

No. _____

In the
Supreme Court of the United States

GPI DISTRIBUTORS, INC.,
Petitioner,

v.

NORTHEAST OHIO REGIONAL SEWER DISTRICT,
Respondent.

**On Petition for Writ of Certiorari to the
Ohio Eighth District Court of Appeals**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Due Process and Equal Protection Clauses prohibit states from imposing substantial financial burdens on indigent parties seeking judicial review (as at least six states have held), or may states effectively deprive low-income litigants of access to the judicial system (as at least five states have held)—even when the court access in question represents the party’s first opportunity to obtain meaningful judicial review of an involuntary property taking?

PARTIES TO THE PROCEEDING

Petitioner is GPI Distributors, Inc., a party that sought an administrative appeal in Ohio state court from an adverse agency decision.

Respondent, and defendant-appellee in the state-court proceedings, is Northeast Ohio Regional Sewer District, a public-utility district and quasi-governmental agency.

Because this petition draws into question the constitutionality of an Ohio statute, the Ohio Attorney General has been served concomitant with the filing of this petition in accordance with 28 U.S.C. § 2403(b) and Sup. Ct. R. 29.4(c).

**CORPORATE DISCLOSURE STATEMENT
UNDER SUP. CT. R. 29.6**

Petitioner GPI Distributors, Inc. states that it has no parent company, and no public company owns 10% or more of its stock.

DIRECTLY RELATED PROCEEDINGS

There remains in the Court of Common Pleas of Cuyahoga County, Ohio, a related proceeding: *GPI Distributors, Inc. v. City of Cleveland, et al.*, No. CV-17-883825. The court in that case has not yet issued a judgment.

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PETITION FOR WRIT OF CERTIORARI

GPI Distributors, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Ohio Eighth District Court of Appeals.

OPINIONS BELOW

The Ohio Supreme Court's decision, declining jurisdiction, is reported at 2019-Ohio-3148, 122 N.E.3d 1291, *recons. denied*, 2019-Ohio-3148, 128 N.E.3d 243. App. 1, 34. The Ohio Eighth District Court of Appeals' decision is reported at 2018-Ohio-4871, 2018 Ohio App. LEXIS 5205. App. 2. The decisions of the Court of Common Pleas of Cuyahoga County, Ohio, are unpublished. App. 23, 26.

JURISDICTION

The Ohio Eighth District Court of Appeals issued its decision and final judgment on December 6, 2018, and denied a timely motion for reconsideration on January 24, 2019. App. 2, 35. The Ohio Supreme Court issued its decision and final judgment, declining jurisdiction, on May 29, 2019, and denied a timely motion for reconsideration on August 6, 2019. App. 1, 34. On October 28, 2019, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to January 3, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Ohio Rev. Code Ann. § 2505.06 (Lexis 2019) provides:

Except as provided in section 2505.12 of the Revised Code, no administrative-related appeal shall be effective as an appeal upon questions of law and fact until the final order appealed is superseded by a bond in the amount and with the conditions provided in sections 2505.09 and 2505.14 of the Revised Code, and unless such bond is filed at the time the notice of appeal is required to be filed.

Ohio Rev. Code Ann. § 6119.06 (Lexis 2019) provides, in pertinent part:

Upon the declaration of the court of common pleas organizing the regional water and sewer

district pursuant to section 6119.04 of the Revised Code and upon the qualifying of its board of trustees and the election of a president and a secretary, said district shall exercise in its own name all the rights, powers, and duties vested in it by Chapter 6119. of the Revised Code, and, subject to such reservations, limitations and qualifications as are set forth in this chapter, such district may:

...

(W)(1) Charge, alter, and collect rentals and other charges for the use of services of any water resource project as provided in section 6119.09 of the Revised Code. Such district may refuse the services of any of its projects if any of such rentals or other charges, including penalties for late payment, are not paid by the user thereof, and, if such rentals or other charges are not paid when due and upon certification of nonpayment to the county auditor, such rentals or other charges constitute a lien upon the property so served, shall be placed by the auditor upon the real property tax list and duplicate, and shall be collected in the same manner as other taxes.

...

STATEMENT OF THE CASE

1. Petitioner, GPI Distributors, Inc. (“GPI”) is an Ohio corporation owned by a single, low-income individual, Gloria Strong. Its assets are three adjoining properties in an economically depressed area of Cleveland, Ohio, including a single-family house.

