

ORIGINAL

1 IN THE SUPREME COURT OF THE UNITED STATES

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4 FAIR ASSESSMENT IN REAL ESTATE :

5 ASSOCIATION, INC., ET AL., :

6 Petitioners, : No. 80-427

7 v. :

8 GENE MC NARY, ET AL. :

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10 Washington, D.C.

11 Monday, October 5, 1981

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 2:18 o'clock p.m.

15

16 APPEARANCES:

17

18 DAVID J. NEWBURGER, ESQ., St. Louis, Missouri,

19 on behalf of the Petitioners.

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21 THOMAS W. WEHRLE, ESQ., St. Louis County Counselor,

22 Clayton, Missouri,

23 on behalf of the Respondent.

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on behalf of the Petitioners	
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on behalf of the Respondent	
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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Fair Assessment in Real Estate Association against McNary. Mr. Newburger, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID J. NEWBURGER, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. NEWBURGER: Thank you, Mr. Chief Justice. May it please the Court, in 1974, David and Lynn Cassilly bought a new home in St. Louis County, Missouri. In 1975, they with other citizens of St. Louis County initiated a series of litigations in the state court system to attempt to obtain a reassessment of real property taxes in St. Louis County and in the state of Missouri.

A series of decisions by the state courts have been rendered on that subject and a process of reassessment is now under legislative and court mandate going forward in the state of Missouri.

In the middle of the process of raising the issue of reassessment in the state of Missouri, the Cassillys, together with a citizen organization in which they were involved, initiated this action, a 1983 action, in which they sought damages against certain state and county officials for what they viewed as a violation of their constitutional rights.

1 Particularly, they alleged two violations of
2 rights. First, they alleged that they had been placed in a
3 category of classification of homeowners that was separate
4 from homeowners in general, that is, new homeowners, and
5 that as new homeowners their real property was assessed at
6 the rate of 33 and a third percent of its fair market value
7 when other homeowners were assessed on average at a
8 prevailing market rate of approximately 22 percent of its
9 fair market value.

10 Secondly, they alleged that in the course of
11 appealing certain assessments over the years, and
12 particularly in one particular year, they were successful in
13 their appeal and their assessed value was reduced, but that
14 they and everybody else who had appealed in that year
15 through the state process had been automatically called up
16 for reassessment in the second year, thus that they were put
17 in a classification of people who had exercised their right
18 to appeal and when people exercised their right to appeal
19 they were separated into a separate class and subjected to a
20 reassessment that raised them back to where they had been
21 assessed in the first place.

22 QUESTION: Mr. Newburger, is there any issue here
23 of whether your complaint stated a cause of action in 1983?

24 MR. NEWBURGER: I do not believe that anybody has
25 seriously challenged whether we stated a cause of action.

1 QUESTION: I am just wondering whether we ought
2 not get that.

3 MR. NEWBURGER: As far as I can see, we have in
4 fact alleged a cause of action, and the District Court
5 dismissed us out exclusively on the subject of the Tax
6 Injunction Act, and, Mr. Justice Brennan, in connection with
7 that, I would also like to narrow today's discussion in
8 another respect. While one of the Petitioners is an
9 association of citizens, this Act -- this lawsuit has been
10 determined solely on the basis of the Cassillys' claim, and
11 the question that we come down to is the interest today of
12 these homeowners in their right to pursue their 1983 action
13 in light of the Tax Injunction Act in Federal Court.

14 QUESTION: In other words, whether, in spite of
15 the fact that the Tax Injunction Act has been extended to
16 declaratory judgments, it should also be extended to
17 monetary relief?

18 MR. NEWBURGER: Yes. Judge Nangle, the District
19 Court Judge who heard the case, dismissed the case on the
20 grounds, stating that this was like a tax refund action, on
21 the grounds that the Tax Injunction Act barred this action,
22 an action at law for damages.

23 QUESTION: Was he suggesting, when he said it was
24 like a tax refund action, that that in any event would be
25 the limit of any 1983 damages? A refund of the excess tax?

1 MR. NEWBURGER: Again, Your Honor, when one gets
2 into a situation that a case is being decided on a motion to
3 dismiss, it is difficult sometimes to know what facts really
4 will be material. In Petitioners' complaint, they allege
5 damages in excess of the amount of tax refund, and I am
6 speaking specifically about the Cassillys, wholly aside from
7 Fair Assessment in Real Estate.

