NO. 19-_____

In the Supreme Court of the United States

CHARLES R. HUNTER,

Petitioner,

v.

UNITED STATES OF AMERICA and
STERLING MORTGAGE AND INVESTMENT COMPANY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL W. WEININGER
COUNSEL OF RECORD
JERRY R. ABRAHAM
MAURICE A. ROSE
ABRAHAM & ROSE, P.L.C.
30500 NORTHWESTERN HIGHWAY,
STE. 410
FARMINGTON HILLS, MI 48334
(248) 251-0594
INFO@ABRAHAMANDROSE.COM
WEININGERLAW@GMAIL.COM

COUNSEL FOR PETITIONER

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether a quiet title action brought against the government pursuant to 28 U.S.C. § 2410(a) requires the taxpayer to retain a legal interest in the subject property, as the Sixth, Ninth, and Eleventh Circuits hold, or whether the attachment of a federal tax lien to the subject property is sufficient alone to abrogate the government's sovereign immunity under that provision, as the Third and Fifth Circuits hold.

2. Whether the government may lawfully invoke its sovereign immunity to a taxpayer's 28 U.S.C. § 2410(a) claim after luring the taxpayer into ceding his legal interest in the subject property and concluding an undisclosed side agreement with a third party to dispose of the property for a fraction of its actual worth.

3. Whether the government may selectively deplete a taxpayer's assets by voluntarily forfeiting the fair market value realized from the sale of his home and recouping the shortfall by levying on his remaining assets.

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Sixth Circuit

Case No. 18-1728

Charles R. Hunter, Plaintiff-Appellant, v.
United States of America; *Sterling Mortgage and Investment Company*, Defendants-Appellees.

Decision Date: April 30, 2019

United States District Court for the Eastern District of Michigan, Southern Division

Case No. 17-13494

Charles R. Hunter, Plaintiff v.
United States of America, *Et Al.*, Defendants.

Decision Date: April 30, 2018

PARTIES TO THE PROCEEDING

Petitioner Charles R. Hunter was the Plaintiff-Appellant in the court of appeals. Respondents United States of America and Sterling Mortgage and Investment Company were the Defendants-Appellees.

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PETITION FOR A WRIT OF CERTIORARI

Charles R. Hunter ("Hunter") respectfully petitions the Court to grant a writ of certiorari to the United States Sixth Circuit Court of Appeals in the case of *Hunter v. United States*, No. 18-1728.

The Court's intervention is necessary to resolve a deepening split among the circuit courts of appeals over the scope of 28 U.S.C. § 2410(a), the exclusive avenue for taxpayers seeking to adjudicate the priority of federal tax liens.

OPINIONS BELOW

The Sixth Circuit Court of Appeals' decision is unpublished, but available at 769 F. App'x 329 (6th Cir. 2019), and reprinted in the Appendix at App.1a. The district court's order dismissing the complaint for lack of subject matter jurisdiction is unpublished, but available at 2018 U.S. Dist. LEXIS 72770 (E.D. Mich. Apr. 30, 2018), and reprinted in the Appendix at App.9a.

JURISDICTION

The Sixth Circuit Court of Appeals entered judgment on April 30, 2019. Justice Sonia Sotomayor granted Hunter's applications for an extension of time to file a petition for a writ of certiorari through September 27, 2019. This Court's jurisdiction is appropriate under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2410(a)-(b)

(a) Under the conditions prescribed in this section and section 1444 of this title [28 U.S.C. § 1444] for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is

> brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

STATEMENT OF THE CASE

A. Background

In September 1999, Hunter purchased residential property located in Birmingham, Michigan (the "Lakeside Property"). App.22a, 34a. Hunter and his spouse executed a mortgage with Wells Fargo Financial America, Inc. ("Wells Fargo") in October 2004. App.22a, 34a-35a. The Internal Revenue Service ("IRS"), thereafter, filed a series of federal tax liens purporting to attach to all Hunter's "property and rights to property." App.24a-25a, 32a-34a.

In early 2017, Wells Fargo commenced nonjudicial foreclosure proceedings against Hunter after he defaulted on the 2004 mortgage. App.22a, 35a. Attempting to comply with statutory notice requirements, Wells Fargo mailed a notice of nonjudicial foreclosure sale to the IRS pursuant to 26 U.S.C. § 7425 and its corresponding Treasury Regulations. App.25a-26a, 35a-36a. Although Wells Fargo timely sent the notice of sale through United States Postal Service ("USPS") certified mail, it is undisputed that (1) Wells Fargo

addressed the notice of sale to the wrong IRS office and address, and (2) USPS never delivered the notice of sale to the IRS. App.26a-28a, 35a-37a.