2. Respondent, Northeast Ohio Regional Sewer District (the “Sewer District”), billed GPI \$12,047.76 for sewer services to GPI’s single-family house, based on the supposed consumption of 1.3 million gallons of water during a six-month period when the property was vacant and secured. App. 48, 70, 85. GPI could not afford to pay the exorbitant and unexplained bill and did not do so. The Sewer District, exercising its authority under Ohio Rev. Code Ann. § 6119.06(W)(1) (Lexis 2019), then caused the Cuyahoga County Fiscal Officer to place a nonconsensual tax lien on GPI’s property for the full amount of the suspicious bill. App. 85.

GPI requested from the Sewer District an administrative hearing to challenge the bill. App. 48, 86. The hearing examiner—a Sewer District employee with no legal training—denied GPI’s requests for pre-hearing discovery and for subpoenas that would have permitted GPI to produce important evidence about the billing inaccuracy; that evidence resided with a third party, the City of Cleveland Water Department.¹ App.

¹ The Sewer District accepted without scrutiny the City of Cleveland Water Department’s report that GPI’s empty house consumed 1.3 million gallons of water in the first six months of 2015—almost 18 times higher than the average consumption for

48–50, 86. Without these litigation tools, GPI had no way to demonstrate that the underlying water-meter reading (on which sewer charges were calculated) was erroneous. After denying GPI the requested discovery and subpoena power, the Sewer District examiner upheld the bill and the corresponding tax lien. App. 49–50.

3. GPI, following Ohio procedure, filed a timely administrative appeal in the Court of Common Pleas of Cuyahoga County, Ohio. The Sewer District moved to dismiss GPI’s appeal under Ohio Rev. Code Ann. § 2505.06 (Lexis 2019). That statute ostensibly required GPI—*as a condition of its right to judicial review*—to post a supersedeas bond in the full amount of the disputed bill, \$12,047.74. The bond was required despite the tax lien in the same amount already encumbering GPI’s real property.

a family of four for that period. Unfortunately, GPI’s situation is not unique. See, e.g., Regan, Cleveland Water Department Cover-Up Fails to Disclose Serious Billing Errors (Feb. 22, 2017), <https://www.news5cleveland.com/news/local-news/investigations/cle-water-dept-cover-up-fails-to-disclose-serious-billing-errors>. Shortly before GPI filed this petition, a lawsuit brought by Cleveland residents accused the City of Cleveland of covering up erroneous billing charges and using the resulting tax liens to discriminate against African-American customers. *Pickett v. City of Cleveland*, No. 1:19-cv-02911-SO (N.D. Ohio Dec. 18, 2019); see also Ackerman et al., NAACP Legal Defense Fund Sues Cleveland Water for Discrimination (Dec. 19, 2019), <https://www.news5cleveland.com/news/local-news/investigations/cleveland-water/naacp-legal-defense-fund-sues-cleveland-water-for-discrimination>.

GPI could not afford to post the statutory bond and did not do so. The Sewer District then moved to dismiss the administrative appeal. App. 86–87. In response, GPI challenged the bond requirement on due-process and equal-protection grounds.² App. 50–58, 87. It argued, among other things, that: (1) the bond requirement denied GPI due process by forcing it to pay an exorbitant amount simply to access the court; and (2) the bond requirement discriminates against low-income parties, depriving them of the right to access the judicial system. App. 52–53, 57–58, 87. The trial court granted the Sewer District’s motion to dismiss without addressing the substance of these constitutional challenges. App. 23–24.

4. GPI appealed to Ohio’s Eighth District Court of Appeals and again argued that the bond requirement of Ohio Rev. Code Ann. § 2505.06 violated GPI’s constitutional guarantees of due process and equal protection. See App. 83–84. To support its equal-protection claim, GPI pointed to *Lindsey v. Normet*, 405 U.S. 56 (1972), which held that bond requirements violate equal protection when they capriciously or arbitrarily deny appeal rights to those who cannot afford them. App. 87. GPI emphasized that in *Lindsey*, the Court invalidated an Oregon statute that required tenants who wished to appeal from final judgment of

² The Eighth District Court of Appeals held that GPI did not properly raise its constitutional arguments before the Court of Common Pleas. App. 17–18. But GPI raised both its due-process and equal-protection arguments in opposing the Sewer District’s motion to dismiss the administrative appeal. App. 50–58.

eviction to post a bond that the tenant in that case could not afford. App. 87.

