

NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN F. GALLAGHER,
MELISSA M. GALLAGHER, AND ON BEHALF OF ALL
OTHER SIMILARLY SITUATED

Petitioners

v.

NORTHAMPTON COUNTY REVENUE
APPEALS BOARD, NORTHAMPTON COUNTY TAX
CLAIM BUREAU, BETHLEHEM AREA
SCHOOL DISTRICT, BETHLEHEM TOWNSHIP,
PORTNOFF LAW ASSOCIATES, LTD, STACY GOBER,
ANDREW FRED A, STEPHEN J BARRON, JR, and
PORTNOFF LAW ASSOCIATES, LTD.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether original federal subject matter jurisdiction under 28 U.S.C. §1331 is not barred by the Tax Injunction Act or the doctrine of comity with regard to claims or declaratory judgment actions brought under the Takings Clause of the Fifth Amendment, the Excessive Fines Clause of the Eighth Amendment, and the Due Process Clauses of the Fourth and Fourteenth Amendments to the United States Constitution in cases that challenge the federal constitutionality of the seizure or sale of private real property by local municipal entities pursuant to state property tax statutes in order to satisfy property tax debts.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, attorney John F. Gallagher, appearing pro se, requests the issuance of a Writ of Certiorari for this Court to review the judgment below of the United State Court of Appeals for the Third Circuit, case no. 23-3171. Attorney Gallagher is the attorney of record in all court proceedings below representing his wife, Melissa M. Gallagher, and on behalf of all others similarly situated.

RELATED DECISIONS BELOW

Petitioner filed a Complaint in the District Court for Eastern District of Pennsylvania, case no. 5:23-cv-03275, with the same caption as on this writ. The court dismissed all claims in the Complaint. The order of the District Court entered on 12/6/2023 granting Defendants Motions to Dismiss all Counts in Petitioners Complaint under FRCP 12(b)(1) is reproduced at Appendix B to this writ.

Petitioner appealed the dismissal in the District Court to the United States Court of Appeals for the Third Circuit, case no. 23-3171. Petitioner received a summary action dismissing his appeal without consideration of any matter asserted in his response to the motion for summary action. The Order of the United States Court of Appeals for the Third Circuit summarily affirming the District Court below entered on 1/23/2024 is reproduced at Appendix A to this writ.

JURISDICTION

This Court's jurisdiction to review the Court of Appeals' decision to summarily affirm the District Court below is invoked under 28 U.S.C. Section 1254. The basis for jurisdiction in the federal district court is federal question jurisdiction under 28 U.S.C § 1331 supported by The Supreme Court of the United

States' decisions in *Knick v. Township of Scott* and *Levin v Commerce Energy*.

FEDERAL STATUTE AND RULE INVOLVED

Tax Injunction Act (hereinafter, "TIA")

28 U.S.C. 1341 - Taxes by States. The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Doctrine of Comity

Comity refers to courts of one state or jurisdiction respecting the laws and judicial decisions of other jurisdictions – whether state, federal or international – not as a matter of obligation but out of deference and mutual respect.

This doctrine has been applied as a nonjurisdictional alternative to the TIA to remove a state tax case from the original jurisdiction of the federal courts to the state courts for consideration of the matter.

See, e.g., Levin v. Commerce Energy, 560 U.S. 413 (2010) (The Supreme Court of the United States held: Under the comity doctrine, a taxpayer's complaint of allegedly discriminatory state taxation, even when

framed as a request to increase a competitor's tax burden, must proceed originally in state court. The Court did not rule on the applicability of the TIA).

STATEMENT OF THE CASE

The District Court below committed reversible error when it interpreted the TIA in the broadest possible manner as barring original federal jurisdiction for Petitioner's entire Complaint, which included his declaratory judgment actions or claims asserting fundamental federal constitutional rights under (i) the Takings Clause of the Fifth Amendment and (ii) the Eighth, Fourth and Fourteenth Amendments to the United States Constitution. In the Court of Appeals for the Third Circuit, Petitioner appealed only Counts V, VII and VIII of his Complaint.

The District Court dismissed all counts in the Petitioner's Complaint under FRCP 12(b)(1) for lack of subject matter jurisdiction, adopting the argument

of Respondents that any claim which involves or “relates to” the administration of state property tax statutes (no matter how tangential, indirect or distant the relationship), is preempted by the TIA or comity. Such a rule would prevent all federal constitutional claims, including Takings Clause claims, from ever being brought first in federal court if a state tax statute is “involved” in the case, and puts these and similar fundamental federal constitutional rights claims in jeopardy of becoming dead letters if they were preempted by the TIA or comity. This overly broad and novel interpretation of the TIA and comity has no support in the Third Circuit or other federal case law and conflicts with several important Supreme Court cases. The lower courts in this Case have refused to recognize the limitations to the TIA and/or comity set forth by this Court.