On April 11, 2017, the Oakland County Sheriff's Office conducted a nonjudicial foreclosure sale where Sterling Mortgage and Investment Company ("Sterling") purchased the Lakeside Property for $420,235.82. App.23a, 35a. The redemption period expired on or around October 11, 2017. *See* Mich. Comp. Laws § 600.3240(8) (imposing a six-month redemption period).

B. District Court Proceedings

On July 12, 2017, the government filed suit in the United States District Court for the Eastern District of Michigan seeking to foreclose on its tax liens and force the judicial sale of the Lakeside Property free and clear of whatever interest, if any, Sterling may have obtained at the April 11, 2017 sheriff's sale. App.28a. The amended complaint named Hunter and Sterling, among others, as party defendants. App.21a.

The government asserted that "[b]ecause the [notice of sale] meant to notify the IRS of the nonjudicial foreclosure sale was not actually given to the IRS, the IRS was not properly notified of the sale of the Lakeside Property" and the federal tax liens remained attached to the property. App.28a. The government sought (1) a declaratory judgment that it possessed "valid and subsisting liens on the Lakeside Property," and (2) an order directing the Lakeside Property be sold with the net proceeds "to be distributed among the parties in accordance with their lawful priorities." App.29a. The parties eventually stipulated to the vol-

untary dismissal of the government's action without prejudice.

But unbeknownst to Hunter (or the district court for that matter), the government and Sterling (collectively, "Defendants") entered into an undisclosed side agreement to settle the litigation in exchange for Sterling's promise to evict Hunter from the Lakeside Property, sell it, and equally divide the net profits of any future sale. App.42a, 56a. The side agreement significantly reduces the remaining funds available to pay off Hunter's outstanding tax liabilities.

Endeavoring to fulfill its part of the side agreement, on October 16, 2017, Sterling filed an eviction action in Michigan state court to recover possession of the Lakeside Property from Hunter. On October 26, 2017, Hunter commenced his own federal lawsuit against Defendants pursuant to 28 U.S.C. § 2410(a)(1), seeking (1) a "declaratory judgment that the federal tax liens have priority over any interest Sterling may have in the Lakeside Property," and (2) an order directing the government "to enforce the federal tax liens" and sell the Lakeside Property. App.39a. Defendants jointly moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).[1] The district court heard oral argument on April 10, 2018. App.45a-68a.

On April 30, 2018, the district court granted Defendants' joint motion and dismissed the case after concluding that the government never waived its sovereign immunity under section 2410(a). App.10a,

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[1] Defendants first disclosed the existence of the side agreement in their joint motion to dismiss the complaint. App.42a.

14a-15a. "Because [Hunter] ha[d] no present legal interest in the Lakeside Property," the district court held that "he lack[ed] standing to bring his action under § 2410(a)(1), and fail[ed] to establish a waiver of the Government's sovereign immunity." App.14a. The district court also dismissed Sterling because Hunter could not enforce section 2410(a)(1) "against Defendant Sterling alone." *Id.* The district court then entered judgment in Defendants' favor.

C. The Sixth Circuit's Decision

On April 30, 2019, a three-judge panel of the Sixth Circuit affirmed the district court's judgment. App.1a. The court of appeals found that the district court (1) correctly decided that the government had not waived its sovereign immunity under section 2410(a) because Hunter no longer possessed a legal interest in the Lakeside Property when he commenced the lawsuit, and (2) properly dismissed Sterling from the case. App.6a-8a. Hunter now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The courts of appeals are now divided over where to draw the line of section 2410(a)'s scope. The conflict introduces a level of uncertainty with profound implications for taxpayers nationwide. This is because section 2410(a) provides taxpayers with the *only* means of adjudicating the priority of federal tax liens. Without recourse to section 2410(a), "taxpayer[s] would have no available means of enforcing compliance with the procedures enacted for [their] benefit" and they would be "deprive[d] . . . of any remedy against arbitrary

administrative action." *Aqua Bar & Lounge, Inc. v. United States*, 539 F.2d 935, 939 (3d Cir. 1976).

Yet, the decision below gives free reign to the type of arbitrary and abusive governmental conduct that section 2410(a) aims to remediate. The Sixth Circuit's ruling—that section 2410(a) does not waive sovereign immunity unless the taxpayer retains a legal interest in the property to which the tax lien attaches—allows the government to (1) run out the clock on the taxpayer's redemption rights, (2) subsequently dispose of his property for a fraction of its worth, (3) recover the amount of any outstanding tax liabilities from his remaining assets, and all the while, (4) preclude the taxpayer from seeking redress in the courts.

