

In The
Supreme Court of the United States

OHIO EX REL. ELLIOTT FELTNER,

Petitioner,

v.

CUYAHOGA COUNTY BOARD OF REVISION, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio**

BRIEF IN OPPOSITION

JANEANE R. CAPPARA
ADAM JUTTE
Assistant Prosecuting Attorneys
The Justice Center,
Courts Tower, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Telephone: (216) 443-7800
jcappara@
prosecutor.cuyahogacounty.us
ajutte@
prosecutor.cuyahogacounty.us

*Attorneys for Cuyahoga County,
Cuyahoga County Board of
Revision, W. Christopher
Murray, II, Armond Budish,
Michael Gallagher, and
Michael W. Chambers*

STEPHEN W. FUNK
Counsel of Record
ROETZEL & ANDRESS, LPA
222 S. Main Street,
Suite 400
Akron, Ohio 44308
Telephone: (330) 376-2700
sfunk@ralaw.com

*Attorney for Respondents
Cuyahoga County, Land
Reutilization Corporation*

QUESTION PRESENTED

Whether this Court will accept review of the Ohio Supreme Court's decision to dismiss a writ of mandamus claim for an alleged "taking" that arose from the lawful enforcement of Ohio's tax foreclosure laws where, as here, the petitioner failed to satisfy the essential elements for a writ of mandamus claim under Ohio law, including but not limited to, demonstrating the lack of an adequate legal remedy under Ohio's judicial review scheme for tax foreclosure proceedings.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
STATEMENT OF THE CASE.....	1
A. Statutory Background	3
B. The Underlying Tax Foreclosure Action	8
C. Feltner’s Original Action For Writ Of Prohibition And Mandamus With Ohio Supreme Court.....	9
REASONS FOR DENYING THE PETITION	11
I. THE OHIO SUPREME COURT PROPERLY DISMISSED FELTNER’S CLAIMS FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS	12
A. The Writ Of Mandamus Claim Was Properly Dismissed Because Feltner Failed To Demonstrate The Lack Of An Adequate Remedy At Law	15
B. The Writ Of Mandamus Claim Was Properly Dismissed Because Feltner Failed To Show That Cuyahoga County Had A Clear Legal Duty To Commence Appropriation Proceedings For An Alleged Taking	20
C. Feltner’s Takings Claim Is Based Upon Factual Allegations That Are Not Proven Or Fully Developed In The Underlying Ohio Supreme Court Proceedings.....	23

TABLE OF CONTENTS – Continued

	Page
D. Most Of The Legal Arguments In Fel- ner’s Petition Were Not Presented To The Ohio Supreme Court	26
II. THE COURT SHOULD DENY THE PETI- TION BECAUSE THE CONSTITUTIONAL QUESTION PRESENTED LARGELY TURNS UPON THE PROPER INTERPRETATION OF OHIO LAW	27
CONCLUSION	32

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bana v. Pittsburgh Plate Glass Co.</i> , 76 N.E.2d 625 (Ohio App. 1947).....	24
<i>Bd. of Regents v. Roth</i> , 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)	29
<i>Beaver Excavating Co. v. Testa</i> , 134 Ohio St.3d 565, 983 N.E.2d 1317 (2012).....	3, 21
<i>Bennis v. Michigan</i> , 516 U.S. 442, 116 S.Ct. 994 (1996).....	20, 26
<i>Bogie v. Town of Barnet</i> , 270 A.2d 898 (Vt. 1970).....	27, 28
<i>Bowie Lumber Co. v. United States</i> , 155 F.2d 225 (5th Cir. 1946).....	24
<i>Coleman v. Dist. of Columbia</i> , 70 F.Supp.3d 58 (D.D.C. 2014)	27, 28, 29
<i>Coleman v. Dist. of Columbia</i> , No. 13-1456, 2016 WL 10721865 (D.D.C. Jun. 11, 2016).....	29
<i>Dubinsky Realty Co. v. Lortz</i> , 129 F.2d 669 (8th Cir. 1942)	24
<i>Eaton v. Boles</i> , No. 5:03-CV-165, 2005 WL 8164008 (W.D. Mich. Nov. 3, 2005)	24
<i>GEM Realty Trust v. First Natl. Bank of Boston</i> , No. CIV 93-606-SD, 1995 WL 127825 (D. N.H. Mar. 20, 1995).....	24
<i>Gen. Motors Corp. v. Limbach</i> , 67 Ohio St.3d 90, 616 N.E.2d 204 (1993).....	31
<i>Jones v. Flowers</i> , 547 U.S. 220 (2006).....	22

TABLE OF AUTHORITIES – Continued

	Page
<i>Knick v. Twp. of Scott</i> , ___ U.S. ___, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019)	18
<i>Leasor v. Kapszukiewicz</i> , 6th Dist. No. L-08-1004, 2008-Ohio-6176, 2008 WL 5050384 (Ohio App. Nov. 21, 2008)	20, 26, 27
<i>Ohio Cas. Ins. Co. v. D&J Distrib. & Mfg., Inc.</i> , 6th Dist. No. L-08-1104, 2009-Ohio-3806, 2009 WL 2356849 (Ohio App. July 31, 2009)	24
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)	17
<i>Rafaeli v. Oakland Cty.</i> , ___ N.W.2d ___, 2020 WL 4037642 (Mich. July 17, 2020)	27, 28
<i>Raguet v. Wade</i> , 4 Ohio 107 (1829)	3
<i>Scarborough v. Gibson</i> , 13 Ohio Dec. 738 (1903), <i>aff'd</i> , 69 Ohio St. 578, 70 N.E. 1130 (1904)	3, 21
<i>State ex rel. Albright v. Court of Comm. Pleas of Delaware Cty.</i> , 60 Ohio St.3d 40, 572 N.E.2d 1387 (1991)	18
<i>State ex rel. AWMS Water Solutions, L.L.C. v. Mertz</i> , 2020-Ohio-5482, ___ N.E.3d ___ (Ohio Dec. 2, 2020)	17
<i>State ex rel. Berger v. McMonagle</i> , 6 Ohio St.3d 28, 451 N.E.2d 225 (1983)	14
<i>State ex rel. Garrett v. Costine</i> , 153 Ohio St.3d 29, 2018-Ohio-1613, 100 N.E.3d 368 (2018)	13
<i>State ex rel. Kerns v. Simmers</i> , 153 Ohio St.3d 103, 101 N.E.3d 430 (2018)	14, 15, 18, 19