8 QUESTION: Including punitive damages?

9 MR. NEWBURGER: I'm sorry?

10 QUESTION: Including punitive?

11 MR. NEWBURGER: Including, but not exclusively.
12 We have assessed both excessive taxes and other monetary
13 damages in some of the years of the complaint and punitive
14 damages, and seek to recover those. I think that when we
15 have the discussion from Judge Nangle, when he says this is
16 like a tax refund action, I think we should recognize
17 another element of his decision, and that is, he said
18 compared to Younger against Harris. Without much analysis
19 of what that meant, he was suggesting, I think, that the
20 difficulty in this case is the difficulty of Federalism,
21 that it is a question of whether the Federal Courts, the
22 lower Federal Courts should hear a Section 1983 action at
23 law for damages in the context of a claim that the entire
24 process is a part of the state taxation process, which is
25 obviously terribly important to keep within the confines of

1 state law.

2 QUESTION: Well, that was certainly the thrust of
3 Great Lakes versus Huffman, wasn't it, that just because it
4 said injunction didn't mean that it was limited to
5 injunction.

6 MR. NEWBURGER: That is right, Mr. Justice
7 Rehnquist. In Great Lakes against Huffman, the Court
8 confined itself to the subject of declaratory judgment
9 actions, which was the question presented, and our tradition
10 is to recognize that declaratory judgments actions are not
11 quite equity actions but certainly are in the realm that is
12 somewhat similar to equity actions, and indeed the argument
13 that I would present to this Court, is that on the language
14 and the legislative history and the precedents, like the
15 Great Lakes case itself, that on all of those terms, that
16 Section 1341, the Tax Injunction Act, bars the Federal
17 Courts from hearing cases in which the claim is for the
18 exercise of anything in the order of equity jurisdiction.

19 But I likewise submit that there is nothing in the
20 statute or the legislative history or the precedents to
21 suggest that the claim for damages should be barred.

22 QUESTION: Well, Mr. Newburger, before we ever had
23 1341, I gather the jurisprudence of this Court was, at the
24 very least, wasn't it, that you had to do administrative
25 exhaustion, administrative exhaustion in the state, and that

1 that was a jurisdictional prerequisite to a tax suit, was it
2 not?

3 MR. NEWBURGER: That is right, Your Honor.

4 QUESTION: That was Weld County, wasn't it?

5 MR. NEWBURGER: Yes.

6 QUESTION: Now, do you think that 1341 in any way
7 affected that jurisdictional requirement?

8 MR. NEWBURGER: I do not think that the question
9 of exhaustion was determined in any way by 1341. I think
10 that it --

11 QUESTION: So that left standing, Weld County
12 would still be good law, notwithstanding 1341.

13 MR. NEWBURGER: I would take the view that Monroe
14 against Pape and the cases that followed from that have
15 determined the exhaustion question in respect to this
16 matter. I certainly do not believe that the Federal Courts
17 in a diversity case simply based on an argument of some
18 inappropriate taxation or taxation contrary to state law
19 would be able to hear that case without going through the
20 processes of administrative exhaustion.

21 QUESTION: At 21 of your brief, you cite Matthews
22 and Rodgers.

23 MR. NEWBURGER: Yes, Your Honor.

24 QUESTION: And the conclusion of the quotation you
25 cite from suggests that a suit at law in the Federal Courts,

1 if the essential elements of Federal jurisdiction are
2 present. Now, didn't that at least contemplate that you had
3 to exhaust your administrative remedies, as a Federal
4 jurisdictional prerequisite, before you could maintain a
5 suit at law in the Federal Courts?

6 MR. NEWBURGER: In a proper case in which the
7 question of exhaustion of administrative or judicial
8 remedies is presented.

9 QUESTION: Incidentally, did you exhaust the
10 administrative remedies in this --

11 MR. NEWBURGER: Your Honor, the position that we
12 take is that exhaustion is not required.

13 QUESTION: No, my question was, did you. Did you
14 attempt to exhaust --

15 MR. NEWBURGER: The trouble with the question is
16 -- again relates back to the facts of the case. There are a
17 number of things that have happened. In two of the years
18 that we have made a complaint on, we did not appeal the
19 assessment. In two of the years we have complained of, we
20 did appeal and complete the appeal of the assessment.

