No. ______

In the
Supreme Court of the United States

THOMAS E. PROCTOR HEIRS TRUST,
Petitioner,
v.
CORNWALL MOUNTAIN INVESTMENTS, L.P., AND RANGE RESOURCES-APPALACHIA, LLC, *ET AL.*,
Respondents.

MARGARET O.F. PROCTOR TRUST,
Petitioner,
v.
CORNWALL MOUNTAIN INVESTMENTS, L.P., AND RANGE RESOURCES-APPALACHIA, LLC, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Pennsylvania Superior Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Due Process Clause of the Fourteenth Amendment requires the government to provide adequate notice before depriving a citizen of his property. U.S. Const. amend. XIV; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Jones v. Flowers*, 547 U.S. 220, 234 (2006). In this case, the Pennsylvania courts have disregarded this constitutional requirement and ignored this Court's precedent by permitting the deprivation of Petitioners' property following notice given solely through newspaper publication, a method of notice that this Court views as little more than a "feint." *Mullane*, 339 U.S. at 315.

This case presents the following question for this Court's review:

Does the Pennsylvania court's refusal to apply "preconceived notions of what is reasonable in the age of the Internet," in the context of a 1932 tax sale where the only notice given to a known owner was by publication in local newspapers, justify the categorical disregard of this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which also preceded the "age of the Internet" by decades yet held notice by publication was inadequate where the identity of the property owner was known?

PARTIES TO THE PROCEEDING

This proceeding involves a Pennsylvania Superior Court opinion which decided two separate appeals involving the same federal due process concerns.[1]

Petitioners in this Court, the defendants-appellants below, are the Thomas E. Proctor Heirs Trust and the Margaret O.F. Proctor Trust, collectively the heirs of the late Thomas E. Proctor and his wife Emma Proctor. All trustees are individuals with the exception of Bank of America, N.A., who is a trustee of the Margaret O.F. Proctor Trust. App. 82.

Plaintiffs-appellees below are Cornwall Mountain Investments, L.P. ("Cornwall") and Range Resources-Appalachia, LLC ("Range Resources").

Defendants-appellees below are International Development Corporation, Pennlyco, Ltd., Virginia Energy Consultants, LLC, Atlantic Hydrocarbon, LLC, Chief Exploration & Development LLC, Quest Eastern Resource, LLC, and Exco Holding (PA), Inc.

Southwestern Energy Production Company was an intervenor-appellee below.

[1] Because the Superior Court's decisions in the two separate appeals involve the same underlying case, and present identical factual and legal issues, Petitioners are filing a single petition for writ of certiorari.

CORPORATE DISCLOSURE STATEMENT

Bank of America, National Association ("BANA"), is one of the trustees of Petitioner Margaret O.F. Proctor Trust. Bank of America Corporation is a publicly-traded company, and no publicly traded corporation owns more than 10% of Bank of America Corporation. Bank of America Corporation owns 100% of NB Holdings Corporation, which owns 100% of BAC North America Holding Company, which owns 100% of BANA Holding Corporation, which owns 100% of Bank of America, N.A.

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INTRODUCTION

Less than twenty years after the unnoticed tax sale that deprived Petitioners of mineral rights now worth hundreds of millions of dollars, this Court observed that "[i]t is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). It recognized that such notice is rarely sufficient to satisfy due process guarantees, for "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." *Id.*

The decision below, and the prior Pennsylvania Supreme Court precedent it relied on, gave only lip service to *Mullane* and its progeny. This case arises from a 1932 tax sale of mineral rights in Pennsylvania. Even though the non-resident owners of the rights had been identified, and even though it was known they resided in Boston, they did not receive any individualized or actual notice of the tax assessments or sale prior to the deprivation of their property. Instead, the only notice provided was by general advertisement in two local Pennsylvania newspapers. There is no evidence in the record of any additional effort. The Pennsylvania Superior Court, relying on a recent Pennsylvania Supreme Court decision that in turn relied on both one of its precedents from 1865 as well as an 1815 state statute, held that there was no due process violation.

The basis for the Pennsylvania courts' adjudication of Petitioners' *federal* due process rights is thus *state* law that precedes not only *Mullane* but also the ratification of the Fourteenth Amendment. The decision below avoided this Court's precedents under the guise of a refusal to apply "preconceived notions of what is reasonable in the age of the Internet." App. 25. But both *Mullane* and the tax sale in this case are of the same pre-Internet era, as are many of this Court's decisions consistently admonishing that notice by publication is insufficient where the identity of the owner is known.

