Nos. 20-316 and 20-357

IN THE

Supreme Court of the United States

MARIA PAPPAS, COOK COUNTY TREASURER, *et al.*,

Petitioners,

v.

A.F. MOORE & ASSOCIATES, INC., *et al.*

Respondents.

(For Continuation of Caption See Inside Cover)

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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FRITZ KAEGI,

Petitioner,

v.

A.F. MOORE & ASSOCIATES, INC., *et al.*

Respondents.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondents A.F. Moore & Associates, Inc.; J. Emil Anderson & Son, Inc.; American Academy of Orthopaedic Surgeons; and Fox Valley/River Oaks Partnership have no parent corporations and therefore no publicly held company owns 10% or more of the stock of any of these companies.

Respondent Prime Group Realty Trust went through a merger and is now known as Riverview Realty LLC, the parent entity of which is Five Mile Capital Partners LLC. No publicly held company owns 10% or more of the stock of these companies.

Respondent Simon Property Group (Delaware), Inc. is a privately held corporation, the parent corporation of which is Simon Property Group, Inc. Simon Property Group, Inc., a publicly held corporation that trades on the NYSE under the symbol SPG, is the sole shareholder of Simon Property Group (Delaware), Inc. and therefore owns more than 10% of the latter company's stock.

RELATED CASE
(in addition to those listed by Petitioner)

In Re A.F. Moore & Associates, Inc., et al., No. 20-2497, U.S. Court of Appeals for the Seventh Circuit. Judgment issuing mandamus entered September 10, 2020.

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INTRODUCTION

It is well established that the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA") and comity doctrine prohibit federal courts from exercising jurisdiction over state taxation disputes only where the state has afforded the taxpayer a "plain, speedy and efficient" remedy for federal constitutional claims. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981); *see also Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 422-23 (2010). The decision below simply applies this long-standing rule of law, nothing more. It presents no issue that calls for this Court's review.

Respondents are commercial and industrial property owners in Cook County, Illinois. Faced with an Illinois procedure that effectively barred Respondents from litigating in state court their equal protection and due process challenges to discriminatory assessments of their properties, a unanimous panel of the Seventh Circuit found the specific facts here presented the "rare case in which taxpayers lack an adequate state-court remedy." *A.F. Moore & Assocs., Inc. v. Pappas*, 948 F.3d 889, 891, 895-96 (7th Cir. 2020) ("*A.F. Moore*"). Petitioners sought rehearing and rehearing *en banc*, but no Circuit judge in active service voted to rehear the case. *A.F. Moore*, 948 F.3d at 889; *see also* 7th Cir. ECF #55.

As the Seventh Circuit noted, its ruling is fully in line with this Court's rulings in *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 514–15 (1981), *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981), and *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*

of Webster Cnty, 488 U.S. 336, 345-46 (1989). It is also fully consistent with decisions of other federal circuits, including the Second and Third Circuits' decisions in *Long Island Lighting Co v. Town of Brookhaven*, 889 F.2d 428 (2d Cir. 1989) and *Garrett v. Bamford*, 582 F.2d 810 (3d Cir. 1978), respectively, that are wrongly claimed by Petitioners to conflict with the decision below.

Respondents' complaint alleges their real properties were assessed at or above *de jure* levels of valuation, while most other similarly classified taxpayers' properties were intentionally and systematically assessed at lower *de facto* levels, violating Respondents' equal protection and due process rights. Cook County officials admitted they had known "forever" that the *de facto* assessment levels for most other properties clearly violated state statutory law up to 2008. *A.F. Moore*, 948 F.3d at 891 (quoting county board member). Respondents initially sought relief in Illinois state courts after exhausting their administrative remedies, but when those proceedings had languished for more than ten years, Respondents sued in federal court under 42 U.S.C. § 1983. The district court dismissed the case for lack of federal jurisdiction under the TIA, alternatively declining jurisdiction under comity, and Respondents appealed.

