No. _____

In The
Supreme Court of the United States

TRUSTEES OF THE
THOMAS E. PROCTOR HEIRS TRUST,

Petitioners,

v.

KETA GAS & OIL COMPANY, ANADARKO E&P ONSHORE, LLC, SWN PRODUCTION COMPANY, INTERNATIONAL DEVELOPMENT CORPORATION, AND TROUT RUN HUNTING & FISHING CLUB, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Pennsylvania Superior Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Due Process Clause of the Fourteenth Amendment requires state governments to provide adequate notice before depriving a citizen of his or her property. U.S. Const. amend. XIV; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Jones v. Flowers*, 547 U.S. 220, 234 (2006). In this case, Pennsylvania courts once again have disregarded this constitutional requirement and ignored this Court's precedent by permitting the deprivation of Petitioners' property following notice given solely through newspaper publication, a method of notice that this Court views as little more than a "feint," *Mullane*, 339 U.S. at 315, even though state officials actually knew the identities and whereabouts of the interested parties.

This case presents the following question for this Court's review:

Does the Pennsylvania court's refusal to apply "preconceived notions of what is reasonable in the age of the Internet," in the context of a tax sale where the only notice given to a known owner was by publication in local newspapers, justify the categorical disregard of this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which also preceded the "age of the Internet" by decades yet held notice by publication was inadequate where the identity of the property owner was known?

PARTIES TO THE PROCEEDING

Petitioners in this Court, defendants-appellants below, are Charles Rice Kendall and Ann P. Hochberg, trustees of the Thomas E. Proctor Heirs Trust (the "PHT"). (The Margaret O.F. Proctor Trust (the "MPT"), whose trustees were also defendants-appellants below, distributed its oil and gas interests to its beneficiaries, and those beneficiaries subsequently conveyed those interests to the PHT; accordingly, the PHT has succeeded to the rights of the MPT and the MPT is no longer a party in interest.) The PHT owns the oil and gas interests of the late Thomas E. Proctor and his wife Emma Proctor, and is successor to the interests of original named defendants Thomas E. Proctor, James H. Proctor, Thomas E. Proctor, Jr., Anne Proctor Rice, Emily Proctor Mandell, Lydia W. Thacher, Augusta Proctor, Ellen O. Proctor, Sarah Joslin, and Abel H. Proctor.

Respondents are Anadarko E&P Onshore, LLC ("Anadarko"), SWN Production Company, LLC ("SWN") and International Development Corporation ("IDC"), all intervenors-plaintiffs-appellees below, and all successors to the original named plaintiff Keta Gas & Oil Company ("Keta"), and Trout Run Hunting & Fishing Club, Inc. ("Trout Run"), successor to original defendant Brinker Hunting Club and an intervenor-defendant-appellee below. Keta, the original named plaintiff, no longer has any interest in the property rights at issue, and appears to be defunct, but nominally remains a party.

CORPORATE DISCLOSURE STATEMENT

Petitioner and its trustees and beneficiaries are individuals. There are no publicly held companies with an interest in the matter.

RELATED CASES

Keta Gas & Oil Company v. Thomas E. Proctor et al., No. 571, Dec. Term, 1950, Court of Common Pleas, Lycoming County, Pennsylvania. Judgment entered October 22, 2018.

Keta Gas & Oil Company v. Thomas E. Proctor et al. (*Appeal of Trout Run Hunting & Fishing Club, Inc., as successor to Brinker Hunting Club*), No. 1939 MDA 2018, Pennsylvania Superior Court. Judgment affirming trial court entered December 6, 2019.

Keta Gas & Oil Company v. Thomas E. Proctor et al. (*Appeal of Trustees of the Thomas E. Proctor Heirs Trust and Trustees of the Margaret O.F. Proctor Trust*), No. 1975 MDA 2018, Pennsylvania Superior Court. Judgment affirming trial court entered December 6, 2019.

Keta Gas & Oil Company v. Thomas E. Proctor et al. (*Appeal of Trout Run Hunting & Fishing Club, Inc., as successor to Brinker Hunting Club*), No. 125 MAL 2020, Pennsylvania Supreme Court. Judgment denying petition for allowance of appeal entered September 22, 2020.

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INTRODUCTION

It has been a bedrock principle of this Court's due process jurisprudence for 70 years that states may not deprive persons of their property without providing notice that was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). It has been equally clear that constructive notice through publication in local newspapers is rarely sufficient, for "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." *Id.* at 315. "Notice" of that sort is little more than a "feint," a "mere gesture" that in most cases does not satisfy the Fourteenth Amendment. *Id.*

Despite this Court's repeated commands, the courts of Pennsylvania have countenanced a blanket exception to *Mullane* and its progeny. This case – the most recent in a series of unconstitutional decisions – sanctioned a 1908 tax sale that deprived the PHT of oil and gas rights that today are worth millions of dollars, executed without any attempt at direct, individualized notice. Here, taxing authorities knew the identities of the non-resident owners of the oil and gas rights at issue, the PHT's predecessors in interest, but officials made no attempt of any sort to provide those owners with any individualized or actual notice of the tax

assessments, or of the tax sale that purportedly divested them of their property.

