No. 20-357

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

Fritz Kaegi, in his capacity as Cook County Assessor,

Petitioner,

v.

A.F. Moore & Associates, Inc., J. Emil Anderson & Son, Inc., Prime Group Realty Trust, American Academy of Orthopaedic Surgeons, Erling Eide, Fox Valley/River Oaks Partnership and Simon Property Group, Inc.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF RELATED PROCEEDING

In re: A.F. Moore & Associates, 20-2497.
United States Court of Appeals for the Seventh Circuit
Judgment entered on September 10, 2020.

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ARGUMENT

Respondents strain to diminish and minimize the importance of the decision below. The decision is far from inconsequential. It has federalized tax objection proceedings, which usurps the states' role in managing all matters of local taxation, contrary to Congress' intent to prevent federal interference with "so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 522 (1981). It also opens local taxing authorities to endless federal court litigation and avoidance of payment under protest, which would "in every practical sense operate to suspend collection of the state taxes," an interference this Court has rejected on principles of federalism. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 114-15 (1981) (internal citations omitted). Respondents should not be permitted to use the federal courts to attack the validity of a state tax system and the Seventh Circuit's opinion must not stand. *California v. Grace Brethren Church*, 457 U.S. 393, 410 (1982).

In 1995, the Illinois General Assembly made a policy choice that tax objection litigation should focus on the ultimate outcome—the property's assessed value—and not the assessing official's methodology or state of mind. As the Illinois legislature recognized, analyzing relative assessed values redirects attention where it belongs: on the uniformity and equality of assessment and taxation. The Seventh Circuit overruled that policy choice, holding that Illinois must allow taxpayers to investigate the collateral issue of intent as part of their constitutional claims. In so doing, the

Seventh Circuit did exactly what the Tax Injunction Act (the "TIA") and the comity doctrine commanded it not to do: it substituted its approach for that of the Illinois General Assembly and given any taxpayer the "green light" to frame their garden variety tax objections as constitutional claims to be heard in federal court.

Illinois is not alone in its approach, but the Seventh Circuit is. Like Illinois, New York does not require proof of the assessing official's unlawful intent in a tax objection proceeding to establish an equal protection violation. In *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 432 (2d Cir. 1989), the Second Circuit held that "evidence of the mental processes of the assessor…is unnecessary to [a taxpayer's] claim that the assessment method violates the equal protection clause." As such, New York's statutory scheme, focused on the relative assessments alone, adequately protected the taxpayer's equal protection rights and its federal lawsuit was barred by the TIA. The Seventh Circuit radically departed from *Long Island Lighting*, creating a circuit split that this Court must now resolve.

The New York and Illinois statutory regimes efficiently process tax objections. They are not the problem here. Indeed, under Section 23-5 of the Property Tax Code ("Section 23-5"), taxpayers who pay their taxes are deemed to have paid their taxes under protest. Section 23-5 ensures that real estate taxes are paid, taxing districts receive a steady flow of revenue and the taxpayers' protest rights are preserved. Under the decision below, taxpayers may file a federal constitutional claim for injunctive relief and not pay any taxes at all. This would disrupt the states' revenue

collections systems. Such an intrusion contravenes the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." *Fair Assessment*, 454 U.S. 115-116; *Grace Brethren Church*, 457 at 410.

The problem in this case is not Illinois' system of taxation. It is Respondents' approach to this litigation and the Seventh Circuit's misinterpretation of Illinois law and the TIA. First, Respondents spent a decade litigating their claims in state court because they insisted on conducting discovery, over Petitioners' continued objections, on the Assessor's intent, a matter that is not probative of a Section 23-15 claim. As the district court aptly concluded: "(d)ecade-long litigation is not a feature of the tax-objection procedures, but rather an unfortunate product of the tactics employed in this case." *A.F. Moore & Associates v. Pappas*, 385 F. Supp. 3d 591, 599 (N.D. Ill. 2019). Respondents created the situation that the Seventh Circuit improperly relied on to invalidate Section 23-15 and related provisions of the Property Tax Code.

