No. 20-567

In The
Supreme Court of the United States

OHIO EX REL. ELLIOT FELTNER,

Petitioner,

v.

CUYAHOGA COUNTY BOARD OF REVISION, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

In Ohio and more than a dozen other states, local governments take homes, land, and commercial property as payment for debts that are a fraction of the properties' value, reaping a windfall at the owner's expense. Pet. at 19. Here, Respondents (collectively "County") took Elliot Feltner's building worth approximately $80,000 more than what he owed in delinquent property taxes, penalties, interest, and fees. Pet. App. C-13. The County concedes that Ohio law authorized its confiscation of Feltner's entire property with no process to refund the surplus value above his debt. Opp. at 8.

The County reframes the question presented, indulging in a complicated discussion of state law to argue that Feltner's federal question is not properly presented here, or that the confiscation of tax-delinquent property is not subject to takings liability under state law. However, the County does not and cannot dispute that Feltner pled and pressed a federal takings claim for just compensation at the Ohio Supreme Court, Pet. App. D-19–20 (Count VII), which that court passed upon by dismissing it with prejudice in a final judgment on the merits. *Id*. at A-1 ("MERIT DECISION WITHOUT OPINIONS" dismissing "all remaining counts," including Count VII). In fact, the Petition depends on no disputed issue of fact or state law.

Indeed, the posture of the case makes it an ideal vehicle for review. The Court may accept the facts alleged by Feltner's Complaint as true, leaving it to address a pure question of federal constitutional law that is both of national importance and a source of

conflict among lower courts: whether government violates the Takings Clause when in the course of debt collection it confiscates property worth more than what is owed and keeps the surplus value as a windfall for the public. *See* Amicus Brief of Geraldine Tyler at 6–13 (describing national impact of such laws). This Court flagged but did not resolve that question sixty-five years ago in *Nelson v. New York*, 352 U.S. 103, 109 (1956). It should resolve it now.

ARGUMENT

I

THE FEDERAL QUESTION WAS PROPERLY PRESENTED AND PRESSED TO THE OHIO SUPREME COURT, WHICH PASSED UPON IT

A federal question that was "either addressed by, or properly presented to, the state court that rendered [a] decision" on the matter is reviewable by this Court. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). "It is well settled" that when raising a federal constitutional challenge in state court that "no particular form of words or phrases is essential, but only that the claim of invalidity . . . be brought to the attention of the state court with fair precision and in due time." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 86 n.9 (1980) (citing *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (internal quotation omitted)). What is required is that the court below have "a fair opportunity to address the federal question that is sought to be presented" to this Court. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Here, Feltner brought an original action for mandamus directly in the Ohio Supreme Court on the grounds that his property "was appropriated . . .

without compensation in violation of the Fifth Amendment to the United States Constitution." Pet. App. D-4. He alleged that the transfer of his entire property to the County "constitute[d] a taking of private property under . . . the Fifth and Fourteenth Amendments," *id*. D-19, without "pay[ment of] just compensation." *Id*. D-20. Moreover, "[p]ursuant to the Fifth and Fourteenth Amendments to the United States Constitution," Feltner alleged that the County was "liable . . . for the fair market value of the property." *Id*. He pressed this claim in his Memorandum in Support of Requests for Writs of Prohibition and Mandamus, pp. 32–33, filed September 17, 2018 (arguing that he is "entitled to compensation" under the Fifth and Fourteenth Amendments to the federal constitution) and in his opposition to the motion to dismiss, pp. 20–24. The Ohio Supreme Court passed upon that federal question when it dismissed the claim in a final judgment on the merits with prejudice for failure to state a claim. *See* Pet. App A-1 (dismissal on the merits). Therefore, the federal question presented by the Petition is properly before this Court.

* * *

Despite the fact that Feltner's federal takings claim was pled, pressed, and passed upon by the Ohio Supreme Court, the County states that the Petition should be denied because it "does not present[] the type of important federal question that warrants review by this Court." Opp. at 2. They argue, in effect, that the decision below turns on state procedures or property law. Their arguments are unavailing.