Because the courts of appeals diverge over how to interpret section 2410(a)'s reach, and because the decision below increases the likelihood of recurrent governmental abuse, this Court should grant certiorari and resolve the legal questions presented on appeal.

I. The Sixth Circuit's Ruling Widens An Already Existing Split Among The Circuits Over Whether Taxpayers Who Commence Quiet Title Actions Against The Government Must Retain A Current Legal Interest In The Subject Property To Abrogate Sovereign Immunity

A. Overview of Section 2410(a)'s Applicability to Lien Priority Disputes

Section 2410(a) "provides a limited waiver of the United States' sovereign immunity." *Pollack v. United States*, 819 F.2d 144, 145 (6th Cir. 1987). The statute subjects the government to suit in federal district court

when a plaintiff seeks to "quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a)(1).

The prevailing view among federal courts today is that "suits to adjudicate lien priority"—the form of relief Hunter seeks—"should be construed as claims to quiet title, and therefore, the United States has consented to suit with respect to such claims." *SunTrust Mortg., Inc, v. United States*, No. 12-3631, 2013 U.S. Dist. LEXIS 145167, at *11 (D. Md. Oct. 8, 2013); *see also Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623, 629 (5th Cir. 2002); *Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228, 1231-32 (1st Cir. 1996); *United States v. Coson*, 286 F.2d 453, 457 (9th Cir. 1961); *Nationstar Mortg., LLC v. Humphrey*, No. 11-2185, 2011 U.S. Dist. LEXIS 83944, at *11-12 (W.D. Tenn. Jul. 29, 2011); *McEndree v. Wilson*, 774 F. Supp. 1292, 1295-96 (D. Colo. 1991); *City of New York v. Evigo Corp.*, 121 F. Supp. 748, 750 (S.D.N.Y. 1954); *but see Raulerson v. United States*, 786 F.2d 1090, 1091-92 (11th Cir. 1986) ("section 2410 waives sovereign immunity only in *actual* quiet title actions, not suits analogous to quiet title actions") (emphasis in original).

Courts follow the predominant view even where the taxpayer does not "challenge . . . the validity of the government's lien." *SunTrust*, 2013 U.S. Dist. LEXIS 145167, at *17; *see also Progressive Consumers*, 79 F.3d at 1233. Still, the court of appeals discounted these authorities because Hunter did not possess a lien or any other legal interest in the Lakeside Property when he filed the complaint. App.6a-7a. This factor, although true, is inconsequential.

Hunter may resort to section 2410(a)—even without *currently* possessing *any* legal interest in the Lakeside Property—because (1) his claim seeks "to adjudicate lien priority," (2) the claim involves "real or personal property on which the United States has or claims a mortgage or other lien," and (3) Hunter has standing to quiet title in the Lakeside Property under Article III to the United States Constitution.

B. Article III Standing

Article III standing requires a showing that:

> (1) [the plaintiff] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). Hunter possesses Article III standing to ascertain whether the federal tax liens have priority over Sterling's sheriff's deed because he faces an imminent, concrete, and particularized harm that would be rectified through declaratory relief in his favor.

Suppose the federal tax liens on the Lakeside Property are entitled to first position. The government may foreclose on the liens; realize *all the net proceeds* of any subsequent sale of the Lakeside Property; and must then apply *all those proceeds* to Hunter's outstanding tax liabilities. This result contrasts starkly with Defendants' undisclosed side agreement, where the

government effectively (albeit improperly) subordinated the federal tax liens to Sterling's sheriff's deed in exchange for 50 percent of Sterling's *net profits* from any subsequent sale. Net profits in this case meaning *net proceeds less* Sterling's payment to Wells Fargo at the sheriff's sale and *less* "certain expenses"—an outcome that (1) substantially diminishes the remaining funds available to pay off Hunter's outstanding tax liabilities, and (2) exposes more of Hunter's remaining assets to federal tax collection measures.[2]

C. Section 2410(a) Does Not Require Independent Statutory Standing

Insofar as the Sixth Circuit's decision suggests that Hunter lacks some form of statutory standing, section 2410(a)'s plain text does not impose any independent standing criteria beyond Article III's "case or controversy" requirement so long as the action involves "real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a). Since the federal tax liens remain attached to the Lakeside Property, Hunter's allegations satisfy this requirement.