TABLE OF AUTHORITIES – Continued

	Page
<i>State ex rel. O'Malley v. Collier-Williams</i> , 153 Ohio St.3d 553, 2018-Ohio-3154, 108 N.E.3d 1082 (2018).....	13
<i>State ex rel. Willis v. Sheboy</i> , 6 Ohio St.3d 167, 451 N.E.2d 1200 (1983).....	19
<i>State ex rel. Feltner v. Cuyahoga Cty. Bd. of Rev.</i> , 155 Ohio St.3d 1403, 119 N.E.3d 431 (Table) (Mar. 20, 2019).....	1, 11
<i>State ex rel. Feltner v. Cuyahoga Cty. Bd. of Rev.</i> , 160 Ohio St.3d 359, 2020-Ohio-3080, 157 N.E.3d 685 (May 28, 2020).....	2, 11, 13
<i>SunTrust Mortgage, Inc. v. Busby</i> , 469 Fed.Appx. 205 (4th Cir. 2012).....	24
<i>Texaco, Inc. v. Short</i> , 454 U.S. 516 (1982)	22
<i>Thomas Tool Services, Inc. v. Town of Croydon</i> , 761 A.2d 439 (N.H. 2000)	27
<i>Tyler v. Hennepin Cty.</i> , No. 20-CV-0889, 2020 WL 7129894 (D. Minn. Dec. 4, 2020)	29
<i>United States v. 0.59 Acres of Land</i> , 109 F.3d 1493 (9th Cir. 1997).....	24
<i>United States v. An Easement and Right-of-Way Over 4.42 Acres of Land</i> , 4:16-CV-0314-HLM, 2018 WL 8131100 (N.D. Ga. Sept. 11, 2018)	24
<i>United States v. Certain Parcels of Land in the County of Arlington, State of Virginia</i> , 261 F.2d 287 (4th Cir. 1958).....	24

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Easement and Right-of-Way Over 1.58 Acres of Land</i> , 343 F.Supp.3d 1321 (N.D. Ga. 2018).....	24
<i>Verizon Comm’ns, Inc. v. FCC</i> , 535 U.S. 467 (2002).....	26
<i>Villas at East Pointe Condo. Assn. v. Strawser</i> , 142 N.E.3d 1200 (Ohio App. 2019).....	30
 CONSTITUTIONAL PROVISIONS	
Ohio Constitution, Article I, Section 19	10
Ohio Constitution, Article II, Section 1	3, 21, 23
Ohio Constitution, Article IV, Section 2(A).....	9, 12
United States Constitution, Fifth Amendment....	10, 25
United States Constitution, Fourteenth Amend- ment.....	10, 25
 STATUTES	
42 U.S.C. § 1983	17
Ohio Revised Code Chapter 1724	16
Ohio Revised Code Chapter 2506	7, 15, 16
Ohio Revised Code Chapter 323	3, 13, 20, 21, 29
Ohio Revised Code Section 2505.....	7, 15, 16
Ohio Revised Code Section 323.31.....	5
Ohio Revised Code Section 323.65.....	<i>passim</i>
Ohio Revised Code Section 323.66.....	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
Ohio Revised Code Section 323.69.....	<i>passim</i>
Ohio Revised Code Section 323.691.....	6, 7, 16, 17
Ohio Revised Code Section 323.70.....	<i>passim</i>
Ohio Revised Code Section 323.72.....	<i>passim</i>
Ohio Revised Code Section 323.78.....	<i>passim</i>
Ohio Revised Code Section 323.79.....	<i>passim</i>
Ohio Revised Code Section 5715.02.....	23
Ohio Revised Code Section 5721.20.....	30
Ohio Revised Code Section 5721.25.....	5

RULES

Rules of the Supreme Court of the United States, Rule 10.....	2, 11
Rules of the Supreme Court of the United States, Rule 10(b).....	12
Rules of the Supreme Court of the United States, Rule 10(c).....	12

STATEMENT OF THE CASE

This case arises from a state tax foreclosure proceeding that was filed in 2015 under Ohio Revised Code 323.65 through 323.79 with the Cuyahoga County Board of Revision (the “Board” or “BOR”), styled *Treasurer of Cuyahoga County, Ohio v. Elliott G. Feltner*, Case No. BR-15-010620 (the “Tax Foreclosure Action”). In proceedings below, Feltner admitted that he was served with the complaint and attended the first hearing in the Tax Foreclosure Action, but that he did not contest the action and did not pay any of the tax impositions that were due and owing. Instead, over a year after the Tax Foreclosure Action was concluded, Feltner filed an original action for a writ of prohibition and a writ of mandamus with the Ohio Supreme Court, which alleged a number of constitutional claims relating to whether the Board of Revision “patently and unambiguously” lacked jurisdiction to hear the tax foreclosure proceeding. (*See* Complaint for Writs of Prohibition and Mandamus, filed September 17, 2018, copy attached as Appendix D to Petition).

Upon review, however, the Ohio Supreme Court dismissed most of Feltner’s claims for failure to state a claim, and ordered further briefing on only two of the writ of prohibition claims (Count I and Count III) that were based upon separation-of-powers and due process arguments. *See State ex rel. Feltner v. Cuyahoga Cty. Bd. of Rev.*, 155 Ohio St.3d 1403, 119 N.E.3d 431 (Table) (Mar. 20, 2019) (copy attached as Appendix B to Petition). Thereafter, the Ohio Supreme Court unanimously denied the two remaining writ of prohibition

claims based upon the conclusion that Feltner failed to demonstrate that the “BOR patently and unambiguously lacked jurisdiction” over the underlying tax foreclosure proceedings. *See State ex rel. Feltner v. Cuyahoga Cty. Bd. of Rev.*, 160 Ohio St.3d 359, 2020-Ohio-3080, 157 N.E.3d 685, ¶ 14 (May 28, 2020) (copy attached as Appendix C to Petition).

In his Petition, Feltner does not challenge the Ohio Supreme Court’s denial of the writ of prohibition claims. Rather, the Petition is limited to challenging the Ohio Supreme Court’s dismissal of the writ of mandamus claim (Count VII) based upon the argument that the lawful enforcement of Ohio’s tax foreclosure laws constitutes an alleged “taking.” (Petition, pg. 8). The Petition ignores the fact, however, that the underlying writ of mandamus claim sought a remedy that was governed by Ohio law, and thus the question of whether Feltner satisfied the essential elements for a writ of mandamus is a question governed by Ohio law, not federal law. Moreover, as discussed below, the question of whether Feltner has an adequate remedy under Ohio’s judicial review scheme for tax foreclosure proceedings is a question governed by state law, and the question of whether Feltner has a constitutionally-protected interest in recovering the “surplus equity” in a tax-foreclosed property is governed by state law. Accordingly, the Petition should be denied because Feltner has failed to demonstrate that the Ohio Supreme Court’s dismissal of his writ of mandamus claim presents the type of important federal question that warrants review by this Court under S.Ct. R. 10.