A. Feltner's Action for Mandamus in the Ohio Supreme Court Was an Appropriate Way to Present and Press His Federal Takings Claim

Ohio "does not have an inverse condemnation . . . cause of action for plaintiffs seeking just compensation for a taking." *River City Capital, L.P. v. Board of Cty. Comm'rs, Clermont Cty.*, 491 F.3d 301, 307 (6th Cir. 2007) (internal quotation omitted). Thus, to bring a federal takings claim in state court, plaintiffs ordinarily file a writ of mandamus which, if granted, forces the government to institute appropriation proceedings to determine what compensation, if any, is due. Indeed, prior to this Court's decision in *Knick v. Scott Township*, 139 S. Ct. 2162 (2019), a writ of mandamus was the only option available to Feltner to enforce his federal right to just compensation. *See River City Capital*, 491 F.3d at 307 (requiring federal takings claims to be raised in Ohio court as writ of mandamus in accordance with the rule of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (overruled by *Knick*); *State ex rel. New Wen, Inc. v. Marchbanks*, 146 N.E.3d 545, 550 (Ohio 2020); *Coles v. Granville*, 448 F.3d 853, 861 (6th Cir. 2006). A party filing a mandamus claim may do so directly in the Ohio Supreme Court. *State ex rel. Pressley v. Indus. Comm'n*, 228 N.E.2d 631, 642 (Ohio 1967). That is what Feltner did. *See* Pet. App. D-19–21.

Had his injury arisen today, Feltner might bring his claim directly in federal court pursuant to *Knick*, which allows plaintiffs to pursue federal takings claims directly in federal court once a taking becomes final. That would avoid the confounding questions of

state procedure discussed by the County. However, it is not uncommon for this Court to review federal takings claims that arise out of mandamus actions in state courts. *See e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828 (1987). What is important is not the cause of action chosen in state court but whether the federal question was brought to the attention of the state court "with fair precision and in due time." *Pruneyard*, 447 U.S. at 87. The County cannot deny that the Ohio Supreme Court was presented with and passed on the federal takings claim. Opp. at 11 ("a majority of the Ohio Supreme Court agreed that the alleged takings claims were properly dismissed for failure to state a claim").

B. The Lower Court Decided the Federal Takings Question Against Feltner

The County believes the federal takings question is unimportant because it hinged on a determination that Feltner failed to prove a lack of adequate remedies at law and was therefore not entitled to the remedy of mandamus. Opp. 14–19. This is speculation, at best, since the Ohio court did not issue an opinion explaining the order dismissing Feltner's federal takings claim. But it is belied by the fact that it did so with prejudice and "on the merits" on a motion to dismiss for failure to state a claim. Pet. App. A-1; *State ex rel. Superamerica Group v. Licking County Board of Elections*, 685 N.E.2d 507, 509–10 (Ohio 1997) (explaining why dismissal is with prejudice). And when the court did issue an opinion dismissing two of his other writ claims, it said nothing about adequate remedies at law but grounded its decision in a finding that the Board of Revision did not

"patently and unambiguously lack jurisdiction" over Feltner's foreclosure proceedings. Pet. App. C-1.

Nevertheless, the County is wrong that Feltner could or should have sought another remedy for this takings claim. On its view, he should have brought a federal takings claim in an appeal from the Board of Revision's June 26, 2017 decision of foreclosure. That appeal must be filed within 14 days. Ohio Rev. Code § 323.79. Or else, it asserts, he should have preempted the Board's decision by earlier transferring the foreclosure proceedings to a judicial forum. Opp. at 16-17. But this ignores that a takings claim does not accrue until it is final. The taking did not become final on June 26, 2017, but weeks *after* the 14-day appeal deadline expired when his right to redeem was terminated just before the property was transferred to the land bank on July 28, 2017. *See* Ohio Rev. Code § 323.65(J); *Hart v. City of Detroit*, 331 N.W.2d 438, 445 (Mich. 1982) (taking occurred when the right to redeem expired). The County does not dispute the timeline. Opp. at 8–9.