Additional statutory standing is further belied by 28 U.S.C. § 2410(b)'s requirement that "[t]he complaint or pleading shall set forth *with particularity* the nature of the interest or lien *of the United States*." (Emphasis added). This aspect of the statute is especially pertinent because Congress did not mandate a corresponding averment regarding the nature of the plaintiff's interest

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[2] Defendants conceded in the district court that Hunter possesses Article III standing to pursue his section 2410(a) claim. App.43a, n.2.

in the subject property as it has with other quiet title provisions. *Compare* 28 U.S.C. § 2410(a)-(b) *with* 28 U.S.C. § 2409a(d) (stating that, in real property quiet title actions against the government, "[t]he complaint shall set forth with particularity the nature of the right, title, or interest *which the plaintiff claims in the real property*") (emphasis added); *see also Koehler v. United States*, 153 F.3d 263, 266 n.5 (5th Cir. 1998).

D. Conflict Among the Circuits

Since Hunter has Article III standing, and his quiet title claim satisfies all section 2410(a)'s elements, the only remaining hurdle is sovereign immunity. For his part, Hunter contends that the presence of federal tax liens on the Lakeside Property is sufficient alone to override sovereign immunity under section 2410(a). The Third and Fifth Circuits endorse his view. Defendants maintain that, in order to abrogate sovereign immunity under section 2410(a), Hunter must additionally retain a current legal interest in the Lakeside Property. The Ninth, Eleventh, and now Sixth Circuits endorse their view.

1. Caselaw Supporting Hunter's Perspective

The Third Circuit's decision in *Kabakjian v. United States*, 267 F.3d 208 (3d Cir. 2001), accords with Hunter's position that the government's waiver of sovereign immunity under section 2410(a) is not dependent upon whether the taxpayer retains a current legal interest in the subject property.

In *Kabakjian*, the government seized and later sold the taxpayers' personal residence to recover unpaid income taxes. After the statutory redemption period

expired, the taxpayers commenced a section 2410(a)(1) claim in federal court challenging the government's method of serving the requisite notice of sale. The government moved to dismiss the claim for lack of subject matter jurisdiction and the district court granted the motion on the basis of sovereign immunity. The Third Circuit reversed.

Noting that the federal tax liens remained attached to the property when the taxpayers commenced the litigation, the Third Circuit held that "the existence of th[ose] federal tax liens" alone "vested the district court with jurisdiction to hear the quiet title claim." *Id.* at 211. This view comports with section 2410(a)'s plain text, which as discussed above, does not impose any additional standing criteria so long as the action (1) involves "real or personal property on which the United States has or claims a mortgage or other lien," and (2) the plaintiff has Article III standing to quiet title in the subject property.

The Third Circuit's ruling is clear, concise, and complete. The existence of federal tax liens—*without anything more*—waives the government's sovereign immunity under section 2410(a). Like Hunter, the taxpayers in *Kabakjian* did not retain a *current* property interest in their former residence when they commenced their quiet title action. They relied exclusively on the presence of the federal tax liens, and that requirement *alone*, to commence their quiet title action because their redemption rights already expired. *Kabakjian*, 267 F.3d at 210; *see also* 26 U.S.C. § 6337 (b)(1).

Nonetheless, the Sixth Circuit's decision below distinguished *Kabakjian* on the ground that the

plaintiffs in that case sought to eventually reclaim title to their property whereas Hunter does not. App.7a. But whether or not Hunter seeks to ultimately recover title to the Lakeside Property does not change the fact that he—like the *Kabakjian* plaintiffs—did not possess a current property interest at the *outset* of the litigation, *i.e.*, the juncture at which courts must assess the government's waiver of sovereign immunity. *See Koehler*, 153 F.3d at 267 (rejecting the Sixth Circuit's rationale for distinguishing *Kabakjian*); *see also Kabakjian*, 267 F.3d at 212 ("[w]e have recognized as a general principle that jurisdiction is determined at the time the suit is filed"); *Dahn v. United States*, 127 F.3d 1249, 1251-52 n.1 (10th Cir. 1997); *Powelson v. United States*, 979 F.2d 141, 145 (9th Cir. 1992); *Kulawy v. United States*, 917 F.2d 729, 733-34 (2d Cir. 1990); *Delta Sav. & Loan Ass'n v. IRS*, 847 F.2d 248, 249 n.1 (5th Cir. 1988); *Bank of Hemet v. United States*, 643 F.2d 661, 665 (9th Cir. 1981) ("the presence of a waiver of sovereign immunity . . . should be determined as of the date the complaint was filed"); *but see Iowa Tribe v. Salazar*, 607 F.3d 1225, 1236 (10th Cir. 2010); *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 51-52 (1st Cir. 2003).

