No. 17-1127

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Although Respondent International Development Corporation ("IDC") urges the Court to deny Petitioners' petition for a writ of certiorari, IDC's arguments rest either upon speculation contradicted by the record or upon fundamental misapprehensions of this Court's jurisprudence. As a result, IDC's contentions do nothing to undercut the arguments Petitioners have previously made. Nonetheless, Petitioners write briefly to highlight the infirmity of IDC's positions, and thus to reiterate why the Court should grant the writ and review this matter on its merits (or summarily reverse the decision below). As Petitioners have already shown, it is factually undisputed that the government sold Petitioners' property at a tax sale without any attempt at individualized notice, despite having knowledge that Petitioners' predecessors had an interest in the property. Under this Court's precedents, the due process violation is clear, and IDC fails to show otherwise.

ARGUMENT

A. IDC's Opposition Rests Upon Speculation About What "Reasonable Efforts" at Personal Notice *Might* Have Revealed, When the Record Is Clear That There Were *No* Efforts at Personal Service.

The bulk of IDC's argument is devoted to an exercise in counter-factual speculation that does nothing to undermine the clear constitutional violation presented here. The record is clear that the *only* attempt that taxing authorities made to provide notice of the tax sales at issue was published notice in local newspapers. It is also undisputed, based upon notations in the assessment record, that taxing authorities knew that the owners of the subsurface rights at issue were "Thomas E. Proctor & Heirs," App. 9, and that a recorded deed for the property identified Mr. Proctor as a resident of Boston, Massachusetts, App. 80.

IDC acknowledges these undisputed facts on the first page of their Opposition. Nonetheless, IDC asks the Court to speculate about what Lycoming County officials *might* have encountered if they *had* tried to provide personal notice, surmising that it might have been difficult or impracticable to locate each of Thomas E. Proctor's individual heirs based upon information that was or was not available in the public record. *See* Brief in Opposition to Petition for Writ of Certiorari ("IDC Brief"), at 1, 2, 3, 6.

This abstract exercise in "alternative history" does not counsel against this Court's review. If Lycoming County officials had tried, but failed, to provide personal notice of the 1932 tax sales at issue, this would be a much different matter. But that is concededly not the case: as Petitioners have emphasized, the record is clear that County officials made no such effort, and accordingly it is irrelevant, for constitutional purposes, whether or to what extent hypothetical notice that was never attempted would or would not have succeeded.

More importantly, the decision below *assumed* 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. Nonetheless, the decision below found that to be irrelevant, based upon its own speculation about the standards of the era and its stated refusal to apply "preconceived notions of what is reasonable in the age of the Internet." *Id.*

By contrast, this Court's precedents make it clear that there is a plain violation of constitutional due process standards when, as here, there is no effort to provide individual notice by mail or otherwise to owners identified in public records. This Court has repeatedly disapproved of notice purely by publication – the only "notice" provided here – because it is "not reasonably calculated to provide actual notice of the pending proceeding," and is therefore constitutionally "inadequate to inform those who could be notified by more effective means such as personal service or mailed notice." *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 795-96 (1983).[1]

[1] *See, e.g., id.* at 798 ("When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service."); *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 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"). *See also* Frank S. Alexander, *Tax Liens, Tax Sales and Due Process,* 75 IND. L.J. 747,

As Justice Jackson explained in greater length in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950):

> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. . . . Chance 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. . . . In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

Id. at 315. *Accord Walker,* 352 U.S. at 117 ("In too many instances notice by publication is no notice at all."); *City of N.Y. v. N.Y., N.H. & H.R. Co.,* 344 U.S. 293, 296 (1953) ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice.").

(cont'd from previous page)

768 (2000) (reading *Mennonite* as having "resolved any lingering doubts" that "names and addresses available from the deed records must be used to provide notice to interested parties").

Accordingly, under the circumstances, it is inappropriate for IDC to speculate about what Lycoming County officials' "reasonable efforts" in 1932 might have revealed, and the lack of any evidence in that regard does not support IDC's effort to forestall this Court's review of the Pennsylvania courts' disregard of clear constitutional commands.

B. IDC's Opposition Misreads *Mullane* and *Mennonite* in Mistakenly Suggesting That They Do Not Apply Here.

IDC's analysis of controlling legal authorities is no more persuasive, and rests, at bottom, on fundamental misapprehensions about *Mullane, Mennonite* and this Court's other decisions on procedural due process.