The District Court took a disparaging view of Petitioner's Complaint, determining that Petitioner's factual allegations are mere legalizations and amount to nothing more than their "desire to not pay taxes", despite clear allegations to the contrary. Counts V, VII and VIII of Petitioner's complaint involve clearly alleged claims for just compensation and protection of the fundamental categorical right to enjoy the equity in their homes, and do not challenge the assessment or amount of property taxes owed. Under these counts, Petitioner has made it clear in that he will not contest or challenge any aspect of the Pennsylvania property tax amount, and that municipalities will receive all property tax money owed pursuant to assessments under said statutes.

It is not proper for a district court to ignore some claims in a complaint when making a 12(b)(1) ruling on subject matter jurisdiction, and then

rewrite plaintiff's factual allegations in a manner that bears no relationship to a legal rule of law and then allows the court to dismiss the complaint. Petitioners are not aware of any rule in the TIA, comity, or anywhere else that requires a complainant to desire to pay taxes to assert federal constitutional rights or to use only specific words that are to the liking of a court. Because the lower courts are not properly applying the TIA or comity, this Court's review is warranted.

As elaborated herein, this Court has provided that statutory original federal court jurisdiction exists for certain federal constitutional rights, such as Takings Clause claims per *Knick*. Per *Levin*, this Court has also limited the scope of comity's jurisdictional bar for claims that involve certain fundamental or categorical federal constitutional

rights under the Bill of Rights of the United States Constitution.

This Court should clarify whether these jurisdictional rules and limitations apply to Petitioner's Counts V, VII and VIII claims and declaratory judgment actions which involve the federal constitutionality of a seizure and/or sale of private property under a state property tax statute to satisfy tax debts. If such rules and limitations apply, then Petitioner's claims in Counts V, VII and VIII of their Complaint should not have been dismissed for lack of subject matter jurisdiction, and the summary order of the Third Circuit should be reversed, and the District Court should be ordered to hear Petitioners Counts V, VII and VIII of their Complaint.

Property tax debts themselves are not the subject of Counts V, VII and VIII. Petitioner has never and does not herein claim that the assessment

and collection of property taxes are takings under the Takings Clause, but rather only that the taking or sale of a protected property interest to satisfy property tax debts must also satisfy certain federal constitutional rights contained in the Bill of Rights. Petitioner was not expecting his legal arguments and factual allegations to be summarily ignored or recharacterized for the purpose of dismissing his case or suffering a summary decision on appeal to the Court of Appeals for the Third Circuit. After paying court fees and working diligently, Petitioner believes he was deprived of an actual right of appeal in Court of Appeals for the Third Circuit in the form of an actual legal decision or opinion, whether published or not.

REASONS FOR GRANTING THE WRIT

- I. The Court Should Grant Certiorari to Clarify the Proper Scope of the Use of the Tax Injunction Act or the Doctrine of Comity by State or Local Municipalities/Governmental Entities to Bar Original Federal Subject Matter Jurisdiction in Cases that Involve the Federal Constitutionality of the Seizure or Sale of Private Real Property Pursuant to State Property Tax Statutes in Order to Satisfy Property Tax Debts.**

Pursuant to Supreme Court of the United States Rule 10(c), Petitioner asserts that the lower courts interpreted the TIA far too broadly, and that this Court should clarify the limits of the TIA as applied to Petitioner's Counts V, VII and VIII of its Complaint.

Accordingly, this Court should clarify, as described herein, the aforesaid rules and limitations of the TIA and the doctrine of comity regarding the claims discussed herein so that parties and courts have certainty and efficiency in litigation to prevent

the cost of unnecessary further litigation and improper dismissal on these matters, as was cautioned by Justice Thomas in *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1 (2015).

A Takings Clause claim or declaratory judgment thereunder, or a similar claim asserting fundamental rights to home equity, is not within the scope of the TIA as set forth by the Supreme Court if it does not contest taxes, but rather seeks to protect equity in the form a payment of just compensation reduced by the amount of taxes owed or other proper remedy. There are several basis on which it can be legally determined that the TIA is either inapplicable to or preempted by the Takings Clause of the 5th Amendment to the United States Constitution and other important rights under the Bill of Rights, as described herein

II. Subject Matter Jurisdiction Under 28 U.S.C. §1331 in This Case Presented a Substantial Legal Question On Appeal That the Third Circuit Court of Appeals Should Have Decided or Certified to this Court.