A. Statutory Background

It is well established that the power of taxation is indispensable to the existence of the State of Ohio, as being necessary for the funding of all aspects of governmental operations. *Raguet v. Wade*, 4 Ohio 107 (1829). “The taxing power is an exercise of the sovereignty of the state through its general assembly.” *Scarborough v. Gibson*, 13 Ohio Dec. 738, 740 (1903), *aff’d*, 69 Ohio St. 578, 70 N.E. 1130 (1904). Indeed, as the Ohio Supreme Court has explained, “the power to tax lies exclusively with the General Assembly pursuant to the general legislative grant conferred by the Ohio Constitution, Article II, Section 1.” *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 983 N.E.2d 1317, ¶ 40 (2012). Pursuant to the constitutional authority granted to Ohio’s legislative branch, therefore, the General Assembly has adopted a comprehensive statutory scheme for the collection of property taxes and the enforcement of the State’s tax liens that is set forth in Chapter 323 of the Ohio Revised Code, which is entitled, “Collection of Taxes.” (See Ohio Rev. Code Chapter 323, <http://codes.ohio.gov/orc/323>).

In accordance with its taxing powers under the Ohio Constitution, the General Assembly in 2006 adopted expedited tax foreclosure procedures for vacant and abandoned lands that are codified in Chapter 323 of the Ohio Revised Code, Sections 323.65 to 323.79. Under the operative statutes, where a tax delinquent property involves “abandoned” land, as defined by Ohio Rev. Code 323.65(A), the county treasurer may initiate an administrative foreclosure

proceeding with the board of revision, which, upon any adjudication of foreclosure, may order disposition of the abandoned land by public auction, or may transfer the tax delinquent land to an “electing subdivision” under Ohio Rev. Code 323.78(B), which provides:

. . . upon adjudication of foreclosure of the parcel, the court or board of revision shall order, in the decree of foreclosure or by separate order, that the equity of redemption and any statutory or common law right of redemption in the parcel by its owner shall be forever terminated after the expiration of the alternative redemption period and that the parcel shall be transferred by deed directly to the requesting municipal corporation, township, county, school district, community development corporation, or county land reutilization corporation without appraisal and without a sale, free and clear of all impositions and any other liens on the property, which shall be deemed forever satisfied and discharged. The court or board of revision shall order such a transfer regardless of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel. No further act of confirmation or other order shall be required for such a transfer, or for the extinguishment of any statutory or common law right of redemption.

See Ohio Rev. Code 323.78.

Importantly, this statutory remedy can be imposed only if a property owner fails to pay his taxes in accordance with Ohio's tax collection laws. Under Ohio Rev. Code § 323.72, in fact, the owner or other interested party has the unilateral and unconditional right to terminate a tax foreclosure proceeding at any time by paying all outstanding taxes, or by showing that the impositions have been paid. *See* Ohio Rev. Code §§ 323.72(A)(2), 323.72(B). Moreover, Ohio Rev. Code Sections 323.31 and 5721.25 provide that a property owner may enter into a tax delinquent installment contract to pay the outstanding taxes over time. Additionally, even if the Board of Revision issues a final order that provides for the foreclosure and direct transfer of a tax delinquent property under Ohio Rev. Code § 323.78, Ohio's tax collection laws provide that the property owner shall be granted an additional 28-day period to redeem the property by paying the outstanding taxes. *See* Ohio Rev. Code §§ 323.65(J) and 323.78 (discussing the "alternative right of redemption period").

In creating this statutory remedy for abandoned, tax delinquent lands, the General Assembly implemented a number of procedural safeguards to protect the rights of property owners. First, with respect to service of process, Ohio Rev. Code § 323.66(C) provides that "the clerk of court, in the same manner as in civil actions, shall provide summons and notice of hearings, maintain an official case file, docket all proceedings, and tax as costs all necessary actions in connection

therewith in furtherance of the foreclosure of abandoned land” under sections 323.65 to 323.79. *Id.* Moreover, under Ohio Rev. Code § 323.69(B)(1), the Summons must notify the property owner that the tax foreclosure proceeding may result in the transfer of the property to an electing subdivision “in the manner prescribed in sections 323.65 to 323.79 of the Revised Code,” and that the owner may avoid this remedy “by paying the total of the impositions against the land at any time before confirmation of sale or transfer of the parcel as prescribed in sections 323.65 to 323.79 of the Revised Code or before the expiration of the alternative redemption period, as may be applicable to the proceeding[.]” *Id.*

Second, the relevant tax collection statutes provide that an affected property owner who wants to contest the foreclosure action in a judicial proceeding shall have the unilateral right to obtain an automatic transfer of the proceeding to the court of common pleas upon request. *See* Ohio Rev. Code §§ 323.691 and 323.70(B). In particular, Ohio Rev. Code § 323.691(A) provides that the board of revision may order the transfer of the tax foreclosure proceeding to the court of common pleas or to a municipal court with jurisdiction over the property, upon a motion filed by the property owner, the county prosecuting attorney, or upon its own motion. *Id.* Moreover, Ohio Rev. Code § 323.70(B) provides that “[i]f, on or before the fourteenth day after service of process is perfected under division (B) of section 323.69 of the Revised Code, a record owner files with the clerk of court a motion requesting that the county

board of revision order the case be transferred to a court pursuant to section 323.691 of the Revised Code, the board shall, without conducting a hearing on the matter, promptly transfer the case for foreclosure of that land to a court pursuant to section 323.691 of the Revised Code to be conducted in accordance with the applicable laws.” *Id.* (emphasis added).

Third, the statutory scheme adopted by the Ohio General Assembly provides an aggrieved party with the right to obtain *de novo* judicial review of a final order of foreclosure and transfer under Chapters 2505 and 2506 of the Ohio Revised Code. *See* Ohio Rev. Code 323.79. In particular, Ohio Rev. Code 323.79 provides that the appeal “shall proceed as an appeal *de novo* and may include issues raised or adjudicated in the proceedings before the county board of revision, *as well as other issues that are raised for the first time on appeal* and that are pertinent to the abandoned land that is the subject of those proceedings.” *Id.* (emphasis added). Thus, Ohio Rev. Code 323.79 provides that a property owner can raise new claims, including constitutional claims, that are “pertinent” to the land that was the subject of the tax foreclosure proceeding in connection with a timely administrative appeal.

B. The Underlying Tax Foreclosure Action

As set forth in the Complaint, the underlying Tax Foreclosure Action was filed with the Cuyahoga County Board of Revision on November 9, 2015, for delinquent real estate taxes owed on Parcel No. 114-26-004 located at 18927 St. Clair Avenue in Cleveland, Ohio (the “Property”). (Compl. ¶ 2 and ¶ 19, copy attached to Petition, Appendix D-5 and D-10). It is undisputed that the Clerk of Courts successfully effectuated service of process upon Feltner by mailing a copy of the summons and complaint to the tax mailing address for the Property that Feltner provided to the Cuyahoga County Treasurer. (Agreed Statement of Facts, Ex. 1, pp. 0001-0003, filed with the Ohio Supreme Court). Moreover, it is undisputed that Feltner had actual knowledge of the tax foreclosure proceeding because he personally appeared at the first scheduled hearing before the Board of Revision on March 15, 2017. (*Id.* at ¶ 13).

