No. 19-857

In the
# Supreme Court of the United States

GPI DISTRIBUTORS, INC.,
*Petitioner*,
v.

NORTHEAST OHIO REGIONAL SEWER DISTRICT,
*Respondent.*

**On Petition for Writ of Certiorari to the Ohio Eighth District Court of Appeals**

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF

The Ohio courts' application of Ohio's pay-to-litigate statute, Ohio Rev. Code Ann. § 2505.06 (Lexis 2019), permitted the Sewer District to impose a nonconsensual lien on GPI's property that evaded meaningful scrutiny solely because GPI lacked the financial wherewithal to post a $12,047.47 bond. In doing so, the Ohio courts endorsed a violation of GPI's equal-protection and due-process rights in defiance of this Court's guidance. See *Connecticut* v. *Doehr*, 501 U.S. 1, 12 (1991) ("[S]tate procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.' ") (quoting *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 604 (1974)); *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972) ("When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."); *Boddie* v. *Connecticut*, 401 U.S. 371, 379–380 (1971) (statute may be unconstitutional when it "jeopardize[s]" a meaningful opportunity to be heard "for particular individuals").[1] Ohio also joined the wrong side of an eleven-state split regarding the constitutionality of bonds that restrict access to judicial review of a wrongful property taking.

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[1] See also *Lecates* v. *Justice of Peace Court No. 4 of State of Del.*, 637 F.2d 898, 908, 911 (CA3 1980) (holding that: (1) an appellant's due-process rights cannot be conditioned on its financial means; and (2) a "meaningful opportunity to be heard" requires access to a "legally-trained judge at some point during the process of adjudication").

The Sewer District cannot, and largely does not, defend these blatant constitutional infirmities. Instead it attempts to distract the Court with immaterial factual distinctions in the state-court cases in question and with a handful of misguided procedural challenges. When it finally gets around to the substance of GPI's claim, the Sewer District portrays the statute's complete bar to court access as no more than a run-of-the-mill filing fee.

But these arguments are baseless. This case presents a clean vehicle to resolve pressing and recurring constitutional issues regarding low-income litigants' access to the court system—issues that will become increasingly important given the impending economic downturn and its likely devastating effects on citizens' financial means to challenge wrongful takings. The Court should grant certiorari to make clear that anyone aggrieved by a property taking has the right to meaningful review without insurmountable financial preconditions.

## I. THIS CASE IS THE APPROPRIATE VEHICLE TO RESOLVE THE STATE SPLIT REGARDING THESE CONSTITUTIONAL QUESTIONS.

The heart of this case is whether a state can force GPI and other low-income litigants to pay beyond their means for their due-process right to a fair and neutral adjudication of a property taking. See Pet. for Cert. i. This Court's precedent establishes that such financial bars to the courthouse doors are unconstitutional. There is nevertheless an eleven-state split regarding the constitutionality of pay-to-litigate statutes, such as

Ohio Rev. Code Ann. § 2505.06.[2] This case provides the opportunity to clarify that statutes that prevent litigants from vindicating their property interests through at least one level of meaningful review are unconstitutional.

### A. The Sewer District Avoids the Court's Past Decisions That Establish § 2505.06's Constitutional Flaws.

Section 2505.06 enables the Sewer District to place nonconsensual liens on citizens' property while evading meaningful judicial review unless the aggrieved citizen can prepay the amount in dispute. And there is no exception for a citizen who cannot afford to do so.

This burden is especially troublesome because the only procedure GPI could access without cost is one that the Sewer District provides, controls, and adjudicates. Its process is in no way fair or neutral; the hearing officer is a Sewer District manager who has a fiduciary obligation to his employer and no legal training. That same manager enjoys full discretion to deny the aggrieved citizen access to fundamental litigation tools, such as discovery and subpoenas. In essence, the Sewer District has the unchecked authority to charge low-income citizens exorbitant fees and then cause the county fiscal officer to impose liens on their properties without affording any meaningful avenue to challenge the taking.

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[2] Six states have held that these kinds of statutes are unconstitutional; five have held that they are constitutional. See Pet. for Cert. 10–12.