21 QUESTION: That is an administrative appeal, is
22 it?

23 MR. NEWBURGER: That went through the
24 administrative appeal process.

25 QUESTION: I see.

1 MR. NEWBURGER: And in one of the years, the
2 appeal was started, but I do not believe that it was carried
3 to completion. But, Your Honor, I would suggest that there
4 is another very important question here, when we talk about
5 exhaustion, and that is the question of exhaustion of what
6 remedy, because the remedy that is being claimed here is the
7 constitutional remedy to be protected from violations of the
8 equal protection clause, and I do not believe that there is
9 any proceeding that could be had in state court other than
10 an analogous 1983 action, perhaps, in state court that would
11 --

12 MR. NEWBURGER: Have the Missouri courts passed on
13 whether 1983 suits may be brought?

14 MR. NEWBURGER: To be perfectly honest, I am of
15 the opinion that it can be done in Missouri, but I don't
16 think that it is necessarily 100 percent clear. But the
17 fact remains that --

18 QUESTION: Well, even if it does --

19 MR. NEWBURGER: That's right.

20 QUESTION: -- even if it can, if you could have
21 brought your suit in state court under 1983, you say that is
22 no answer in any event.

23 MR. NEWBURGER: That's right, Your Honor, because
24 --

25 QUESTION: You may still go into Federal Court.

1 MR. NEWBURGER: -- quite clearly under the train
2 of cases that have developed around 1983 following Monroe
3 against Pape, this is an election that a plaintiff has under
4 the circumstances.

5 The other fact that is terribly important to the
6 question that you are pressing me on is whether, if we do
7 proceed with our case, we actually are posing a problem with
8 the administration of state taxes, and I think that it is
9 very important to recognize that the case that we have
10 prosecuted here has only minimal impact on the exercise of
11 the taxation processes in the State of Missouri.

12 The only thing we are asking for is damages
13 arising out of our constitutional breach by individual
14 defendants, not by any public authority. We are asking from
15 the damages from institutional defendants, and we are asking
16 from those damages based upon the fact, as we allege, that
17 those individual defendants in bad faith, because, of
18 course, there is official immunity in the picture, in bad
19 faith --

20 QUESTION: They are state officials?

21 MR. NEWBURGER: I am sorry?

22 QUESTION: They are state officials?

23 MR. NEWBURGER: They are state and county
24 officials.

25 QUESTION: And to sue state and county officials

1 does not interfere with their work. Is that your position?

2 MR. NEWBURGER: No, Your Honor. I am certain that
3 it is possible -- well, I have no doubt but that the
4 litigation itself has some possibility of a chilling impact
5 on the exercise of discretion that they would pursue. I
6 would point out to the Court that the Court has developed a
7 doctrine of official immunity, Wood v. Strickland and the
8 cases that are associated with that, which I suggest is a
9 doctrine developed to protect state officials so that they
10 do properly exercise their discretion.

11 QUESTION: You haven't sued the county or any
12 municipality as such, have you?

13 MR. NEWBURGER: That is right, Your Honor.

14 QUESTION: So that there is no Owen and
15 Independence problem here.

16 MR. NEWBURGER: That is right, Your Honor. In
17 fact, this case came down before the decision -- this case
18 was initiated before the decision in Independence, but I
19 doubt that Independence would be relevant because this is an
20 exercise of the county taxing authority, which is in a
21 direct administrative line from state taxing authority, and
22 I don't think that there is the presence of a municipal
23 corporation in the circumstance to create that problem.

24 I think that it is important to recognize because
25 of the official immunity doctrine that the liability of

1 these defendants can only be established if we establish
2 first the equal protection violation and second that they
3 acted in bad faith, because when we worry about whether the
4 officials' exercise of discretion will be hindered, the
5 answer to that question has to be that while it may be
6 hindered, it is in a very limited way, and it is certainly
7 no more hindered than governors and police officers and
8 other officials who under the official immunity doctrine may
9 have some possibility of liability in some circumstances
10 where their bad faith is established.

11 QUESTION: Mr. Newburger, may I interrupt you?
12 The references to bad faith in this context are somewhat --
13 a little bit unusual, it seems to me. Supposing there was a
14 statute in the state that said new homes shall be assessed
15 at 33 percent of market value, and after a year they shall
16 be assessed at 20 percent of market value. Is it your view
17 that that statute would violate the equal protection
18 clause?

19 MR. NEWBURGER: If there were some reasonable
20 basis for that classification --

21 QUESTION: That is all we know. All we know is
22 that there is a statute that says that, and then the people
23 who work in the Tax Department are trying to collect taxes
24 on that basis.

25 MR. NEWBURGER: The question, as I am sure you

1 recall, Mr. Justice Stevens, relates back to the question of
2 whether such a classification is palpably arbitrary, and
3 indeed that is the reason that I am using the word "bad
4 faith" in this discussion. I would take the view that that
5 kind of classification has no apparent justification on its
6 face unless there is some kind of legitimate public policy
7 of discouraging the construction of new homes which I have a
8 very hard time contemplating.