In the context of physical takings, this Court has warned that "procedural rigidities should be avoided" so that an "owner is not required to resort either to piecemeal or to premature litigation." *United States v. Dickinson*, 331 U.S. 745, 749 (1947). An owner is not required to file a takings claim "until the situation becomes stabilized." *Id.* None of the remedies the County would have Feltner pursue satisfy that condition. Until the County extinguished Feltner's equity, it was not clear whether it would be lost. He had hoped to save his property by finding a buyer who would pay the tax debt and pay him for his equity. *See* Pet. App. D-12. Moreover, the government could have

abandoned its unconstitutional plan and sold the property through Ohio's ordinary tax foreclosure sale process, which would have returned to Feltner the surplus proceeds. *See* Ohio Rev. Code §§ 323.25, 323.73, 5721.20; *Danforth v. United States*, 308 U.S. 271, 284 (1939) ("Until taking, the condemnor may discontinue or abandon his effort."). Once Feltner's injury was final, he properly presented his claim for just compensation to the Ohio Supreme Court, which rejected it.

Moreover, Feltner alleged that the County issued its foreclosure decision "without providing notice of the final judgment." Pet. C-14, D-12. Consequently, under Ohio's standards, it would have been inappropriate to dismiss his mandamus claim for adequate alternative remedy on a 12(b)(6) motion, since he plausibly alleged that he lacked notice of the County's decision and consequently did not know about an appeal deadline. *State ex rel. Washington v. D'Apolito*, 123 N.E.3d 947, 950–51 (Ohio 2018) (dismissal of mandamus claim for adequate alternative remedy in missed appeal was inappropriate where allegations plead lack of notice).

Additionally, the County is also mistaken when it argues that the federal question was not pressed or passed on because the issue was not extensively briefed. Opp. at 26. The federal claim was pled; it was defended in the briefs; and the court dismissed the federal takings claim for failure to state a claim, with prejudice and on the merits. "It suffices . . . that the court below passed on the *issue* presented . . . ." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991) (emphasis added).

II

THE TAXING POWER DOES NOT GIVE THE GOVERNMENT LICENSE TO TAKE MORE THAN IT IS OWED IN TAXES, PENALTIES, INTEREST, AND COSTS

The County argues that a federal takings question is not presented because it deprived Feltner of his $80,000 in equity using a tax statute rather than eminent domain. Opp. at 20. It submits that an Ohio statute permits the taking of what it calls "abandoned land," and argues support from this Court's decisions in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), and *Bennis v. Michigan*, 516 U.S. 442 (1996). Opp. at 22, 26. The County misses the mark. Feltner does not dispute the County's power to take property to collect delinquent taxes, fees, penalties, and interest. *See Jones v. Flowers*, 547 U.S. 220, 234 (2006). But the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government," *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893), and the question presented here is whether government can avoid paying just compensation when it confiscates property worth substantially more than what is owed.

The equity interest taken from Feltner (the value of his property in excess of any debts) does not resemble a tax. *See* Ohio Const. art. XII, § 2 (requiring "uniform" property tax rates); Amicus Brief of Center for Constitutional Jurisprudence at 2–7. And the County's recitation of its undisputed statutory authority to take the equity does not answer the question of whether doing so violates the Takings Clause. After all, the government may not "by *ipse dixit* . . . transform private property into public

property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *see also* Amicus Brief of Buckeye Institute 19–22 (describing historical roots of property right in equity).

The County's citation to *Texaco* is also inapposite. Opp. at 22. In *Texaco*, 454 U.S. at 518, this Court held that an Indiana statute did not effect a taking when it extinguished a property owner's mineral interest in property that had not been used for 20 years and where the owner failed to file a statement of claim with a local recorder. This is not remotely analogous to the operation of Ohio's tax foreclosure regime. Ohio's statute sugarcoats the injustice by labeling seized property "abandoned," but it does not use the word sensibly. It defines all tax-delinquent "unoccupied" land as "abandoned lands." Ohio Rev Code § 323.65(A), (F)(a–c). The statute does not apply Ohio abandonment principles that "depend primarily upon an intention" of the owner to abandon. *Sogg v. Zurz*, 905 N.E.2d 187, 191 (Ohio 2009). The County does not and cannot meaningfully claim Feltner abandoned his property. *See* Opp. at 3–4; Pet. App. D-11–12.