The Circuit Court reversed the dismissal of Respondents' § 1983 action. The central issue on appeal was whether Illinois' tax objection procedures afforded Respondents a plain, speedy and efficient remedy in light of: (1) a 1995 Illinois statutory amendment (the "Methodology Prohibition"), 35 ILCS 200/23-15(b)(3), prohibiting judicial inquiry into the methods, practices, procedures, and intent of the Assessor; (2) an Illinois appellate decision holding

that the Methodology Prohibition bars adjudication of federal constitutional claims in state court, *Friedman v. Pappas,* No. 1-02-2685 (Ill. App. 1st Dist. 2003); and (3) additional statutory provisions that prohibited Respondents from joining the Assessor in the state court proceedings, which in turn led to the Assessor's willful destruction of evidence relevant to Respondents' federal constitutional claims during the state litigation.[1] *See A.F. Moore*, 948 F.3d at 892-96.

Although Petitioners and Amici say the Illinois state remedies are somehow "plain, speedy and efficient," even after more than ten years of fruitless state court litigation and the Assessor's massive spoliation of evidence, Petitioners at the same time have repeatedly insisted that the Methodology Prohibition prohibits the Illinois courts from considering evidence of the Assessor's methodology and intent – the evidence critical to Respondents' equal protection and due process claims. Mirroring *Friedman,* Petitioners explicitly argued below that taxpayers could not raise constitutional claims in the state process *at all*. *A.F. Moore*, 948 F.3d at 895-96, n. 2 (quoting Petitioners' brief, 7th Cir. ECF #21 at 17-18). As the Seventh Circuit

1. The Methodology Prohibition and related restrictions enacted in 1995 (the "1995 Amendments") significantly altered the Illinois tax objection process addressed by this Court fourteen years earlier in *Rosewell*. *See Rosewell*, 450 U.S. at 508-510, nn. 6-7, 514. *Rosewell* held that the Illinois procedures then in place, which did not include the Methodology Prohibition, provided an adequate remedy. This Court has not revisited the Illinois system since the 1995 Amendments, and the Seventh Circuit considered for the first time in this case whether the Amendments prevented taxpayers from raising federal constitutional challenges. *A.F. Moore*, 948 F.3d at 893-95.

observed, Petitioners argued that "the only matter at issue in a [state tax objection] is whether the assessment of the real estate property was correct." *A.F. Moore*, 948 F.3d at 895 (quoting 7th Cir. ECF #21 at 20).[2] The Court recognized that this precluded consideration of Respondents' constitutional claim for discriminatory treatment based on assessments of *other* similarly classified properties at lower *de facto* levels, which violated equal protection even if Respondents' properties were assessed at the "correct" *de jure* level.

On those facts, the Seventh Circuit found that Illinois did not provide Respondents with a plain, speedy and efficient remedy for deprivation of their constitutional rights, and that this therefore was the "rare case in which taxpayers lack an adequate state-court remedy." *A.F. Moore*, 948 F.3d at 891, 895-96. Accordingly, neither the TIA nor related comity doctrines barred Respondents' federal claims, and the Court reversed the dismissal of Respondents' § 1983 action.

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2. *See also A.F. Moore* Oral Arg. at 14:31-22:05, 25:07-28:57; 23:31-25:07, where Petitioners repeatedly failed to explain or repudiate this assertion. Petitioners' brief unambiguously stated that Plaintiffs were "not free" to raise federal constitutional claims in the Illinois proceedings. (7th Cir. ECF #21 at 17-18; *see also id.* at 7-8, 10-11, 12-13.) Their attempts to retract this concession in their current petitions, as in their rehearing petitions below, do not even cite to the relevant sections of their Seventh Circuit brief. (County Ptn. at 11-12, n. 6; Assessor Ptn. at 10, 17; 7th Cir. ECF #40 at 7-9; 7th Cir. ECF #41 at 7.) Although Petitioners now say such claims may be raised, they cannot reconcile that position with their continued insistence that the Assessor's methodology and intent are off limits. (County Ptn., at 2, 5, 11, 14; Assessor Ptn., at 6-7, 15, 20.) As the Seventh Circuit correctly observed, that limitation effectively forecloses proof of the equal protection claim. *A.F. Moore*, 948 F.3d at 895.