The question of whether there is original federal subject matter jurisdiction for the Petitioner's claims is a substantial legal question that was recognized by both parties in the District Court proceeding. The Respondents failed to show that subject matter jurisdiction was not a substantial question presented on appeal because, in the District Court below, they requested leave to brief the issue of whether the Tax Injunction Act or the doctrine of comity bars Petitioner's claims originally in federal court. (doc. ## 23 and 23-2).

The Determination of whether there is federal question jurisdiction is made based on the plaintiff's pleadings and not upon the response or the facts as

they may develop. See generally *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). The District Court erred by violating the rule in *Merrell Dow Pharmaceuticals* by (ii) disregarding Petitioner's clearly plead factual allegations, (ii) adopting the Respondent's recharacterization of Petitioner's Complaint and (iii) using that as a reason to relabel Petitioner's entire Complaint as a state tax case for purposes of the TIA to dismiss all counts.

The issue of jurisdiction does not present a factual dispute to be decided by the judge as between the allegations of a complaint and the contents of a motion to dismiss in response under 12(b)(1); thus, a judge is not a finder of fact entitled to adopt a defendant's view of a complaint. Rather, under *Merrell*, the judge in this case was required to accept Petitioner's reasonable allegations as true to

determine whether the claims were well-pleaded and plausible. The judge did not do that.

A motion to dismiss for lack of subject-matter jurisdiction should only be granted if it appears certain that the plaintiff cannot prove any set of facts in support of his claims entitling him to relief. *Wagstaff v. United States Dep't of Educ.*, 509 F.3d 661, 663 (5th Cir. 2007). The lower district court failed to adhere to the proper standards of review by ignoring Petitioner's Fifth Amendment and other fundamental rights claims/declaratory judgment actions, despite a clear claim for just compensation reduced by taxes owed, and authoritative legal precedent from this Court that there is jurisdiction for such claims.

Plaintiffs alleged and showed that the Pennsylvania property tax statutes do not provide for adequate just compensation because a property can

be sold for a small fraction of its fair market values and thus protected equity can be forfeited in violation of the Takings Clause. (Complaint Para. 163, 164) The measure of a taking is the loss to the owner, not the benefit to the government. Section 504(b)(3) of the Real Estate Tax Sale Law states in relevant part:

If it is determined that the owner does not desire to continue to reside in the residence, or that a deferral of tax pursuant to paragraph (2) would jeopardize ultimate recovery of the tax claim or claims in full, and *it appears that the owner has equity in the residence which would be lost at a regular tax sale*, a special sale of the residence can be arranged. At least two independent appraisals of the residence shall be obtained, and the residence shall be placed on the market at a price midway between such appraisals for a period not to exceed eleven (11) months from the date the property was initially scheduled for sale (emphasis added).

Settled Takings Clause jurisprudence *United States*

v. General Motors Corp states:

The courts have held that the deprivation of the former owner, rather than the accretion of a right or interest to the sovereign, constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking. ("The constitutional provision [Takings Clause] is addressed to every sort of interest the citizen may possess") 323 U.S. 373, 378 (1945).

(Doc. No. 20, para. 23, case 23-3171)

Rather than accept Petitioner's allegations as true and address the legal issue that some claims as alleged are not subject to the TIA in accordance with Supreme Court precedent, the District Court abandoned the proper standards of review for jurisdictional claims that (i) reasonable allegations must be taken as true and (ii) the complaint be interpreted in a light most favorable to the non-moving party. The lower court substituted its own

belief or factual finding for the clear factual allegations in Petitioner's Complaint, adopting the Respondents arguments and characterizations in its motion to dismiss. Thus, the District Court (i) did not interpret the Complaint in a light most favorable to the Petitioner, the nonmoving party (Appellants below), and (ii) did not take Petitioner's factual allegations as true. (Doc. No. 20, para. 8, case 23-3171). Importantly, the District Court violated this Court's rule in *Merrell Dow Pharmaceuticals, Inc.* that responses to a Complaint are not an appropriate basis to make a jurisdictional decision. Thus, there is a substantial question as to whether Appellants' claims, Counts V, VII, and VIII are barred by the TIA or comity. Accordingly, the Third Circuit Court of Appeals summary decision in this case should be reversed, and this Court should settle the question whether there is federal jurisdiction.

The District Court also provided no hearing or opportunity for the Petitioner to have oral argument or to make a proper showing on this issue. As a part of the Petitioner's right of appeal, the Third Circuit, rather than summarily affirming the District Court, should have opined on this issue or certified the question to this Court for guidance, especially considering that the District Court's failure to apply the proper standards of review. Petitioner wonders why the lower courts would speed through his case without a better legal review.