The Pennsylvania courts have thus sanctioned a complete end-run around this Court's precedents. Since *Mullane*, the Court has had to periodically reiterate that the government is under an obligation to provide reasonably individualized notice to a property owner before depriving them of their property. It appears that the time has come yet again for this Court to emphasize that it meant what it said in *Mullane* and subsequent cases: notice by generalized publication is rarely sufficient, particularly where the identity of the owner is known.

Petitioners urge this Court to review the judgment below and provide much-needed certainty to property owners, tax collectors and courts across the country, to ensure that Constitutional mandates are recognized as recurrent ownership disputes dispose of hundreds of millions of dollars of oil and gas rights.

Pennsylvania is not alone in recently divesting recorded subsurface owners of their property through tax sales that occurred in which only constructive notice by publication was given.

This case presents issues of increasingly significant importance, and it is critical that this Court prevent further disregard of its due process precedents. Tens of thousands of acres of subsurface rights in Pennsylvania alone have been subjected to similar tax sales without notice to the property owners. Moreover, with the nationwide boom in unconventional oil and gas drilling in the past decade, property owners throughout the country are facing the same issue: discovering after the fact that their property was taken without any attempt at individualized notice. Settling the question presented here is essential to clarifying property rights that are subject to a number of pending and impending disputes. Similar tax sales affecting severed oil, gas and mineral rights litter tax books across the country, and are already the subject of a number of existing disputes. Significant interests are at stake: the value of the oil and gas rights at issue in this case alone substantially exceed $100 million.

This case presents an excellent vehicle for addressing the question presented, as the courts addressed the constitutionality of the notice as a pure question of law.

For all these reasons, the Court should grant the petition for a full hearing on the merits. In the alternative, and at a minimum, the Court should summarily reverse the decision below as it is clearly in error and flouts this Court's Fourteenth Amendment precedents.

OPINIONS BELOW

The opinion of the Pennsylvania Superior Court affirming the judgment of the Court of Common Pleas of Lycoming County in the appeal of Petitioner the Margaret O.F. Proctor Trust, after panel reconsideration, is reported at 158 A.3d 148 and reproduced at App. 5-33. The judgment order of the Pennsylvania Superior Court affirming the judgment of the Court of Common Pleas of Lycoming County in the appeal of Petitioner the Thomas E. Proctor Heirs Trust, after panel reconsideration, is not reported and is reproduced at App. 36-38. The orders of the Pennsylvania Superior Court granting panel reconsideration are reproduced at App. 34-35 and 39-40. The orders of the Pennsylvania Supreme Court denying the Petitions for Allowance of Appeal are reported at 172 A.3d 593 (Table) and 172 A.3d 594 (Table) and are reproduced at App. 1-4. The opinions and orders of the Court of Common Pleas of Lycoming County are not reported and are reproduced at App. 41-79.

JURISDICTION

The Pennsylvania Superior Court entered its opinions upon panel reconsideration on March 21, 2017. App. 5-33, 36-38. The Pennsylvania Supreme Court denied the Petitioners' Petitions for Allowance of Appeal on October 10, 2017. App. 1-4. On January 3, 2018, Justice Alito granted an extension of time to file this Petition until February 7, 2018. Nos. 17A682, 17A683. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

A. Factual Background

This case involves a forced tax sale of private property without the requisite notice, in violation of the Due Process Clause of the Fourteenth Amendment. It stems from a dispute over the ownership of oil, natural gas and minerals beneath four tracts of unimproved real estate known as James Strawbridge Warrants 5666, 5668, 5751, and 5753 in Lycoming County, Pennsylvania (the "Subject Property").

On October 27, 1890, Thomas E. Proctor purchased the Subject Property. In an October 2, 1894 Deed, recorded in the public deed records of Lycoming County, Pennsylvania, Mr. Proctor along with his wife Emma Proctor conveyed the surface estate to Elk Tanning Company, but excepted and reserved unto himself, his heirs and assigns "all the natural gas, coal, coal oil, petroleum, marble and all minerals of every kind and character in, upon, or under the said land" (the "Proctor reservation"). App. 7; *see also* App. 80 at

78a. The reservation expressly stated that the Proctors were residents of Boston, Massachusetts. App. 80 at 39a, 80a. When Mr. Proctor died later that year, his heirs inherited the reserved subsurface estate. App. 7.