The Seventh Circuit's decision announced no new rule of law, nor did it deviate in any way from well-established precedents of this Court or of the various circuit courts of appeal requiring that the state must provide a "plain, speedy and efficient remedy" for federal constitutional claims before federal jurisdiction can be barred under the TIA and comity. *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 514–15 (1981); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981). Likewise, the decision below does not pave the way for federal litigation of "garden variety" or "ordinary" tax disputes, nor does it "federalize" tax objections, as Petitioners and Amici[3]

3. Amici are The Illinois Association of School Boards, the Illinois Association of School Officials, various Illinois School Districts and one Illinois municipality. Respondents declined to consent to Amici's filing because their interests are identical to those of the Petitioners County and Collector, who are Amici's agents for purposes of collecting, distributing, and refunding property taxes. *Bridgman v. Korzen*, 54 Ill. 2d 74, 78 (1972). Most of Amici's arguments simply restate arguments otherwise advanced by Petitioners and require no additional comment. Two arguments – that the ruling below portends devastating class action liabilities (Amici at 9-10) or debilitating prospective injunctions (*Id.* at 10-12) – are not otherwise addressed because they have not been advanced by Petitioners and are simply not relevant here. This is not a class action and conjectural Rule 23 considerations are not properly before this Court. Nor is any prospective injunctive relief blocking tax collections sought in this case. As for hypothetical cases where prospective injunctive relief might be sought, the decision below does not foreclose traditional considerations of public interest before any such injunction could issue. *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20 (2008). A third argument, that federal relief would harm Amici's "ability to manage refunds" (Amici at 10-11), ignores that the refunds sought are the same as provided by state law, *see* 35 ILCS 200/23-20, and that refunding illegally or unconstitutionally

hyperbolically claim. (Assessor Ptn., at 4, 18; County Ptn., at 29; Amici at 6-9.) Unlike this case, the typical tax objection is a straightforward dispute about the fair market value of the assessed property that raises no federal constitutional questions concerning the Assessor's methodology in assessing entire classes of property. Moreover, as the Seventh Circuit observed in its ruling on Respondents' petition for mandamus, a change in *de jure* class levels in 2008 also forestalls a repetition of the instant facts. *In Re A.F. Moore & Associates, Inc.*, 2020 WL 5422791 at *3 (7th Cir. Sept. 10, 2020) ("*A.F. Moore II*").[4]

In other words, the decision below is specific to the "rare" circumstances presented here. *A.F. Moore*, 948 F.3d at 891. Petitioners' rhetorical suggestions that it portends some vast "erosion" of the Tax Injunction Act or somehow throws Illinois' entire system of real estate taxation into "disarray" are misplaced and have no record support. (Assessor Ptn. at i, 18.)

Petitioners' argument regarding Illinois constitutional "uniformity" provisions presents no justification for certiorari. The provision on which Petitioners' rely for a supposedly "stricter standard" than federal equal protection has no application to property taxes. And the

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collected taxes is required by due process. *McKesson Corp. v. Div. of Alc. Bev.*, 496 U.S. 18, 51 (1990).

4. After the Seventh Circuit reversed the dismissal of Respondents' complaint, the district court granted Petitioners' motion for a stay pending their petitions for certiorari. In *A.F. Moore II*, the Seventh Circuit granted Respondents' petition for mandamus, vacating the stay. 2020 WL 5422791 at *1, *4.

ruling Petitioners say the Seventh Circuit "overlooked" was not cited in their brief, did not address the statutory restrictions on constitutional claims, and has been superseded by regulatory amendments. (*See* County Ptn. at 8-10, 24-26; Assessor Ptn., at 5, 16-17.) In any event, Petitioners failed to raise the "uniformity" argument until they requested a rehearing or rehearing *en banc* below, which was summarily denied. *See A.F. Moore,* 948 F.3d at 891.

For these reasons, as more fully addressed below, the County's and Assessor's Petitions for Writ of Certiorari should be denied.

ARGUMENT

I. Certiorari Should Be Denied Because The Seventh Circuit Correctly Found That Respondents Lacked A Plain, Speedy and Efficient State Court Remedy.