The decision below, in approving this outcome, ignored *Mullane* entirely. Rather, it relied solely on a Pennsylvania Supreme Court precedent, *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016), to hold that constructive notice of tax sales *always* satisfies due process. *Herder Spring,* in turn, gave only lip service to *Mullane* and its progeny, and instead relied on an 1865 Pennsylvania decision and an 1815 statute.

In short, Pennsylvania courts have abrogated the PHT's *federal* due process rights by applying *state* law that not only precedes *Mullane,* but that in fact predates the ratification of the Fourteenth Amendment itself. These courts have avoided this Court's precedents under the guise of a refusal to apply "preconceived notions of what is reasonable in the age of the Internet." *Herder Spring*, 143 A.3d at 379. But *Mullane* itself is from the pre-Internet era, as are many of this Court's other decisions consistently admonishing that notice by publication is insufficient where the identity of the owner was – as here – known or readily ascertainable.

Since *Mullane*, the Court has had to reiterate periodically that the government is under an obligation to provide reasonably individualized notice to property owners before depriving them of their property. Once again, this Court needs to emphasize that it meant what it said in *Mullane* and subsequent cases: notice

by generalized publication is rarely sufficient, particularly where the identity of the owner is known.

The PHT thus urges this Court to review the judgment below and provide much-needed certainty to property owners, tax collectors and courts across the country, to ensure that constitutional mandates are recognized as recurrent ownership disputes dispose of billions of dollars of oil and gas rights. Pennsylvania is not alone in divesting recorded subsurface owners of their property through tax sales for which only constructive notice by publication was given.

Indeed, this case presents recurring issues of increasingly significant importance, and it is critical that this Court prevent further disregard of its due process precedents. Tens of thousands of acres of subsurface rights in Pennsylvania alone have been subjected to similar tax sales without notice to the property owners. Moreover, with the nationwide boom in unconventional oil and gas drilling, property owners throughout the country are facing the same issue: discovering after the fact that their property was taken without any attempt at individualized notice. Settling the question presented here is essential to clarifying property rights that are subject to a number of pending and impending disputes. Similar tax sales affecting severed oil, gas and mineral rights litter tax books across the country, and have already been the subject of a number of existing disputes. Significant interests are at stake: the value of the oil and gas rights at issue in this case alone are valued in the millions of dollars, and the PHT has already been deprived of oil and gas rights, through tax

sales approved by Pennsylvania courts, that are valued in the hundreds of millions of dollars.

For all these reasons, the Court should grant the petition for a full hearing on the merits. In the alternative, and at a minimum, the Court should summarily reverse the decision below, as it is clearly in error and flouts this Court's Fourteenth Amendment precedents.

OPINIONS BELOW

The opinion of the Pennsylvania Superior Court affirming the judgment of the Court of Common Pleas of Lycoming County is reported summarily at 225 A.3d 1140 (Table), and reproduced at App. 3-22. The order denying reargument is reproduced at App. 44-45. The order of the Pennsylvania Supreme Court denying the Petition for Allowance of Appeal is reported at 239 A.3d 23 (Table) and is reproduced at App. 1-2. The opinions and orders of the Court of Common Pleas of Lycoming County are not reported and are reproduced at App. 23-43.

JURISDICTION

The Pennsylvania Superior Court entered an opinion and order on December 6, 2019, and denied rehearing or reargument by order dated February 11, 2020. App. 3-22, 44-45. The Pennsylvania Supreme Court denied a Petition for Allowance of Appeal on September

22, 2020. App. 1-2. Pursuant to this Court's March 19, 2020 Order, this petition was due within 150 days. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Because this petition calls into question the constitutionality of a Pennsylvania state statute, the Act of March 13, 1815, P.L. 177, 72 P.S. §§ 5981, 6001, as applied, 28 U.S.C. § 2403(a) may apply, and this petition is being served on the Attorney General of Pennsylvania.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, as relevant here, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT

A. Factual Background

This case involves a forced tax sale of private property without any effort at the individualized notice required under this Court's precedents, in violation of the Due Process Clause of the Fourteenth Amendment. It stems from a dispute over the ownership of oil, natural gas and minerals beneath two tracts of land in Lycoming County, Pennsylvania known as Warrants 5665 and 5667 (the "Premises").

Prior to 1894, Thomas E. Proctor acquired substantial tracts of forest land in Pennsylvania, including the Premises, in connection with his leather tanning business. *See* App. 4. In an October 1894 Deed, recorded in the public deed records of Lycoming County, Pennsylvania, Mr. Proctor along with his wife Emma Proctor conveyed the surface estate to Elk Tanning Company, but excepted and reserved unto himself, his heirs and assigns "all the natural gas, coal, coal oil, petroleum, marble and all minerals of every kind and character in, upon, or under the said land" (the "Proctor Exception"). App. 5, 29, 66-70, 99-100. The deed expressly stated that the Proctors were residents of Boston, Massachusetts. App. 66. When Mr. Proctor died later that year, his heirs inherited the excepted subsurface estate. App. 99.