In 1903, Elk Tanning Company conveyed its interests in the surface estate, "subject to all . . . reservations . . . contained in the deeds," to Central Pennsylvania Lumber Company. App. 8. In 1919, Central Pennsylvania Lumber Company sold the surface estate to the trustees of the Cornwall Mountain Club. *Id.* In 1920, these trustees conveyed the surface estate to the Cornwall Mountain Club, again expressly subject to the Proctor reservation. *Id.* The portion of the Subject Property currently in dispute (the "Cornwall Surface Estate"), after a partial sale, exceeds 2,500 acres. App. 8.

Following Mr. and Mrs. Proctor's initial 1894 severance, the subsurface property rights were never assessed for taxes until 1930 and 1931. App. 9. Then, the "Mineral Rights" were assessed at $.50 per acre with the owner of the "Mineral Rights"[2] identified as "Thomas E. Proctor & Heirs." *Id.* This assessment bore troubling indicia of an arrangement predesigned to transfer the subsurface rights to the Cornwall Mountain Club, the existing surface owner. The tax was imposed for the first and only times those two

[2] Whether the term "Mineral Rights" included oil and gas was an issue in dispute below, but is not a matter at issue for the purpose of this Petition because the courts below decided that question as a matter of state law. App. 11, 20.

years, and only on those portions of the Subject Property that corresponded with the Cornwall Surface Estate.[3] App. 26, 31. Further, "the 1930 assessment was generated outside the statutorily-mandated triennial assessment cycle." App. 26. Unlike a typical annual property tax assessment on surface rights, where the owner likely anticipates that tax, here no taxes had been assessed on the subsurface rights for the prior forty years after Proctor first purchased the property. Nor would have the owners of the subsurface rights have expected taxation by virtue of them taking an act to develop their property, as "no oil and gas was produced on the property that year." App. 26.

While the Superior Court acknowledged that it "may be true" that "the manner and timing of the assessment of the mineral rights corresponding to the surface estate of the Cornwall Mountain Club, and only those mineral rights, were instigated by Cornwall in order to precipitate a tax sale, the purpose of which was to permit Cornwall to gain title to the severed subsurface rights," it held that "improper motive is not a reason to void the sale." App. 31.

After this tax was, unsurprisingly, not paid, the county treasurer set a tax sale of the "Mineral Rights" for June 13, 1932. App. 32. The only pre-sale notices were advertisements in local newspapers, the first being only eighteen days before the sale. App. 25, 32. There is no evidence in the record of any attempt to give actual notice to the identified owners, Thomas E. Proctor & Heirs. This lack of notice was purportedly

[3] The county treasurer at the time was subsequently convicted of embezzlement, forgery and falsification of records. App. 31.

justified, under then-existing Pennsylvania law, by the legal fiction that taxes assessed against unimproved ("unseated") property were assessed against the property itself *in rem,* rather than against the owners. App. 25. Cornwall Mountain Club, the surface owner, purchased the "Mineral Rights" at the tax sale. App. 9. On August 1, 1932, the Lycoming County Treasurer issued five deeds purportedly conveying the Proctor property's "mineral rights" to Cornwall Mountain Club. *Id.* The mineral rights were never again assessed.

In 2010, Cornwall Mountain Club transferred title of the subsurface estate it had purchased at the tax sale to Cornwall Mountain Investments, L.P. ("Cornwall"). App. 9. At that point, the Proctor heirs' interests had come to be held by two separate trusts, the Thomas E. Proctor Heirs Trust and the Margaret O.F. Proctor Trust. App. 7.

B. Procedural history

Respondent Cornwall commenced this action in 2011, seeking to quiet title to the oil, gas, and minerals beneath the Cornwall Surface Estate.[4] App. 10. Cornwall claimed title to subsurface materials by virtue of

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[4] Cornwall initially commenced the action against Petitioner Thomas E. Proctor Heirs Trust, but later joined Margaret O.F. Proctor Trust as a defendant. There was a single proceeding in the Court of Common Pleas, but the Superior Court docketed the appeal of each Petitioner separately. It issued its substantive opinion in the appeal of Petitioner Margaret O.F. Proctor Trust, App. 5, and stated in its judgment order issued on the same day in the appeal of Petitioner Thomas E. Proctor Trust that it affirmed for the reasons stated in that opinion. App. 37.

the 1932 tax sales. *Id.* Another Respondent, Range Resources-Appalachia, LLC ("Range"), thereafter joined the proceedings and asserted an interest in oil and gas beneath the Subject Property as Cornwall's lessee. *Id.*

In an August 4, 2014 opinion, the trial court entered judgment on the pleadings in favor of Respondents, finding that Cornwall acquired the Proctor property's reserved oil and gas estates through the 1932 tax sale. App. 69-79. Among other things, as relevant here, the trial court dismissed the Petitioners' challenge that the tax sales were void because their predecessors did not receive proper notice of the 1932 tax sale. App. 77-78. After Petitioners moved for reconsideration, on October 31, 2014 the trial court granted reconsideration, limited to whether the taxing authority's failure to provide proper notice of the tax sale rendered it void. App. 62-68.