The question of jurisdiction in this case involves detailed analysis of the TIA, the doctrine of comity, and the nature of the governmental powers being exercised when a municipality seizes or sells real property to collect on property tax debts. Under *Levin*, this analysis also depends heavily on the type of claim being made and the nature of the remedy

that is being sought. All of this was ignored by the lower courts.

III. Count V— Declaratory Judgment Under the Takings Clause—*Knick v Township of Scott* provides for Original Federal Subject Matter Jurisdiction under 28 U.S.C. 1331 for Takings Clause Claims and Declaratory Judgments Thereunder.

The legal basis for federal subject matter jurisdiction for a Takings Clause claim and a declaratory judgment on the constitutionality of a property tax statute under the Takings Clause is the same. If there is original federal jurisdiction under 28 U.S.C. 1331 for a Takings Clause claim per *Knick v Township of Scott*, then there would be original federal jurisdiction for a federal court to decide a declaratory judgment action under the Takings Clause pursuant to 28 USC §§1221 and 1222 provided constitutional standing requirements are met. Petitioner asserts that the federal district courts have

original jurisdiction to hear all the underlying federal constitutional claims asserted herein under 28 U.S.C. §1331, and therefore have jurisdiction to hear declaratory judgments under 28 USC §§1221 and 1222 as plead by Petitioner in his Complaint.

A. Clarify Whether *Knick v Township of Scott* provides for Statutory Original Federal Subject Matter Jurisdiction for a Takings Clause Claim or Declaratory Judgment Action That Involves the Federal Constitutionality of a State Property Tax Statute.

The *Knick* case involved land use regulation of a local municipality. The Supreme Court in *Knick* considered the doctrine of comity in relation to Fifth Amendment Takings Clause claims against local governments pursuant to 42 U.S.C. §1983, and declined to apply the broad doctrine in its response to the dissent in that case:

"The dissent also asserts that today's ruling "betrays judicial federalism." [this is the doctrine of comity]. But since

the Civil Rights Act of 1871, part of “judicial federalism” has been the availability of a federal cause of action when a local government violates the Constitution. 42 U. S. C. §1983. Invoking that federal protection in the face of state action violating the Fifth Amendment cannot properly be regarded as a betrayal of federalism. *Knick* 139 S. Ct. 2162, 2178 (Fn 8) (2019).

The Supreme Court found that the doctrine of comity was inapplicable in *Knick*, but the Court had no occasion to address the applicability of the TIA because *Knick* did not involve a state tax statute. *Knick* provides for no exceptions, nor does it create a tiered system of rights which relegates certain Takings Clause cases to lesser status than others. But perhaps most important is that because the Court found the very broad doctrine of comity inapplicable in that case, then, as per *Levin*, the TIA would not be applicable either. This potential conflict is easily resolved by the fact that *Levin* also

stands for the proposition that whether the TIA applies in a case is not a mere pleading game but, rather, depends on the remedy sought. Because the remedy for a Takings Clause violation in a state or local property tax case would be just compensation over and above the mount of tax owed, the TIA should not be applicable either. See *Levin*, *infra* at 435-437 (Justices Thomas and Scalia, concurring in the judgment)

The District Court also erred in applying *Fair Assessment in Real Estate Ass'n, Inc. v. McNary* to dismiss Petitioners 42 U.S.C. §1983 claims because it conflicts with *Knick's* ruling that Takings Clause claims have original jurisdiction in federal court. *Fair Assessment in Real Estate Ass'n, Inc* is distinguishable on the basis that it did not involve the Takings Clause, a fundamental constitutional right or a right which requires heightened judicial

scrutiny. Additionally, the Takings Clause is self-executing and does not require Congressional legislation such as 42 U.S.C. §1983 to create a civil cause of action.

B. Clarify Whether Original Federal Question Jurisdiction is Not Barred By the Tax Injunction Act in a Case Brought Under the Takings Clause of the Fifth Amendment to the United States Constitution Because Such a Case is Not a “Tax” Case for Purposes of the TIA and Cannot Be Relabeled As Such By a Taxing Municipality.

Petitioner asserts that the TIA does not apply to Takings Clause claims or declaratory judgments thereon because the authority of a governmental entity to take seize or sell property to satisfy a tax debt rests on the power of eminent domain, not on the taxation power. *Sweet v. Rechel*, 159 U.S. 380 (1895). Therefore, a Takings Clause claim is not a “tax” case for purposes of the TIA.