9 QUESTION: Well, what if the statute had a
10 preamble reciting that the additional expense in connection
11 with new construction, building permits, inspections, and so
12 forth, justified this? Would you have any problem with it
13 then? There are additional expenses for new homes, are
14 there not?

15 MR. NEWBURGER: Yes, certainly there are expenses
16 for new homes, including a building permit, which indeed
17 could be characterized as a tax.

18 QUESTION: And building inspections.

19 MR. NEWBURGER: And building inspections could be
20 characterized as a tax. If there were that kind of rational
21 basis for the distinction, then it may be that the
22 classification is not palpably arbitrary, but it seems to me
23 that it is important for us to remember a couple of facts.
24 One, under the law and the constitution of Missouri, there
25 is no classification of real property to be recognized.

1 That is a ground rule in the State of Missouri.

2 QUESTION: Yes, but if we are talking about the
3 Federal Constitution, does it really matter to us whether
4 the classification is made by the legislature or by the
5 people who collect the taxes, if they do it on a uniform
6 basis and make tha particular rule?

7 MR. NEWBURGER: The second argument that I would
8 make arises out of Sioux City against Breckenridge, which is
9 a 1923 decision of this Court, and that is that if you have
10 by happenstance a development in which there are some people
11 who are assessed at a much higher rate than the prevailing
12 rate throughout the country, that that is a palpably
13 arbitrary distinction that creates a classification that is
14 not consistent with the equal protection clause.

15 QUESTION: But this one by your own allegation is
16 not a happenstance or an accident. They have a state policy
17 of treating new homes at one rate and older homes at a
18 different rate, and it seems you have conceded that it is
19 not palpably arbitrary.

20 MR. NEWBURGER: No, I didn't mean to concede --

21 QUESTION: If there was a statute, you conceded
22 it, I mean.

23 MR. NEWBURGER: I am suggesting that there are
24 circumstances in which a program can be established in which
25 distinction can be drawn in different kinds of real

1 property. I would suggest that in the exact circumstances
2 of this case, that it is necessary for me to prove in the
3 District Court, if I am going to be heard on this case, that
4 these classifications are palpably arbitrary. My intention
5 in making that proof is that what had happened was, because
6 of an absence of reassessment in the county, the county
7 permitted old properties to continue at their level of
8 assessment for some 20 years, and at the same time engaged
9 in an activity of assessing new property at 33 and a third
10 percent of the fair market value of that property.

11 Now, that, I suggest, is not a decision that was
12 based upon a rational basis, that there is not a distinction
13 to be drawn between that old property and the new property.
14 I think that is exactly what the case was in Sioux City, and
15 the Court in that case taught all of us that that was a
16 classification that was unconstitutional within the equal
17 protection clause.

18 QUESTION: When was the last time anybody cited
19 Sioux City? I haven't read it, to be honest with you.

20 MR. NEWBURGER: Well, it is interesting. Sioux
21 City was cited in 1978, I believe is the year, by the
22 Supreme Court of Missouri, to tell the assessors that in
23 fact that is the controlling law of the land, and that they
24 ought to have either been assessing property at that lower
25 22 percent or they ought to be assessing everybody at the

1 higher 33 percent. The important question, though, here, is
2 a question of Federal jurisdiction, and while it is
3 certainly fair and fair game to take after me on the
4 question of whether I am going to prove that equal
5 protection violation if I am returned to District Court,
6 that is not what Judge Nangle did in dismissing me, and what
7 he did in dismissing me was to determine that I was barred
8 either by the Tax Injunction Act or by some analogy to the
9 Younger against Harris doctrine.

10 QUESTION: Was there an answer in this case, or
11 just a motion to dismiss?

12 MR. NEWBURGER: There are two different sets of
13 Respondents and Defendants in this case.

14 QUESTION: Well, let me ask you my ultimate
15 question. Was immunity pleaded in any of the answers?

16 MR. NEWBURGER: I don't recall.

17 QUESTION: Because I thought our qualified
18 immunity rule under -- and I think it was in Proculia
19 against Naverett out of Illinois, wasn't it?

20 MR. NEWBURGER: Are you thinking of Bridgewell,
21 Your Honor?

22 QUESTION: No, I am not. I am thinking of the
23 qualified immunity case. Unless the defendant knew or
24 should have known that this was a violation of the equal
25 protection clause, he is immune.

1 MR. NEWBURGER: I believe that is right.

2 QUESTION: And we have several times said that
3 unless the law was clearly established, especially on a
4 constitutional basis, he shouldn't be held liable to
5 damages.

