

No. 23-762

*In The  
Supreme Court of the United States*

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SAM SILVERBERG,

Petitioner,

v.

DISTRICT OF COLUMBIA,  
Mayor Bowser,  
Donald Sullivan, and  
Gerard Anderson

Respondents,

\_\_\_\_ Δ \_\_\_\_\_

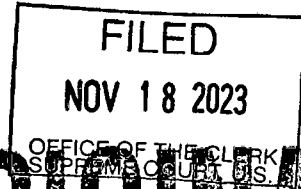
On Petition For Writ Of Certiorari  
To The U.S. Court Of Appeals Of The D.C. Circuit

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PETITION FOR WRIT OF CERTIORARI

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**QUESTIONS PRESENTED:**

1. Whether the exclusive jurisdiction to shield local tax assessments from constitutional challenges in a federal court to protect state revenues can be extended when the local tax is used to appropriate property rights?
2. Whether the appellate court reliance on Jenkins and their assertion that federal jurisdiction is barred from all constitutional claims arising from the assessment is conflicting with *Hibbs v. Winn*, 542 U.S. 88?
3. Whether the appellate court abused their discretion by refusing to enter an amended complaint without providing “justifying reasons” for the refusal?
4. Whether the appellate court abused their discretion when the court introduced state claims for relief where the states have exclusive subject matter jurisdiction, that the plaintiff was effectively seeking a refund which contradicts plaintiff’s statements in the record that he is not seeking a refund or challenging the assessment?
5. Whether the practice of this appellate court to dismiss a complaint having a mix of claims where some claims do not have federal subject matter jurisdiction is conflicting with the second circuit where the surviving claims are adjudicated is an abuse of discretion? *Dorce v. City of New York*, 2 F.4th 81, 82 (2d Cir. 2021)

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Sam Silverberg petitions this court for a Writ to review a dismissal of petition for rehearing by the United States Court of Appeals For the District Of Columbia Circuit *En Banc* case No. 22-7133 (entered September 19, 2022) in App D (App.7-8); And the August 23, 2023, the United States Court of Appeals for District of Columbia Circuit affirming the dismissal and affirming summary judgement at App. C (App.5-6) and the Court of Appeals affirmed the District Court dismissal and denied rehearing App. B (App.4) and the court below the United States District Court For the District of Columbia granting defendants motion to dismiss App. A (App.1-3).

**STATEMENT OF JURISDICTION**

The Court of Appeals for the District of Columbia Circuit entered judgment on August 23, 2023 App D (App.7-9). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY****42 USC § 1983 (2011)**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a

judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**Fifth Amendment**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**REQUEST FOR SUMMARY REVERSAL.**

Petitioner requests that this Court summarily reverse the District of Columbia Circuit's ruling that all constitutional claims arising out of the assessment are shielded from federal jurisdiction. This ruling overrules *Hibbs v. Winn*, 542 U.S. 88. In *Hibbs*, federal jurisdiction is only barred when there is a negative effect on state revenue. The ruling would bar federal jurisdiction even when there is no tax dispute such as *Silverberg's* 5th amendment taking claim for appropriating property rights. Many circuit courts have relied on *Hibbs* such as *Dorce v. City of New York*, 2 F.4th 81, 82 (2d Cir.

2021) and *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020)

### Statement of the case

Silverberg filed a 42 USC 1983 action that his 5<sup>th</sup> amendment rights were violated. The case arose when the District of Columbia heretofore known as DC determined that my property at 6820 32nd St. NW Washington DC 20015 was vacant. Under "The Fiscal Year 2011 Budget Support Act of 2010" DC created a Class 3 property tax rate for residential vacant property. The property would be taxed at \$5.00 per \$100 of assessed value. My property tax bill increased from 9,000.00 to 45000.00. Because of the high tax bill, DC is forcing me to sale or lease the property. My property tax assessment consists of two portions. The first portion is the normal tax assessment used for the purpose of generating tax revenues to fund government operations. The second portion is a penalty tax or a fine to appropriate property rights from property owners.

DC crafted the legislation for appropriating fundamental property rights from property owners by forcing them to sale or lease their property, by using the property tax system as the vehicle to appropriate their property rights. DC believed their appropriation would be shielded from federal jurisdiction by the use the property tax. The language "appropriating owners property rights" is not a challenge to DC's tax statue but describes the purpose of the statute.

### REASONS FOR GRANTING THE WRIT



*In Cedar Point Nursery v. Hassid*, 594 U.S. \_\_\_\_ (2021) published June 23, 2021 stated that “the questioned to be answered is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner’s ability to use his own property. Whenever a regulation results in a physical appropriation of property, a per se taking has occurred, and Penn Central has no place.” In Cedar Point, the government’s physical appropriation of the right to exclude others from the property owner was deemed to be a per se taking, requiring compensation. Cedar Point did hold that the taking clause of the 5th Amendment provides for compensation or injunctive relief for appropriating the property right to exclude others from the property.

Claim 1 (the only claim for relief presented) does not require the District Court to review a DC tax law or regulations for any constitutional violations. Claim 1 does not dispute the DC’s assessment of the property tax or the imposition of the tax or requests a refund or dispute any DC tax law. There is no loss of revenue to DC, because the property tax will always be paid and there is no interference with DC’s ability to collect a tax.

DC does not dispute Silverberg’s position that the taking clause of the 5th Amendment does not challenge his tax assessment, or the administration of DC’s tax laws or improved his tax burden. By not disputing Silverberg’s positions, DC concedes that Silverberg’s position is correct.