A Takings Clause claim could also fall under the exception to the TIA because the remedy of just compensation is not a challenge to the validity or the amount of the tax in question. The government will receive its tax money and therefore the TIA would not be a hindrance even if tax administration is affected because compliance with adequate just compensation under the Takings Clause is mandatory and categorical. Adequate just compensation to a property owner is a condition precedent to the exercise of eminent domain. *Sweet v Rechel*, 159 U.S. 380 (1895). This Court has stated that it will not tolerate violations of the Takings Clause no matter how disruptive to regulatory systems because of the "categorical" right to adequate just compensation:

The Fifth Amendment does not merely provide a damages remedy to a property

owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. *Arrigoni Enterprises, LLC v. Durham*, 136 S.Ct. 1409, 1409, (2016) (THOMAS, J., dissenting from denial of certiorari). Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking." *Id.*, at 1410. ***If this requirement makes some regulatory programs "unworkable in practice," so be it—our role is to enforce the Takings Clause as written.***) *Knick v. Township of Scott*, 139 S. Ct. 2162, 2180 (2019) [cleaned up, emphasis added]

The jurisdictional bar in the TIA cannot be invoked by a municipality's relabeling a Takings Clause case as a tax case; therefore, the lower courts erred by relabeling the Petitioner's entire case as a "tax case" at the behest of municipal authorities and their collection agency. See *National Federation of Independent Business v. Sebelius*, 567 U.S. 519

(2012) (Constitutional rights cannot be avoided by relabeling cases as tax cases.)

The governmental authority to seize or sell private property for a public use such as to satisfy a tax debt rests upon its right of eminent domain not other powers or rights such as taxation. *Sweet v. Rechel*, 159 U.S. 380 (1895). A local municipality does not possess the power or legislative authority to expand or "roll" its limited delegation of power to assess or collect a property tax (which is protected by the TIA) into its limited power of eminent domain (not protected by the TIA) In other words, a municipality may not use "taxes" to shield itself from federal scrutiny for potential violation of constitutional rights that do not have a similar jurisdictional limitation. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (holding that the federal Anti-Injunction Act

(the federal corollary to the TIA) did not bar a suit against ACA, the court said: "Congress may not, for example expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a "tax." (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36–37 (1922); *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994)).

In *Tyler v Hennepin County*, this Court ruled that the sale of a private home by a local municipality to satisfy state or local property tax debt was a taking for purposes of the Takings Clause of the Fifth Amendment and that just compensation must be provided. However, the *Tyler* Court did not rule on the issue of what constitutes adequate just compensation outside the confines of the facts in that case. Because the protected property interest under

the Takings Clause in this case involves construction of Pennsylvania law, there are important federal constitutional issues of first impression that should be decided by federal courts, not state courts.

Petitioner contends and alleged below in his response to Appellees' Motion for Summary Action in the Third Circuit Court of Appeals, that (i) because a municipal governmental authority cannot lawfully expand its limited taxing powers into the area of eminent domain by invoking the TIA or comity to avoid federal constitutional scrutiny and give itself the power to take, seize or sell property in violation of the Fifth Amendment; therefore (ii) when it seizes or sells property to satisfy a property tax debt, the statute providing for such seizure or sale should be strictly construed and should satisfy all Takings Clause jurisprudence, including the provision for adequate just compensation set forth by this Court in

Knick and Sweet v. Rechel, 159 U.S. 380 (a municipality or state statute must provide for adequate just compensation as a condition precedent to a taking—provided at or before the time of a taking). (Doc. No. 20, para. 13, 14, 15, case 23-3171)

Respondents claim that *Knick* and *Tyler* are inapplicable in this case because this Court did not address the TIA in those cases. Despite this obvious substantial legal issue that needed to be decided, the Court of Appeals for the Third Circuit failed to do so in this case. Petitioner seeks a declaratory judgment that the Pennsylvania property tax statutes violate the above rules and asks this Court to determine whether (i) the lower courts have jurisdiction over these claims and (ii) the claims are plausible and, accordingly, reverse the Third Circuit's summary decision in this case. (Doc. No. 20, para. 13, 14, 15, case 23-3171).

IV. Counts V, VII and VIII— Clarify whether *Levin* provides for Original Federal Subject Matter Jurisdiction Because These Claims Plausibly Assert Fundamental Rights or Rights Which Demand a Heightened Level of Judicial Scrutiny.