First, IDC suggests that the rule announced in *Mullane* and *Mennonite* is limited to the holders of "active" mortgages. *See* IDC Brief at 2-3. That is not the case. The requirement of personal notice first announced in the context of trust beneficiaries, *see Mullane,* and expanded in the context of mortgagees, *see Mennonite,* has been explicitly applied to property owners and tax sales. In particular, *Jones v. Flowers,* 547 U.S. 220 (2006), involved a property owner's claim that the notice given him in advance of a tax sale was constitutionally insufficient, because there were indicia that the notice had failed to reach him. In agreeing, the Court expressly held that, "before forcing a citizen to satisfy his [tax] debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking." *Id.* at 234.

Second, IDC suggests that individual notice is not constitutionally required for tax sales of "unseated" land because Pennsylvania law "treat[ed] unseated land as the taxpayer." IDC Brief at 3-4. But *Mullane* explicitly disregarded, for constitutional purposes, the "fiction"[2] that an action against a property *in rem* requires any less notice than an action *in personam*. 339 U.S. at 312-13. And this Court's precedents in the ensuing decades have reiterated this point. For example, in *Greene v. Lindsey,* 456 U.S. 444 (1982), the Court stated:

> As in *Mullane,* we decline to resolve the constitutional question based upon the determination whether the action is more properly characterized as *in rem* or *in personam*. . . . [A]ll proceedings, like all rights, are really against persons. In this case, appellees have been deprived of a significant interest in property . . . . In light of this deprivation, it will not suffice to recite that because the action is *in rem,* it is only necessary to serve notice "upon the thing itself."

Id. at 450-51 (citations, internal quotations and footnotes omitted). In sum, as the Court wrote in *Burnham v. Superior Court,* 495 U.S. 604, 621 (1990), "all suits against absent nonresidents" such as Petitioners are "on the same constitutional footing,

[2] *See Shaffer v. Heitner,* 433 U.S. 183, 212 (1977) (expressly recognizing that it is a "fiction" that "an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property").

regardless of whether a separate Latin label is attached to one particular basis of contact."

C. Nothing About the *Herder Spring* Decision, or Other Denials of Certiorari, Justifies the Court's Inaction Here.

Finally, IDC suggests in error that this Court's prior denial of petitions for writs of certiorari in the *Herder Spring* case and other cases compels the same outcome here. *See* IDC Brief at 4-5 (citing, *inter alia, Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016), *cert. denied,* 137 S. Ct. 641 (2017)).

This case is distinguishable from *Herder Spring* on a basis that is critical for the relevant constitutional analysis: here, the lower court held that notice of the severed property interests had been properly given to the taxing authorities, and the identities of the subsurface owners — "Thomas E. Proctor & Heirs" — were known to taxing authorities. *See* App. 9, 32. By contrast, in *Herder Spring* the owner of the property interest was not readily identfiable.[3]

As Petitioners have already shown, *Herder Spring,* rather than justifying the result here, demonstrates Pennsylvania courts' entrenched refusal to credit this Court's teachings, under the

[3] Further, there was a substantial question in *Herder Spring* as to whether the constitutional question, an issue not pled in the trial court or discussed on direct appeal, had even been preserved. *See* 143 A.3d at 379-82 (Todd, J., concurring on the ground that the due process challenge had been waived).

guise of a refusal to apply "preconceived notions of what is reasonable in the age of the Internet." 143 A.3d at 378. Although the court in *Herder Spring* cited *Mullane,* the court disregarded it in favor of pre-*Mullane* authority (an 1815 statute and a court decision that predated the adoption of the Fourteenth Amendment), making the unsupported conclusion that these decisions illustrated "the constraints of the era." 143 A.3d at 377 (citing *City of Philadelphia v. Miller*, 49 Pa. 440 (1865), and Act of March 13, 1815, P.L. 177, § I, 72 P.S. § 6001).

Further, IDC's attempt to inject meaning into this Court's denial of certiorari in *Herder Spring* and other cases ignores nearly 100 years of this Court's jurisprudence, decisions emphasizing that the denial of a petition for writ of certiorari carries no implication or inference regarding the Court's views of the merits of the dispute. *See, e.g., Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 365 n.1 (1973); *Atlantic Coast Line R. Co. v. Powe,* 283 U.S. 401, 403-04 (1931) (Holmes, J.); *United States v. Carver,* 260 U.S. 482, 490 (1923) (Holmes, J.). If anything, as Petitioners have already shown, the fact that this issue has recurred often in recent years, but has not yet been resolved by the Court, shows that it merits the Court's full consideration on the merits.

In sum, this is an especially compelling case for this Court's review (or summary reversal), so that this Court can once again reiterate that *Mullane* and subsequent cases mean what they say.

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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