The Fifth Circuit's decision in *Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623 (5th Cir. 2002) lends further support to Hunter's reading of section 2410(a). In *Hussain*, the taxpayer's insurance company filed an order to show cause against the IRS in Louisiana state court to ascertain the priority of federal tax liens on the taxpayer's insurance proceeds. On that basis alone, the government removed the action to federal court, where the district judge identified which of the taxpayer's creditors were entitled to the proceeds.

On appeal, the Fifth Circuit addressed (1) whether the government had waived its sovereign immunity under section 2410(a), and if it did, (2) whether the state court show cause order qualified as an interpleader action under section 2410(a)(5). Although the insurance company never claimed any property interest in the taxpayer's insurance proceeds, the Fifth Circuit held that "the nature of the *government's* interest" is what "triggers (or prevents) the waiver of immunity." *Id.* at 634 (emphasis added).

The Fifth Circuit traced an extensive line of authority "reiterat[ing] that § 2410(a) applies only when the issue concerns the priority of an existing government mortgage or other security interest." *Id.* at 630. Since "the *government* maintains an outstanding tax lien on [the taxpayer's] property," the Fifth Circuit concluded that, "§ 2410(a) appears [to be] applicable" and that the government had waived its sovereign immunity. *Id.* at 630 (emphasis added).

Below, the government urged the Sixth Circuit to disregard *Hussain* because the insurance company's complaint was an interpleader action under section 2410(a)(5) rather than a direct quiet title action under section 2410(a)(1). But neither section 2410(a), its statutory history, nor its interpretive precedents recognize this distinction, *i.e.*, that someone must possess a current property interest to assert a valid section 2410(a)(1) claim while section 2410(a)(5) dispenses with the same requirement. *See Hussain*, 311 F.3d at 629-30 (deciding whether the government waived sovereign immunity under section 2410(a) generally before determining whether the taxpayer's insurance company met section 2410(a)(5)'s specific inter-

pleader requirements). And the government cited no authority drawing that distinction either.

2. Caselaw Supporting Defendants' Perspective

Side-stepping *Kabakjian* and *Hussain*, the government argued that the Sixth Circuit below should adopt *Raulerson v. United States*, 786 F.2d 1090 (11th Cir. 1986).

In *Raulerson*, the IRS issued a federal tax lien against the taxpayer's real property. The taxpayer pled guilty to marijuana trafficking five months later. As part of his plea agreement, the taxpayer "specifically agreed to forfeit and waive his interest" in the real property. *Raulerson*, 786 F.2d at 1091. The taxpayer then commenced a quiet title action against the government:

> seeking (1) a declaration that the IRS lien on his [real] property has priority over all other interests [in the same property] and (2) an order that the IRS satisfy its jeopardy assessment by selling the [real] property.

Id. Although the district court ruled that the government waived its sovereign immunity under 2410(a)(1) because the taxpayer's "claim was akin to an action to quiet title," the Eleventh Circuit concluded otherwise. *Id.*

Reversing the district court, the Eleventh Circuit held that "[w]hile the instant action may be similar to a quiet title action, section 2410 waives sovereign immunity only in *actual* quiet title actions, not suits analogous to quiet title actions." *Id.* (emphasis in original). Since the taxpayer "forfeited title to the [real]

property . . . and waived his interest in the property by the specific terms of his plea agreement," the Eleventh Circuit determined that "there is no controversy as to who has title to this property: all parties concede that this property belongs to the government." *Id.*

But whether *Raulerson* carries any precedential weight today is doubtful. Two reasons support this conclusion. *One*, the emerging consensus among federal courts is that "suits to adjudicate lien priority"—like the one the taxpayer filed in *Raulerson*—"should be construed as claims to quiet title, and therefore, the United States has consented to suit with respect to such claims." *SunTrust Mortg.*, 2013 U.S. Dist. LEXIS 145167, at *11.

And *two*, the Eleventh Circuit decided *Raulerson* nineteen years before Congress enacted the Taxpayer Bill of Rights in 2015. *See* 26 U.S.C. § 7803(a)(3). That provision appears to authorize taxpayers to compel the government to foreclose on federal tax liens assessed against them where the government's failure to do so (1) substantially diminishes the remaining funds available to pay off the taxpayer's outstanding tax liabilities, and (2) exposes more of the taxpayer's remaining assets to federal tax collection measures. *Cf.* IRS Publication 1, Your Rights as a Taxpayer, The Taxpayer Bill of Rights, No. 7—The Right to Privacy ("Taxpayers have the right to expect that any IRS . . . enforcement action will comply with the law and *be no more intrusive than necessary* . . . ") (emphasis added); The Taxpayer Bill of Rights, No. 10—The Right to a Fair and Just Tax System ("Taxpayers have the right to expect the tax system to consider facts and circumstances that might *affect*

their underlying liabilities" and their "ability to pay") (emphasis added).