The Proctor Exception created a separate estate, subject to a separate assessment if appropriate. *See, e.g., Wilson v. A. Cook Sons Co.,* 148 A. 63, 64 (Pa. 1929) ("where there is a divided ownership of the land there ought to be a divided taxation").

In 1903, Elk Tanning Company conveyed its interests in the surface estate, "subject to all . . . reservations . . . contained in the deeds," to Central Pennsylvania Lumber Company ("CPLC"). App. 5, 70-73, 100.

In June 1908, Calvin H. McCauley, Jr. (CPLC's general assistant solicitor) purchased the Premises at a tax sale, occasioned by CPLC's failure to pay taxes assessed in 1907. App. 5, 30, 100.

There is no evidence in the record of any attempt to give actual notice to the record owners of

the subsurface, Thomas E. Proctor or his heirs, even though, at the time of the 1908 tax sale, Lycoming County taxing authorities unquestionably knew that Proctor's heirs claimed an interest in the subsurface and that they resided in Boston:

- The deed to Elk Tanning Company in which Proctor excepted and reserved his subsurface rights was filed in the Lycoming County deed records, available in the very court house in which the County Commissioners and County Treasurer had their offices. *See* App. 66-70, 99-100.
- Proctor's will, identifying his heirs, was also filed in Lycoming County's public records. *See* App. 99.
- Unchallenged evidence reflected that Proctor's and his heirs' attorneys and agents directly and regularly communicated with the Lycoming County Treasurer's office with regard to payments of taxes on Proctor properties (before, during and after the time period at issue here). *See* App. 64-66, 73-87, 95-97.
- Unsurprisingly, then, County and township assessment records reflected Proctor's and his heirs' ownership, including the ownership of subsurface rights specifically. *See, e.g.,* App. 85-94.[1]

[1] Because reporting of interests for assessment and taxation, by statute, was made to county officials, *see* Act of March 28, 1806, P.L. 644, 4 Sm.L. 346, § 1, 72 P.S. § 5020-409, who then provided the information to township assessors, *township* records necessarily reflect actual knowledge on the part of *county* officials.

The lack of individualized notice, in the face of tax officials' actual knowledge, was purportedly justified by the legal fiction that taxes assessed against unimproved ("unseated") property were assessed solely against the property itself *in rem,* rather than against the owners. Accordingly, the statutory regime in place at the time required only notice by publication in local newspapers. And even this purported "notice" was not required to name the owners of the property to be sold. *See generally Herder Spring*, 143 A.3d at 363-66; Act of March 13, 1815, P.L. 177, 72 P.S. § 6001.

Nor was there anything else associated with the assessment or ensuing sale that would indicate that the separate, previously-severed subsurface estate was in jeopardy. Indeed, an assessment and sale of subsurface rights under the circumstances would have violated then-existing Pennsylvania law. *See generally F.H. Rockwell & Co. v. Warren County*, 77 A. 665 (Pa. 1910) (prohibiting the assessment and taxation of subsurface rights in the absence of any basis for their valuation). Where subsurface rights could be taxed, they were, and in those instances the Proctor heirs paid the assessments. *See, e.g.,* App. 89-94.

Two years later, McCauley subsequently quitclaimed the Premises back to CPLC, along with 55 other tracts, for $1. App. 5, 30. Respondents all claim their interests through CPLC. App. 6.

B. Procedural history

Keta originally brought this action in November 1950, seeking to quiet title to the subsurface rights at issue, contending that the 1908 tax sale had extinguished the Proctor exception and reunited the surface and mineral estates. Immediately thereafter, Keta obtained a fraudulent default judgment, by submitting a false affidavit in favor of service by publication. (Keta swore that it did not know the whereabouts of the defendants, when it in fact was negotiating at the time with the Proctor heirs over a potential lease of the Premises.) When Keta's fraud came to light, the trial court opened the judgment, and the matter proceeded on the merits. App. 6-7. The PHT and MPT specifically alleged, in (*inter alia*) their counterclaim against all intervenor-plaintiffs, that the tax sale was void because "the heirs of Thomas E. Proctor did not receive constitutionally-sufficient notice," and that "notice by publication alone violated the due process guarantees of the . . . United States Constitution[ ]." App. 47, 50, 51.

After discovery, the trial court entered a summary judgment in favor of Respondents in October 2018. App. 26-43. The trial court did not address the PHT's and MPT's contention that the absence of individualized notice rendered the tax sale constitutionally defective, asserted in their consolidated brief in opposition to intervenors-plaintiffs' motions for summary judgment. App. 55.

The PHT and MPT timely appealed the trial court's judgment, contending *inter alia* that the tax sale

violated the Fourteenth Amendment because of the lack of any effort to provide individual notice. App. 57-58. On December 6, 2019, after briefing and argument, the Superior Court affirmed the trial court's summary judgment. App. 3-22. In rejecting the PHT's and MPT's due process argument, the Superior Court agreed that there was no evidence of any attempt at individualized notice. Even so, the court believed that constructive notice by publication alone was nonetheless consistent with the Fourteenth Amendment's due process guarantees.