The County's citation to *Bennis* fares no better. Unlike *Bennis* and this Court's related civil forfeiture precedent, the property here was not an instrumentality of crime. *See Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434, 447 (Mich. 2020) (discussing *Bennis* and forfeiture in the context of Michigan's tax foreclosure system). "[T]he land of a delinquent tax-payer . . . is neither the instrument nor the fruit of any offence." *Martin v. Snowden*, 59 Va. 100, 142–143 (1868), *aff'd sub nom. Bennett v. Hunter*, 76 U.S. 326

(1869). The County does not claim Feltner violated criminal law or that seizing his equity was a punishment. Rather, the County calls it a "remedy" to recover a debt. Opp. at 5. This Court should grant the petition to decide whether such governmental debt collection satisfies the Constitution's demands.

III

STATE AND FEDERAL COURTS CONFLICT ON THE QUESTION PRESENTED

The County disputes the breadth of the split among state and federal courts on the question presented, arguing that four cases cited by Feltner are factually distinguishable. The County distinguishes decisions by the supreme courts of Michigan, New Hampshire, and Vermont, because in those cases the government sold the property and realized a surplus from the sales. Opp. at 27–28. But in all three cases (as in this one) the government claimed absolute ownership of the property and extinguished the property owner's equity interest before it sold the property. *Rafaeli*, 952 N.W.2d at 444 (absolute title vested in County prior to public sale and statute provided all sale proceeds belong to government); *Thomas Tool Servs., Inc. v. Croydon*, 761 A.2d 439 (N.H. 2000) (same). *Bogie v. Town of Barnet*, 270 A.2d 898, 899–900 (Vt. 1970) (same). Thus, like here, the question was whether government could extinguish debtors' equity interest in their property, taking a windfall at their expense.

Moreover, the Michigan Supreme Court has already demonstrated that its holding in *Rafaeli* is not constrained to cases where government sells property and realizes surplus profits; it also applies where

government gives the property to a land bank without public sale. *See Jackson v. Southfield Neighborhood Revitalization Initiative*, __ N.W.2d __, 2021 WL 373128 (Mich. Feb. 2, 2021) (vacating denial of takings claim in *Jackson*, No. 344058, 2019 WL 6977831, at *2 (Mich. Ct. App. Dec. 19, 2019), and remanding for reconsideration in light of *Rafaeli*).

The County's attempt to distinguish *Coleman* is also unpersuasive. Opp. at 29. There the district court looked at how an owner's equity is treated in contexts other than tax foreclosures to determine that it is a constitutionally protected property interest. *Coleman through Bunn v. District of Columbia*, No. 13-1456 (EGS), 2016 WL 10721865, at *3 (D.D.C. June 11, 2016). Feltner similarly shows that in other contexts Ohio protects equity as a discrete property interest. Pet. at 13–14.

The Petition demonstrates a conflict on the question presented. *Id.* at 21–26. The conflict has split lower courts even while the Petition has been pending. *See, e.g., Tyler v. Hennepin County*, No. 20-CV-0889 (PJS/BRT), 2020 WL 7129894, at *1 (D. Minn. Dec. 4, 2020) (dismissing takings claim because *Nelson* means "former owner has a property interest in the surplus only if a provision of a constitution, statute, or municipal code creates such an interest"); *Fox v. County of Saginaw*, No. 19-CV-11887, 2021 WL 120855, at *12 (E.D. Mich. Jan. 13, 2021) (denying a motion to dismiss and interpreting *Nelson* as leaving the question unanswered). This Court should grant review and settle the split.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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