The trial court again reversed itself in response to Respondent Range's ensuing motion for further reconsideration, finding that a six-year statute of limitations barred any challenge to the tax sales. App. 50-57. Thereafter, Respondents moved for judgment on the pleadings to dispose of the pending counterclaims and cross-claims, a motion the trial court granted on September 3, 2015, based upon its prior finding that Cornwall owned the mineral rights at issue. App. 41-43.

Petitioners timely appealed the trial court's final judgment. On December 21, 2016, after briefing and argument, the Superior Court affirmed the trial court's judgment on the pleadings. App. 35, 40. On

February 13, 2017, the Superior Court granted panel reconsideration and withdrew its earlier decision. App. 34, 39. On March 21, 2017, the Superior Court issued an Opinion and Order in which it again affirmed the trial court's decision, largely on the same grounds as the earlier decision. App. 5-33, 36-38. While it agreed with the trial court that Petitioners "are time-barred from challenging procedural irregularities," it agreed with Petitioners that the statutes of limitations "do not preclude one from defending a quiet title action on the basis that the tax sale was void," App. 29, and thus went on to decide whether the lack of constitutionally-sufficient pre-sale notice rendered the tax sale at issue void.

In the relevant portion of its opinion, the Superior Court did not deny, as a factual matter, that "since the assessments reference 'Thomas E. Proctor & Heirs' as the mineral rights owners, the officials in Lycoming County knew the heirs had an interest in the property and could have provided notice to the Proctor heirs with reasonable effort." App. 25. The Superior Court briefly cited but otherwise ignored *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Instead, it cited the Pennsylvania Supreme Court's prior decisions in *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016), and *City of Philadelphia v. Miller*, 49 Pa. 440 (1865). It relied on *Miller* even though that case pre-dated *Mullane* and the enactment of the Fourteenth Amendment, and cited an 1815 Pennsylvania statute's provisions regarding the requisite notice. And even though *Mullane* itself predated the Internet by decades, the crux of the Superior

Court's reasoning was that it should not apply "preconceived notions of what is reasonable in the age of the Internet." App. 25.

On October 10, 2017, the Pennsylvania Supreme Court denied Petitioners' Petitions for Allowance of Appeal. App. 1-4.

REASONS FOR GRANTING THE WRIT

A. The decision below flouts this Court's decisions in *Mullane* and *Mennonite*.

It is undisputed that the only notice the local government attempted to provide before divesting the Proctor heirs of their property at a mineral rights tax sale was published notice in local newspapers. This plainly fails to satisfy the due process requirements this Court set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Under those decisions, constructive notice, by itself, does not constitute "due process of law" *when the identity of the owner is known*. *See also*, *e.g., Walker v. City of Hutchinson,* 352 U.S. 112, 116 (1956) (published notice was constitutionally insufficient when landowner's name "was known to the city and was on the official records," such that "even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value").

Despite this Court's clear instruction to the contrary in those cases and others, the decision below refused to analyze whether reasonable efforts could have been made that would have actually notified the Proctor heirs of the tax sale. Instead, it looked to the standards "of the era" to determine that published notice was enough to satisfy due process. But the "era" at issue here (a 1932 tax sale) is indistinguishable in any material respect from the circumstances prevailing in *Mullane* (a 1947 trust proceeding). The Pennsylvania court's refusal to apply to consider "what is reasonable in the age of the Internet" was thus a thinly veiled means of evading this Court's precedents while purporting to apply them.

1. **This Court's Due Process Clause jurisprudence clearly requires personal notice to be provided to known individuals prior to depriving them of their property.**

The Superior Court, in rejecting Petitioners' argument that the 1932 tax sale was void because the constructive notice provided was constitutionally deficient, announced a bright-line rule that constructive notice through publication for *in rem* tax sales *always* comports with due process requirements. As a result, the Superior Court's decision violates *Mullane* and *Mennonite*, and subsequent cases applying those decisions.

