No. 17-88

In the Supreme Court of the United States

WAYSIDE CHURCH, ET AL.,

Petitioners,

v.

VAN BUREN COUNTY, MICHIGAN, ET AL., ET AL.,

Respondents.

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

BRIEF AMICUS CURIAE OF THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

Petitioners raise three questions, and *amicus* will address only the first, which is:

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF AMICUS CURIAE

This *amicus* brief is submitted by the Buckeye Institute for Public Policy Solutions (the "Buckeye Institute").[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is located directly across from the Ohio Statehouse on Capitol Square in Columbus, where it assists executive and legislative branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

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[1] All parties have consented to the filing of this and other briefs in letters on file with the Clerk of Court, and the parties were notified of amicus's intention to file this brief at least 10 days prior to the due date. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or its counsel made a monetary contribution to the brief's preparation or submission. *See* Sup. Ct. R. 37.

Through its Legal Center, the Buckeye Institute works to create and defend a stable atmosphere that allows individuals to do with their property as they see fit. That stable environment depends on, among other things, the government's recognition of and respect for private property rights. In particular, the government should not take private property without due process of law and fair compensation. This *amicus* brief furthers the Buckeye Institute's mission of protecting private property from government takings without just compensation consistent with the Fifth and Fourteenth Amendments to the Constitution of the United States.

SUMMARY OF ARGUMENT

In contrast to nearly every other State, Michigan law provides that, when local governments seize title to tax delinquent properties and sell them, they keep the entirety of the proceeds, not just the amount necessary to secure their claim. As Judge Kethledge noted in his Sixth Circuit dissent, "In some legal precincts that sort of behavior is called theft." *Wayside Church v. Van Buren County*., 847 F. 3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting).

Michigan's law is not just inconsistent with the practice in most other States, it is inconsistent with the general practice with respect to other non-tax liens. Accordingly, it is an outlier. This case presents this Court with an opportunity to rein in an abusive practice shared by only a small minority of States.

ARGUMENT

In this brief, the Buckeye Institute will show that the Michigan practice of taking any excess proceeds from tax sales and applying them to public use is the minority position—and one that should not be allowed or encouraged to expand. The Buckeye Institute will also show that the practice is not common to non-tax liens.

1. Permitting governmental bodies to take windfall profits from tax foreclosures will have perverse effects.

A. The practice of taking windfalls from tax foreclosures is inconsistent with sound budgeting and appropriations of public funds.

Michigan's practice raises concerns about the way in which Michigan counties fund their operations.[2] As Petitioners note, the County pocketed $274,850 in excess of the tax debts and related charges from the sale of Petitioners' properties. Pet. at 6. Michigan law provides that "[a]ll or a portion of any remaining balance [here, $274,850] . . . may subsequently be transferred into the general fund of the county by the board of commissioners." Mich. Comp. Laws § 211.78m(8), at Pet App. D-7.

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[2] Even if this concern sounds like a state law problem, it is a pernicious by-product of the underlying practice of taking the windfall.

Ordinarily, the county would agree on a budget that is based on its anticipated tax and fee revenues. It would then apply those revenues to the budgeted expenses. When it takes a windfall, as it did in the case of Wayside Church and the other Petitioners, those ordinary processes are by-passed, and oversight by the public suffers.

Should Michigan's outlier practice be allowed to be enforced going forward, it could lead to more widespread use and abuse. Should the courts sanction it, other cash-strapped entities are likely to see the practice as an attractive source of potential revenue—one that offers large sums of money with little accountability. The political process[3] might—or might not—provide a potential check on this sort of legislative activity, but this Court should not rely on political checks alone, where the Constitution provides protections.