As in *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 345-46 (1989), the gravamen of Respondents' equal protection claims is that the vast majority of similarly classified properties in Cook County, Illinois were systematically under-assessed, well below statutory levels, while Respondents' properties were assessed at or above the *de jure* levels. *A.F. Moore*, 948 F.3d, at 892-93.

The Assessor's methodology and intent are central to that claim. The valuations of Respondents' properties "can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." *Allegheny, supra,* at 346. Respondents must be

able to show that the disparity between their assessments and others in the same class resulted from the Assessor's "deliberately adopted system," *Cumberland Coal Co. v. Bd. of Revision*, 284 U.S. 23, 25 (1931), requiring proof of "something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); *Allegheny*, 488 U.S. at 345 (quoting *Sunday Lake*). Intentional discrimination *is* the equal protection violation. *Village of Willowbrook v. Olech*, 428 U.S. 562, 564 (2000) (quoting *Allegheny*).

Petitioners, however, have steadfastly maintained that Illinois' current tax objection procedure bars that kind of proof. (*See e.g.*, County Ptn., at 2, 5, 11, 14; Assessor Ptn. at 6, 15-16.) The 1995 Amendments to the Illinois Property Tax Code, mainly codified in 35 ILCS 200/23-15 ("§ 23-15"), barred evidence of the Assessor's methodology and intent and any judicial consideration of those issues:

> [i]f an objection is made claiming incorrect valuation, the court shall consider the objection **without regard to the correctness of any practice, procedure, or method of valuation** followed by the assessor . . . in making or reviewing the assessment, and **without regard to the intent or motivation** of an assessing official.

35 ILCS 200/23-15(b)(3) (emphasis added) (the "Methodology Prohibition").[5]

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5. Petitioners claim that the 1995 Amendments were intended to ease the proof burdens on taxpayers by eliminating proof of

Based on the Methodology Prohibition, the Illinois appellate court in *Friedman v. Pappas,* No. 1-02-2685 (Ill. App. 1st Dist. 2003), held constitutional claims to be barred in state tax objection proceedings. *See A.F. Moore*, 948 F.3d at 893. *Friedman* is unpublished, but it remains the only Illinois appellate ruling on the issue, and it was cited and discussed extensively by the parties and considered by the Court below. The impact of the Methodology Prohibition was therefore central to the Seventh Circuit's determination that Respondents were without a "plain, speedy or efficient remedy" for their constitutional claims. *A.F. Moore*, 948 F.3d at 895-96.

Consistent with *Friedman*, Petitioners repeatedly asserted in their briefs below that the Methodology Prohibition bars consideration of Respondents' constitutional claims in Illinois tax objection proceedings. The Seventh Circuit specifically called out the following example:

> In their brief, the defendants assert that the taxpayers err in presuming that they can raise their constitutional claims, sharply admonishing that "[t]hey are not free to do so." Instead, the defendants argue, "the only matter at issue in a Section 23-15 action is whether the assessment of the real estate property was correct."

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actual or constructive fraud in connection with single-property assessments. (Assessor Ptn., at 14-16; County Ptn., at 10-11.) Whatever salutary purpose the 1995 Amendments may have had in connection with single-property market valuation claims – which constitute the vast majority of tax objection proceedings – that does not excuse the lack of a plain, speedy and efficient remedy where, as here, the source of the equal protection violation is a systemic underassessment of other properties.

A.F. Moore, 948 F.3d at 895 (quoting Petitioners' Seventh Circuit Brief (7th Cir. ECF #21 at 17-18)); *see also id.* at 20.

It is hard to conceive of a more direct acknowledgment of the lack of a "plain, speedy and efficient" state court remedy. And Petitioners' newfound explanation that their brief was referring to the assertion of claims under 42 U.S.C. § 1983, per *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) (*see* County Ptn. at 11-12, n. 6), is a gross distortion of the record. Although *National Private Truck* was cited below, the issue addressed in the relevant section of Petitioners' brief was the scope of proceedings under § 23-15, not whether the Illinois court was required to hear claims under Section 1983.[6] Petitioners argued unmistakably that the "exclusive" § 23-15 remedy for "incorrect" assessments barred all other "common law or *constitutional claims*." (7th Cir. ECF #21 at 7-8, 10-13, emphasis added.)