Over sixty years ago in *Mullane*, this Court held that it could not regard the likelihood of the sort of notice that occurred here reaching the intended party as "more than a feint." 339 U.S. at 315. The case considered what sort of notice the Due Process Clause required be given to two class of beneficiaries of a trust. As to beneficiaries whose interests or whereabouts could not be ascertained with due diligence, the Court held that notice by newspaper publication was sufficient. *Id.* at 317. But as to those beneficiaries whose identities and place of residence were known, however, that notice by publication was unconstitutional because such notice was not "reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319. The Court found "no tenable ground for dispensing with a serious effort to inform them personally . . . , at least by ordinary mail to their record addresses." *Id.* at 318.

Mullane requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 339 U.S. at 314. As the Court explained, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315. Of import here, *Mullane* specifically rejected the notion that officials could dispense with individual notice by characterizing a proceeding as a matter *in rem,* holding that "the requirements of the Fourteenth Amendment . . . do not depend upon a classification for which the standards are so elusive and confused generally." Rather:

> Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to

> constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.

Id. at 312-13.

Unsurprisingly, given this clear holding in *Mullane*, over thirty years later in *Mennonite* this Court held that notice by publication to a known mortgagee "did not meet the requirements of the Due Process Clause of the Fourteenth Amendment." 462 U.S. at 800. Similar to the facts in this case, *Mennonite* arose from a quiet title action brought by a purchaser of property at a tax sale. Also like this case, the mortgagee received no actual notice of the sale, and none was attempted. Instead, the local government only posted notice in the local courthouse and published notice prior to the sale. *Id.* at 794.

The Court held that this lack of actual notice violated the Due Process Clause because the identity of the mortgagee was known. Specifically, it held that "[n]otice by mail or other means as certain to ensure actual notice *is a minimum constitutional precondition* to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable." *Id.* at 800 (first emphasis added). *Mennonite* emphasized that the government may not avoid "the relatively modest administrative burden of providing notice by mail." *Id.* at 799-800. In sum, the government's use of the "less reliable forms of notice" by publication "is not reasonable where, as here, 'an inexpensive and efficient mechanism such as mail service is available.'" *Id.* at 799 (citation omitted).

Though *Mullane* and *Mennonite* are clear enough, they are not the only cases where this Court, long before "the age of the Internet," App. 25, has reiterated that notice by publication is constitutionally unsound. *See Schroeder v. City of N.Y.,* 371 U.S. 208, 211, 212-13 (1962) (notice by posting and publication is insufficient where the property owner's identity was "readily ascertainable" from deed records); *Walker*, 352 U.S. at 116 (notice only by publication is insufficient where the property owners were listed in official records); *City of N.Y. v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1953) ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice.").

2. The decision below cannot be reconciled with this Court's precedent.

The decision below is impossible to square with the unbroken line of authority just discussed. The Superior Court inexplicably held that due process required no more than notice by publication in a local Pennsylvania newspaper. But it is undisputed that the taxing authorities knew both that the subsurface rights were owned by Thomas Proctor and his heirs, and that they resided in Boston. App. 9; App. 80 at 39a, 80a. Thus, under *Mullane* and its progeny, the government was required to take reasonable steps to notify the Proctor heirs. *See Mennonite*, 462 U.S. at 800 (if a party's name and address are "reasonably ascertainable," notice by mail or equally effective means is required).[5] Instead, it took no steps at all beyond the general publication that this Court has so often condemned.

None of the Superior Court's proffered reasons for rejecting Petitioners' due process arguments withstand scrutiny. Its analysis was limited to a mere two paragraphs, in which it acknowledges *Mullane* but thereafter ignores it. App. 24-25. Rather than looking to this Court's precedents to resolve Petitioners' Fourteenth Amendment claim, the decision below relied on two decisions of the Pennsylvania Supreme Court. First, it cited *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016), *cert. denied*, 137 S. Ct. 641 (2017). Similar to this case, *Herder Spring* involved a 1935 tax sale that stripped the owners of the subsurface rights of their property interest and provided only published notice of the sale.

Herder Spring held that such notice satisfied *Mullane* and its progeny. The case initially acknowledged that *Mullane* "broke with past precedent allowing notice by publication for *in rem*

[5] Since this Court's decision in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), there can be no dispute that *Mullane* applies retroactively to the tax sale at issue here. "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review *and as to all events, regardless of whether such events predate or postdate our announcement of the rule*." 509 U.S. at 97 (emphasis added). *See, e.g.*, *T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*, 388 P.3d 240, 249–50 (N.M. 2016), *cert. denied*, 137 S. Ct. 1584 (2017).

cases," 143 A.3d at 376, but it then fell back almost immediately on that very past precedent under the pretense of considering "the constraints of the era." *Id.* at 377. Vaguely alluding to "preconceived notions of what is reasonable in the age of the Internet," *id.* at 378, it held that published notice was adequate because that notice complied with an 1815 Pennsylvania statute pertaining to *in rem* cases—the very distinction that *Mullane* had rejected. *See* 339 U.S. at 312-13 (discussed *supra* at 14)).