GPI also relied on *Lecates v. Justice of Peace Court No. 4 of State of Del.*, 637 F.2d 898 (CA3 1980), to argue that an appellant's due-process rights cannot be conditioned on its financial means. App. 87. GPI explained that under *Lecates*, an unaffordable bond cannot function as a jurisdictional prerequisite to appeal—in effect, a filing fee—without violating equal-protection principles, particularly when the appeal serves as the first opportunity for judicial review. App. 87. GPI distinguished such right-to-appeal bonds from ordinary supersedeas bonds, explaining that the latter serve only to stay execution of a judgment pending appeal, not to gain access to appellate review in the first place.

GPI also pointed to *Lindsey* in support of its due-process argument. It explained that under *Lindsey*, courts must afford litigants access to the courthouse for a full and fair opportunity to be heard on the merits. App. 59–60. GPI raised two points of moment here: (1) that the administrative hearing failed to satisfy due-process requirements because it denied GPI the opportunity to present a full challenge to the sewer bill to a neutral adjudicator; and (2) that the bond requirement prevented GPI from accessing the judicial system where it would have had its first opportunity for the full measure of due process that the Constitution demands. App. 53–58.

4. The Ohio Court of Appeals rejected GPI's constitutional arguments. The appellate court took the baffling position that GPI could not challenge the bond

statute's constitutionality unless GPI first complied with the statute by posting the very bond that it could not afford. App. 20–21. The appellate court seems to have concluded that GPI's failure to post the statutory bond justified the application of the constitutional-avoidance canon. App. 18–20. GPI moved for reconsideration, and the appellate court denied that motion. App. 35.

GPI then filed a petition to the Ohio Supreme Court, seeking that court's discretionary review. App. 79. The Ohio Supreme Court declined to hear the case and denied GPI's subsequent motion for reconsideration. App. 1, 34.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE A SPLIT AMONG STATE COURTS: WHETHER THE CONSTITUTION PERMITS STATE REQUIREMENTS THAT EFFECTIVELY DEPRIVE LOW-INCOME PARTIES OF MEANINGFUL JUDICIAL REVIEW.

The Court should grant this writ to resolve a dispute among state courts about the constitutionality of bonds (or bond-like equivalents) that function as filing fees and prohibit low-income litigants from accessing established procedures to appeal. That dispute has its roots in a line of cases that includes the Court's decisions in *Boddie v. Connecticut*, 401 U.S. 371 (1971), and *Lindsey v. Normet*, 405 U.S. 56 (1972).

A. The Court Has Provided Guidance on the Constitutional Principles Prohibiting Certain Court Filing Fees.

In *Boddie*, the Court held that state judicial systems could not require indigent parties to pay unaffordable filing fees to pursue divorce proceedings. The Court explained that “persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.” *Boddie, supra*, at 377. The Court further noted that “a statute or a rule may be held constitutionally invalid as applied” when it “operate[s] to jeopardize” a meaningful opportunity to be heard “for particular individuals.” *Id.*, at 379–380. In that context, the Court held that “a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party’s opportunity to be heard.” *Id.*, at 380.

The following year, the Court extended the *Boddie* holding in *Lindsey, supra*. There, the Court struck down on equal-protection grounds an Oregon statute requiring appellants in eviction actions to post a double bond as a prerequisite to appeal. See *Lindsey*, 405 U.S., at 74–75. The Court held that “a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession,” *id.*, at 77–78, and that Oregon could “validly make special provision for the peaceful and expeditious settlement of disputes over possession between landlord and tenant,” *id.*, at 76. But the Court concluded that “the double-bond requirement . . . does

not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord.” *Id.*, at 77. Thus, “[w]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.” *Ibid.*

Together, *Boddie* and *Lindsey* recognize that low-income litigants are entitled to access the justice system despite their limited financial resources and that states may not impose unreasonable barriers without encroaching on principles of due process and equal protection. *Boddie* teaches that a fundamental right, such as the right to terminate a marriage, is likely to present due-process concerns. See *Boddie, supra*, at 376–377 (noting that the issue presented was one of “access to the judicial system in the first instance”). *Lindsey* teaches that equal-protection principles provide a further layer of relevant analysis when a filing fee burdens some classes of litigants disproportionately. *Lindsey, supra*, at 74–79.