The government also pressed the Sixth Circuit to follow *E.J. Friedman Co. v. United States*, 6 F.3d 1355 (9th Cir. 1993). There, the plaintiff financed the taxpayer's purchase of real property. A trust deed in the plaintiff's favor secured the loan. The taxpayer then defaulted on its finance agreement, failed to pay federal taxes, and the IRS recorded a federal tax lien against the property. To salvage its investment, the plaintiff negotiated a "workout agreement" with another lender and the title company. The plaintiff released its trust deed as part of the agreement and applied for a tax lien discharge. When the IRS denied the application, the plaintiff filed suit under section 2410(a) seeking a declaratory judgment that "the property is not encumbered by the tax lien because the lien is worthless." *E.J. Friedman*, 6 F.3d at 1358. And when the district court dismissed the lawsuit claim because of sovereign immunity, the Ninth Circuit affirmed. Upholding the district court's order of dismissal, the Ninth Circuit ruled that the plaintiff could not quiet title because it retained "no property interest of [its] own in these properties." *Id.* (internal quotation marks omitted).

In relying on *E.J. Friedman*, though, the government overlooked a critical distinction. There, the plaintiff did not possess an interest in the property *or* seek to adjudicate the federal tax lien's priority. Hunter, by comparison, seeks this very form of relief.

Read together, *Kabakjian*, *Hussain*, *Raulerson*, and *E.J. Friedman* place the nation's federal courts in an intolerable predicament. As the law currently

stands, district courts across the country face conflicting guidance over how to assess whether the government has waived its sovereign immunity under section 2410(a)–a statute that "provides the only route" for challenging the government's "method[s] of [tax] collection." *Harrell v. United States*, 13 F.3d 232, 235 (7th Cir. 1993); *see also Kulawy*, 917 F.2d at 733; *Aqua Bar & Lounge*, 539 F.2d at 939; *cf. United States v. John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 303 (1960) ("the only way in which the United States can be joined in its capacity as junior lienor is pursuant to the terms of 28 U.S.C. § 2410").

Because "of the recurring importance of th[is] problem in the administration of the tax laws and [the] conflict between the decision below and those of some of the Courts of Appeals," this Court should intercede and grant certiorari. *United States v. Zacks*, 375 U.S. 59, 61 (1963); *see also Commissioner v. Clark*, 489 U.S. 726, 737 (1989) (certiorari granted to "resolve this conflict [between the courts of appeals] on a question of importance to the administration of the federal tax laws"); *United States v. Grace Estate*, 395 U.S. 316, 318 (1969); *Commissioner v. Duberstein*, 363 U.S. 278, 284 (1960); *United States v. Brosnan*, 363 U.S. 237, 240 (1960); *Flora v. United States*, 362 U.S. 145, 147 (1960).

II. The Sixth Circuit's Decision Opens The Door To Widespread Governmental Abuse

A. Fraud on the Court

The Sixth Circuit's decision, which tethers section 2410(a)'s waiver of sovereign immunity to the taxpayer's retention of a legal interest in the subject property, allows the government to dodge federal subject matter

jurisdiction through fraudulent artifices. And that is exactly what happened in this case.

"Fraud on the court" typically involves "unconscionable scheme[s] calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or *unfairly hampering the presentation of the opposing party's claim or defense*." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (emphasis added); *see also New York Credit & Fin. Mgmt. Grp. v. Parson Ctr. Pharmacy, Inc.*, 432 F. App'x 25, 26 (2d Cir. 2011).

The government procured Hunter's stipulation to voluntary dismiss the prior litigation *before* his statutory right to redeem the Lakeside Property had expired. *See* Mich. Comp. Laws § 600.3240(8). But without Hunter's knowledge (and without informing the district court), Defendants resolved the prior litigation on their own secret terms. The government entered into an undisclosed side agreement to settle the prior litigation in exchange for Sterling's promise to evict Hunter from the Lakeside Property, sell it, and split the net profits of any subsequent sale. As the district court recognized, "Mr. Hunter was not part of the settlement negotiations or the ultimate agreement." App.11a. And the government acknowledged as much during the district court's April 10, 2018 hearing:

> **The Court:** Were you representing [Hunter] at that time?
>
> **Mr. Weininger:** Yes, we were.
>
> **The Court:** And you didn't ask for [a copy of the side agreement]?