The Sewer District attempts to side step four pivotal cases—this Court's decisions in *Doehr*, *Lindsey*, and *Boddie*, and the Third Circuit's decision in *Lecates*—all of which expose the constitutional infirmities here. See Brief in Opposition 17–19. The Sewer District wholly ignores *Doehr* and *Lecates*, and it tries to distinguish *Lindsey* and *Boddie* by classifying § 2505.06's bond requirement as a mere filing fee. See Brief in Opposition 17. But § 2505.06 functions exactly the same way as the double-bond requirement that the Court found unconstitutional in *Lindsey*. *Lindsey*, 405 U.S., at 74–76. Similarly, the Sewer District's reliance on *Ortwein* v. *Schwab*, 410 U.S. 656 (1973), and *United States* v. *Kras*, 409 U.S. 434 (1973), is misplaced; neither case addresses the constitutionality of imposing ***significant*** financial burdens on a litigant's initial access to the courts, nor were the underlying interests considered fundamental. See *Ortwein*, *supra*, at 656–658 (involving $25 filing-fee requirement for appellate review of welfare-benefit reduction); *Kras*, *supra*, at 436 (requiring $50 fee to petition for bankruptcy discharge).

### B. The Sewer District Cannot Refute the State Split.

The Sewer District urges that there is no state-court split because GPI's cited cases do not universally involve bonds and administrative appeals. This argument highlights the Sewer District's misunderstanding of the constitutional infirmities that have been apparent throughout this case. This case is about substantial financial barriers that prevent indigent litigants from accessing ***meaningful first***

***review of a property taking***, not their access to appellate review of a trial court's decision. States are indeed split over the former.

The issue that drives the split is whether a litigant has a right to meaningful review of a taking ***before*** having to pay. Two of the cases the Sewer District addresses illustrate the point; the courts in question upheld financial barriers precisely because the complaining party had had adequate access to relief ***before*** the financial barrier arose. See *Lyle Construction, Inc.* v. *Ohio Dept. of Natural Resources, Div. of Reclamation*, 34 Ohio St.3d 22, 24, 516 N.E.2d 209, 211 (1987) (appellant had been "afforded a myriad of appellate opportunities" at the administrative level before it had to prepay the penalty) (emphasis deleted); *State ex rel. Caulk* v. *Nichols*, 281 A.2d 24, 26 (Del. 1971) ("these appellants had the benefit of a trial in a Court of original jurisdiction"). These cases demonstrate the importance of affordable access to a neutral and fair adjudication; they hold that once that process occurs, the Constitution poses no barrier to a fee for ***further*** review.

Whether or not these holdings are correct is beside the point because GPI was required to post the exorbitant bond ***before*** the trial court would hear its administrative appeal of the debt giving rise to the tax lien. And the trial court dismissed GPI's appeal because it could not meet that bond requirement. Even the state-court cases that the Sewer District addresses explicitly reject financial barriers that give rise to that predicament. See *Psychiatric Assoc.* v. *Siegel*, 610

So.2d 419, 425 (Fla. 1992) (due-process violation because the "statutes contain no provision to address the merits of a plaintiff's claim before requiring him or her to post a bond"); *Frizzell* v. *Swafford*, 104 Idaho 823, 827, 663 P.2d 1125, 1129 (1983) (due-process violation when plaintiff was required to post bond before invoking her right to hearing with counsel); *Jones* v. *State of Nebraska, Dept. of Revenue*, 248 Neb. 158, 167, 532 N.W.2d 636, 642 (1995) (tax-prepayment unconstitutional as applied to indigent persons because it prevented them from presenting a defense " 'to a competent tribunal ***before exaction of the tax and before the command of the state to pay it becomes final and irrevocable***' " (quoting *Frye* v. *Haas*, 182 Neb. 73, 76, 152 N.W.2d 121, 124–125 (1967)) (emphasis added by *Jones* court).