B. State Courts Are Split on the Constitutionality of Financial Barriers to the Right of Appeal.

At the state-court level, these federal constitutional principles have led to disparate results. At least six states—Delaware, Florida, Idaho, Maryland, Montana, and Nebraska—recognize that the Constitution precludes financial barriers that stand in the way of judicial review, including appellate review. See *State ex rel. Caulk v. Nichols*, 281 A.2d 24, 26–27 (Del. 1971) (“[A] person cannot be barred from filing an appeal simply because of his inability to pay or provide bond

for those expenses.”); *Sittig v. Tallahassee Memorial Regional Medical Ctr., Inc.*, 567 So. 2d 486, 487 (Fla. App. 1990) (“The bond requirement clearly cannot withstand constitutional scrutiny where it effectively operates to preclude the appellant from exercising her constitutional right of access solely because of her financial inability to post the requisite bond.”), *aff’d sub nom Psychiatric Associates v. Siegel*, 610 So. 2d 419 (Fla. 1992); *Frizzell v. Swafford*, 104 Idaho 823, 827–828, 663 P.2d 1125, 1129–1130 (1983) (“Because they require that a person be deprived of his property before he has had a full due process hearing, the bond requirements . . . are unconstitutional.”); *Coroneos v. Montgomery County*, 161 Md. App. 411, 427, 869 A.2d 410, 419 (2005) (“posting a bond . . . [as] a prerequisite to an appeal” would render appeal “meaningless, because the owner would have to make the very payment he is attempting to challenge as a prerequisite to the appeal”); *Ball v. Gee*, 243 Mont. 406, 410, 795 P.2d 82, 84–85 (1990) (“appeal bonds violate indigents’ rights to due process if they are not afforded a full and fair opportunity to litigate the issues before a competent court prior to appeal”); *Jones v. State, Department of Revenue*, 248 Neb. 158, 167, 532 N.W.2d 636, 643 (1995) (“A taxpayer who is financially unable to pay the tax should be given an opportunity for judicial review of the assessment prior to payment of the tax.”).

By contrast, at least five states—Connecticut, Illinois, Indiana, Rhode Island, and West Virginia—have generally upheld the constitutionality of right-of-access appeal bonds, even when the appellant cannot afford to post them. See *Browne v.*

Peters, 33 Conn. Supp. 531, 536, 360 A.2d 131, 134 (1976) (“It is only where indigency results in deprivation of a fundamental right that the equal protection clause may be violated.”); *McLean v. Department of Revenue*, 184 Ill. 2d 341, 356, 704 N.E.2d 352, 360 (1998) (“We are not convinced that the ‘bond or lien’ requirement . . . is unreasonable in the context of constitutional analysis”); *Strube v. Sumner*, 385 N.E.2d 948, 949 (Ind. App. 1978) (upholding local rule requiring the “posting of an appeal bond before an appeal can be perfected”); *Jones v. Aciz*, 109 R.I. 612, 632, 289 A.2d 44, 55 (1972) (“We cannot say that in these circumstances the legislative requirement of a . . . bond in exchange for its grant to the tenant of a right to appeal from an adverse judgment constitutes invidious discrimination even in the case of an indigent defendant.”); *Frantz v. Palmer*, 211 W. Va. 188, 194, 564 S.E.2d 398, 404 (2001) (“[T]his Court has generally viewed compliance with statutorily-imposed deadlines for the posting of bonds to prosecute an action or perfect an appeal as jurisdictional in nature.”).

With the decision below, Ohio deepens the state-court split by adding itself to this list of states that deprive appellate review to litigants who cannot afford to post a bond that serves not merely to stay an underlying judgment, but to permit entry through the courthouse doors.

II. THE COURT SHOULD CLARIFY THAT STATES MAY NOT DEPRIVE COURT ACCESS TO LOW-INCOME LITIGANTS WHOSE PROPERTY HAS BEEN TAKEN WITHOUT DUE PROCESS.