If there were any legitimate question about Petitioners' position, they had ample opportunity to clarify it at oral argument. The Seventh Circuit panel asked Petitioners *eight times* to explain how an equal protection claim could be heard in the face of the Methodology Prohibition, or under rules that prohibit Respondents' equal protection claims outright under the alternative procedure of appeal

6. Respondents acknowledged in both the state and federal courts that § 1983 was generally unavailable to taxpayers in either state or federal court under *National Private Truck*, but this rule was subject to the same exception as the TIA and comity. Section 1983 is unavailable *only* if state procedures are adequate for assertion of taxpayers' federal constitutional claims. (*See e.g.* Respondents Reply Br., 7th Cir. ECF #25 at 13, n. 10, citing 515 U.S. at 591, n. 6.) Only the exception is at issue, not the rule.

to the Illinois Property Tax Appeal Board ("PTAB"). *A.F. Moore*, 948 F.3d at 895-96, n. 2. (Oral Arg. at 14:31-16:10, 16:20-17:08, 17:20-17.58, 18:46-20:30, 20:36-22:04, 23:31-25:07 (PTAB), 25:07-27:18, 27:18-28:57.) Counsel for Petitioners could not do so in any cogent way.

Petitioners cannot now renounce those clear and unequivocal admissions. Even in their certiorari petitions, Petitioners continue to assert that Illinois law bars inquiry into the Assessor's methodology and intent, and that the Assessor is immune from suit. (County Ptn., at 2, 5, 11, 14; Assessor Ptn., at 6, 15-16.) Nor is Petitioners' position salvaged by a passing reference to "constitutional claims" in a Civic Federation-Bar Association Task Force report, part of the "legislative history" of § 23-15. (County Ptn., at 6-7, Assessor Ptn. at 15, Amici at 15.) As the Methodology Prohibition has been construed and applied in Illinois well after issuance of that report, and as Petitioners themselves vigorously argued throughout these proceedings, Illinois affords no forum to address Respondents' constitutional claims. We cannot put it any more plainly than the Seventh Circuit:

> By the defendants' own admission, then, the section 23-15 procedures provide no forum for the taxpayers to raise their constitutional claims. Nor have the defendants been able to point to any alternative channels in which these taxpayers can raise their federal constitutional claims in Illinois courts.

A.F. Moore, 948 F.3d at 895-96. The Seventh Circuit reiterated this when it subsequently granted Respondents' mandamus petition to overrule the district court's stay of

proceedings pending Petitioners' petitions for certiorari, stating:

> Based on the defendants' own concessions, we held that Illinois's procedures left these taxpayers no remedy at all for their claims, let alone a speedy and efficient one – the taxpayers had been litigating in state courts for a decade.
>
> * * * *
>
> The spirit of our mandate in this case was clear. After concluding that the taxpayers lacked a plain, speedy, and efficient remedy in the state courts, we remanded the case to the district court for it to resolve the taxpayers' claims. Then, mindful that these taxpayers had already spent a decade trying to litigate these claims in state court, and judging the Supreme Court unlikely to grant certiorari, much less to reverse our judgment, we expressly denied the defendants' request that we stay our remand pending their petition for a writ of certiorari.

A.F. Moore II, 2020 WL 5422791 at *1, *2.

It is no answer to suggest, as the Assessor does, that the federal courts should nonetheless stay their hand because the Illinois Supreme Court *might* someday remedy the situation *if* the matter comes before it and *if* it ultimately decides to hear the case. (Assessor Ptn. at 24; *see also* Amici at 12-14.) "Such an unclear path to relief is not a sufficiently 'plain' remedy under the Tax Injunction Act." *A.F. Moore*, 948 F.3d at 895-96, n. 2; *see Rosewell*,

450 U.S. at 516-17, 520 (an unclear or uncertain remedy is not "plain"); *see also McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39, 50 (1990) (due process requires a "clear and certain" taxpayer's remedy). Based on the record below, there is no issue that warrants this Court's review. The Seventh Circuit's conclusion that Respondents were without a plain, speedy and efficient state remedy was well-supported, and certiorari therefore should be denied.