Of course, *Mullane*, *Mennonite*, and this Court's other cases rejecting notice by publication were all decided well before "the age of the Internet," but they still rejected the sufficiency of notice by publication. For example, in 1956 this Court emphasized that "[i]t is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property." *Walker*, 352 U.S. at 116. Though *Herder Spring* purported to apply *Mullane* retroactively, in actuality it created a complete end-run around the decision under the guise of looking to "the constraints of the era." This critical error is mirrored in the Superior Court's decision below.[6] The Superior Court neglected to proffer any explanation why the published notice in a local newspaper, when the government knew both the owners' identity and

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[6] The violation of this Court's precedents is even more egregious in this case than in *Herder Spring*. In *Herder Spring*, the court emphasized that there was no evidence that the local government had been informed of the subsurface owners' reservation. 143 A.3d at 360. Here, by contrast, the lower court held that notice of the severed property interests *had* been properly given to the taxing authorities, and the identity of the subsurface owner was thus known to taxing authorities. App. 32.

that they did not live locally, were "means . . . such as one desirous of actually informing the [owner] might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

In addition to *Herder Spring*, the Superior Court relied on the pre-*Mullane* decision of *City of Philadelphia v. Miller*, 49 Pa. 440 (1865). App. 25. *Herder Spring* had also relied heavily on that decision, even though—incredibly—that decision pre-dated the enactment of the Fourteenth Amendment. Moreover, a decision of a state Supreme Court occurring prior to a decision of this Court that resolved a federal constitutional issue can have little valid impact on the requisite analysis of the federal constitutional issue. For example, while *Miller* posited that even if an owner "received no notice of the sale, it required of him no great measure of diligence to look after his interests" and redeem the property within an allotted time period, 49 Pa. at 451, *Mennonite* specifically rejected such a contention, holding that "a party's ability to take steps to safeguard its interest does not relieve the State of its constitutional obligation." 462 U.S. at 799.[7]

[7] Even if it were not irrelevant as a legal matter, *Miller*'s reliance on what might be reasonably expected of the property owner has no application as a factual matter in this case. The reserved Proctor mineral rights had never been assessed prior to 1930 and 1931. In other words, for the thirty-six consecutive years after the severance of subsurface rights in 1894, no tax was assessed on the subsurface estate. Further, under then-prevailing Pennsylvania law, no assessment of non-producing oil and gas interests could even be made unless there was a basis, through production in the vicinity, for valuing the interest. *See F.H. Rockwell & Co. v. Warren County,* 77 A. 665, 666 (Pa. 1910).

The decision below, *Herder Spring*, and *Miller* all pointed to the fact that published notice purportedly complied with an 1815 Pennsylvania statute. But this Court has clearly stated that it "require[s] the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Jones v. Flowers*, 547 U.S. 220, 230 (2006). *See also Robinson v. Hanrahan,* 409 U.S. 38, 40 (1972) (published notice of an *in rem* vehicle sale is insufficient when state knows that owner is jailed). Even if the 1815 statute were appropriate in many similar cases because the identity of landowners was not known, or because they typically resided in areas of local newspaper circulation, the facts of this case cannot render reliance on that statute compliant with the Due Process Clause.

The notice required to comply with the Due Process Clause must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite*, 462 U.S. at 795 (citation omitted). Here, there is no evidence that the government attempted to but was unable to locate the Proctor heirs. That this did not occur here, allowing the seizure of property now worth hundreds of mil-

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Here, it is undisputed that there was no prior production that could form a basis for an assessment. *See* App. 26. Thus, the Proctor Heirs had no reason to be on guard for such an assessment in 1930, or to expect that their subsurface rights would be assessed, taxed or sold for non-payment.

lions of dollars, is doubly troubling given that that underlying facts bear all indicia of an intentional attempt to illegally transfer the Petitioners' heirs' property to Cornwall's predecessors. The subsurface was assessed for two years and two years only, never before and never after. App. 9. Moreover, the subsurface assessments were conveniently subdivided to mirror Cornwall's surface estate, in violation of generally-applicable principles of Pennsylvania law. App. 31; *Reading v. Finney,* 73 Pa. 467, 472 (Pa. 1873) ("'The acts relating to the assessment of lands . . . are plain, and require the assessor to assess and return the lands in his township in single tracts, according to their ownership.'").