The Court should grant the writ of certiorari to confirm that when a state places an involuntary lien on a low-income citizen's real property, it must provide that citizen access to judicial review without imposing insurmountable financial barriers.

A. The Ohio Courts Have Deprived GPI of a Meaningful Opportunity to Challenge the Sewer District's Exorbitant Lien on GPI's Real Property.

The Ohio courts denied GPI an opportunity to be heard in a neutral forum to challenge the \$12,047.47 lien the Sewer District placed on its real property under Ohio Rev. Code Ann. § 6119.06(W)(1) (Lexis 2019). The trial court dismissed GPI's administrative appeal because GPI did not post a bond in the full amount of the disputed bill, as is ostensibly required under Ohio Rev. Code Ann. § 2505.06 (Lexis 2019), and the appellate court affirmed. App. 4. The Ohio courts insisted on a right-of-access bond despite the existing lien in the same amount—reminiscent of the double-bond requirement this Court rejected in *Lindsey*.

Together, the lien and the bond requirement ensure inadequate process to an Ohio homeowner who is struggling financially. The problem is particularly egregious given the infirmities that plagued the Sewer District's hearing process—including the absence of pretrial discovery, the inability to subpoena third-party

witnesses, and the absence of a legally trained neutral adjudicator. The Third Circuit has addressed a strikingly similar circumstance and invalidated a Delaware statute that conditioned a low-income defendant's right to appeal from a justice of the peace to a superior court on the posting of a surety bond. See *Lecates*, 637 F.2d 898, at 911 (“meaningful opportunity to be heard” requires access to “a legally-trained judge at some point during the process of adjudication”).

B. The Ohio Administrative-Appeal Bond Requirement Offends Due Process.

The Due Process Clause of the Fourteenth Amendment unequivocally requires “due process of law” before a state deprives an individual of “life, liberty, or property.” Although the Constitution does not *ipso jure* preclude individual states from establishing their own procedures, this Court has determined that the three-part inquiry outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), is the appropriate standard by which to judge what process is constitutionally due. See, e.g., *Turner v. Rogers*, 564 U.S. 431, 444–445 (2011). Thus, the factors relevant in determining whether the aberrational bond requirement violated due process are:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative

burdens that the additional or substitute procedural requirement would entail.

Mathews, supra, at 335. The Sewer District’s unilateral control over the amount of the disputed bill—and therefore the amount of the required supersedeas bond—practically ensures that a person disputing a bill will be erroneously deprived of property. Thus, the judgment below directly conflicts with this Court’s due-process jurisprudence.

At the outset, the private-property interest at stake is “significant.” See *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). Recall that the supersedeas-bond amount corresponds to the value of the tax lien placed upon GPI’s real property. Like attachments and other encumbrances, liens “ordinarily cloud[] title; impair[] the ability to sell or otherwise alienate the property; taint[] any credit rating; reduce[] the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.” See *id.*, at 11. Undoubtedly, “state procedures for creating and enforcing attachments, *as with liens*, ‘are subject to the strictures of due process.’” *Id.*, at 12 (emphasis added) (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604 (1974)).

Although *Doehr* and its predecessors involved disputes between private parties,³ the Court has

³ Before *Doehr*, the Court struck down several statutes that permitted a private party to deprive another of property in a prejudgment *ex parte* proceeding. See *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) (holding unconstitutional

routinely emphasized the importance of an individual’s constitutional right to be heard *before* being deprived of property—whether by the government or otherwise. See, e.g., *Mathews, supra*, at 343–344. That requirement serves the fundamental right to “protect [an individual’s] use and possession of property from arbitrary encroachment.” *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972). Even with judicial supervision, “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.” *Doehr, supra*, at 14 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170–172 (1951) (FRANKFURTER, J., concurring)). For that reason, deprivations that occur via *ex parte* proceedings are especially troublesome, albeit not *per se* unconstitutional. Cf. *Doehr, supra*, at 9–10.