II. Illinois Constitutional Uniformity Principles Provide No Basis for this Court's Review.

In an argument not raised until their Circuit court petitions for rehearing or rehearing *en banc*, Petitioners claim § 23-15 incorporates a "Uniformity Clause" of the Illinois Constitution, which they say "encompasses" federal equal protection and yet applies a more stringent standard than equal protection. (County Ptn., at 9; Assessor Ptn, at 5, 17.) However, the case Petitioners cite for that proposition, *Marks v. Vanderventer*, 2015 IL 116226, had nothing to do with § 23-15 tax objection proceedings. The "Uniformity Clause" it construed, Ill. Const. 1970, Art. IX, § 2, embodying a slightly more stringent "real and substantial difference" standard than state equal protection, applies only to "***non***-property taxes or fees." *Marks*, 2015 IL 116226 at ¶¶ 22-23 (emphasis added). And Petitioners fail to call to this Court's attention *Grais v. City of Chicago*, 151 Ill.2d 197, 217 (1992), where the Illinois Supreme Court expressly ***refused*** to extend the more stringent "real and substantial difference" standard to the uniformity clause applicable to real property taxes in Cook County. (Ill. Const. 1970, Art. IX, § 4(b)).

Moreover, Petitioners' argument elides the fact that, under their interpretation of Illinois uniformity principles, the Methodology Prohibition and related restrictions would still bar any evidence and judicial consideration of the Assessor's methodology and intent. The Prohibition and restrictions are just as inimical to proof of Respondents' claims that the discriminatory assessments violated state uniformity principles as they are to proof of their federal equal protection claims.

Accordingly, neither *Marks* nor the Illinois Constitution's uniformity clause for non-property taxes are applicable here, and they cannot possibly foreclose Respondents' federal equal protection rights. Similarly inapposite is *Walsh v. Property Tax Appeal Board*, 181 Ill.2d 228 (1998), which Petitioners say was "overlooked" below, quite possibly because Petitioners failed to cite it in their Seventh Circuit brief. (*See* County Ptn., at 8-10, 24-26; Assessor Ptn., at 16.) *Walsh* in any event did not involve a § 23-15 tax objection proceeding or the Methodology Prohibition; it involved an alternative PTAB process, which the Seventh Circuit addressed directly in its Opinion as not affording any plain, speedy or efficient remedy to Respondents here. *A.F. Moore*, 948 F.3d at 895-96, n. 2; Oral Arg. at 23:31-25:07. As the Seventh Circuit noted, the PTAB procedure was subsequently amended eight years after *Walsh* to specifically prohibit equal protection claims based on assessment levels of other properties in the same classes as Respondents' properties.[7] So, apart from being untimely, Petitioners'

7. The PTAB decision noted by the Seventh Circuit held that 86 Ill. Admin. Code § 1910.50(c)(3) barred it from hearing equal protection or uniformity claims about the assessment levels of commercial and industrial properties like the Respondents'.

"uniformity" arguments simply do not withstand scrutiny and offer no basis for certiorari.

III. The Decision Below Does Not Conflict with Decisions of this Court.

The Seventh Circuit's conclusion precisely follows the rulings of this Court, as well as the express language of the TIA, that state tax disputes are barred from federal courts only where the state has afforded taxpayers a "plain, speedy and efficient" remedy for their *federal constitutional claims*. 28 U.S.C § 1341; *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981). As this Court said in *Rosewell*:

> The [TIA] embodied Congress' decision to transfer jurisdiction over a class of *substantive federal claims* from the federal district court to the state courts, *as long as state-court procedures were "plain, speedy and efficient"* and final review of the substantive federal claim could be obtained in this Court.

450 U.S. at 515, n. 19 (emphasis added).

Moreover, "'uncertainty concerning a State's remedy may make it less than "plain" under [the TIA]'" and "'uncertainty' surrounding a state-court remedy lifts the bar to federal-court jurisdiction." *Rosewell*, 450 U.S. at

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(*See* Resp. Sep. App., 7th Cir. ECF #13 at 197, 199-200.) Section 1910.50(c)(3) was specifically revised to bar these claims in a 2006 amendment. 30 Ill. Reg. 10103, 10106-08 (6/2/2006).