A final hearing in the Tax Foreclosure Action was held on June 21, 2017, but Feltner did not appear at the hearing and did not pay the taxes in full or enter into a delinquent tax repayment plan. (Compl. ¶ 25, Petition, Appendix D-12). Therefore, the Board of Revision entered an Adjudication of Foreclosure on June 21, 2017 that, among other things, ordered the direct transfer of the tax delinquent property to the Cuyahoga County Land Reutilization Corporation under R.C. 323.78. (*Id.* at ¶ 28). Pursuant to R.C. §§ 323.65(J) and 323.78, therefore, Feltner then had 28 days to redeem the tax-foreclosed property by paying any and all

delinquent real estate taxes, current real estate taxes, and the court costs associated with the Tax Foreclosure Action. Feltner, however, did not redeem the Property by paying all of the taxes or by entering into a payment plan. Moreover, he did not file a timely appeal from the Board's final order of foreclosure with the Court of Common Pleas under R.C. 323.79. Thus, in accordance with the plain language of Ohio's tax foreclosure laws, Feltner lost all right, title, and interest in the Property once the alternative right of redemption period expired under R.C. 323.78.

C. Feltner's Original Action For Writ Of Prohibition And Mandamus With Ohio Supreme Court

On September 17, 2018, over a year after the tax foreclosure proceedings were concluded, Feltner filed an original action for a writ of prohibition and mandamus with the Ohio Supreme Court. Under Article IV, Section 2(A) of the Ohio Constitution, the Ohio Supreme Court has original jurisdiction to hear complaints for extraordinary writs, including writs of prohibition and mandamus, but it does not have original jurisdiction to hear claims for damages, which must be filed with Ohio's trial court, the Court of Common Pleas. The Complaint filed by Feltner with the Ohio Supreme Court, therefore, was limited only to claims for extraordinary writs. It alleged six (6) claims for writ of "prohibition" (Counts I through VI) based upon the allegation that the Board of Revision "patently and unambiguously" lacked jurisdiction over the underlying

Tax Foreclosure Action, and a single claim for a writ of “mandamus” (Count VII) based upon the allegation that the direct transfer of the Property for the failure to pay taxes under R.C. 323.78 constitutes an uncompensated “taking” under Article I, Section 19 of the Ohio Constitution and the Fifth and Fourteenth Amendment of the U.S. Constitution. (Compl. ¶¶ 34-84, Appendix pp. D-13 through D-22).

In response to Feltner’s Complaint, all of the Respondents filed Motions to Dismiss based upon the fact that the Complaint failed to satisfy the essential elements of a writ of prohibition claim and a writ of mandamus claim under Ohio law. With respect to the writ of mandamus claim alleged in Count VII, Respondents primarily relied upon two legal arguments: (1) that Feltner failed to demonstrate the lack of an adequate remedy at law; and (2) that Feltner failed to demonstrate that Cuyahoga County had a clear legal duty to commence appropriation proceedings for an alleged taking because Feltner lost all of his right, title, and interest in the tax-foreclosed property as a result of the enforcement of Ohio’s tax collection laws, not as a result of the power of eminent domain. (*See* Cuyahoga County’s Motion to Dismiss, pp. 22-27, filed 10/11/2018, and Cuyahoga County Land Reutilization Corporation’s Motion to Dismiss, pp. 30-32, filed 10/8/2018).

Upon review, the Ohio Supreme Court issued an Order on March 20, 2019, that dismissed all of Feltner’s claims, except for Count I and Count III, which alleged claims for a writ of prohibition based upon alleged separation of powers and due process arguments.

See State ex rel. Feltner v. Cuyahoga Cty. Bd. of Rev., 155 Ohio St.3d 1403, 119 N.E.3d 431 (Table) (Mar. 20, 2019) (copy attached as Appendix B to Petition). Thereafter, following additional briefing, the Supreme Court denied the two remaining prohibition claims because it found that Feltner failed to show that the Board of Revision “patently and unambiguously” lacked jurisdiction over the Tax Foreclosure Action under Ohio’s tax foreclosure laws. *See State ex rel. Feltner v. Cuyahoga Cty. Bd. of Revision*, 160 Ohio St.3d 359, 2020-Ohio-3080, 157 N.E.3d 369, ¶ 14 (May 28, 2020) (copy attached as Appendix C to Petition). While two of the seven justices filed a concurring opinion that argued that the Ohio Supreme Court should have ordered additional briefing on the takings claims alleged in Counts V and VI, *id.*, at ¶ 29 (Fischer, J., concurring) (Appendix C-13),¹ the other five justices did not join in this concurring opinion. Thus, a majority of the Ohio Supreme Court agreed that the alleged takings claims were properly dismissed for failure to state a claim.



REASONS FOR DENYING THE PETITION

Petitioner has not presented compelling reasons to grant the petition for writ of certiorari under S.Ct. R. 10. The Ohio Supreme Court’s decision turned upon

¹ We note that Counts V and VI of the Complaint alleged claims for a writ of prohibition, not a writ of mandamus, and Feltner’s Petition only seeks to challenge the Ohio Supreme Court’s dismissal of the writ of mandamus claim alleged in Count VII. (Petition, pg. 8).

whether Feltner satisfied the essential elements for a writ of prohibition and writ of mandamus claim under Ohio law, and the Ohio Supreme Court did not write any opinion on the merits of any important federal constitutional questions that should be reviewed by this Court. Indeed, the question of whether Feltner satisfied the applicable legal standards for a writ of mandamus is a question governed primarily by state law, not federal law. Moreover, as discussed below, the question of whether Feltner has an adequate remedy under Ohio's judicial review scheme for tax foreclosure proceedings is a question governed by state law. Accordingly, under S.Ct. R. 10(b) and (c), the Petition should be denied.

I. THE OHIO SUPREME COURT PROPERLY DISMISSED FELTNER'S CLAIMS FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS.

As previously discussed, the Ohio Supreme Court's original jurisdiction in this case was limited only to claims for extraordinary writs under Article IV, Section 2(A) of the Ohio Constitution. The sole claims alleged by Feltner in the Complaint, therefore, were limited to six claims for a writ of prohibition (Counts I-VI) and a single claim for writ of mandamus (Count VII). The availability of an extraordinary writ under Ohio law is a question of state law that does not warrant review by the U.S. Supreme Court. Accordingly, the Petition should be denied.