In ruling that published notice satisfied Due Process, the Superior Court did not cite *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), or any of this Court's other precedents. Instead, the court relied solely on the Pennsylvania Supreme Court's prior decision in *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016), reading *Herder Spring* to hold that notice by publication was *per se* sufficient under all circumstances. App. 20-21. *Herder Spring,* in turn, relied on an 1815 Pennsylvania statute prescribing the requisite notice and *City of Philadelphia v. Miller*, 49 Pa. 440 (1865), which held that the statutory notice by publication was permissible because of "the difficulties of ascertaining ownership information relating to unseated landowners and the protection provided by the [statute's two-year] redemption period." 143 A.3d 378. The *Herder Spring* court did so even though both the statute and *Miller* pre-dated not only *Mullane*, but also the enactment of the Fourteenth Amendment itself. The *Herder Spring* court justified its conclusion by

stating that it would not apply "preconceived notions of what is reasonable in the age of the Internet," *id.*, even though *Mullane* itself predated the Internet by decades.

The Superior Court also discounted the PHT's and MPT's effort to distinguish *Herder Spring,* rejecting the evidence – not available to the court in *Herder* Spring – showing that Proctor and his heirs' identities were known to tax authorities. The court incorrectly stated that the PHT did not "provide any factual support regarding the supposed ease of locating Proctor's heirs in regards to the 1908 tax sale," characterizing the PHT's and MPT's undisputed evidence as "impermissible speculation or conjecture." App. 21.

On February 11, 2020, the Superior Court denied the PHT's and MPT's petition for reargument. App. 44-45.

On September 22, 2020, the Pennsylvania Supreme Court denied the PHT's Petition for Allowance of Appeal, App. 1-2, in which the PHT and MPT argued the tax sale effected an unlawful deprivation of property rights without due process of law, App. 60-61.

REASONS FOR GRANTING THE WRIT

A. The decision below flouts this Court's decisions in *Mullane* and *Mennonite*.

It is undisputed that the only notice the local government attempted to provide, before divesting the Proctor heirs of their property rights, was published

notice in local newspapers, even though the heirs' identity was not only readily ascertainable from public records, but in fact was actually known to local officials. This plainly fails to satisfy the due process requirements this Court set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Under those decisions, constructive notice, by itself, does not constitute "due process of law" *when the identity of the owner is known*. *See also*, *e.g., Walker v. City of Hutchinson,* 352 U.S. 112, 116 (1956) (published notice was constitutionally insufficient when landowner's name "was known to the city and was on the official records," such that "even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value").

Despite this Court's clear instruction to the contrary in those cases and others, the decision below refused to analyze whether reasonable efforts could have been made that would have actually notified the Proctor heirs of the tax sale. Instead, relying on Pennsylvania precedent, it held that published notice was in every case sufficient to satisfy due process. While this conclusion, grounded on the decision in *Herder Spring*, was purportedly based on the standards "of the era," the "era" at issue here (a 1908 tax sale) is indistinguishable in any material respect from the circumstances prevailing in *Mullane* (a 1947 trust proceeding). The Pennsylvania court's refusal to consider "what is reasonable in the age of the Internet" was thus a thinly

veiled means of evading this Court's precedents while purporting to apply them.[2]

This failure to adhere to this Court's authority is all the more inexplicable given that there was ample, undisputed record evidence showing that taxing authorities not only *could have* identified the true owners, but that they in fact *did* know those owners' identities and whereabouts (and indeed had directly corresponded with the owners by mail).

1. This Court's Due Process Clause jurisprudence clearly requires personal notice to be provided to known individuals prior to depriving them of their property.

The Superior Court, in rejecting the PHT's argument that the 1908 tax sale was void because the constructive notice provided was constitutionally deficient, announced a bright-line rule that constructive notice through publication for *in rem* tax sales *always* comports with due process requirements, regardless of what the record in fact shows about the identity and

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[2] In light of this Court's decision in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), there can be no dispute that *Mullane* applies retroactively to the tax sale at issue here. "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review *and as to all events, regardless of whether such events predate or postdate our announcement of the rule*." 509 U.S. at 97 (emphasis added). *See, e.g.*, *T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*, 388 P.3d 240, 249-50 (N.M. 2016), *cert. denied*, 137 S. Ct. 1584 (2017).

location of interested parties. As a result, the Superior Court's decision violates *Mullane, Mennonite*, and this Court's subsequent cases applying those decisions.

Over sixty years ago in *Mullane*, this Court held that it could not regard the likelihood that the sort of notice that occurred here would reach the intended party as "more than a feint." 339 U.S. at 315. The case considered what sort of notice the Due Process Clause required be given to two classes of trust beneficiaries. As to beneficiaries whose interests or whereabouts could not be ascertained with due diligence, the Court held that notice by newspaper publication was sufficient. *Id*. at 317. But as to those beneficiaries whose identities and place of residence were known, however, notice only by publication was unconstitutional because such notice was not "reasonably calculated to reach those who could easily be informed by other means at hand." *Id*. at 319. The Court found "no tenable ground for dispensing with a serious effort to inform them personally . . . , at least by ordinary mail to their record addresses." *Id.* at 318.