516-17 (quoting *Tully v. Griffin, Inc.*, 429 U.S. at 76, and *Hillsborough v. Cromwell,* 326 U.S. at 625–62). As this Court said in *California v. Grace Brethren Church*:

> This Court has not hesitated to declare a state refund provision inadequate to bar federal relief if the taxpayer's opportunity to raise his constitutional claims in the state proceedings is uncertain.

457 U.S. 393, 414, n. 31 (1982); *see also McKesson*, 496 U.S. at 39, 50 (due process requires a "clear and certain" taxpayer's remedy). It is Petitioners' petitions, not the Seventh Circuit's decision, that are at odds with this Court's TIA and comity precedents.

The Assessor's sky-is-falling prophecy of an "erosion" of the TIA and comity based on Justice Kennedy's dissenting opinion in *Hibbs v. Winn*, 542 U.S. 88 (2004) is entirely misplaced. (Assessor Ptn., at i, 11, 12, 18, 23-24.) In *Hibbs,* this Court held that the TIA did not bar a taxpayer action challenging on establishment clause grounds certain tax credits issued to parochial schools. 542 U.S. 92-94, 111-12 (Ginsburg, J.). Justice Kennedy's dissent argued that federal jurisdiction should have been declined in favor of allowing the issue to be addressed by the Arizona state courts, which concededly would have been available to adjudicate the issue. However, consistent with the decision below, a firm underpinning of Justice Kennedy's reasoning was that "[t]he TIA specially exempts actions that could not be heard in state courts by providing an exception for instances 'where a plain, speedy, and efficient remedy may [not] be had in the courts of the State.' 28 U.S.C. § 1341." *Hibbs,* 542 U.S. at 121

(Kennedy, J., dissenting). As the Seventh Circuit held, Petitioners have no such remedy here.

The decision below is fully in accordance with this Court's precedents and represents no departure from or "progressive erosion" of settled law. (Assessor Ptn. at 12.) There is therefore no conflict with decisions of this Court that would justify issuance of a Writ of Certiorari.

IV. The Decision Below Does Not Conflict with Decisions of The Second and Third Circuits or Any Other Federal Circuit.

The County Petitioners incorrectly claim that *A.F. Moore* conflicts with decisions from the Second and Third Circuits, citing to *Long Island Lighting Co. v. Brookhaven*, 889 F.2d 428 (2d Cir. 1989), and *Garrett v. Bamford*, 582 F.2d 810 (3d Cir. 1978), respectively. (County Ptn. at 19-23.) The County Petitioners' argument misrepresents the decisions from all three Circuits.

Neither the Second nor Third Circuits, nor any other federal court decision of which Respondents are aware, has confronted anything like the Illinois Methodology Prohibition barring taxpayers from seeking review of an assessor's methodology and intent, and therefore barring proof of an equal protection violation as described in *Allegheny Pittsburg Coal Co. v. Cty. Comm'n of Webster Co.*, 488 U.S. 336 (1989). Nor has any other case involved state officials' concession, mirroring a state appellate court ruling, that constitutional tax challenges were barred outright in the state courts. *A.F. Moore*, 948 F.3d at 893, 895-96, citing *Friedman v. Pappas*. There

is no inconsistency in the Second, Third, and Seventh Circuits' rulings, as they all simply follow long-settled law regarding the adequacy of state remedies under the TIA.

A. The Second Circuit's Decision in *Long Island Lighting* Is Consistent with *A.F. Moore*.

In holding that New York taxpayers' remedies were adequate for TIA and comity purposes, *Long Island Lighting* addressed three distinct state procedures. First, taxpayers could challenge assessed valuations under Article 7 of the New York Real Property Tax Law. 889 F.2d at 431. Second, the Article 7 action could be coupled with "a declaratory judgment action . . . *assert[ing] its challenges to the constitutionality of the assessor's methodology*." *Id.* at 431-32 (emphasis added). Finally, taxpayers also "*might attack the constitutionality of the assessment methodology* [through] . . . a § 1983 action in state court." *Id.* at 432 (emphasis added).[8]

Long Island Lighting held that the adequacy of the first two remedies was not impaired by a case law rule against inquiry into an assessor's "mental processes," "subjective intent," or "subjective attitudes." 889 F.2d at 432. This was not an impairment because "intentional discrimination" follows from "proof that the *assessment method* results in disparate treatment of similarly situated taxpayers." *Id.* (emphasis added).