In his Petition, Feltner ignores the applicable legal standards that govern a writ of prohibition and writ of mandamus under Ohio law. It is well-established, however, that “[a] writ of prohibition is an extraordinary remedy that is granted in limited circumstances ‘with great caution and restraint.’” *State ex rel. O’Malley v. Collier-Williams*, 153 Ohio St.3d 553, 2018-Ohio-3154, 108 N.E.3d 1082, ¶ 9 (2018). In order to obtain a writ of prohibition, therefore, Feltner bore the heavy burden to prove that (1) the Board of Revision is about to exercise or has exercised judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of the law. *State ex rel. Garrett v. Costine*, 153 Ohio St.3d 29, 2018-Ohio-1613, 100 N.E.3d 368, ¶ 9 (2018). As the Ohio Supreme Court explained in its opinion in this case, a writ of prohibition generally will be granted under Ohio law only if a tribunal “patently and unambiguously” lacks jurisdiction over a particular matter. *Feltner*, 160 Ohio St.3d 359, 2020-Ohio-3080, 157 N.E.3d 685, at ¶ 8 (copy attached to Petition, Appendix C-4) (citations omitted). Thus, in this case, a writ of prohibition was not granted because the Ohio Supreme Court held that the Board of Revision had been granted the statutory authority to hear the underlying tax foreclosure proceeding by the relevant sections of Chapter 323 of the Ohio Revised Code. (*Id.* at ¶ 14, Appendix C-7).

In his Petition, Feltner does not challenge the Ohio Supreme Court’s dismissal of his writ of prohibition

claims, but only challenges the Ohio Supreme Court's dismissal of the writ of mandamus claim alleged in Count VII. (Petition, pg. 8). In raising this challenge, however, the Petition fails to set forth the applicable three-part legal standard for granting a writ of mandamus under Ohio law. In order to be entitled to a writ of mandamus for an alleged taking under Ohio law, the Ohio Supreme Court has held that the landowners must show "(1) that they have a clear legal right to appropriation proceedings, (2) that respondents have a clear legal duty to commence the proceedings, and (3) that the landowners have no plain and adequate legal remedy." *See State ex rel. Kerns v. Simmers*, 153 Ohio St.3d 103, 101 N.E.3d 430, 433 (2018) (citing *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225 (1983)). Thus, in order to obtain a writ of mandamus, it was incumbent upon Feltner to show the lack of an adequate remedy at law. *See Kerns*, 101 N.E.3d at 435.

Here, although the Ohio Supreme Court did not write an opinion to explain why it dismissed the writ of mandamus claim alleged in Count VII, Respondents argued below that Feltner's mandamus claim should be dismissed because Feltner failed to show both the lack of an adequate remedy at law and a clear legal right and clear legal duty to commence appropriation proceedings. Both arguments provided the Ohio Supreme Court with two separate and independent grounds for dismissing Feltner's mandamus claim. We discuss each argument more fully below.

A. The Writ Of Mandamus Claim Was Properly Dismissed Because Feltner Failed To Demonstrate The Lack Of An Adequate Remedy At Law.

The claim for writ of mandamus was properly dismissed first and foremost because Feltner failed to demonstrate “the lack of an adequate remedy at law,” which, as the Ohio Supreme Court has held, is an essential element of a writ of mandamus claim. *Kerns*, 101 N.E.3d at 435. In this regard, the Ohio Supreme Court held in *Kerns* that a writ of mandamus may not be issued for an alleged taking if the property owners failed to pursue an administrative appeal of the underlying governmental action that caused the alleged taking. *Id.* at 433-435. Accordingly, in *Kerns*, the Ohio Supreme Court denied the petition for writ of mandamus because the Relators failed to exercise their statutory right to file a timely administrative appeal from the underlying administrative order that was the cause of the alleged taking. *Id.*

Here, it is undisputed that Ohio General Assembly’s judicial review scheme for administrative tax foreclosure proceedings provided Feltner with the legal right to file an administrative appeal under Ohio Revised Code Chapters 2505 and 2506 with the court of common pleas, and to raise any new issues for the first time on appeal that were pertinent to the land that was the subject of the tax foreclosure proceeding. In particular, Ohio Rev. Code § 323.79 provides:

Any party to any proceeding instituted pursuant to sections 323.65 to 323.79 of the Revised

Code who is aggrieved in any of the proceedings of the county board of revision under those sections may file an appeal in the court of common pleas pursuant to Chapters 2505 and 2506 of the Revised Code upon a final order of foreclosure and forfeiture by the board. A final order of foreclosure and forfeiture occurs upon confirmation of any sale or upon confirmation of any conveyance or transfer to a certificate holder, community development organization, county land reutilization corporation organized under Chapter 1724 of the Revised Code, municipal corporation, county, or township pursuant to sections 323.65 to 323.79 of the Revised Code.

Id. Under Ohio Rev. Code § 323.79, an appeal must be filed within 14 days after the confirmation of any sale, or in the case of a direct transfer, within 14 days of “the date on which an order of transfer or conveyance, whether included in the decree of foreclosure or a separate order, is first filed with and journalized by the clerk of court.” *Id.*

Furthermore, Ohio’s judicial review scheme for tax foreclosure proceedings provided Feltner with the statutory right to transfer the case to the common pleas court under Ohio Rev. Code §§ 323.691(A) and/or 323.70(B). In particular, Ohio Rev. Code § 323.691(A) provides that the board of revision may order the transfer of the tax foreclosure proceeding to the court of common pleas or to a municipal court with jurisdiction over the property, upon a motion filed by the property owner, the county prosecuting attorney, or upon its

own motion. *Id.* Moreover, Ohio Rev. Code § 323.70(B) provides that “[i]f, on or before the fourteenth day after service of process is perfected under division (B) of section 323.69 of the Revised Code, a record owner files with the clerk of court a motion requesting that the county board of revision order the case be transferred to a court pursuant to section 323.691 of the Revised Code, the board shall, without conducting a hearing on the matter, promptly transfer the case for foreclosure of that land to a court pursuant to section 323.691 of the Revised Code to be conducted in accordance with the applicable laws.” *Id.* Thus, Feltner had the automatic right to transfer the case to the common pleas court where he could have pursued any and all legal remedies, including any counterclaims under 42 U.S.C. § 1983 or Ohio law for an alleged taking.

In this case, however, it is undisputed that Feltner never sought to transfer the case to the common pleas court under Ohio Rev. Code §§ 323.691 or 323.70 and never filed a timely administrative appeal of the Board’s direct transfer order under Ohio Rev. Code § 323.79. While Feltner’s Petition argues that the takings claim did not arise until after the 14-day appeal time had expired, this argument ignores the fact that a takings claim generally becomes ripe for adjudication once “the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 618, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001); *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 2020-Ohio-5482, ___ N.E.3d

___, ¶ 32-33 (Ohio Dec. 2, 2020). Although this Court overruled the state litigation requirement in *Knick v. Twp. of Scott*, ___ U.S. ___, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019), it did not overrule or question the validity of the “final decision” standard, which was not at issue in *Knick*. *Id.* at 2169. Here, the Board of Revision issued a final decision that applied the statutory remedy set forth in Ohio Rev. Code § 323.78 to Feltner’s property when it ordered the foreclosure and direct transfer of the property on June 21, 2017. Thus, under Ohio’s judicial review scheme, Feltner should have raised any and all of his claims, including his alleged takings claim, in conjunction with a timely administrative appeal taken from the Board’s final decision under Ohio Rev. Code § 323.79.