Mullane requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 339 U.S. at 314. As the Court explained, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

Of import here, *Mullane* specifically rejected the notion that officials could dispense with individual notice by characterizing a proceeding as a matter *in rem,* holding that "the requirements of the Fourteenth Amendment . . . do not depend upon a classification for which the standards are so elusive and confused generally." Rather:

> Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.

Id. at 312-13.

Unsurprisingly, given this clear holding in *Mullane*, over thirty years later in *Mennonite* this Court held that notice by publication to a known mortgagee "did not meet the requirements of the Due Process Clause of the Fourteenth Amendment." 462 U.S. at 800. Similar to the facts in this case, *Mennonite* arose from a quiet title action brought by a purchaser of property at a tax sale. Also like this case, the mortgagee received no actual notice of the sale, and none was attempted. Instead, the local government only posted notice in the local courthouse and published notice prior to the sale. *Id.* at 794.

The Court held that this lack of actual notice violated the Due Process Clause because the identity of

the mortgagee was known. Specifically, it held that "[n]otice by mail or other means as certain to ensure actual notice *is a minimum constitutional precondition* to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable." *Id.* at 800 (first emphasis added). *Mennonite* emphasized that the government may not avoid "the relatively modest administrative burden of providing notice by mail." *Id.* at 799-800. In sum, the government's use of the "less reliable forms of notice" by publication "is not reasonable where, as here, 'an inexpensive and efficient mechanism such as mail service is available.'" *Id.* at 799 (citation omitted).

Though *Mullane* and *Mennonite* are clear enough, they are not the only cases where this Court, long before "the age of the Internet," has reiterated that notice by publication is constitutionally unsound. *See Schroeder v. City of N.Y.,* 371 U.S. 208, 211, 212-13 (1962) (notice by posting and publication is insufficient where the property owner's identity was "readily ascertainable" from deed records); *Walker*, 352 U.S. at 116 (notice only by publication is insufficient where the property owners were listed in official records); *City of N.Y. v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1953) ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice.").

2. The decision below cannot be reconciled with this Court's precedent.

The decision below is impossible to square with the unbroken line of authority just discussed. The Superior Court inexplicably held that due process required no more than notice by publication in a local Pennsylvania newspaper. But it is undisputed that the taxing authorities knew both that the subsurface rights were owned by Thomas Proctor and his heirs, and that they resided in Boston. *See supra* at 7. Thus, under *Mullane* and its progeny, the government was required to take reasonable steps to notify the Proctor heirs. *See Mennonite*, 462 U.S. at 800 (if a party's name and address are "reasonably ascertainable," notice by mail or equally effective means is required). Instead, it took no steps at all beyond the general publication that this Court has so often condemned.

None of the Superior Court's proffered reasons for rejecting the PHT's due process arguments withstand scrutiny. Its analysis was limited to a single paragraph, and never even cited *Mullane* or its progeny. App. 20-21. Rather than looking to this Court's precedents to resolve the PHT's Fourteenth Amendment claim, the decision below relied solely on *Herder Spring*. Similar to this case, *Herder Spring* involved a 1935 tax sale that stripped the owners of severed subsurface rights of their property interest and provided only published notice of the sale.

Herder Spring held that such notice satisfied *Mullane* and its progeny. The case initially acknowledged that *Mullane* "broke with past precedent allowing notice by publication for *in rem* cases," 143 A.3d at 376, but it then fell back almost immediately on that very past precedent under the pretense of considering "the constraints of the era." *Id.* at 377. Vaguely alluding to "preconceived notions of what is reasonable in the age of the Internet," *id.* at 378, it held that published notice was adequate because that notice complied with an 1815 Pennsylvania statute pertaining to *in rem* tax sales – the very distinction that *Mullane* rejected. *See* 339 U.S. at 312-13 (discussed *supra* at 15).

Of course, *Mullane*, *Mennonite*, and this Court's other cases rejecting notice by publication were all decided well before "the age of the Internet," but they still rejected the sufficiency of notice by publication. For example, in 1956 this Court emphasized that "[i]t is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property." *Walker*, 352 U.S. at 116. Though *Herder Spring* purported to apply *Mullane* retroactively, in actuality it created a complete end-run around the decision under the guise of looking to "the constraints of the era." This critical error is carried over into the Superior Court's decision below.[3] The Superior Court

[3] The disregard of this Court's precedents is even more egregious in this case than in *Herder Spring*. In *Herder Spring*, the court emphasized that there was no evidence that the local government had been informed of the subsurface owners' reservation. 143 A.3d at 360. Here, by contrast, the undisputed evidence of record shows that taxing authorities knew the identities and

neglected to proffer any explanation why the published notice in a local newspaper, when the government knew both the owners' identity and that they did not live locally, were "means . . . such as one desirous of actually informing the [owner] might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