Nothing in the New York procedures resembled the Illinois Methodology Prohibition's sweeping bar

8. The state court action under § 1983 which *Long Island Lighting* held available is now foreclosed by *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995).

against any judicial review of "the correctness of any practice, procedure, *or method of valuation* followed by the assessor . . . and . . . *the intent* or motivation of any assessing official." *See* 35 ILCS 200/23-15(b)(3) (emphasis added). To the contrary, the New York procedure as described in *Long Island Lighting* specifically permitted evidence of the assessor's "methodology" to prove discriminatory "intent" in an equal protection claim. 889 F.2d at 431-32.

The Methodology Prohibition here would foreclose that evidence. Like the New York taxpayers' claim in *Long Island Lighting*, the Respondents' equal protection claim here is not concerned with the Assessor's "subjective attitudes," but instead it is concerned with an objective inquiry into his "methods, practices and procedures." Methodology is the lynchpin of intentional and systematic discrimination under this Court's ruling in *Allegheny*, and such proof was fully available under the New York law evaluated in *Long Island Lighting*. Recognizing that such proof was barred entirely or that its availability was wholly uncertain under Illinois law, precluding an adequate remedy for an equal protection violation, *A.F. Moore* is fully consistent with *Long Island Lighting*.

B. The Third Circuit's Decisions Are Consistent with *A.F. Moore*.

The County Petitioners claim the decision below also conflicts with the Third Circuit's decision in *Garrett v. Bamford*, 582 F.2d 810 (3d Cir. 1978), arguing that a state constitutional "uniformity" action may be substituted in lieu of an action under the Equal Protection Clause for TIA and comity purposes. (County Ptn., at 22-23.) As

explained above in section II, the "uniformity" argument was not made below until Petitioner's requests for rehearing, and is inapplicable in any event because the Illinois "uniformity" case law invoked by Petitioners did not consider the Methodology Prohibition or other restrictions in the tax objection procedure that deprived Respondents of an adequate state remedy.

That, in itself, distinguishes *Garrett*. The statutory action in *Garrett* required the state court to find and apply the uniform *de facto* assessment level, and in stark contrast to the Illinois Methodology Prohibition, it permitted the court to "*rely on any relevant evidence*." 582 F.2d. at 815-16 (emphasis added). Even then, however, federal jurisdiction was retained pending confirmation that the state remedy was fully adequate. *Id*. at 812, 819; *see also Gass v. Co. of Allegheny*, 371 F.3d 134, 138 (3d Cir. 2004) (reexamining Pennsylvania law, concluding that no change occurred that made the state remedy more difficult). Echoing its decision in *Garrett*, in *Behe v. Chester Co. Bd. of Assessment*, 952 F.2d 66 (3d Cir. 1991), the Third Circuit explained that the Pennsylvania remedy applied *exactly* the same standards as a federal equal protection claim, but that the federal claim itself nonetheless remained fully available as an alternative. *Behe*, 952 F.2d at 68-69.

Nothing in the Third Circuit's decisions suggests that a procedure with restrictions like the Methodology Prohibition can be substituted for full protection of federal equal protection rights, as Petitioners argue here. To the contrary, the Third Circuit's careful evaluation of the adequacy of the Pennsylvania remedies indicates that, if confronted with the restrictive Illinois procedures, the

Third Circuit would reach exactly the same conclusion as *A.F. Moore*. The decision below is perfectly consistent with *Garrett,* and Petitioners have failed to establish any split of authority between the federal circuits that would justify a grant of Certiorari here.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari of Petitioners, the Cook County Treasurer and County of Cook, and the Petition for Writ of Certiorari of Petitioner, the Cook County Assessor, should be denied.

Respectfully submitted,

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