The lower courts ignored the relevant portions of this Court's opinion in *Levin* that constitutional claims which assert fundamental constitutional rights or rights which require heightened judicial scrutiny are not barred by the TIA or doctrine of comity. Petitioner alleged and provided much state and federal legal support in filings below that the Supreme Court of the United States, and Pennsylvania statutes, cases, and the state constitution all provide that ownership rights to real property in Pennsylvania are fundamental rights that require heightened judicial scrutiny. (Complaint para. 166, 195). The Supreme Court of the United States determined in *Vanhorn's Lessee v Dorrance*

that real property rights in Pennsylvania are fundamental law that require heightened judicial scrutiny:

*The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his **whole property**, real and personal, for the good of the community, without receiving a recompence in value. *Vanhorn's Lessee v. Dorrance*, 2 U.S. 304, 309-310 (1795).*

Because Petitioner successfully plead his claim for fundamental property rights which have heightened judicial scrutiny, *Levin* should provide jurisdiction in the federal courts for these counts. These allegations and legal assertions fell on deaf ears in the lower courts.

A. Clarify *Levin* by Determining (i) Whether Claims Which Assert Fundamental Federal Constitutional Rights or Rights Which Demand a Heightened Level of Judicial Scrutiny Are Exempt From Both Comity and the TIA or (ii) Whether a Plaintiff Must Show That Each Such Claim Meets the Jurisdictional Exception to the TIA.

The District Court below ignored relevant portions of *Levin* by dismissing all of Petitioner's constitution claims despite *Levin's* carve out for claims under the Bill of Rights that assert fundamental rights or demand a heightened level of judicial scrutiny under comity. The *Levin* Court described the type of case that is subject to the TIA as a "run of the mine" tax case. Plausible assertions of fundamental rights against taxing authorities cannot be considered as "run of the mine" tax cases, especially Takings Clause claims. However, at the behest of Portnoff Law Associates, Respondent and

collection agency for various municipalities, the Pennsylvania district courts have decided to apply the strictest possible standard of dismissing all federal claims that relate to or “arise from” state or local taxes--using the TIA in the broadest possible manner, declaring that federal courts have no choice and plaintiffs “fail to show” that state remedies are inadequate without proper consideration. The district courts have set no standard for such a showing and summarily dismiss all federal claims arising from state tax or involving administration of a state tax statute, an absurd legal rule that would prevent all federal civil rights and constitutional claims where state tax administration is somehow involved. See *Lehigh Valley Properties v. Portnoff Law Associates, Ltd.* No. 19-4892, 2020 WL 19854889 (E.D.Pa. Apr.27, 2020) The absurdity of the application of the TIA in this overbroad manner can

be demonstrated where a local sheriff killed a homeowner while in the process of removing the owner from the home for nonpayment of property taxes pursuant to a property tax sale. Because such a case relates to state tax administration, a civil rights suit in federal court could be dismissed. Whether there is jurisdiction under the TIA is not discretionary for a federal court.

This expansive view of the TIA as barring all federal claims that relate to or involve state tax collection was rejected by the Supreme Court in *Direct Mktg. Ass'n v. Brohl*: "The Court of Appeals' [over-broad] definition of "restrain," by contrast, produces a "vague and obscure" boundary that would result in both needless litigation and uncalled-for dismissal." 575 U.S. 1, 14 (2015). Justice Ginsburg, concurring with Justice Thomas in *Brohl*, stated:

Congress designed the Tax Injunction Act not "to prevent federal-court interference with all aspects of state tax administration," (internal quotation marks omitted) but more modestly to stop litigants from using federal courts to circumvent States' "pay without delay, then sue for a refund *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 19 (2015) (Ginsburg, J, Concurring in the opinion).

What Justice Thomas predicted is what happened in this case; overbroad interpretation of the TIA resulted in needless litigation and is being used as a docket clearing mechanism.

As Justice Thomas pointed out in his concurrence in *Levin*, the majority opinion deemed fundamental federal constitutional rights claims to be outside the scope of comity and potentially the TIA. However, the *Levin* Court did not rule on the applicability of the TIA in that case. The precise applicability and interplay between the TIA and the

doctrine of comity in state or local tax cases was left unclear by the *Levin* Court fourteen years ago.

It seems clear from both *Levin* and *Knick* that the behavior of a municipality in potentially violating or being able to avoid federal scrutiny for violating important federal constitutional rights under the Bill of Rights, such as a Takings Clause claim, is the type of case that Justice Ginsburg believed ought to have original federal jurisdiction under both the TIA and comity. Justice Thomas acknowledged as much in his concurrence. Justice Thomas stated, "The Court wishes to leave the door open to . . . retain federal jurisdiction over constitutional claims that the Court simply does not believe Congress should have entrusted to state judges under the [Tax Injunction] Act." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 436 (2010) (Justice Thomas, concurring in the judgment).