Herder Spring also relied heavily on the pre-*Mullane* decision of *City of Philadelphia v. Miller*, 49 Pa. 440 (1865), even though – incredibly – that decision pre-dated the enactment of the Fourteenth Amendment. *Miller* is not only antiquated, however; it also is flatly inconsistent with this Court's ensuing pronouncements. For example, while *Miller* posited that even if an owner "received no notice of the sale, it required of him no great measure of diligence to look after his interests" and redeem the property within an allotted time period, 49 Pa. at 451, *Mennonite* specifically rejected such a contention, holding that "a party's ability to take steps to safeguard its interest does not relieve the State of its constitutional obligation." 462 U.S. at 799.[4]

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location of the subsurface owner (and indeed had been directly dealing with those interested parties). *See supra* at 7.

[4] Even if it were not irrelevant as a legal matter, *Miller*'s reliance on what might be reasonably expected of the property owner has no application as a factual matter here, given that (as discussed above) the Proctor heirs would have had no reason, under then-prevailing law, to be on guard for the potential sale of their rights because of the surface owner's non-payment. *See supra* at 6, 8.

Herder Spring and *Miller* all pointed to the fact that published notice purportedly complied with an 1815 Pennsylvania statute. Act of March 13, 1815, P.L. 177, § I, 72 P.S. §§ 5981, 6001. But this Court has clearly stated that due process "require[s] the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Jones v. Flowers*, 547 U.S. 220, 230 (2006). *See also Robinson v. Hanrahan,* 409 U.S. 38, 40 (1972) (published notice of an *in rem* vehicle sale is insufficient when state knows that owner is jailed). Even if reliance on the 1815 statute were appropriate in certain cases (for example, where the identity of landowners was truly unknown, and not ascertainable from public records), the facts of this case cannot render reliance on that statute compliant with the Due Process Clause.

After all, as explained above, the notice required to comply with the Due Process Clause must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite*, 462 U.S. at 795 (citation omitted).

Here, there is no evidence that the government attempted to but was unable to locate the Proctor heirs. In fact, as shown above, the record revealed, as a matter that was not in dispute, that Lycoming county officials had both constructive *and actual* knowledge of Proctor's interest:

- As an initial matter, taxing authorities could have obtained relevant information – Proctor's and his heirs' interest and residence in Boston – by reviewing records kept in another room in the very same county courthouse.
- Beyond that, however, the evidence reflects that they *actually* knew about Proctor's and his heirs' interest, and had direct dealings with their agents specifically relating to taxes on Proctor's and his heirs' unseated interests.[5]

In any event, Pennsylvania courts' entrenched approach offends the Due Process Clause and this Court's clear precedents providing for the constitutional protection of property rights. Allowing the decision below to stand would open the door for other courts to pursue a similarly unapologetic path of disregarding this

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[5] Even though this evidence was never called into question, the Superior Court discounted it entirely as "speculation or conjecture," purportedly because the PHT did not "present any factual support regarding the supposed ease of locating Proctor's heirs." App. 23. This is not only incorrect, but also, more broadly, fundamentally misses the point: because the record below reveals *no* effort at providing individualized notice, there is no need to surmise as to whether any such notice might or might not have reached its intended recipients. (If, for example, the record reflected a notice by mail that was returned as undeliverable, or that the Proctor interest was unrecorded in the deed books, this would be a much different case.)

In short, the Superior Court's summary disregard of the PHT's evidence does not counsel against this Court's review, because this Court's precedents make clear that it is irrelevant, for constitutional purposes, whether hypothetical notice that was never attempted would in fact have succeeded, so long as an attempt at such notice was, as here, reasonably practicable based on the information available to public officials.

Court's clear constitutional precedents, simply in the interest of expediency, or to favor the interests of local voters over non-resident landowners. This Court should grant review to foreclose that destabilizing path.

In short, because the decision below disregards binding United States Supreme Court precedent and the underlying constitutional norms that this Court has consistently upheld, this Court should grant review. Sup. Ct. R. 10(c) (certiorari warranted where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

B. This is a recurring and important issue, and this case is a good vehicle for addressing it.

Pennsylvania courts' repeated refusal to apply *Mullane* and its progeny to tax sales has enormous practical significance. Title to subsurface oil and gas rights has increasingly come into dispute in recent years, as the value of those rights has risen dramatically. *See, e.g.*, *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 914-15 (Pa. 2013) (describing the development of natural gas extraction in Pennsylvania). In this case alone, the oil and gas rights at issue are worth millions of dollars. And this case implicates but a small portion of the valuable subsurface rights in Pennsylvania. Pennsylvania overlies a large portion of the Marcellus Shale, an underground rock formation whose embedded natural gas is valued conservatively in the

hundreds of billions of dollars. Nicole R. Snyder Bagnell & Stephanie L. Hadgkiss, *Eastern Shale Plays – A Game Plan for Success*, 55 Rocky Mtn. Min. L. Inst. 32-1, § 32.03 (2009).