6 MR. NEWBURGER: I believe that is correct.

7 QUESTION: So, I just wonder why in this case, if
8 you are going to have to prove -- if there is any doubt
9 about the equal protection violation, I would think the
10 immunity defense is going to be fairly solid.

11 MR. NEWBURGER: Well, I agree with that, Your
12 Honor, except that if you go back through the history of
13 what has gone on in this case in the state Courts, I believe
14 that the defendants fully understood that they were
15 violating the constitutional rights of the individual.

16 QUESTION: Well, then, why should you --

17 MR. NEWBURGER: In 1975 --

18 QUESTION: You are not going to have to prove it
19 then, I take it.

20 MR. NEWBURGER: Well, that is right, but I mean, I
21 believe that that is a matter of defense, and certainly I
22 expect to raise that issue in a trial. Perhaps I am
23 assuming that they will defend on all issues and they will
24 not.

25 QUESTION: Well, do you know any cases that come

1 right out and hold that this differential in assessment
2 violates the equal protection clause?

3 MR. NEWBURGER: Sioux City and Breckenridge, and
4 Sioux City is the decision of this Court in 1923, and
5 Breckenridge is a decision of the Missouri Supreme Court in
6 1978. In addition to that there was a decision of the
7 Missouri --

8 QUESTION: And yet the Missouri administrative
9 appeal system gives you no relief, says it is not, I take
10 it.

11 MR. NEWBURGER: The practice of the defendants in
12 this case has been to continue --

13 QUESTION: Well, I know, but you appealed it. You
14 appealed it in a couple of the years, didn't you?

15 MR. NEWBURGER: And in the years it was involved
16 there was partial relief but there was not total relief. In
17 fact, if I have my years straight, in 1978 there was a
18 partial relief; in 1979, the Assessor's Office issued a
19 computer letter which, incidentally, is in the allegations
20 within the record here, a computer letter that said, since
21 you got relief and your taxes were reduced last year, we are
22 automatically raising your taxes for next year, and did not
23 do that to anybody except those people who had exercised
24 their right of appeal, and I must say, Justice Stevens, it
25 seems to me that this is another classification in which I

1 may be able to clearly establish constitutional rights
2 violation.

3 QUESTION: Have you ever presented the
4 constitutional question to any Illinois authorities?

5 MR. NEWBURGER: Missouri, Your Honor.

6 QUESTION: I mean Missouri.

7 MR. NEWBURGER: The entire question of whether
8 there should be a reassessment is in the Missouri legal
9 process, where it belongs. This Court and the Federal
10 District Courts should not be hearing the question of
11 reassessment as a general policy matter within this Court.

12 QUESTION: Is the equal protection question
13 pending in the Missouri Court?

14 MR. NEWBURGER: I -- no. I do not believe the
15 question is pending at all, because I believe it was decided
16 by the Missouri Supreme Court in Breckenridge, and in
17 another case which is Estate of Cassilly against Reining,
18 and by the lower Courts on numerous occasions --

19 QUESTION: Mr. Newburger, I saw your light go on.
20 I just wanted to ask one more question.

21 MR. NEWBURGER: Certainly.

22 QUESTION: If we can get back to the
23 jurisdictional question, namely, jurisdiction of the Federal
24 Court to entertain a 1983 action in cases like this.

25 MR. NEWBURGER: Yes.

1 QUESTION: Is there anything in this quotation
2 from Rosewell? You just mentioned Rosewell.

3 MR. NEWBURGER: Yes, Your Honor.

4 QUESTION: Page 21, in which we said, "It is true
5 that post-1937 Court cases have suggested that the Tax
6 Injunction Act recognized and sanctioned the pre-existing
7 Federal equity practice." And we said that "it was a
8 long-standing rule of Federal equity to keep out of state
9 tax matters as long as a plain, adequate, and complete
10 remedy could be had at law."

11 Does that bear at all on our question here?

12 MR. NEWBURGER: I believe it bears most
13 importantly on the question in this regard. We are not
14 raising the question of litigating the presence or absence
15 of a plain, speedy, or adequate remedy.

16 QUESTION: So we assume that there is one.

17 MR. NEWBURGER: Well, we assume that --

18 QUESTION: Yes.

19 MR. NEWBURGER: -- without making inappropriate
20 concessions. What we are arguing is that the Tax Injunction
21 Act which refers to the Federal Courts in joining,
22 suspending, or restraining the actions related to tax
23 assessment is simply unrelated to damage actions, and that
24 the Tax Injunction Act nor the doctrines of comity, as this
25 Court has developed them over the years, in the absence of

1 any suggestion of a claim for the exercise of equity
2 jurisdiction, should bar this action.

