga County Land Reutilization Corporation to show cause why they should not be compelled to initiate appropriation proceedings pursuant to Ohio Revised Code Chapter 163;

5) Award Relators their attorneys' fees; and

6) Issue such other and further relief as may be available either at law or in equity.

Respectfully submitted,

/s/ Marc E. Dann
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Ohio Revised Code provisions at issue:

323.65 Definitions

As used in sections 323.65 to 323.79 of the Revised Code:

(A) "Abandoned land" means delinquent lands or delinquent vacant lands, including any improvements on the lands, that

are unoccupied and that first appeared on the list compiled under division (C) of section 323.67 of the Revised Code, or the

delinquent tax list or delinquent vacant land tax list compiled under section 5721.03 of the Revised Code, at whichever of the following times is applicable:

(1) In the case of lands other than agricultural lands, at any time after the county auditor makes the certification of the delinquent land list under section 5721.011 of the Revised Code;

. . . .

(F)(1) "Unoccupied," with respect to a parcel of land, means any of the following:

(a) No building, structure, land, or other improvement that is subject to taxation and that is located on the parcel is physically inhabited as a dwelling;

(b) No trade or business is actively being conducted on the parcel by the owner, a tenant, or another party occupying the parcel pursuant to a lease or other legal authority, or in a building, structure, or other improvement that is subject to taxation and that is located on the parcel;

(c) The parcel is uninhabited and there are no signs that it is undergoing a change in tenancy and remains legally habitable, or that it is undergoing improvements, as indicated by an application for a building permit or other facts indicating that the parcel is experiencing ongoing improvements.

(2) For purposes of division (F)(1) of this section, it is prima-facie evidence and a rebuttable presumption that may be rebutted to the county board of revision that a parcel of land is unoccupied if, at the time the county auditor makes the certification under section 5721.011 of the Revised Code, the parcel is not agricultural land, and two or more of the following apply:

(a) At the time of the inspection of the parcel by a county, municipal corporation, or township in which the parcel is located, no person, trade, or business inhabits, or is visibly present from an exterior inspection of, the parcel.

(b) No utility connections, including, but not limited to, water, sewer, natural gas, or electric connections, service the parcel, or no such utility connections are actively being billed by any utility provider regarding the parcel.

(c) The parcel or any improvement thereon is boarded up or otherwise sealed because, immediately prior to being boarded up or sealed, it was deemed by a political subdivision pursuant to its municipal, county, state, or federal authority to be open, vacant, or vandalized.

(d) The parcel or any improvement thereon is, upon visible inspection, insecure, vacant, or vandalized.

….

(J) "Alternative redemption period," in any action to foreclose the state's lien for unpaid delinquent taxes, assessments, charges, penalties, interest, and costs on a parcel of real property pursuant to section 323.25, sections 323.65 to 323.79, or section 5721.18 of the Revised Code, means twenty-eight days after an adjudication of foreclosure of the parcel is journalized by a court or county board of revision having jurisdiction over the foreclosure proceedings. Upon the expiration of the alternative redemption period, the right and equity of redemption of any owner or party shall terminate without further order of the court or board of revision. As used in any section of the Revised Code and for any proceeding under this chapter or section 5721.18 of the Revised Code, for purposes of determining the alternative redemption period, the period commences on the day immediately following the journalization of the adjudication of foreclosure and ends on and includes the twenty-eighth day thereafter.

323.78 Election to invoke alternative redemption period

(A) Notwithstanding anything in Chapters 323., 5721., and 5723. of the Revised Code, a county treasurer may elect to invoke the alternative redemption period in any petition for foreclosure of abandoned lands under section 323.25, sections 323.65 to 323.79, or section 5721.18 of the Revised Code.

(B) If a county treasurer invokes the alternative redemption period pursuant to this section, and if a municipal corporation, township, county, school district, community development organization, or

county land reutilization corporation has requested title to the parcel, then upon adjudication of foreclosure of the parcel, the court or board of revision shall order, in the decree of foreclosure or by separate order, that the equity of redemption and any statutory or common law right of redemption in the parcel by its owner shall be forever terminated after the expiration of the alternative redemption period and that the parcel shall be transferred by deed directly to the requesting municipal corporation, township, county, school district, community development corporation, or county land reutilization corporation without appraisal and without a sale, free and clear of all impositions and any other liens on the property, which shall be deemed forever satisfied and discharged. The court or board of revision shall order such a transfer regardless of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel. No further act of confirmation or other order shall be required for such a transfer, or for the extinguishment of any statutory or common law right of redemption.

(C) If a county treasurer invokes the alternative redemption period pursuant to this section and if no community development organization, county land reutilization corporation, municipal corporation, county, township, or school district has requested title to the parcel, then upon adjudication of foreclosure of the parcel, the court or board of revision shall order the property sold as otherwise provided in Chapters 323. and 5721. of the Revised Code, and, failing any bid at any such sale, the parcel shall be forfeited to the

state and otherwise disposed of pursuant to Chapter 5723. of the Revised Code.

5721.20 Unclaimed moneys remaining to owner

Except in cases where the property is transferred without sale to a municipal corporation, township, county, community development organization, or county land reutilization corporation pursuant to the alternative redemption period procedures contained in section 323.78 of the Revised Code, any residue of moneys from the sale or foreclosure of lands remaining to the owner on the order of distribution, and unclaimed by such owner within sixty days from its receipt, shall be paid into the county treasury and shall be charged separately to the county treasurer by the county auditor, in the name of the supposed owner. The treasurer shall retain such excess in the treasury for the proper owner of such lands upon which the foreclosure was had, and upon demand by such owner, within three years from the date of receipt, shall pay such excess to the owner. If the owner does not demand payment of the excess within three years, then the excess shall be forfeited to the delinquent tax and assessment collection fund created under section 323.261 of the Revised Code, or in counties that have established a county land reutilization corporation fund under section 323.263 of the Revised Code, to the county land reutilization corporation fund.

No. _____

In the
Supreme Court of the United States

OHIO EX REL. ELLIOT FELTNER,
Petitioner,

v.

CUYAHOGA COUNTY BOARD OF REVISION,
et al.,
Respondents.

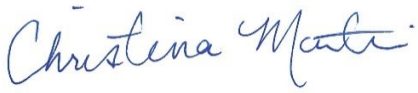
On Petition for Writ of Certiorari
to the Supreme Court of Ohio

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR A WRIT OF CERTIORARI contains 6,958 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 2020.



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No. _____

OHIO EX REL. ELLIOT FELTNER,
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CUYAHOGA COUNTY BOARD OF REVISION,
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Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 23rd day of October, 2020, send out from Omaha, NE 5 package(s) containing * copies of the PETITION FOR A WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following:

SEE ATTACHED

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Subscribed and sworn to before me this 23rd day of October, 2020.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

Renee J. Goss
Notary Public

Andrew H. Cockle
Affiant

40211

The State ex rel. Elliot G. Feltner, Relator v.
Cuyahoga County, Ohio Board of Revision, et al.
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