The *Levin* Court left unresolved the question of whether a plaintiff at the trial court level must show that a claim for fundamental federal Constitutional rights also meets the exception to the TIA for a federal court to have original subject matter jurisdiction. Justice Thomas seemed to suggest that the exception to the TIA should be invoked for such claims *Id.* (See *Levin*, concurring opinion, Justice Thomas and Justice Scalia, concurring in the judgment) If so, Petitioner contends that he met that standard and should have been given a proper hearing and fair opportunity below to show that (i) state remedies are inadequate to protect the federal constitutional rights asserted or (ii) that the remedy Petitioner sought involves just compensation or other remedy that does not challenge a tax assessment or seek changes to tax

amounts, and thus not within the purview of the TIA.

Petitioner made specific allegations in his Complaint and specific references in numerous court filings to relevant portions of the Pennsylvania property tax statutes which Petitioner allege fail to provide for adequate just compensation in the amount of fair market value of the property to protect equity if his property is sold under the statutes to satisfy a tax debt. Petitioner further showed, *infra*, that the statutes recognize that equity can be lost at a tax sale when property is sold for less than fair market value and provides for special property assessments to obtain FMV—but only if a municipality so chooses and only for the elderly. (Doc. No. 20, para. 23, case 23-3171)

These reasonable allegations and showings should have been accepted as true by the District

Court, and therefore should have satisfied a showing that state remedies under the statute are not adequate for purposes of the exception to the TIA, assuming that such is required of Petitioner. Because just compensation in the amount of fair market value upon a tax sale is not adequately available under the property tax statutes, a plaintiff, as alleged by Respondents in their Motion for Summary Action in the Court of Appeals, would have to use Pennsylvania's eminent domain statute, and thus would require a plaintiff to exhaust state remedies in violation of this Court's ruling in *Knick* that Takings Clause claims can be brought first in federal court. (Doc. 10-1, p. 8, Case 23-3173). Respondents claim that the exceptions in *Levin* do not apply in this case and cite *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, a Supreme Court opinion adopted by the District Court, as support for jurisdictional dismissal

of this case. However, that case did not involve the type of constitutional claims made in this case. The District Court, by improperly recharacterizing Petitioner's claims as a tax case, pointed to *Fair Assessment in Real Estate Ass'n, Inc* causing them to ignore other more relevant and potentially applicable binding Supreme Court precedent.

B. Further Clarify *Levin* By Determining An Evidentiary or Legal Standard and Hearing By Which a Plaintiff May Make a Showing in the District Court That An Exception to the TIA Applies.

The court should grant certiorari in this case to clarify the applicability of *Levin* to Petitioner's Counts V, VII and VIII, and determine the proper hearing and standard for showing that the TIA is either inapplicable or that state remedies are inadequate for purposes of the exception to the TIA. The Petitioner sought to create a robust record in the district court and on appeal to show that state

remedies were inadequate prior to the District Court's dismissal of all counts.

If Petitioner's allegations and showings below plausibly meet the applicable standards as determined by this Court such that the District Court has jurisdiction to hear these claims, then Petitioner requests this Court to make that determination and order that the Third Circuit Court of Appeals is reversed and the District Court has jurisdiction to hear Counts V, VII and VIII.

CONCLUSION

Petitioner, John F. Gallagher, respectfully
requests that this Court issue a Writ of Certiorari to
review this case.

Dated: April 16, 2024 Respectfully submitted,

By: s/ John F. Gallagher
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APPENDIX A
(Summary Action by the Court of Appeals for
the Third Circuit Affirming District Court)
Case: 23-3171 Document: 21-1 Date Filed: 01/23/2024
UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 23-3171 DCO-046

JOHN F. GALLAGHER; MELISSA M. GALLAGHER,
and on behalf of all others similarly situated,
Appellants

v.

NORTHAMPTON COUNTY REVENUE APPEALS
BOARD; NORTHAMPTON COUNTY TAX CLAIM
BUREAU; BETHLEHEM TOWNSHIP; BETHLEHEM
AREA SCHOOL DISTRICT; STACY GOBER, IN HER
INDIVIDUAL AND OFFICIAL CAPACITY;
STEPHEN J. BARRON, JR., IN HIS INDIVIDUAL
AND OFFICIAL CAPACITY; ANDREW J. FREDA, IN
HIS INDIVIDUAL AND OFFICIAL CAPACITY;
PORTNOFF LAW ASSOCIATES, LTD
Appellees
(E.D. Pa. No. 5-23-cv-03275)

Present: JORDAN, RESTREPO and PORTER, Circuit Judges

1. Appellees' Motion for Summary Action pursuant to
Third Circuit Local Appellate Rule 27.4(a)
2. Appellants' Response in Opposition to Motion

Respectfully,
Clerk/CJG

ORDER
The foregoing motion is hereby GRANTED.