3 QUESTION: But suppose the Missouri Supreme Court
4 were to say, yes you may maintain a 1983 action in our state
5 court for the damages that you are seeking in the Federal
6 Courts. Would that have any relation to this?

7 MR. NEWBURGER: Unless this Court were to adopt a
8 new precedent, which it has not so far done, that requires
9 the pursuit of a 1983 action in --

10 QUESTION: That is your Monroe and Pape argument,
11 isn't it?

12 MR. NEWBURGER: I am sorry?

13 QUESTION: That is your Monroe and Pape argument.

14 MR. NEWBURGER: Yes.

15 QUESTION: Yes.

16 MR. NEWBURGER: Okay. If I may reserve two
17 minutes for rebuttal.

18 CHIEF JUSTICE BURGER: Very well.

19 Mr. Wehrle?

20 ORAL ARGUMENT OF THOMAS W. WEHRLE, ESQ.,

21 ON BEHALF OF THE RESPONDENT

22 MR. WEHRLE: Mr. Chief Justice, may it please the
23 Court, I would just like to make one comment on Mr.
24 Newburger's statement that he felt that this case could have
25 a chilling effect upon the tax officials of St. Louis County

1 and of the State of Missouri. I believe that is why we are
2 here, because we feel that this Court and all the other
3 Courts as well as Congress, that their intent was when they
4 passed the Tax Injunction Act, was to keep Federal District
5 Courts from interfering with the collection of state taxes
6 as far as the method, assessment, levy, and collection was
7 concerned, and when he says that no doubt that this cause of
8 action will have a chilling effect upon tax officials, then
9 we submit to you that it is the reason, that is the reason
10 why Judge Nangle said what he said, because he said he could
11 not in any way go into this lawsuit without actually
12 becoming an Appellate Court in regard to the assessment of
13 taxes in St. Louis County.

14 QUESTION: Well, Mr. Wehrle, the statute, of
15 course, in words, deals only with enjoining, suspending, or
16 restraining, doesn't it? And here what you have is an
17 action for money damages. Is that an action to suspend or
18 enjoin or restrain?

19 MR. WEHRLE: I think it would be an action to
20 restrain and suspend, not to enjoin, because when we look at
21 what the meanings of those words are, restrain, to restrain
22 and suspend, restrain, you know, to pull the effect back.
23 And so if any cause of action, be it an injunction suit,
24 declaratory judgment suit, a suit for a tax refund, or just
25 a plain damage suit like this, it is going to have the

1 effect of pulling back what the tax official is going to do
2 in his job.

3 QUESTION: There is a considerable difference
4 between declaratory judgment and damages.

5 MR. WEHRLE: Yes, sir, but --

6 QUESTION: So the declaratory judgment case does
7 not help you at all.

8 MR. WEHRLE: Mr. Justice, I think it does.

9 QUESTION: Well, the only difference between a
10 declaratory judgment and an injunction is one piece of
11 paper. That is the only difference, right?

12 MR. WEHRLE: No, sir, I think --

13 QUESTION: What else do you need after you get a
14 declaratory judgment?

15 MR. WEHRLE: Well, the declaratory judgment is --

16 QUESTION: All you need is a motion to turn it
17 into a permanent injunction.

18 MR. WEHRLE: But the Courts have looked on it as
19 different, Judge, and I think that if we look at the history
20 --

21 QUESTION: There is a little difference between
22 that and damages, isn't there?

23 MR. WEHRLE: There is a difference, yes, sir, but
24 when we look at the history --

25 QUESTION: Can you get a declaratory judgment for

1 damages?

2 MR. WEHRLE: No, sir.

3 QUESTION: Well, how does it help you on damages?

4 MR. WEHRLE: It helps us on damages for this
5 reason. I submit to the Court that when the Tax Injunction
6 Act was passed, what Congress had in mind at that time was
7 the fact that there was discrimination against state --

8 QUESTION: But they limited it to injunctions.

9 MR. WEHRLE: Yes, sir, but the --

10 QUESTION: They could have said, the Federal
11 Courts shall take no action on state cases.

12 MR. WEHRLE: That is right.

13 QUESTION: But they did not. They limited it to
14 injunctions.

15 MR. WEHRLE: But they limited it to injunctions,
16 but, Judge, the Court has extended it to declaratory
17 judgments. The Courts have extended it to declaratory
18 judgments, and I think if Congress --

19 QUESTION: So eventually we will extend it to
20 probate.

21 MR. WEHRLE: Possibly. Yes, sir.

22 QUESTION: Can declaratory judgments become a
23 predicate for money damage judgments?

24 MR. WEHRLE: It could. Yes, Judge, yes.

25 QUESTION: Not only that, to get damages you

1 certainly are going to have to have a judgment that this
2 assessment system is illegal.