The troubling fact pattern underlying this case is unfortunately not uncommon in Pennsylvania, as exhibited by *Herder Spring* and the cases that have repeatedly applied it to sanction "title wash" tax sales that expropriate subsurface property rights without due process.[6] *See, e.g., Woodhouse Hunting Club, Inc. v. Hoyt,* 183 A.3d 453 (Pa. Super. Ct. 2018); *Cornwall Mt. Invs., L.P. v. Thomas E. Proctor Heirs Trust,* 158 A.3d 148 (Pa. Super. Ct.), *appeal denied,* 172 A.3d 594 (table) (Pa. 2017), *cert. denied,* 138 S. Ct. 1698 (2018); *Leonard v. Newman*; *Spigelmyer v. Colony*, No. 1602 MDA 2015, 2016 WL 4876216 (Pa. Super. Ct. July 26, 2016); *Bailey v. Elder,* No. 79 MDA 2015, 2015 WL 6954488 (Pa. Super. Ct. Nov. 9, 2015), *appeal denied,* 145 A.3d 722 (table) (Pa. 2016), *cert. denied,* 137 S. Ct. 641 (2017). *See also Pa. Game Comm'n v. Thomas E. Proctor Heirs Trust,* 455 F. Supp. 3d 127 (M.D. Pa. 2019) (rejecting a due process argument but denying summary judgment on state law grounds).

Nor has Pennsylvania's approach gone without justifiable criticism. *See also* Mark Prokopchak, *Renewing Respect For Record Notice: Cleaning Up The*

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[6] "A 'tax wash sale' or 'title wash' describes the effect of early tax sales of unseated land on a prior severance of a subsurface estate." *Leonard v. Newman*, No. 1291 MDA 2016, 2017 WL 3017066 at *1 n.1 (Pa. Super. Ct. July 17, 2017) (citing *Herder Spring,* 143 A.3d at 166).

Pennsylvania Title Wash, 2 Tex. A&M J. Prop. L. 533, 560 (2015) ("Punishing record mineral estate owners by divestment of their property interest for allegedly not . . . paying taxes on minerals that are nearly impossible to value or assess until extracted is anathema to both current law and common sense.").

Even if the type of scenario here, and state courts' failure to apply *Mullane*, were limited to Pennsylvania, certiorari would be warranted, given that tens of thousands of acres of land in Pennsylvania are likely implicated by *Herder Spring* alone. *See, e.g.,* Joel R. Burcat & Megan E. Albright, *'Title Washing' in Pennsylvania Is Alive and Well*, The Legal Intelligencer, Aug. 25, 2016, *available at* https://www.saul.com/sites/default/files/sites/default/files/documents/Legal%20Intel%20article%20BurcatAlbright_082516.pdf.

But the significance of the issue is not limited to just one state. With the boom in unconventional oil and gas exploration in recent years, the issue is coming to the forefront in courts throughout the country. In recent years, a number of state courts have upheld the divestiture of severed subsurface property rights when the only "notice" given to the subsurface owner was constructive notice by publication. *See, e.g., T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*, 388 P.3d 240, 249-50 (N.M. 2016) (upholding 1948 quiet title judgment of a reserved subsurface right where the only notice was by publication, misreading *Mullane*), *cert. denied*, 137 S. Ct. 1584 (2017); *Quantum Res. Mgmt., L.L.C. v. Pirate Lake Oil Corp.*, 112 So. 3d 209 (La. 2013) (refusing to apply

Mullane and *Mennonite* to a 1925 tax sale of severed mineral rights), *cert. denied*, 134 S. Ct. 197 (2013); *Aarco Oil & Gas Co. v. EOG Resources, Inc.*, 20 So. 3d 662, 668-69 (Miss. 2009) (upholding 1942 tax sale divesting subsurface owners where only the surface owners received record notice).

Importantly, however, this is an issue on which state courts have disagreed. Not every court treats this Court's holdings in such a careless fashion. *See Jordan v. Jensen*, 391 P.3d 183 (Utah 2017) (applying *Mennonite* to hold that due process prevented divestiture of mineral rights through unnoticed 2000 tax sale); *Owens v. Tergeson*, 363 P.3d 826 (Colo. App. 2015) (applying *Mullane* to overturn default judgment in 1973 quiet title action). This conflict among the states further shows that this Court's intervention is needed, to ensure that important constitutional safeguards apply uniformly throughout the nation. *See* Sup. Ct. R. 10(b) (certiorari warranted where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort").

As the facts underlying these cases indicate, localities across the nation have disposed of severed subsurface rights in ways that pose significant concerns under *Mullane* and its progeny. Now that those long-undeveloped rights are of sudden value, courts are forced to confront the due process issues that have arisen. Although the economic magnitude of this issue nationwide is difficult to calculate, the value in Pennsylvania and this case alone demonstrates the

significant interests at stake. More critically, the Constitutional protection of a person's property has an intrinsic value that cannot be measured in dollars. The cavalier approach taken by the court below in permitting this deprivation of property cannot be countenanced.[7]

The decision below in effect upholds a government-sanctioned expropriation of valuable real property

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[7] Any concern about repose or the disruption of settled expectations are overblown, and do not excuse the unconstitutional deprivation of property without due process.