Despite those due-process concerns, the state procedures in *Doehr* and its predecessors provided some procedural safeguards to counteract the risk of erroneous deprivation. For instance, the statute in *Doehr* authorized an “expeditious post-attachment adversary hearing; notice for such a hearing; judicial review of an adverse decision; and a double damages action if the original suit is commenced without probable cause.” *Doehr, supra*, at 15–16. Applying

a state statute that authorized prejudgment garnishment of wages without notice and prior hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment seizure of property); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (garnishment of wages). Because those cases did not involve disputes between an individual and the government, the Court applied a slight deviation of the *Mathews* test—one that also considered the competing private interests. See *Doehr, supra*, at 10–11.

these safeguards, the Court has stricken down similar statutes that required the party *seeking* a lien to post a bond as collateral against the lien. See *Fuentes, supra*, at 83–84; cf. *Doehr, supra*, at 18–24. Here, no such procedural “safeguards” exist. To the contrary, Ohio Rev. Code § 2505.06 (Lexis 2019) imposes a bond requirement onto the person already *burdened by* the lien.

In fact, the only procedural safeguard available to GPI was the Sewer District’s self-described “informal” hearing. But that hearing itself raises due-process concerns because the presiding arbiter was neither a judge nor lawyer. Moreover, because of the arbiter’s fiduciary obligation to “enhance District revenue” as the Sewer District’s Director of Operations and Maintenance, App. 49, he was more than merely predisposed to rule against GPI; it was his job to do so. With that level of bias, he was hardly a “neutral and detached judge” as due process requires “in the first instance.” See *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972); see also *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (noting the requirement of impartiality “is no different when a legislature delegates adjudicative functions to a private party”).⁴

⁴ Although this Court has distinguished between agency hearings that are “prosecutorial” versus “judicial” in nature, even the “less rigid requirements” of agencies exercising prosecutorial functions still requires, at minimum, that the state provide “a neutral adjudicator to conduct a *de novo* review of all factual and legal issues.” *Concrete Pipe, supra*, at 618. In any event, the Sewer District does not contend that the hearing was prosecutorial, nor would the process satisfy the “less rigid” standard even if it were.

Further, the Sewer District had full control over the amount of the lien and, indeed, whether and how it would hear GPI's challenge to that lien. When an administrative decision amounts to nothing more than a granting of "administrative grace," the hearing offends due process. See *Wiren v. Eide*, 542 F.2d 757, 764 (CA9 1976).

Notwithstanding these grave constitutional concerns, the Ohio Court of Appeals concluded that the lien and lack of judicial review had not deprived GPI of due process. But the court made no effort to defend the imposition of a bond requirement on top of the very same *ex parte* tax lien that GPI sought to challenge. If left standing, the opinion below would allow the Sewer District wantonly to charge its customers beyond what they can afford and then slap liens on their properties, all without fear of ordinary judicial scrutiny. That absurd approach both enhances the risk of erroneous deprivation and fails to meet the Constitution's due-process requirements.

C. The Ohio Administrative-Appeal Bond Requirement Offends Equal Protection.

Bonds that are required to appeal from an administrative property-taking deprive indigent persons of their "only opportunity to exercise a fundamental right—the right to contest a property seizure." See *Brown v. District of Columbia*, 115 F. Supp. 3d 56, 71 (CADDC 2015). Ohio's statute works to deny indigent individuals the right to a meaningful hearing. This Court in *Boddie* recognized that certain cost requirements serve as impermissible barriers to court access for people who cannot afford to pay them.

Boddie, 401 U.S. 371, at 379–380. When a court proceeding provides an individual of her only ability to be *meaningfully* heard, cost barriers that may be valid on their face become unconstitutional when applied to such individuals. *Ibid.*

Boddie created this protection against the deprivation of fundamental rights, like the right to terminate a marriage. Subsequent cases have clarified that *Boddie*'s protections do not apply to rights that are not fundamental. See *United States v. Kras*, 409 U.S. 434, 435 (1973) (requiring an indigent individual to pay filing fees required for a no-asset bankruptcy proceeding does not violate equal protection); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (finding no equal-protection violations in a mandatory \$25 filing fee to appeal an adverse decision from a state welfare agency). But where a deprived right is more akin to recognized fundamental rights (like marriage) and less similar to nonessential rights (like bankruptcy proceedings or welfare), then indigent individuals deserve special protections allowing them to have a meaningful hearing in front of a neutral judge before the state may strip them of that right.