Second, the appellate panel held that Section 23-15 did not provide Respondents a plain, speedy and efficient remedy to address their constitutional claims, despite the fact that the statute inherently rests upon principles of uniformity and equal protection under the Illinois constitution, *see Walsh v. PTAB*, 181 Ill. 2d 228, 237 (1998), and provides Respondents the precise relief they seek—a full refund plus interest. Under analogous circumstances, the Third Circuit reached the opposite, and correct, conclusion. In *Garrett v. Bamford*, the court held that the TIA bars

federal lawsuits where "the precise equal protection right of uniformity which appellants wish to assert in the federal courts is guaranteed by the [state] Constitution." 582 F.2d 810, 815–16 (3d Cir. 1978).

In the final analysis, the decision below conflicts with the Second and Third Circuits in holding that Petitioners—and scores of others—may proceed on ordinary tax objection complaints in federal court to investigate the collateral issues of an assessor's methodology and intent. This Court must now resolve that conflict.

I. The Decision Below Conflicts With The Second and Third Circuits. (Reply to Opp. Br. at 5, 17-21)

Under Illinois and New York law, a taxpayer may seek a refund of real estate taxes on the ground that similarly-situated real property was assessed at a lower rate. *See Long Island Lighting*, 889 F.2d at 432 (describing New York statute and noting that the claim for a refund rests on a showing of disparate assessment); 35 ILCS 200/23-15; *Walsh*, 181 Ill. 2d at 235 (stating that "the Illinois Constitution's uniformity clause requires not only uniformity in the level of taxation, but also in the basis for achieving the levels"). Neither state's statute requires a taxpayer to introduce evidence that the assessing official acted wrongfully as part of its refund claim.

Prior to 1995, Illinois required taxpayers to prove that the assessing official's actions amounted to constructive fraud. But the legislature later amended the statute to eliminate that requirement, declaring that taxpayers were entitled to the same

relief whether the assessment was "incorrect or illegal."[1] Ironically, Respondents argue that the amendment that made it easier for taxpayers to prevail in court is now a barrier to their success.

Respondents argue that the decision below does not conflict with *Long Island Lighting* because litigants in New York could challenge the methodology that the assessing officials employed in a declaratory judgment action or a Section 1983 action in state court. (Opp. Br. at 18-19.) But this argument presents an incomplete picture of both *Long Island Lighting* and Respondents' own litigation.

With regard to the declaratory judgment remedy, the Second Circuit noted that New York law did not allow "inquiry into the assessor's mental processes, judgments, and observations" but that the taxpayers could submit "proof of a systematic overassessment" through the assessment of similarly situated properties. *Long Island Lighting*, 889 F.2d at 432. The court reasoned that "proof that the assessment method *results* in disparate treatment of similarly situated taxpayers is all that is required" to succeed on an equal protection claim. *Id*. at 433 (emphasis added). Thus, "the issue of subjective intent as a separate inquiry simply evaporates." *Id*. The

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[1] Respondents falsely suggest that the amendment conferred "immunity" on the Assessor's Office, allowing it to escape the consequences of some untold wrongdoing. The Assessor's Office never engaged in the "willful destruction" of documents. (Opp. Br. at 3, 11.) It produced volumes of documents in response to Respondents' subpoenas and numerous Assessor's Office employees were deposed in the course of Respondents' decade-long diversion, over the Assessor's repeated objections. Any documents not available to be produced were disposed of through the Office's document retention policy. The Assessor's Office did not violate a litigation hold or any other directive to retain documents dating back a decade or more.

Second Circuit applied the TIA and comity doctrine, affirming the district court's dismissal of a constitutional challenge of "the assessor's mental processes, judgments, and observations." *Id*. When faced with the exact same question, the Seventh Circuit refused to apply the TIA and comity doctrine in the same manner.

As to Section 1983, state courts have jurisdiction to hear such claims. *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). Indeed, Respondents filed a Section 1983 claim in the state court case. The court dismissed the claim because under *Walsh*, Section 23-15 is premised on principles of uniformity and equal protection and provides objectors a full and complete remedy.[2] *Walsh*, 181 Ill. 2d at 235-237. Like the Second Circuit in *Long Island Lighting*, the Third Circuit in *Garrett* held that an equal protection claim alleging lack of uniformity in assessment practices can be vindicated for purposes of the TIA through a state's constitutional requirement for uniform assessments. 582 F.2d at 815–16. Thus, the decision below cannot be reconciled with the decisions of the Second Circuit in *Long Island Lighting* or the Third Circuit in *Garrett*.[3] The conflict among the circuits is clear.