B. Tax lien foreclosures are not meant to generate windfalls.

Such windfalls are also inconsistent with the fundamental nature of tax lien foreclosures. As the Supreme Court of Texas noted, "Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit. The only reason they hold this property at all is 'pursuant to' their powers of foreclosure as a taxing entity." *Syntax, Inc.*

[3] Individuals who are delinquent on their tax obligations—some of whom are delinquent for entirely understandable reasons—are not likely to succeed politically in blocking the expansion of windfall takings policies.

v. Hall, 899 S.W. 2d 189, 191 (Tex. 1995). It held that the former owner had the right to excess proceeds, pointing out that the taxing entity "is made whole by its collection of delinquent taxes, costs, interest and penalties from the proceeds of the sale." *Id*. at 192.

While the court was construing Texas law, its observations apply to all taxing entities. Even if the state law gives the excess proceeds to the government, as the laws of several states do, they cannot deny that they are receiving a windfall.

C. Permitting governmental bodies to take windfall profits from tax foreclosures will encourage governments to evade the more rigorous requirements this Court has imposed on valid takings.

The Buckeye Institute also notes that the use of eminent domain powers to condemn blighted properties offers Michigan and the other states that follow its practice the ability to gather up properties. However, Ohio's current practice shows that tax foreclosure proceedings are already an attractive "end-run" around the more onerous constitutional takings rules—providing expedited procedures that municipalities avail themselves of even without the lure of windfall profits. Allowing windfall profits will encourage even more use of tax foreclosure to achieve ends that are, in reality, takings that should be subject to the demands of the Constitution.

In the Buckeye Institute's home state of Ohio, municipality and county land banks are acquiring

tax liens .The Franklin County and Columbus land banks plan to acquire and demolish 1,130 homes by the end of 2019.[4] For its part, the Port of Greater Cincinnati Development Authority is engaged in a "rapidly-expanding campaign ... to seize property through a faster, more aggressive foreclosure process."[5] In many cases, the land is worth more than the house on it, giving tax speculators an incentive to acquire the property. The process in each case begins with unpaid tax bills, bills that can be as small as or smaller than those of Petitioners. As one Phoenix attorney observes, "If you successfully foreclose, you normally find them ... in socioeconomically depressed neighborhoods."[6]

The pernicious effects of tax foreclosures can be noted without undercutting the notion that the taxes should be paid. Foreclosure, though, is often a draconian response in that the property forfeited is

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[4] *See* Ferenchik, Mark, *Land bank in central Ohio on a demolition mission*, The Columbus Dispatch, Nov. 14, 2016, http://www.dispatch.com/content/stories/local/2016/11/13/local-land-banks-on-a-demolition-mission.html.

[5] *See* Horn, Dan, *Owe back taxes? Port Authority might take your property*, Cincinnati.com, April 27, 2017, http://www.cincinnati.com/story/news/politics/2017/04/26/owe-back-taxes-port-authority-might-foreclose-help-your-neighborhood/100462582/.

[6] *See* Mahoney, Emily L. and Clark, Charles T., *Arizona owners can lose homes over as little as $50 in back taxes*, http://www.azcentral.com/story/money/real-estate/2017/06/12/tax-lien-foreclosures-arizona-maricopa-county/366328001/

worth far more than the delinquent tax bill. Wayside Church's property was sold for $206.000 to satisfy a debt of $16,750. Pet. at 6. Bennie Coleman, a Marine Corps veteran living in Washington, DC, lost his house valued at $197,000 because taxes of $135 were unpaid.[7]

Ohio law does allow for the property owner to demand that the county pay him or her the excess proceeds, so long as the demand is made within one year after the sale. Ohio Rev. Code Ann. § 5723.11. Where such a process to claim the excess is lacking, as in Michigan, the foreclosing jurisdiction would have an even stronger incentive to use tax foreclosure actions on properties it sees as blighted and, thereby, generate funds for public use without following the normal processes.

II. This Court should consider whether Michigan's taking of more than it was owed is a taking in violation of the Fifth Amendment.