Such a fundamental right is at stake here. The Fourteenth Amendment establishes as fundamental the right to avoid unreasonable state confiscation of property. Thus, indigent parties must have access to judicial review of a state administrative agency's property taking. Several federal circuit courts have recognized as much in the context of civil forfeiture cases. For example, in *Wiren v. Eide*, *supra*, border-control officers seized Wiren's car at a border crossing,

and he was required to post a \$250 bond (far less than the bond at issue here, even in 1976 dollars) in order to obtain a judicial determination regarding the propriety of that forfeiture. *Wiren*, 542 F.2d, at 763. The court held that the bond requirement violated both his due-process and his equal-protection rights because “application of [the bond] requirement operate[d] to deprive him of a significant property interest without according him the opportunity for a hearing solely because he is indigent.” *Ibid.* “A mandatory bond requirement in a forfeiture statute is ‘unconstitutional with respect to indigent persons on due process and equal protection grounds’ because it has the effect of depriving those individuals of their only opportunity to exercise a fundamental right—the right to contest a property seizure.” *Brown v. District of Columbia*, *supra*, at 71 (citing *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 736 (CADDC 2001)). When a state has deprived an indigent citizen of property, bonds restricting that citizen’s right to be heard in the judicial system violate due-process and equal-protection protections.

D. Ohio's Warped Application of the Constitutional-Avoidance Canon Is Inconsistent with this Court's Jurisprudence.

The Ohio appellate court further confused the analysis by holding that GPI's failure to comply with the Ohio bond statute was a predicate to challenging its constitutionality. In so doing, the court misapplied the canon of constitutional avoidance.

Parties are not required to comply with statutes they believe to be unconstitutional before they can challenge those statutes. See *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); see also *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1 (CA1 2012); *Atlanta Shipping Corp. v. Chemical Bank*, 818 F.2d 240, 246 (CA2 1987); *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612 (CA3 2013); *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 695–96 (CA6 2015); *Capeheart v. Terrell*, 695 F.3d 681, 685 (CA7 2012); *Zanders v. Swanson*, 573 F.3d 591, 593 (CA8 2009); *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002 (CA9 2003); *ACLU v. Johnson*, 194 F.3d 1149 (CA10 1999); *ACLU v. Florida Bar*, 999 F.2d 1486 (CA11 1993); *Great Lakes Gas Transmission Ltd. v. F.E.R.C.*, 984 F.2d 426, 430 (CADC 1993); *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372 (CA Fed. 2007). The Ohio appellate court's decision to the contrary is at odds with precedent in nearly every Circuit. Its interpretation of the bond requirement would mean that no one could ever

challenge the statute's constitutionality unless that challenger could afford the bond.

The Ohio appellate court also mistakenly invoked the constitutional-avoidance canon. That canon applies only when a statute is susceptible to a construction that does not implicate the Constitution. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018); *Clark v. Martinez*, 543 U.S. 371, 385 (2005). But when there is only one way to read a statute, the constitutional-avoidance canon simply does not apply, and the court must address the merits of a challenge to the statute's constitutionality. See *Jennings, supra*; *Warger v. Shauers*, 574 U.S. 40, 50 (2014); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001). The canon does not authorize courts to employ it as a means to "avoid" a constitutional challenge when the challenged statute is not open to interpretation. See *Jennings, supra* (rejecting the Ninth Circuit's constitutional-avoidance holding when statute allowed for only one plausible construction).

Here, the Ohio appellate court did not find the offending statute susceptible to more than one construction. Nor did it determine whether the statute was, in fact, constitutional. Instead, the court employed circular reasoning to avoid the constitutional question altogether: it held that GPI could not challenge the statute it argued was unconstitutional without first complying with it. See App. 19. But "[t]hat is not how the canon of constitutional avoidance works." *Jennings, supra*, at 843.

The Ohio court's holding thus runs contrary to this Court's jurisprudence. By suggesting that GPI had not

preserved its right to challenge the offending bond requirement, the Ohio appellate court compounded the constitutional infirmity and only further warrants the writ of certiorari that GPI urges the Court to grant.

CONCLUSION

GPI should not have to post a bond that it cannot afford simply to raise a court challenge to the Sewer District's *ex parte* imposition of a \$12,047.76 tax lien on its property. The petition for writ of certiorari should be granted.

Respectfully submitted,

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