The Pennsylvania courts' entrenched approach cannot be squared with this Court's due process precedents. The Commonwealth's courts have repeatedly declared that the adequacy of pre-deprivation notice must be viewed through the lens of the times—but defined "the times" with recourse to an 1865 decision that predates the Fourteenth Amendment, and ignores the information available to the taxing authorities in 1932, who could have obtained relevant information by reviewing records kept in another room in the very same county courthouse. Such an approach offends the Due Process Clause and this Court's clear precedents interpreting the constitutional protection of property rights. Allowing the decision below to stand would open the door for other courts to pursue a similarly blatant path of disregarding this Court's clear constitutional precedents, simply in the interest of expediency, or to favor the interests of local voters over non-resident landowners. This Court should grant review to foreclose that destabilizing path.

In short, because the decision below disregards binding United States Supreme Court precedent and the underlying constitutional norms that this Court has consistently upheld, this Court should grant review. Sup. Ct. R. 10(c) (certiorari warranted where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

B. This issue is important, and this case is a good vehicle for addressing it.

The Pennsylvania courts' repeated refusal to apply *Mullane* and its progeny is of enormous significance. Title to subsurface oil and gas rights has increasingly come into dispute in recent years, as the value of those rights has risen dramatically. *See, e.g.*, *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 914-15 (Pa. 2013) (describing the development of natural gas extraction in Pennsylvania). In this case alone, the oil and gas rights at issue are worth hundreds of millions of dollars. And this case implicates but a small portion of the valuable subsurface rights in Pennsylvania. Pennsylvania covers a large portion of the Marcellus Shale, an underground rock formation whose embedded natural gas is valued conservatively in the hundreds of billions of dollars. Nicole R. Snyder Bagnell & Stephanie L. Hadgkiss, *Eastern Shale Plays—A Game Plan for Success*, 55 Rocky Mtn. Min. L. Inst. 32-1, § 32.03 (2009).

The troubling fact pattern underlying this case is unfortunately not uncommon in Pennsylvania, as exhibited by *Herder Spring* and others grappling with that state's prior "title wash." *See, e.g.*, *Leonard v. Newman*, No. 1291 MDA 2016, 2017 WL 3017066, at *1 n.1 (Pa. Super. Ct. July 17, 2017) ("A 'tax wash sale' or 'title wash' describes the effect of early tax sales of unseated land on a prior severance of a subsurface estate." (citation omitted)); *Spigelmyer v. Colony*, No. 1602 MDA 2015, 2016 WL 4876216 (Pa. Super. Ct. July 26, 2016); *Bailey v. Elder*, No. 08-02327, 2014 WL 11045888 (Pa. Ct. C. P. Dec. 10, 2014). *See also* Mark Prokopchak, *Renewing Respect For Record Notice: Cleaning Up The Pennsylvania Title Wash*, 2 Tex. A&M J. Prop. L. 533, 560 (2015) ("Punishing record mineral estate owners by divestment of their property interest for allegedly not . . . paying taxes on minerals that are nearly impossible to value or assess until extracted is anathema to both current law and common sense."). Even if the type of scenario here, and the state courts' failure to apply *Mullane*, were limited to Pennsylvania, certiorari would be warranted in light of the "gold rush mentality" bringing these issues to the forefront in the state. George A. Bibikos & Jeffrey C. King, *A Primer on Oil and Gas Law in the Marcellus Shale States*, 4 Tex. J. Oil Gas & Energy L. 155, 156 (2008-2009) ("a gold rush mentality has been developing in the Marcellus Shale states").

Tens of thousands of acres of land in Pennsylvania are likely implicated by *Herder Spring* alone. *See, e.g.,* Joel R. Burcat & Megan E. Albright, *'Title Washing' in Pennsylvania Is Alive and Well*, The Legal Intelligencer, Aug. 25, 2016 (reprinted ALM Props.