The Buckeye Institute agrees with Petitioners' contention that the federal and state courts are split on whether a taking results when a governmental body keeps more than it is owed from the proceeds of a tax lien sale. *See* Pet. at 17-18; *compare*, *e.g.*, *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A. 2d 439 (N.H. 2000) (taking) *with e.g.*, *City of Auburn v. Mandarelli*, 320 A.2d 22 (Mass. 1974) (no

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[7] *See* Sallah, Michael, et al., *Left With Nothing*, The Washington Past, Sept. 8, 2013, available at http://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/?utm_term=.3b0d3c3cc326.

taking). In addition, it agrees that this Court's decision in *Nelson v. City of New York*, 352 U.S. 104 (1956), does not answer the question presented.

In *Nelson*, this Court held that the owners were not entitled to the return of excess proceeds where "the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings." 352 U.S. at 110. It explained, "[W]e do not have here a statute which absolutely precludes an owner from obtaining the proceeds of a judicial sale." *Id*.

This Court also noted that, as to one property that had charges of $814.50 and was assessed at $46,000, the law had changed "permitting the reconveyance of property acquired and still held by the City upon payment of arrears, interest, and the costs of foreclosure." *Id*. at 106, 111. That statutory change was added to "ameliorate[] to some extent the severity" of the prior version of the law. *Id*. at 111.

Here, under Michigan law, the excess proceeds go to the foreclosing jurisdiction after the delinquent taxes and any related costs are paid. *See* Pet App. at D-4 – D-6. The remedy available to Petitioners is unclear. As Judge Kethledge noted in his dissent, "[J]urisdictional uncertainty . . . awaits" Petitioners in state court. *Wayside Church*, 957 F. 3d at 824 (Kethledge, J., dissenting). They must choose between two courts, and, no matter which course they choose, "they will face a strong argument that they chose wrongly." *Id.* because they must choose between two courts, and Accordingly, Petitioners

present the question the Court did not answer in Nelson, and this Court should answer it now.

III. Michigan's rule is the minority rule.

Michigan law gives the excess remaining after back taxes and other charges have been paid to the general fund of the county or to the foreclosing governmental body. Only a handful of other States do that. Further, other States provide for a redemption period in which the property owner can recover the property.

Michigan appears to be joined by five other States: Arizona, North Dakota, Massachusetts, Minnesota, and Montana. In pertinent part, North Dakota law provides, "If the property was sold for an amount sufficient to cover all outstanding taxes and special assessments, tax receipts must be written for all such years, and any remaining amount must be *credited to the general fund of the county*." N.D. Cent. Code § 57-28-20.1 (emphasis added). The laws of Arizona, Minnesota and Montana are to similar effect. *See* ARS § 42-18303C; Minn. Stat. 280-29; Mont. Code §§ 7-6-4414(2), 15-17-322. Finally, in *Kelly v. City of Boston*, 204 N.E. 2d 123 (Mass., 1965), the court held that, under Massachusetts law, any surplus went to the foreclosing municipality.

In contrast to the laws of Michigan and those other states, Virginia law expressly states, "The former owner, his heirs or assigns of any real estate sold under this article shall be entitled to the surplus received from such sale in excess of the taxes, penalties, interest, reasonable attorneys' fees,

costs and any liens chargeable thereon." Va. Code Ann. § 58.1-3967.

The laws of 22 other States (Alabama, Alaska, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Missouri, Nevada, Ohio, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming) are to the same effect in giving the former owner or redeeming party a chance to claim the excess proceeds.[8] Those former owners may have to submit a claim within a specified time after the sale or notice, but they are still better off than they would be under a scheme that gives the taxing jurisdiction any or all of the excess proceeds.

III. Michigan's practice of taking more than it is owed is inconsistent with the practice for ordinary non-tax liens arising in the private sector.