First, there is no basis for the supposition that tax sale purchasers knew that a sale of the surface would also convey a subsurface interest severed before the assessment, or that purchasers relied on that knowledge (particularly where, as here, the relevant post-tax sale deeds reiterated the prior Proctor Exception). Until *Herder Spring*, the weight of precedent held otherwise. *See, e.g., N.Y. Nat. Gas Corp. v. Swan-Finch Gas Dev. Corp.,* 278 F.2d 577, 579-80 (3d Cir. 1972); *Day v. Johnson,* 31 Pa. D. & C. 3d 556 (C.C.P. 1983); *New Shawmut Mining Co. v. Gordon,* 43 Pa. D. & C. 2d 477 (C.C.P. 1963); *Kline v. Hull,* 10 Law. L.J. 74 (C.C.P. 1951).

Second, the application of due process requirements to tax sales "would not necessarily defeat all titles based on tax deeds. First, not every deed would be challenged; the owner may in fact have abandoned the property. Second, the doctrine of adverse possession would defeat challenges to most other deeds." Jonathan W. Still, Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings,* 84 Yale. L.J. 1505, 1517 (1975).

Third, a mistaken desire for the preservation of historical outcomes should not outweigh constitutional guarantees. After all, "traditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Shaffer v. Heitner,* 433 U.S. 186, 212 (1977).

rights that offends this Court's articulations of what "due process of law" requires. Pennsylvania courts' decisions communicate clearly that due process is nothing more than an empty promise whenever it might be inconvenient to recognize, or where it might favor out-of-state landowners to the detriment of local voters. This is plainly a matter of substantial public importance justifying this Court's attention. Deferring review will only lead to further chaos and uncertainty.

This case is also a good vehicle for emphasizing that state courts must faithfully apply *Mullane* and its guarantees of minimal due process. The record below is "clean." There is no evidence to suggest that tax officials made *any* effort to provide individualized notice; rather, the Pennsylvania court's reasoning rested solely on *Herder Spring*'s conclusion that *Mullane* did not alter the prior 1865 decision that notice by publication is constitutionally adequate. Accordingly, there is no need for the Court to wade into nuanced questions as to the sufficiency of governmental efforts to notify interested parties.

Nor are there any factual issues that raise a legitimate question as to whether an attempt at individualized notice was impossible or impracticable, *see Mullane,* 339 U.S. at 317, such as an unrecorded deed or a confused chain of title.[8] Here, it is undisputed that

[8] *See Herder Spring,* 143 A.3d at 377 (justifying notice by publication because "ownership of unseated land was often contested," and because "it frequently occurs that the owner's deed is not recorded, his name is not registered, he is not known, no one is in actual possession, and there is no apparent owner or reputed

both the deed embodying the Proctor Exception and the will identifying Proctor's heirs were filed in Lycoming County's public records. *See* App. 66-70, 99. Further, both tax records and undisputed testimony contemporaneous with the tax sale showed that the Proctor heirs' interest in the property and their general whereabouts were *actually known*. *See* App. 64-66, 73-97. This case therefore presents the Court with the opportunity to reaffirm the applicability of *Mullane* and *Mennonite* without confronting any fact-bound issues or state-law defenses.

C. Summary reversal is warranted.

Though the question presented warrants full consideration on the merits, at a minimum this Court should grant certiorari and summarily reverse the decision below as it is directly contrary to this Court's Fourteenth Amendment precedents. Summary reversal is appropriate in situations in which "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Pavan v. Smith*, 582 U.S. ___, ___, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)). *See, e.g., Pavan v. Smith*, 582 U.S. ___, ___, 137 S. Ct. 2075, 2076-77 (2017) (per curiam) (summarily reversing state supreme court's failure to follow this Court's precedent); *Wearry v. Cain*, 577 U.S. ___, ___, 136 S. Ct. 1002, 1007

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owner in the neighborhood of the property" (citations and internal quotations omitted)).

(2016) (per curiam) (summarily reversing decision where the "lower courts have egregiously misapplied settled law."); *Maryland v. Kulbicki,* 577 U.S. 1, 2 (2015) (per curiam) (summarily reversing because the court below applied *Strickland v. Washington,* 466 U.S. 668 (1984), "in name only"); *Grady v. North Carolina,* 575 U.S. 306, 309-10 (2015) (per curiam) (summarily reversing a judgment inconsistent with this Court's recent Fourth Amendment precedents); *Martinez v. Illinois,* 572 U.S. 833, 843 (2014) (per curiam) (summarily reversing state court decision that "r[an] directly counter to our precedents").

As described in the preceding sections, all three of these criteria are easily satisfied here, and the fact pattern underlying this case has arisen with frequency in recent years as subsurface rights have become increasingly valuable. Summary reversal is appropriate not only to rectify the unlawful seizure of property worth millions of dollars that occurred here, but to reiterate that courts nationwide must actually apply, rather than avoid, the mandates of *Mullane* and its progeny.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted,

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