The Montana Supreme Court captured the essence of the problem: "[T]he indigent is named as a defendant, told that he will lose his property if he does not defend, and then told that he cannot defend because he is poor. The procedure is not only unconstitutional, it is an affront to our sense of justice." *Ball* v. *Gee*, 243 Mont. 406, 413, 795 P.2d 82, 86 (1990); see also *Coroneos* v. *Montgomery Cty.*, 161 Md. App. 411, 427, 869 A.2d 410, 419 (2005) (construing state statute but noting that the right to appeal would be meaningless if "the [property] owner would have to make the very payment he is attempting to challenge as a prerequisite to the appeal"). GPI should not have to forfeit judicial review of its property taking simply because it cannot afford to pay the bond Ohio has imposed as a condition of that review.

## II. THERE IS NO PROCEDURAL BAR TO CERTIORARI.

Contrary to the Sewer District's misguided procedural challenges, this case is a clean vehicle for the Court to address the pressing and recurring constitutional issues regarding financial barriers to a litigant's access to the courts. The Court has jurisdiction, and GPI has preserved its constitutional challenges.[3]

### A. The Court Has Jurisdiction Under 28 U.S.C. § 1257(a).

The Sewer District wrongly urges that 28 U.S.C. § 1257(a) is "inapplicable" because the Supreme Court of Ohio declined jurisdiction over GPI's appeal. See Brief in Opposition 16. But this Court does not take that view; when a state's supreme court refuses to accept for discretionary review an intermediate appellate court's judgment on the merits, the intermediate court's decision is a final judgment under § 1257(a). See, *e.g.*, *Grady* v. *North Carolina*, 575

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[3] The Sewer District notes that a related proceeding is currently pending in the Court of Common Pleas of Cuyahoga County, Ohio. Brief in Opposition 6. GPI filed that separate action before the Sewer District denied GPI's administrative challenge. It did so in part to ensure that the county fiscal officer would not transfer the nonconsensual lien to a buyer, as Ohio law permits, before GPI could exhaust its administrative remedies; such a transfer would have mooted GPI's administrative appeal. The Sewer District does not argue that the separate action affords GPI an adequate remedy. Indeed, the Sewer District moved to dismiss that separate action, arguing that GPI had not exhausted its administrative remedies. Thus, this Court's review is the only avenue GPI has for obtaining any meaningful review in any court.

U.S. 306, 308, n. (2015) (treating the North Carolina Supreme Court's discretionary dismissal of the appeal as a "decision on the merits"); *Jefferson* v. *City of Tarrant,* 522 U.S. 75, 81 (1997) (holding that a state court's decision is final if it is "subject to no further review or correction in any other state tribunal" and is "an effective determination of the litigation").[4] Here, Ohio's Eighth Appellate District's judgment is final because it is subject to no other state-court review and it has effectively determined the litigation. See App. to Pet. for Cert. A–1, 4, 34. This Court therefore has jurisdiction under § 1257.

### B. GPI Preserved Its Constitutional Challenges by Raising them in the Supreme Court of Ohio.

The Sewer District is also wrong in characterizing the issue GPI raises here as a "wholly separate" question from the ones it presented to the Supreme Court of Ohio. See Brief in Opposition 16. In that court GPI framed its constitutional challenges around the appellate court's erroneous application of the constitutional-avoidance doctrine. Doing so by necessity challenged the constitutionality of Ohio Rev. Code Ann. § 2505.06. It would have been impossible for the Supreme Court of Ohio to review the Eighth

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[4] See also *Douglas* v. *California*, 372 U.S. 353, 354 (1963) (granting certiorari after the California Supreme Court denied petitioners' request for discretionary review); *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 237 (1967) (granting certiorari from an intermediate state court decision because of the "important constitutional question involved" and because Florida's supreme court was not required to hear the appeal).

District's decision without considering whether GPI's constitutional arguments had merit.

GPI's appeal to the Supreme Court of Ohio implicated the same due-process argument GPI has raised here—that the Eighth District engaged in circular reasoning by refusing GPI's challenge to the constitutionality of § 2505.06 precisely because GPI had not complied with that statute. GPI, in making that argument, explained that a statutory fee that limited court access in a takings challenge was the exact kind of barrier that this Court has struck down as unconstitutional. See App. to Pet. for Cert. A–96, 97; *Lindsey*, 405 U.S., at 74–76.