In the private sector, lien claimants do not get a windfall. Rather, they are reimbursed for their contributions and expenses, and the owner of the

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[8] Ala. Code § 40-10-28(a)(1); Alaska Stat. 29-45-480(b); Ark. Code § 26-37-209; Conn. Gen. Stat. § 12-157(h); Del. Code Tit. 9 § 879; Fla. Stat §§ 197.522, 197.582Ga. Code Ann. § 48-4-5(a); Idaho Code § 31-608(2)(b); Kan. Stat. § 79-2803; Ky. Rev. Stat. 426.500; Me. Rev. Stat. Tit. 36 § 949; Mo. Rev. Stat. 140.340; Nev. Rev. Stat. 361.610.5; Ohio Rev. Code § 5723.11; SC Code § 12-51-130; SDCL § 10-22-27; Tenn. Code § 67-5-2702(c); Tex. Tax Code § 34.04(c); Wash. Rev. Code § 84.64.080(10); WV Code § 11A-3-65; Wis. Stat. § 75-36(4) (homesteads); Wyo. Stat. 39-13-108(d)(4).

property at issue has an opportunity to claim any residue. Public bodies, like Van Buren County, should do no less in assuring that the lienholder is adequately compensated but not enriched beyond the debt, reasonable interest, and expenses.

In Alabama, for example, private lien claimants must be content with recovering the value of their input, interest, and, depending on their contract, a reasonable attorney's fee. Mechanics and materialmen working on a building or improvement for land can claim a lien for the "unpaid balance due the contractor by the owner or proprietor," or they can claim a full balance lien if they give notice to the owner before furnishing any labor or materials, unless the owner objects. *See* Ala. Code § 35-11-210 (2014). A condominium association can claim a lien for "any unpaid assessment . . . , together with interest thereon and , if authorized by the declaration or bylaws, reasonable attorney's fees." Ala. Code § 35-8-17; *see also* Ala. Code § 35-8A-316(a) ("The association has a lien on a unit for any assessment levied against that unit or fines imposed against that unit's owner from the time the assessment or fine becomes due.").

Likewise, a number of craftsmen and service providers, who have a possessory lien on the property they work on or have in their possession, are to hold or pay any balance remaining after their charge to the owner. They include:

Hotels find themselves in possession of goods and baggage of their guests and have the right to sell them after a specified period of time to recover the amount owed. *See e.g.*, Ohio Rev. Code §§ 4721.04,

4721.06 (establishing a lien, allowing owner to claim the residue after sale within three years); Ala. Code §35-11-131 ("[T]he balance, if any there be, shall be paid over to the owner on demand."); Mont. Code § 71-3-1403 (owner given one year to claim balance); Miss. Code § 75-73-17 (2017).

Jewelers, *see*, *e.g.*, Ga. Code Ann. § 44-14-433 (residue held by county for one year with opportunity for owner to claim); Ala. Code § 35-11-151 ("the balance, if any, to be held for the debtor").

Laundries, *see*, *e.g.*, Ga. Code Ann. §33-14-455 ("[T]he residue, if any shall be paid on demand to the owner of the goods sold."); Ala. Code 35-11-171 ("the balance, if any, held for the debtor").

Equipment service or repair, *see*, *e.g.*, Ga. Code Ann. § 44-14-465 ("[T]he residue, if any, shall be paid on demand to the owner of the equipment sold."); ORS § 311.644(5) (For real property machinery sold for taxes, "[i]f the amount realized on the sale is in excess of the amount of taxes, interest, penalties, and costs due on the property, the excess shall be repaid to the person charged with the taxes, interest, penalties, and costs.").

Livery stable keepers, *see*, *e.g.*, Ala. Code § 35-11-191 ("[T]he balance, if any there be, he shall pay over to the owner.").

Sawmill owners, *see*, *e.g.*, Ala. Code § 35-11-251(a) ("[T]he residue, if any there be, he shall pay over to the owner of such lumber.").

Cotton gin and other facility owners, *see* Ala. Code § 35-11-291(a) ("[T]he residue, if there be any, shall be paid to the owner" of the commodity sold).

If cotton gin owners, livery stable keepers, and others in their position can be happy with recovering their costs, so too should be jurisdictions empowered to tax real property.

CONCLUSION

For the foregoing reasons, and those stated by Petitioners in the Petition for Writ of Certiorari, *amicus* respectfully requests that this Court grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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