> **Mr. Weininger:** We were never informed there was. We were just told that the case was going to be dismissed, period. We were not informed of the side arrangement between the Government and Sterling. Their attorneys are here. You may ask them if they informed us. They would tell you they did not.
>
> **The Court:** You don't have to step aside. He can talk loud. Did you inform [Hunter] of the settlement?
>
> **Mr. Moore:** No, your honor.

App.62a-63a.

Hunter would certainly have refused to stipulate to the voluntary dismissal had the government disclosed its intention to, in effect, subordinate the federal tax liens to Sterling's sheriff's deed. Because the redemption period had not yet expired, Hunter's redemption right still qualified as a current property interest. Hunter could have either (1) filed a section 2410(a) counterclaim in the prior litigation, or (2) attempted to raise sufficient funds to redeem the property outright and secure the federal tax liens' priority. *See Ruby & Assoc., P.C. v. Shore Financial Services*, 276 Mich. App. 110, 118 (2007) ("A right of redemption is a property interest that may be conveyed"), *vacated on other grounds*, 480 Mich. 1107 (2008); *see also* Mich. Comp. Laws § 600.3240(1); *Cobleigh v. State Land Office Bd.*, 305 Mich. 434, 436-37 (1943). Defendants' fraudulently concealed their side agreement from Hunter to foreclose both these options.

The government further misrepresented to the district court that Hunter stipulated to the dismissal

of the prior litigation. The government had to procure Hunter's stipulation in order to voluntary dismiss the prior litigation without a court order. Fed. R. Civ. P. 41(a)(1)(A)(ii). Stipulations are "voluntary agreement[s] between opposing parties concerning some relevant point." Black's Law Dictionary (10th ed. 2014) (defining "stipulation"). Mutual assent is the bedrock for such agreements. It "implies in a general way that both parties to an exchange shall have a *reasonably clear conception* of what they are getting and what they are giving up." Marvin A. Chirelstein, Concepts and Case Analysis in the Law of Contracts 66 (1990) (emphasis added). A "mutual understanding" must exist between the parties to an agreement "about their relative rights and duties regarding past or future performances." Black's Law Dictionary (10th ed. 2014) (defining "agreement").

The government never even attempted to reach a "mutual understanding" with Hunter. Rather, the government intentionally misled Hunter to believe that it was voluntarily and unconditionally dismissing the prior litigation and the parties' interests would revert to the *status quo ante*, *i.e.*, that the federal tax liens would again take precedence over Sterling's later-recorded sheriff's deed. *Bechuck v. Home Depot U.S.A., Inc.*, 814 F.3d 287, 293 (5th Cir. 2016); *see also Dearth v. Mukasey*, 516 F.3d 413, 415 (6th Cir. 2008) ("when a voluntary dismissal is without prejudice the plaintiff is placed in a legal position as if he had never brought" suit).

And by concealing the side agreement from Hunter (and avoiding his certain objection to it), the government bypassed mandatory court approval of the agreement's

terms under Rule 41(a)(2), a provision designed "to protect the nonmovant from unfair treatment." *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994); *see also Cabrera v. Esso Std. Oil Co. P.R.*, 723 F.3d 82, 88 (1st Cir. 2013).

B. Selective Depletion

The Sixth Circuit's ruling likewise condones the government's impermissible practice of selectively depleting the taxpayer's assets. "Selective depletion" occurs when the government voluntarily forfeits the fair market value realized from the sale of one of the taxpayer's assets and recoups the difference by levying on his remaining assets.

For example, suppose (1) the taxpayer owns Assets A-J, (2) a federal tax lien attaches to Asset A, (3) the federal tax lien is in first position, and (4) the IRS would realize 100 percent of the taxpayer's outstanding tax liability from the levy and sale of Asset A. The IRS may not voluntarily subordinate the federal tax lien on Asset A to the interest of a junior lienholder; realize only 25 percent of the taxpayer's outstanding liability from the subsequent private sale of Asset A; and then recapture the shortfall by levying on, or "depleting" so to speak, Assets B-J.