DC relied on *Jenkins v. Washington Convention Ctr.* 236 F. 3d 6 (D.C. Cir 2001) that the complaint

lacks subject matter jurisdiction. The Jenkins' Court gave the Superior Court exclusive jurisdiction based on their analysis of the congressional intent of the statute. The Jenkins court further expanded the exclusive jurisdiction to cover all tax disputes. To meet the requirements of Jenkins, DC attempted to establish a new claim for relief based on a background fact in the Complaint that Silverberg's lawsuit is a request that the District Court review his tax assessment.

### **DISTRICT COURT DECISION**

The District Court relies on Jenkins that "Congress unambiguously intended to vest in the District of Columbia courts exclusive jurisdiction over all challenges to District of Columbia taxes including those involving federal statutory or constitutional claims, in lieu of jurisdiction in the federal courts." The District Court concluded that Jenkins' limitation on federal jurisdiction covers 5th amendment constitutional challenges even when there is no tax dispute. The District Court never explained how Silverberg's 5th amendment claim for compensation creates a tax dispute or challenges the assessment nor responded to Silverberg's cited authority why Jenkins' does not apply in this case.

### **APPELLATE COURT**

The appellate Court affirmed the District Court on different grounds, not finding a tax dispute, the appellate Court decided to extend the exclusive jurisdiction to all constitutional claims that arises from the assessment and even for a purpose never contemplated by the Congress. The appellate Court does not

cite legal authority to extend the exclusive jurisdiction for this purpose.

The appellate Court introduced two new state claims for relief that did not raise a federal question. The appellate court asserted that Silverberg, "alleged in the amended complaint that the District of Columbia had wrongly determined that his property was vacant." This assertion was never made and is not supported by the record. The court relied on Silverberg's background fact that the property was occupied. The court concluded from this statement that he was seeking judicial review of his vacancy status in order to obtain a refund. The appellate court conclusion is contrary to Silverberg's statements in the record that he is not seeking a refund or challenging his assessment.

The federal court cannot adjudicate these state claims because the local courts have exclusive jurisdiction. Silverberg filed a motion to amend the complaint to eliminate the language used to support these new claims. The motion was denied without providing a justifying reason as required in *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The Jenkins' court and appellate court analysis is inconsistent with the jurisdictional analysis in *Hibbs v. Winn*, 542 U.S. 88. The appellate panel overrules *Hibbs*. *Hibbs* was directed to a third party who challenged Arizona law for allocating tax credits to a religious institution in violation of the establishment clause. The plaintiff was not seeking a refund. *Hibbs* found that the federal court had subject matter jurisdiction. The federal cases cited in *Hibbs*, were directed to a constitutional claim that the allocation of funds favored segregated schools, these federal

courts held they had subject matter jurisdiction. Likewise in *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020), and in *Dorce* the constitutional claims did not bar federal jurisdiction. Under the District Court and Appellate Court's analysis, all these cited federal courts would not have subject matter jurisdiction because the constitutional claims arose out of the assessment.

The *Hibbs* court explains "We examine in this opinion both the scope of the term "assessment" as used in the TIA, and the question whether the Act was intended to insulate state tax laws from constitutional challenge in lower federal courts even when the suit would have no negative impact on tax collection.

[T]he Court has recognized, from the AIA's text, that the measure serves twin purposes: It responds to "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference"; and it "require[s] that the legal right to the disputed sums be determined in a suit for refund, ; while §7421(a) "precludes suits to restrain the assessment or collection of taxes," the proscription does not apply when "plaintiffs seek not to restrain the Commissioner from collecting taxes".

"The [TIA]Act was designed expressly to restrict "the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes." S. Rep., p. 1. In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative

history announce a sweeping congressional direction to prevent “federal-court interference with all aspects of state tax administration.”

Therefore, exclusive jurisdiction was usually limited to cases where a plaintiff was attempting to reduce their tax liability or to resolve a tax burden or a challenge to a collection of a tax.

In *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015), the court relied on the meaning of assessment as set forth in *Hibbs v. Winn*, 542 U. S. 88,100 (2004) to determine the existence of exclusive jurisdiction.

“In defining the terms of the TIA, we have looked to federal tax law as a guide. *Hibbs*, supra, at 102–105.” Justice Ginsburg in her concurring opinion stated “the Court has observed, Congress designed the Tax Injunction Act not “to prevent federal-court interference with all aspects of state tax administration,” *Hibbs v. Winn*, 542 U. S. 88,105 (2004) (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” regimes. See *id.*, at 104–105 (“[I]n enacting the [Tax Injunction Act], Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority.”). This suit does not implicate that congressional objective. The *Direct Marketing Association* is not challenging its own or anyone else’s tax liability or tax collection responsibilities. And the claim is not one likely to be pursued in a state refund action.

The District Court or Appellate Court does not address any of these issues. especially whether the

appropriation of property rights from property owners is a constitutional challenge to a tax statute whose primary purpose is to appropriate property rights by forcing property owners to sell their property. Based on the above analysis the District Court or Appellate Court would have subject matter jurisdiction of the taking clause of 5th amendment requiring compensation for appropriating property rights from the plaintiff, especially when there is no challenge or interference with the collection of a DC tax. Hibbs points out that DC's exclusive jurisdiction cannot be cut loose from its state-revenue-protective moorings. See, e.g., *California v. Grace Brethren Church*, 457 U. S., at 410

#### THE QUESTIONS PRESENTED IS RECURRING AND IMPORTANT.

Cities in California such as Oakland, Berkley, and San Francisco and Seattle have passed vacant property tax legislation. Vacant property tax legislation will spread as cities try to shift the financial burden for providing affordable housing problems to property owners. Based on information, the issues in this case are being litigated. Meanwhile these cases will consume the time of the federal courts. Property owners will loose their property because they could not afford their property tax. This Court should resolve these issues by granting the petition for writ of certiorari.

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#### CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DATED: November 17, 2023

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