Indeed, in adopting expedited procedures for administrative tax foreclosure proceedings under Ohio Rev. Code §§ 323.65 through 323.79, the Ohio General Assembly clearly sought to create a comprehensive judicial review scheme that would ensure that all claims, including constitutional claims, arising from or relating to tax foreclosure proceedings are expeditiously, efficiently, and conclusively resolved. This is critical because it is a well-established principle of Ohio law that a party may not bypass the legislatively-prescribed judicial review scheme for claims arising from administrative proceedings. *See State ex rel. Albright v. Court of Comm. Pleas of Delaware Cty.*, 60 Ohio St.3d 40, 42, 572 N.E.2d 1387, 1389 (1991). As the Ohio Supreme Court explained in *Kerns*, “[w]here a constitutional process of appeal has been legislatively provided, the

sole fact that pursuing such process would encompass more delay and inconvenience than seeking a writ of mandamus is insufficient to prevent the process from constituting a plain and adequate remedy in the ordinary course of the law.” *Kerns*, 101 N.E.3d at 435 (quoting *State ex rel. Willis v. Sheboy*, 6 Ohio St.3d 167, 451 N.E.2d 1200 (1983)). Moreover, as the Ohio Supreme Court explained in *Kerns*, the fact that the appeal time has now expired does not mean that Feltner lacked an adequate remedy at law. *Id.*, 101 N.E.3d at 433. “‘If that were the case, this criterion for a writ of mandamus would be met whenever the opportunity to pursue another adequate remedy expired. Would-be appellants could thwart the appellate process simply by ignoring it.’” *Id.* at 433-434 (citations omitted).

In his Reply Brief, Feltner likely will present additional arguments for why his takings claims were not subject to Ohio’s judicial review scheme for tax foreclosure orders. Such arguments, however, are not only meritless, but are immaterial to the outcome of this Petition because the question of whether Ohio’s judicial review scheme for tax foreclosure orders provides an adequate remedy at law is a question of state law, not federal law. Thus, regardless of what Feltner argues, his Petition should be denied because this state law issue is not the type of important federal question that might warrant further review by this Court.

B. The Writ Of Mandamus Claim Was Properly Dismissed Because Feltner Failed To Show That Cuyahoga County Had A Clear Legal Duty To Commence Appropriation Proceedings For An Alleged Taking.

Respondents also asked the Ohio Supreme Court to dismiss Feltner's writ of mandamus claim because his complaint failed to show that Cuyahoga County had a clear legal duty to commence appropriation proceedings for an alleged taking, or that Feltner had a clear legal right to compel the commencement of appropriation proceedings. As this Court has held, "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis v. Michigan*, 516 U.S. 442, 452-453, 116 S.Ct. 994 (1996). Here, it is undisputed that the direct transfer remedy was imposed by the Board of Revision under Ohio Rev. Code § 323.78 due to the failure to pay taxes. Indeed, but for the failure to pay taxes, no transfer could have been ordered under Ohio's tax foreclosure laws at all. Thus, no takings claim can arise as a matter of law because the Board's lawful enforcement of Ohio's tax collection statutes in Ohio Rev. Code Chapter 323 involves the exercise of the State's taxing power, not the power of eminent domain. *See Leasor v. Kapszukiewicz*, 6th Dist. No. L-08-1004, 2008-Ohio-6176, 2008 WL 5050384, *4 (Ohio App. Nov. 21, 2008) (rejecting alleged takings claim as a matter of law because "[t]he sale of property

for delinquent taxes involves the taxing power, not the eminent domain power of the government”).

Indeed, there is nothing in the Ohio Constitution or the Ohio Revised Code that provides that Cuyahoga County can be compelled to pay compensation to a delinquent taxpayer merely because the Board of Revision imposed a statutory remedy created by the Ohio General Assembly for the failure to pay taxes. As the Ohio Supreme Court has explained, Article II, Section 1 of the Ohio Constitution delegates “the power to tax” exclusively to the legislative branch of government, the Ohio General Assembly. *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 40. In this regard, county boards of revision act as the “state’s agents” in carrying out the statutory powers granted by the General Assembly pursuant to taxing powers conferred by Ohio Constitution, Art. II, § 1. *Scarborough v. Gibson*, 13 Ohio Dec. 738, 740 (1903), *aff’d*, 69 Ohio St. 578, 70 N.E. 1130 (1904). Section 323.78, in fact, is part of the Chapter of the Ohio Revised Code, entitled “Collection of Taxes.” *See* Ohio Revised Code Chapter 323. Thus, by enforcing the state statutes established by the Ohio General Assembly for the collection of taxes, the Board of Revision is exercising the State’s taxing powers under Art. II, Sec. 1 of the Ohio Constitution.

Although the imposition of a direct transfer remedy under R.C. 323.78 does not involve a tax sale, this distinction is immaterial because, regardless of the statutory remedy involved – sale, forfeiture, or transfer – the fact remains that a property owner loses all of his

or her right, title, and interest in the property *as a result* of the failure to pay taxes. As this Court has observed, “People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property.” *Jones v. Flowers*, 547 U.S. 220, 234 (2006). Thus, given that the Board of Revision’s direct transfer order was based upon Feltner’s failure to pay taxes, no takings claim can arise as a matter of law.

This is critical because this Court “has never required the State to compensate the owner for the consequences of his own neglect.” See *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982). In *Texaco*, for example, the Supreme Court held that the State of Indiana cannot be held liable to pay compensation for the loss of property where, as here, it results from an owner’s failure to comply with certain statutory conditions imposed by state law. *Id.* at 529-530. Similarly, the State of Ohio also cannot be liable for an alleged taking that arises from a person’s neglect in failing to comply with the statutory requirements for the payment of taxes. In both cases, the property owner lost their interest in the property through their own neglect by failing to comply with the applicable statutory requirements.