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[2] Respondents made no effort to appeal the dismissal, depriving Illinois courts of their obligation to resolve the important state-law issues that the Seventh Circuit has now ushered into federal court.

[3] Respondents contend that the decision below "announced no new rule of law." (Op. Br. at 5.) Not so. In deviating from *Long Island Lighting*, which applied the TIA to a similar statutory framework, as well as misapplying *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 109 S. Ct. 633 (1989), the decision below deviated from existing law and set forth a template for improperly federalizing tax refund claims.

II. Illinois Law Provides A Plain, Speedy, Efficient And Adequate Remedy For The Garden Variety Tax Objections That Respondents Have Filed. (Reply to Opp. Br. at 1-7, 10-11)

Like the appellate panel, Respondents claim that this is the "rare case" in which taxpayers lack an adequate state court remedy. *See* Opp. Br. at 4; *A.F. Moore & Associates v. Pappas*, 948 F.3d 889, 891 (7th Cir. 2020). Both are mistaken. Respondents argue that Illinois law precludes consideration of their equal protection 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' d*e jure* level." (Op. Br. at 4.) The appellate panel adopted Respondents' incorrect reading of Illinois law. *A.F. Moore*, 948 F.3d at 895.

Walsh demonstrates that Respondents and the appellate panel got it wrong. In *Walsh*, the Illinois Supreme Court held that a taxpayer could pursue a refund claim under Illinois' Property Tax Code where his real property was assessed at the proper value but similarly-situated properties were assessed at a lower value, and the owners of those other properties thus paid less tax. *Walsh*, 181 Ill. 2d at 237. Section 23-15 provides for a full and complete remedy of a refund plus interest for taxes paid due to an incorrect or illegal assessment.

Walsh shows that taxpayers may challenge levels of assessment based upon non-uniformity and disparate treatment of similarly-situated properties. As a result, under this Court's decision in *Nat'l Private Truck Council v. Oklahoma Tax Comm'n,*

515 U.S. 582 (1995),[4] the state court correctly decided that Section 1983 provides no remedy to Respondents here. By ignoring *Walsh* and construing this point of Illinois law in contravention of *Walsh*, the appellate panel decided an important federal question regarding the proper application of the TIA and comity doctrine in a way that conflicts with the Illinois Supreme Court's decision in *Walsh*.

Respondents object that Petitioners first cited *Walsh* in a petition for rehearing. This objection is groundless for two reasons. First, Petitioners promptly raised *Walsh* after the appellate panel misconstrued Section 23-15 and held that it did not incorporate principles of equal protection. Second, a litigant may raise lack of subject matter jurisdiction at any time. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). The TIA is a challenge to a federal court's subject matter jurisdiction. *See Wright v. Pappas*, 256 F.3d 635, 636 (7th Cir. 2001).

The appellate panel ignored *Walsh* and held that the district court had subject matter jurisdiction over Respondents' federal constitutional claims. Because Petitioners can challenge the improper exercise of subject matter jurisdiction at any

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[4] Respondents (Op. Br. at 4, n.2) and the appellate panel contend that Petitioners conceded that Illinois's tax objection procedures do not allow the taxpayers to raise their constitutional claims. That is simply not correct. Rather, Petitioners argued that under *Nat'l Private Truck Council*, Section 1983 did not provide Respondents with the declaratory and equitable relief as *they* framed their complaint because the remedy they sought—relief from non-uniform assessments—was available under Illinois law. Petitioners conceded nothing.

time, Respondents' objection to the timing of Petitioners' *Walsh* argument is of no moment.

III. Neither *Allegheny* Nor The Unpublished Illinois Appellate Court Order In *Friedman* Supports Respondents' Claim That They Lacked A Plain, Speedy And Efficient State Court Remedy. (Reply to Opp. Br. at 7-15)

Both Respondents and the appellate panel rely upon this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), in support of the need of federal jurisdiction to address Respondents' equal protection claim. But this case is dissimilar to *Allegheny*, both procedurally and substantively.

In *Allegheny*, the plaintiffs brought their equal protection claim in the courts of West Virginia, won in the trial court, lost in the West Virginia Supreme Court, but won in this Court. In contrast, Respondents filed their equal protection claim in the courts of Illinois, lost in the trial court, and ran right to federal court without appealing the decision, even to the intermediate appellate court.