3 MR. WEHRLE: Yes, sir. You first have to have a
4 declaratory judgment saying that this act or this act or
5 some statute is unconstitutional.

6 QUESTION: May I disagree that you don't need a
7 declaratory judgment to recover actions on a case that asks
8 for damages. You can get damages without a declaratory
9 judgment, can't you?

10 MR. WEHRLE: Well, Judge --

11 QUESTION: When you sue for damages, can't you get
12 it without a declaratory judgment?

13 MR. WEHRLE: Yes, sir, but in this case --

14 QUESTION: Can't you?

15 MR. WEHRLE: Yes, sir.

16 QUESTION: Can't you? I thought so.

17 MR. WEHRLE: Yes, sir, you could, but I --

18 QUESTION: I don't want to give back a whole lot
19 of judgments I have delivered.

20 QUESTION: You can't get damages without a
21 judgment.

22 MR. WEHRLE: You've got to have a judgment.

23 QUESTION: I said declaratory --

24 MR. WEHRLE: Yes, sir.

25 QUESTION: -- and that is what you also said,

1 declaratory.

2 QUESTION: I said judgment. I said judgment.

3 QUESTION: Well, take declaratory out.

4 MR. WEHRLE: In this case, I think before, under
5 these facts, which was a motion to dismiss -- this is here
6 on a motion to dismiss, no question about it. There are two
7 sets of defendants here. One, the county defendants, the
8 county assessor, the county collector of revenue, and the
9 county executive. There is also a set of defendants of the
10 Missouri State Tax Commission.

11 Now, the Missouri State Tax Commission filed an
12 answer, I call them the state defendants. The county
13 defendants filed a motion to dismiss on comity and the Tax
14 Injunction Act, and Judge Nangle sustained that motion to
15 dismiss, and that is why we are here, on the motion to
16 dismiss.

17 Judge, I might point out that the Breckenridge
18 case was decided on a motion to dismiss. It had never been
19 tried. It came back on a motion to dismiss, and we submit
20 that, Judge, before any damages could be sustained in this
21 case, we submit that the Trial Court, the District Judge
22 first is going to have to go into the manner of assessment,
23 how the assessment was arrived at comparing new homes to old
24 homes, and how it was applied, and then we submit, then you
25 are getting back into an attack on tax assessment, and this

1 Court as well as all other Federal Courts, the history has
2 been that they have deferred to the state Courts.

3 They say, you have a plain, speedy, efficient
4 remedy in the state Courts, you take your matter to the
5 state Courts, do not come to the Federal Courts. That has
6 been the history, even before the Tax Injunction Act, and we
7 submit that since that Tax Injunction Act, that the Courts
8 have -- they started out with injunction suits, but then
9 they have gone to declaratory judgment suits, they have gone
10 to tax refund suits. The Ninth Circuit and the Eighth
11 Circuit have said that on a tax refund suit, which was not
12 -- there was no such thing as a tax refund suit as far as
13 when the Tax Injunction Act was passed, but in those two
14 Circuits they have said that what Congress intended, what
15 the Federal Courts have done in the past, we now extend to a
16 tax refund suit, and therefore the Tax Injunction Act would
17 bar us.

18 QUESTION: You don't need the Tax Injunction Act.
19 In your argument you don't need it.

20 MR. WEHRLE: No, sir, we wouldn't, but we do have
21 it.

22 QUESTION: And you did not urge it. The Court
23 just took it.

24 MR. WEHRLE: Not with one of our motions to
25 dismiss. It was based on this.

1 QUESTION: It was?
2 MR. WEHRLE: Yes, sir.
3 QUESTION: I thought it was on comity.
4 MR. WEHRLE: No, sir, that is what the Court found
5 on both of them.
6 QUESTION: Oh, I see.
7 MR. WEHRLE: Judge Nangle said --
8 QUESTION: But you would be satisfied with comity,
9 wouldn't you?
10 MR. WEHRLE: Yes, sir, we would be satisfied with
11 a tax refund or comity.
12 QUESTION: There is a refund remedy, is there,
13 under Missouri practice?
14 MR. WEHRLE: Yes, sir.
15 QUESTION: What is it, that you have to pay your
16 tax?
17 MR. WEHRLE: You pay your tax under protest, and
18 within 90 days you file a suit in the Circuit Court, and at
19 that point we say, besides that, they take an appeal, the
20 County Board of Equalization, to the State Tax Commission,
21 and we submit that that is their plain, speedy, and
22 efficient remedy at law which the Tax Injunction Act --
23 QUESTION: Does that Commission have the authority
24 to decide the constitutional question of whether the
25 classification is --

1 MR. WEHRLE: I think -- yes, sir, Judge, yes.
2 That is how the Breckenridge case went up. It was on a tax
3 protest case.