In his Petition, Feltner seeks to circumvent the foregoing case law by making the conclusory legal allegation that the State’s imposition of the direct transfer remedy is not based upon the State’s taxing powers, but is based upon the exercise of the State’s “eminent domain powers.” Again, this is a meritless argument that ignores the fact that this question is ultimately

controlled by the proper interpretation of the statutory powers granted to county boards of revision under Ohio law. Under Ohio law, a county board of revision is a creature of statute that does not have any powers or authority *other* than the specific statutory powers granted by the Ohio Revised Code. The Ohio General Assembly, however, has never granted any eminent domain powers to boards of revision. *See* Ohio Rev. Code § 5715.02 (granting authority to hear tax valuation complaints); Ohio Rev. Code § 323.65 (granting authority to hear tax foreclosure proceedings). Rather, the statutory powers granted to boards of revision under Ohio Rev. Code 323.65 through 323.79 are based entirely upon the State’s *taxing* powers under Article II, Section 1 of the Ohio Constitution. Accordingly, for this additional reason, the Ohio Supreme Court properly dismissed Feltner’s writ of mandamus claim.

C. Feltner’s Takings Claim Is Based Upon Factual Allegations That Are Not Proven Or Fully Developed In The Underlying Ohio Supreme Court Proceedings.

In his Petition, Feltner alleges that the Board of Revision’s tax foreclosure order constitutes a “taking” because the alleged fair market value of the property exceeded the amount of tax impositions owed. Even if his writ of mandamus claim had not been dismissed, however, the fact remains that Feltner’s mandamus claim was based solely upon allegations, and ultimately would have required Feltner to prove, *through competent and admissible evidence*, that the fair market

value of this abandoned, tax-foreclosed property actually exceeded the total amount of tax impositions owed. In this case, however, there was no factual record developed by the parties on this issue in the underlying Ohio Supreme Court proceedings.

In his Petition, Feltner relies solely upon the auditor's most recent tax valuation as evidence of the fair market value of the property as of the date of the alleged transfer. (Petition, pg. 7). This argument, however, ignores the fact that the assessed valuation of property for tax purposes is not admissible to establish the fair market value of a property for purposes of an alleged takings claim.² Indeed, in Ohio, "the general rule is that the assessed valuation of property is not evidence of value for other than tax purposes." *Ohio Cas. Ins. Co. v. D&J Distrib. & Mfg., Inc.*, 6th Dist. No. L-08-1104, 2009-Ohio-3806, 2009 WL 2356849, at ¶ 22 (Ohio App. July 31, 2009) (quoting *Bana v. Pittsburgh*

² We note that the federal courts have consistently followed this well-established principle of law in numerous cases. *See, e.g., SunTrust Mortgage, Inc. v. Busby*, 469 Fed.Appx. 205, 207 (4th Cir. 2012); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1495-96 (9th Cir. 1997); *United States v. Certain Parcels of Land in the County of Arlington, State of Virginia*, 261 F.2d 287, 289-291 (4th Cir. 1958); *Bowie Lumber Co. v. United States*, 155 F.2d 225, 228 (5th Cir. 1946); *Dubinsky Realty Co. v. Lortz*, 129 F.2d 669, 673 (8th Cir. 1942); *United States v. Easement and Right-of-Way Over 1.58 Acres of Land*, 343 F.Supp.3d 1321, 1345-1346 (N.D. Ga. 2018); *United States v. An Easement and Right-of-Way Over 4.42 Acres of Land*, 4:16-CV-0314-HLM, 2018 WL 8131100, *2 (N.D. Ga. Sept. 11, 2018); *Eaton v. Boles*, No. 5:03-CV-165, 2005 WL 8164008 (W.D. Mich. Nov. 3, 2005); *GEM Realty Trust v. First Natl. Bank of Boston*, No. CIV 93-606-SD, 1995 WL 127825, *5 (D. N.H. Mar. 20, 1995).

Plate Glass Co., 76 N.E.2d 625, 628 (Ohio App. 1947)). Here, Feltner is not attempting to use the auditor's valuation for tax purposes. Rather, he is attempting to use the auditor's most recent tax valuation to satisfy his burden to prove an alleged "taking" under the Fifth and Fourteenth Amendments of the U.S. Constitution. Thus, even if his writ of mandamus claim had not been dismissed for failure to state a claim, the fact remains that Feltner would not have been able to rely upon the auditor's most recent tax valuation, but would have been required to present competent and admissible evidence to demonstrate the fair market value of the property at the time of the alleged taking, which is not part of the evidentiary record in this case.

Indeed, under Ohio law, tax appraisals are only conducted every six (6) years based upon a mass appraisal methodology that does not even purport to determine the fair market value of any individual property as of the date of the alleged taking. With respect to Feltner's property, the most recent tax appraisal would have been conducted as of January 1, 2012, more than five years before the tax foreclosure order was issued in June 2017. Accordingly, because the value of property can change over time and may be affected by changes in market and physical conditions, the auditor's most recent appraisal for tax purposes, even if admissible, still would not be controlling in determining the fair market value of the property at the time of the transfer.³ The lack of a fully-developed

³ This is an important point because the Petition is based upon the flawed assumption that the vacant, tax-foreclosed property at

factual record on this issue, therefore, is an additional reason for why the Petition should be denied.

D. Most Of The Legal Arguments In Feltner’s Petition Were Not Presented To The Ohio Supreme Court.

This Court ordinarily will not grant review unless the issue was “pressed or passed” upon below. *Verizon Comm’ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002). Here, most of the legal arguments raised in Feltner’s Petition are based upon arguments that were neither pressed nor passed upon in the underlying writ of prohibition action. In response to the Respondents’ Motions to Dismiss, Feltner raised only three (3) pages of argument in support of the alleged mandamus claim, which were limited to: arguing that Ohio’s judicial review scheme did not provide an adequate remedy at law, and distinguishing this Court’s opinion in *Bennis* and the state court opinion in *Leasor*. See Feltner’s Memorandum Contra to Respondents’ Motions to Dismiss, pp. 21-24, filed on October 22, 2018.

issue had “surplus equity” when it became subject to a tax foreclosure order in 2017. This is not a fair or accurate assumption. If a property owner truly believes that there is “surplus equity” in a property that becomes subject to a tax foreclosure action, he or she would likely look to sell their property or enter into a payment plan to protect this alleged equity. Here, Feltner appeared at the first tax foreclosure hearing, but he did not make any attempt to pay his outstanding taxes, enter into a payment plan, or take any other timely action under Ohio’s administrative and judicial review scheme to protect his alleged interest in this abandoned, tax delinquent property.

Feltner's Petition for Writ of Certiorari, however, raises a whole host of new legal arguments that were never presented or passed upon by the Ohio Supreme Court. The Petition does not even cite *Leasor* or any other Ohio takings cases, but instead relies upon a number of state court opinions from other jurisdictions that are not controlling and were never presented to the Ohio Supreme Court. Accordingly, for this additional reason, the Petition should be denied.

II. THE COURT SHOULD DENY THE PETITION BECAUSE THE CONSTITUTIONAL QUESTION PRESENTED LARGELY TURNS UPON THE PROPER INTERPRETATION OF OHIO LAW.