To the extent there is any question about whether the Illinois Property Tax Code protects Respondents' equal protection rights, Illinois courts should first decide that question. Congress considered this a fundamental purpose of the TIA, which the appellate panel ignored. *Grace Brethren Church*, 457 U.S. at 410; *Hibbs v. Winn*, 542 U.S. 88, 113-14 (2004) (Kennedy, J., dissenting). In fact, at oral argument, the appellate panel considered whether to certify this question to the Illinois Supreme Court under Illinois Supreme Court Rule 20, to which the parties had no objection.

Ultimately, the panel unilaterally expanded the scope of federal jurisdiction. This end run around traditional judicial process ought not to be condoned.

Allegheny is also substantively distinguishable because Illinois law provides for a full and complete remedy for a tax refund claim based on disparate assessments. *Walsh*, 181 Ill. 2d at 237; 35 ILCS 200/23-15(b)(1). Respondents and the appellate panel improperly relied on *Friedman v. Pappas*, 1-02-2685 (Ill. App. Ct. 2004), an unpublished appellate court decision, to reach the opposite conclusion. By rule, that unpublished order is not the law of Illinois and "may not be cited as precedent by any party." Ill. Sup. Ct. R. 23(e). The Respondents should not have cited it, and more importantly, the appellate panel should not have found it dispositive of any issue, particularly to hold in contravention of the Illinois Supreme Court's opinion in *Walsh*.

Respondents also object to Petitioners' reliance on *Marks v. Vanderventer*, 2015 IL 116226, because it involves the Uniformity Clause for *non*-property taxes under Illinois' Constitution (*i.e.*, Art. IX, §2) instead of the Uniformity Clause for real property (i.e., Art. IX, §4), which is at issue here. Both uniformity provisions, however, incorporate equal protection principles: *Marks* pertains to non-property cases, and *Walsh* says the same for real property taxes. *See Marks*, 2015 IL 116226, ¶29; *Walsh*, 181 Ill. 2d at 234–47. Together, these cases teach that Illinois' constitutional provisions demanding uniformity in taxation do the work of equal protection. Respondents' objection to *Marks* is therefore meaningless.

Moreover, Respondents cite a case, *Grais v. City of Chicago*, 151 Ill. 2d 197 (1992), in which the Illinois Supreme Court declined to adopt a "a real and substantial difference" to uniformity claims but nonetheless stated that under Art. IX, §4, "any such classification shall be reasonable and assessments shall be uniform within each class." *Grais*, 151 Ill. 2d at 217. Respondents' reliance on *Grais* is misplaced and, in fact, supports Petitioners' position. The appellate panel found that Illinois did not provide a remedy for disparate treatment in the assessment and taxation of real property. The issue in *Grais* was not *whether* such claims could be brought, but *how* they should be evaluated. Implicit in that discussion is the fact that such a remedy exists.

IV. The Decision Below Conflicts With Decisions of This Court. (Reply to Opp. Br. at 15-17)

While Respondents and the appellate panel attempt to characterize the decision below as limited to the facts of this "rare case," the opinion has in fact opened the federal courts—and taxing bodies across the state and the nation—to a flood of constitutional challenges to property tax assessments, regardless of the legitimacy of any such claims. Nowhere does the appellate panel limit its analysis to the alleged *Allegheny* claim before it. Rather, it views the issue as "whether [S]ection 23-15 prevents taxpayers from raising federal constitutional challenges to their property taxes," without qualification. *A.F. Moore*, 948 F.3d at 895.

The appellate panel insists that in an equal protection claim, a challenger must prove there was "no rational basis" for the disparate tax treatment, which requires proof of the assessor's intent. *Id.* But this Court has held to the contrary. In *Nordlinger v. Hahn*, this Court recognized that "the Equal Protection Clause does *not* demand…that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its [tax] classification." 505 U.S. 1, 15 (1992) (emphasis added). Curiously, the appellate panel relies on *Nordlinger* for precisely the *opposite* proposition to suggest that such proof is required here, where the Illinois legislature provided more than a "plausible inference" of a reasonable governmental objective for amending section 23-15 to remove the need for proof of intent. This Court must grant certiorari to resolve this conflict and settle this important question of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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