Congress's enactment of the Taxpayer Bill of Rights signals an end to the days when the IRS exercised unfettered discretion to dispose of the taxpayer's assets in this fashion. Congress assigned the Commissioner of Internal Revenue "the affirmative duty . . . to promote and protect" the Taxpayer Bill of Rights. H.R. Rep. No. 114-70 at 2 (2015); *see also* 26 U.S.C. § 7803(a)(3) ("the Commissioner shall ensure that

employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights").

These rights include "the right to expect that any IRS . . . enforcement action will *comply with the law and be no more intrusive than necessary*" and "the right to expect the tax system to consider facts and circumstances that might *affect their underlying liabilities*" and their "*ability to pay*." IRS Publication 1, Your Rights as a Taxpayer, The Taxpayer Bill of Rights, No. 7—"The Right to Privacy," No. 10—"The Right to a Fair and Just Tax System"; *see also* 26 U.S.C. § 7803 (a)(G), (J). Both rights prohibit the government from "selectively depleting" Hunter's assets by declining to foreclose on the federal tax liens attached to the Lakeside Property. Such tax collection measures conflict with the Commissioner's dual responsibility to the treasury *and* the taxpayer. *See* 26 U.S.C. § 7803(a)(3)(G), (J). And they find no support in either the Internal Revenue Code, the Treasury Regulations, or any federal taxation precedents.

Lastly, the government's selective depletion of Hunter's assets "shocks the judicial conscience." Take, for instance, *Ringer v. Basile*, 645 F. Supp. 1517 (D. Colo. 1986). In that case, the IRS sold the taxpayer's residence for $1,725 when the property was allegedly worth over $40,000. The taxpayer filed a section 2410(a) claim in state court to invalidate the sale (which the government removed to federal court), arguing that the government "failed to realize, and even failed to attempt to realize, anything approaching a reasonable price for the property." *Id.* at 1518.

Although the district court observed that "the Internal Revenue Service is under no obligation to sell

seized property at its fair or reasonable market value," *id.* at 1519, and that the Internal Revenue Code affords the IRS a certain amount of discretion to establish "a minimum price below which such property shall not be sold," *see* 26 U.S.C. § 6335(e)(1)(A)(i), the district court ruled that such discretion must still "have limits lest it become a license to commit obvious injustice." *Ringer*, 645 F. Supp. at 1521. Denying the government's motion to dismiss the complaint, the district court endorsed the taxpayer's stance that "if the selling price is so low as to shock the judicial conscience, a court may grant relief and set aside the sale." *Id.* at 1523.

The government's side agreement with Sterling meets this threshold. According the government's own estimates, the Lakeside Property was worth approximately $737,000 in July 2017. App.23a. Assuming the fair market value has remained the same, and assuming the government was willing to foreclose on the federal tax liens in the normal course, the government would stand to realize approximately $737,000 (excluding the costs of sale).

Pursuant to its side agreement with Sterling, though, the government would at most net $158,382 ($737,000 [the value of the Lakeside Property] minus $420,235.82 [the amount Sterling paid at the sheriff's sale] is $316,764.18. Dividing this sum equally between the government and Sterling results in a net value to the government of $158,382.09 [excluding the costs of sale])—a near *80 percent* reduction in the realized value of the property.

Not to mention, Hunter's predicament is far more compelling. In *Ringer*, the IRS never intended to sell

the property at a steep discount. The IRS merely set the minimum bid price and the highest bid happened to approximate that value. Here, the government artificially deflated the realized value of the Lakeside Property because of its undisclosed side agreement with Sterling—a prime example of "obvious injustice." *Ringer*, 645 F. Supp. at 1521.

Requiring taxpayers to retain a current property interest when commencing section 2410(a) quiet title actions (as the Sixth Circuit held) encourages the same abusive tactics the government employed against Hunter. The ruling below enables the government to skirt the district court's federal subject matter jurisdiction, sell Hunter's residence for a fraction of its actual value, recover the deficiency from his remaining assets, and bar him from ever obtaining redress for his injuries. The Court should grant certiorari, not only to prevent this type of manifest injustice from happening again, but to send a clear message to the government that no one prevails when victory comes at the expense of the public's trust in the judicial system and those sworn to uphold its integrity.

CONCLUSION

For the above reasons, Hunter respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

DANIEL W. WEININGER
COUNSEL OF RECORD
JERRY R. ABRAHAM
MAURICE A. ROSE
ABRAHAM & ROSE, P.L.C.
30500 NORTHWESTERN HIGHWAY
SUITE 410
FARMINGTON HILLS, MI 48334
(248) 251-0594
INFO@ABRAHAMANDROSE.COM
WEININGERLAW@GMAIL.COM

COUNSEL FOR PETITIONER

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