Inc. 2016), https://www.saul.com/sites/default/files/sites/default/files/documents/Legal%20Intel%20article%20BurcatAlbright_082516.pdf. But with the boom in subsurface resource extraction in recent years, the issue is not limited to Pennsylvania. Instead, it is coming to the forefront in courts throughout the country. A number of state courts have recently considered the application of *Mullane* and *Mennonite* to tax sales or default judgments that predate those decisions and involve severed subsurface property rights. *See, e.g., T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*, 388 P.3d 240, 249–50 (N.M. 2016) (applying *Mullane* to a 1948 quiet title judgment of a reserved subsurface right where the only notice was by publication), *cert. denied*, 137 S. Ct. 1584 (2017); *Quantum Res. Mgmt., L.L.C. v. Pirate Lake Oil Corp.*, 112 So. 3d 209 (La. 2013) (refusing to apply *Mullane* and *Mennonite* to a 1925 tax sale of severed mineral rights), *cert. denied*, 134 S. Ct. 197 (2013); *Aarco Oil & Gas Co. v. EOG Resources, Inc.*, 20 So. 3d 662, 668-69 (Miss. 2009) (applying *Mullane* and *Mennonite* to a 1942 tax sale where only the surface owners received record notice);. *See also Jordan v. Jensen*, 391 P.3d 183 (Utah 2017) (unnoticed 2000 tax sale of mineral rights); *Owens v. Tergeson*, 363 P.3d 826 (Colo. App. 2015) (1973 quiet title action).

As the facts underlying these cases indicate, localities across the nation have disposed of severed subsurface rights in ways that pose significant concerns under *Mullane* and its progeny. Now that those long-undeveloped rights are of sudden value, courts are forced to confront the due process issues that have arisen. Although the economic magnitude of this issue nationwide is difficult to calculate, the value in Pennsylvania and this case alone demonstrates the significant interests at stake. More critically, the Constitutional protection of a person's property has an intrinsic value that cannot be measured in dollars. The cavalier approach taken by the court below in permitting this deprivation of property cannot be countenanced.

The decision below in effect upholds a government-sanctioned expropriation of valuable real property rights that did not even comply with the minimal procedural safeguards in place at the time, and that offends this Court's ensuing articulations of what "due process of law" requires. The Pennsylvania courts' decisions communicate clearly that due process is nothing more than an empty promise whenever it might be inconvenient to recognize. This is plainly a matter of substantial public importance justifying this Court's attention. Deferring review will only lead to further chaos and uncertainty and unfair outcomes to *bona fide* purchasers of property.

This case is also a good vehicle for emphasizing the state courts must faithfully apply *Mullane* and its guarantees of minimal due process. The due process issue was briefed by the parties and decided by the courts below. Further, the decision below was decided on the pleadings—meaning that there is no set of facts or evidence that would have altered the state court's ruling that notice by publication in a local newspaper alone satisfies the process due to non-residents whose names and addresses were known. App. 13-14 ("Judgment on the pleadings should only be granted where there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law."). The Pennsylvania court's reasoning rested on its conclusion that *Mullane* did not alter its prior 1865 decision that notice by publication is constitutionally adequate. This case therefore presents the Court with the opportunity to declare the applicability of *Mullane* and *Mennonite* to pre-decision conduct without confronting any factbound issues or state-law defenses.

C. Summary reversal is warranted.

Though the question presented warrants full consideration on the merits, at a minimum this Court should grant certiorari and summarily reverse the decision below as it is directly contrary to this Court's Fourteenth Amendment precedents. Summary reversal is appropriate in situations in which "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Pavan v. Smith*, 582 U.S. ___, ___, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)). *See, e.g., Pavan v. Smith*, 582 U.S. ___, ___, 137 S. Ct. 2075, 2076–77 (2017) (per curiam) (summarily reversing state supreme court's failure to follow this Court's precedent); *Wearry v. Cain*, 577 U.S. ___, ___, 136 S. Ct. 1002, 1007 (2016) (per curiam) (summarily reversing decision where the "lower courts have egregiously misapplied settled law."); *Maryland v. Kulbicki,* 577 U.S. ___, ___, 136 S. Ct. 2, 3 (2015) (*per curiam*) (summarily reversing because the court below applied *Strickland v. Washington,* 466 U.S. 668 (1984), "in name only"); *Grady v. North Carolina,* 575 U.S. ___, ___, 135 S. Ct. 1368 (2015) (*per curiam*) (summarily reversing a judgment inconsistent with this Court's recent Fourth Amendment precedents); *Martinez v. Illinois,* 572 U.S. ___, ___, 134 S. Ct. 2070, 2077 (2014) (*per curiam*) (summarily reversing state court decision that "r[an] directly counter to our precedents").

As described in the preceding sections, all three of these criteria are easily satisfied here, and the fact pattern underlying this case has arisen with frequency in recent years as subsurface rights have become increasingly valuable. Summary reversal is appropriate not only to rectify the unlawful seizure of property worth millions of dollars that occurred here, but to reiterate that courts nationwide must actually apply, rather than avoid, the mandates of *Mullane* and its progeny.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted,

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