GPI also argued in that court that § 2505.06's bond requirement violates equal-protection principles because it requires a litigant to pay her alleged debt as condition of challenging that same statute's constitutionality. App. to Pet. for Cert. A–83, 84, 90, 99 n.6 ("Having to convey . . . the full amount of the disputed sewer bill simply to enter the courthouse door would violate the Constitution's . . . equal-protection provisio[n] even in the absence of a lien."). That is the same substantive equal-protection question GPI has raised with this Court. Pet. for Cert. i ("Do the Due Process and Equal Protection Clauses prohibit states from imposing substantial financial burdens on indigent parties seeking judicial review . . . ?").

GPI has never "abandon[ed]" these important constitutional questions, as the Sewer District urges. See Brief in Opposition 16. Rather, GPI has preserved its constitutional challenge to § 2505.06 from the outset. It raised that challenge in opposing the Sewer

District's motion to dismiss the administrative appeal in the trial court, it raised it in the state appellate court, and it raised it inherently in seeking the Supreme Court of Ohio's review of the Eighth District's refusal to address it. See App. to Pet. for Cert. A–90, 91.

### C. The Sewer District's Other Procedural Arguments Are Unavailing.

The Sewer District next launches two procedural attacks: (1) that GPI did not timely raise its constitutional challenge in the trial court; and (2) that GPI failed to pursue an alternative means of providing security under the offending statute. See Brief in Opposition 11, 13. Neither argument finds support under the law (or common sense), and neither argument undermines the propriety of this Court's review.

The first attack urges that GPI waited too long to raise its constitutional challenges. See *id.*, at 11. This argument echoes the Eighth District's distorted reasoning. But GPI raised those challenges when they first became pivotal—in opposing the Sewer District's motion to dismiss GPI's administrative appeal. Ohio law nowhere requires litigants to raise such as-applied claims in a separate action, as the Sewer District suggests. Cf. *Woods Cove III, L.L.C.* v. *American Guaranteed Mgt. Co.*, 2018-Ohio-1829, ¶ 19, 113 N.E.3d 62, 67 (Ohio App.) (acknowledging that litigants may challenge a statute's constitutionality in a motion filed in an ordinary civil action). To the contrary, Ohio law recognizes that an issue is preserved if raised ***in opposing the trial-court motion to which it***

***pertains***. See *Penix* v. *Boyles*, 2003-Ohio-2856, ¶ 29 (Ohio App., May 28, 2003); *Novosel* v. *Gusto, Inc.*, No. 73575, 1998 WL 842135, *1 (Ohio App., Dec. 3, 1998). Indeed, GPI's constitutional challenges did not ripen until ***after*** the court refused to excuse it from posting a bond. See App. to Pet. for Cert. A–47, 50, 58. Rejecting GPI's constitutional challenges on the basis of this misguided timing argument is itself an affront to GPI's constitutional rights. Nor did the timing leave the constitutional issue "underdeveloped," as the Sewer District posits. See Brief in Opposition 11. To the contrary, GPI fully briefed the constitutional issue and properly presented it to the trial court as soon as it became germane.

Second, the Sewer District claims that GPI could have substituted the bond under Ohio Rev. Code Ann. § 2505.11 (Lexis 2019) by "conveying property to the Court." Brief in Opposition 13. But that method of perfecting an appeal presents the same unconstitutional financial barrier to judicial review. The only distinction between the two methods is the type of property conveyed: the bond is a conveyance of cash, and the "substitution" is a conveyance of real property. The alternative is effectively no alternative at all. What is more, the Sewer District had ***already deprived GPI of its property*** through the tax lien giving rise to the constitutional infirmity. It would compound that infirmity to require GPI to convey more of its property before it could vindicate its constitutional rights. This Court held unconstitutional such a double-bond requirement in *Lindsey*, and it should do the same here.

## CONCLUSION

Despite the Sewer District's arguments, GPI's petition for certiorari presents the perfect vehicle to resolve the extant state split regarding the constitutionality of statutes that require litigants to pay exorbitant fees to access meaningful review for the first time. As the economy falters, this problem will only worsen. The Court should grant certiorari.

Respectfully submitted,

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