In his Petition, Feltner alleges that “state and federal courts conflict” over whether the government must pay “compensation” for the alleged taking of the “surplus equity” in a tax-foreclosed property. (Petition, pg. 21). This is a meritless argument because most of the cases cited on pages 21 and 22 of the Petition are factually distinguishable in that they involve the post-collection failure to refund the surplus proceeds of a tax sale, not the alleged taking of the “surplus equity” in a tax delinquent property that becomes subject to a forfeiture or transfer as a result of the failure to pay taxes. See *Rafaeli v. Oakland Cty.*, ___ N.W.2d ___, 2020 WL 4037642 (Mich. July 17, 2020); *Coleman v. Dist. of Columbia*, 70 F.Supp.3d 58 (D.D.C. 2014); *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000); *Bogie v. Town of Barnet*, 270 A.2d 898, 899-900

(Vt. 1970). Indeed, in each of the cases cited on pages 21 and 22 of the Petition, the question of whether the property owner had a constitutionally-protected interest in recovering the surplus proceeds of a tax sale depended upon a proper interpretation of state law, *i.e.*, the relevant state constitutional provisions, state statutes, and state court decisions. *Id.* Thus, none of the cases are controlling or applicable to this case.

Here, this case does not involve an alleged post-collection failure to refund the surplus proceeds of a tax sale. Rather, in this case, Feltner is seeking to recover the difference between the alleged “fair market value” of this abandoned, tax-delinquent property and the total amount of tax impositions owed. None of the cases cited in Feltner’s Petition, however, involve this type of alleged takings claim. In fact, in *Rafaeli*, the Michigan Supreme Court specifically rejected this type of alleged takings claim, finding that the recovery of the “fair market value” of a tax-foreclosed property would result in a “windfall” because the plaintiffs were “largely responsible for the loss of their properties’ value by failing to pay their taxes on time and in full,” and that such an award would be “taking money away from the public as a whole.” *Id.*, ___ N.W.2d ___, 2020 WL 4037642, at *24.

Similarly, the district court opinions in the *Coleman* case are readily distinguishable because they were based primarily upon the fact that “the District failed to respond” to the plaintiffs’ argument about whether they had been deprived of a constitutionally-protected property interest under D.C. law. *Id.*, 70

F.Supp.3d at 81. While the District later argued in a motion for judgment on the pleadings that Coleman did not have a constitutionally protected interest under the D.C.'s tax-sale statute, the district court again denied the District's motion because it did not address the D.C. Court of Appeals decisions cited by the plaintiffs. *See Coleman v. Dist. of Columbia*, No. 13-1456, 2016 WL 10721865 (D.D.C. Jun. 11, 2016). Thus, the opinions in *Coleman* turned upon an analysis of D.C. law, and also do not establish any precedent that would be controlling or applicable to Ohio law.

This is a critical distinction because it is well-established that property interests are created and defined by state law, not the U.S. Constitution. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Here, since Feltner's interest in the tax-foreclosed property is defined by state law, it is subject to the statutory requirements relating to the payment of taxes that are set forth in Chapter 323 of the Ohio Revised Code. Indeed, the statute at issue in this case – Ohio Rev. Code 323.78 – expressly provides that a property owner loses all right, title, and interest in a tax-foreclosed property once the alternative right of redemption period expires, “regardless” of the fair market value of the property. *Id.* Accordingly, since property interests are created and defined by state law, the question of whether the enforcement of Ohio Rev. Code 323.78 deprived Feltner of a constitutionally-protected property interest also depends upon the proper interpretation of state law. *See Tyler v. Hennepin Cty.*, No. 20-CV-0889, 2020 WL 7129894, *8-11 (D.

Minn. Dec. 4, 2020) (dismissing takings claim because Minnesota law did not create any constitutionally-protected interest in recovering the “surplus equity” of a tax-foreclosed property that became subject to forfeiture under Minnesota’s tax foreclosure laws).

In his Petition, Feltner cites Ohio Rev. Code 5721.20 as allegedly supporting his position because Ohio law provides a property owner with the statutory right to recover the surplus proceeds of a tax sale if he or she follows the proper statutory procedures. The plain language of this statute, however, expressly states that this statutory right does not apply “in cases where the property is transferred without sale . . . pursuant to the alternative redemption period procedures contained in section 323.78 of the Revised Code.” *Id.* Thus, the Ohio General Assembly has clearly and unambiguously provided, by statute, that there is no right under Ohio law to recover any alleged “surplus equity” in a tax-foreclosed property that becomes subject to the direct transfer remedy set forth in Ohio Rev. Code § 323.78.

In his Petition, Feltner also cites a number of cases from other states for the proposition that he has an “equitable” interest in recovering the alleged “surplus equity” in a tax-foreclosed property. (Petition, pp. 11-14). This argument ignores the fact, however, that Ohio law is controlling in defining Feltner’s property interests, and thus the decisions of other state courts are not applicable or controlling in deciding this state law issue. Indeed, in his Petition, Feltner cites only one Ohio case – *Villas at East Pointe Condo. Assn. v.*

Strawser, 142 N.E.3d 1200, 1205 (Ohio App. 2019) – as allegedly supporting the proposition that a lien-holder has an “equitable” interest in the “surplus proceeds” of a foreclosure sale, but this case is readily distinguishable because it does not involve a tax foreclosure proceeding, and does not involve a situation where a property owner lost his interest in a property as a result of the failure to pay taxes.

Indeed, under Ohio law, it is well established that equity does not apply to tax matters, which are based entirely upon the rights and obligations established by statute. *See Gen. Motors Corp. v. Limbach*, 67 Ohio St.3d 90, 93, 616 N.E.2d 204 (1993) (“we have not applied equitable principles to tax matters”). Thus, since tax matters are controlled by statute, the plain language of Ohio Rev. Code § 323.78 is controlling in determining whether Feltner has any interest in recovering the alleged “surplus equity” of a tax-foreclosed property under Ohio law. Accordingly, since this issue is controlled by state law, the Petition does not present the type of important federal question that might warrant further review by the U.S. Supreme Court.



CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

JANEANE R. CAPPARA
ADAM JUTTE
Assistant Prosecuting Attorneys
The Justice Center,
Courts Tower, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Telephone: (216) 443-7800
jcappara@
prosecutor.cuyahogacounty.us
ajutte@
prosecutor.cuyahogacounty.us

STEPHEN W. FUNK
Counsel of Record
ROETZEL & ANDRESS, LPA
222 S. Main Street,
Suite 400
Akron, Ohio 44308
Telephone: (330) 376-2700
sfunk@ralaw.com
Attorney for Respondents
Cuyahoga County, Land
Reutilization Corporation

Attorneys for Cuyahoga County,
Cuyahoga County Board of
Revision, W. Christopher
Murray, II, Armond Budish,
Michael Gallagher, and
Michael W. Chambers