By the Court,
Dated: January 23, 2024

s/ Kent A. Jordan

APPENDIX B
(District Court Dismissal of all Counts in
Complaint)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JOHN F GALLAGHER, <i>et al.</i> ,	:	
Plaintiffs,	:	
	:	
v.	:	Civil No. 5:23-cv-03275-
JMG	:	
	:	
NORTHAMPTON COUNTY REVENUE : APPEALS		
BOARD, <i>etal.</i> ,	:	
Defendants.	:	

ORDER

AND NOW, this 6th day of December 2023, upon consideration of Defendant's Motion to Dismiss (ECF No. 18) and Plaintiff's Response in Opposition (ECF No. 20); **Defendant's Motions to Dismiss (ECF No. 19), Defendant's Motions to Dismiss (ECF No. 21), Defendant's Motions to**

Dismiss (ECF No. 22) and Plaintiff's Ominbus Response in Opposition (ECF No. 25),

IT IS HEREBY ORDERED that the Defendants' Motions to Dismiss (ECF Nos. 18, 19, 21, 22) are **GRANTED** and all counts are **DISMISSED**.¹

¹ Plaintiffs bring suit against the Northampton County Revenue Appeals Board,

Northampton County Tax Claim Bureau, Bethlehem Township, Bethlehem Area School District, Portnoff Law Associates, LTD., Stephen Barron, Andrew Freda, and Stacy Gober. In Counts 5, 6, 7, 8, and 9, Plaintiffs assert that Pennsylvania's tax laws and enforcement mechanisms violate their federal Constitutional Rights. Also, Plaintiff brings a Civil RICO claim under 18 U.S.C. 1962 against Portnoff Law Associates LTD., Stacy Gober, Andrew Freda, and Steven Barron for their attempts to collect taxes from Plaintiffs.

All Defendants move for dismissal pursuant to Fed. R. Civ. P. 12(b)(1). Defendants assert that this Court lacks subject matter jurisdiction because the Tax Injunction Act states that "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Beyond the legalese and jargon in Plaintiffs' Complaint, t\$he Complaint in total amounts to Plaintiffs'

desires to not pay their taxes. Specifically, Plaintiffs take issue with how their local taxes are determined, collected, and enforced.

IT IS FURTHER ORDERED that the Clerk is **DIRECTED** to mark this file **CLOSED**.¹

BY THE COURT:

/s/ John M. Gallagher

JOHN M. GALLAGHER

United States District Court
Judge

¹ For Counts 1, 2, 3, 4, and 10 in Plaintiffs Complaint, Plaintiff alleges state claims. Given the Complaint's reference to alleged constitutional violations, although minimal, this Court finds it has federal question jurisdiction. However, for the reasons set forth above, the Complaint has failed to sufficiently plead a federal claim of which this Court has jurisdiction over. Because all federal claims are being dismissed, this Court will not exercise supplemental jurisdiction over any potential state law claims. See *Gagliardi v. Fisher*, 513 F. Supp. 2d 457, 463 (W.D. Pa. 2007) (declining supplemental jurisdiction after dismissing the federal question claims for failure to state a claim). Any potential state-law claims are therefore not addressed on their merits herein. Because at this time all of the federal claims are being dismissed, the Court declines to extend supplemental jurisdiction to hear any potential state claims.

The Supreme Court has held that “taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts” so long as “plain, adequate, and complete” remedies are available in state court. *Fair Assessment in Real*

Estate Ass’n, Inc. v. McNary, 454 U.S. 100, 116 (1981). Additionally, because the RICO claim in Count 11 is based on the Defendants’ actions to collect taxes, those actions are also protected based on the principles of comity. See *Lehigh Valley Properties, Inc. v. Portnoff Law Associates*, No. 19-4892, 2020 WL 19854889 at *5 (E.D. Pa. Apr. 27, 2020). The Third Circuit has held that the Pennsylvania state courts provide a “plain, speedy, and efficient” remedy for challenges to a county’s assessment of real property taxes. See, e.g., *Gass v. Cnty. of Allegheny, Pa.*, 371 F.3d 134, 137-38 (3d Cir. 2004). Plaintiffs have failed to demonstrate how the legal apparatuses of Pennsylvania are inadequate or unavailable to hear their legal dilemmas. Accordingly, Plaintiff’s federal Counts 5, 6, 7, 8, 9, 11 are dismissed for lack of subject matter jurisdiction.