4 QUESTION: If instead of this being a
5 discrimination between new homeowners and old homeowners, if
6 the discrimination was based on, say, racial classification
7 or national origin or something like that, and there was an
8 allegation that all the persons of a given race were
9 assessed at a different basis, and that was state policy and
10 so forth, you would still say that claim had to be asserted
11 in the state Court?

12 MR. WEHRLE: Yes, sir, because, Judge, I think the
13 Tax Injunction Act would come in for this reason. I do not
14 believe that there is any way you could arrive at that
15 decision without going into the matter of assessment. You
16 have to do it.

17 QUESTION: The only issue would be whether the
18 principle of taxing at different rates because, in this
19 case, they are new homeowners as opposed to old, or in the
20 other case because they are members of Race A instead of
21 Race B, that that principle is either right or wrong. You
22 couldn't raise that issue at all in a Federal Court under
23 your view.

24 MR. WEHRLE: That is right, Judge, because of the
25 fact of, I think, Bland versus McHann. That was a case in

1 which they -- of course, that was an injunction case and for
2 damages, and that was one of our allegations, that because
3 of their race, and because of the demonstrations, that their
4 property tax assessments had been increased, but the Court
5 said, we have to inquire into the method of assessment, and
6 because we have to inquire into the method of assessment,
7 then the Tax Injunction Act comes into play, and would bar
8 the cause of action.

9 QUESTION: Mr. Wehrle, you have relied primarily
10 on the Tax Injunction Act, 1341 --

11 MR. WEHRLE: Yes, sir.

12 QUESTION: -- as barring this 1983 suit for
13 damages.

14 MR. WEHRLE: Yes, sir.

15 QUESTION: Have you any other ground for barring
16 jurisdiction in the Federal Court?

17 MR. WEHRLE: I think on the question of comity,
18 defererering to the Court, and I think --

19 QUESTION: Is that jurisdictional, comity?

20 MR. WEHRLE: Sir?

21 QUESTION: Is comity jurisdictional?

22 MR. WEHRLE: Well, I think Judge Nangle was saying
23 that because of the history of the Federal Courts deferring
24 questions of state taxation to the state Courts, then that
25 is where they should be; even though we have the Tax

1 Injunction Act, they still should be in the state Courts.

2 QUESTION: Pre-1341 --

3 MR. WEHRLE: Yes, sir.

4 QUESTION: -- there was a Federal principle to

5 stay out of state tax cases.

6 MR. WEHRLE: Yes, sir.

7 QUESTION: But that was equity.

8 MR. WEHRLE: I am sorry, sir?

9 QUESTION: That was equity, wasn't it?

10 MR. WEHRLE: That was equity, yes, sir, but he was

11 extending it, saying, well, since that has been the history,

12 and that has been, as the Court said in Bland versus McHann,

13 the long-standing judicial policy, and Congressional

14 restriction of Federal jurisdiction in cases involving state

15 tax administration makes it the duty of Federal Courts to

16 withhold relief, and I think that is what Judge Nangle had,

17 the long-standing policy of the Federal Courts and

18 Congressional restraint.

19 QUESTION: I take it you would be willing to win

20 this case on either ground.

21 MR. WEHRLE: Yes, sir. I think either ground

22 would apply, sir. Yes.

23 QUESTION: Why do you think the Eighth Circuit

24 found it so difficult and divided equally?

25 MR. WEHRLE: I don't know. I can't answer that,

1 Judge. I know they did not come down with any opinion, so
2 we don't know.

3 QUESTION: But they expressed, and I think it is
4 very unusual, they expressed their division.

5 MR. WEHRLE: Yes, sir.

6 QUESTION: And did not hide it behind a general
7 statement of an equally divided Court.

8 MR. WEHRLE: I believe, Judge, the only thing I
9 might say, and it might be speculation on my part, is, right
10 before that the Court, I think it was the Seventh Circuit,
11 came out with the Fulton Market case, in which they
12 permitted a damage suit under 1983, and said that the Tax
13 Injunction Act would not bar it, and I say possibly four of
14 the Judges on the Eighth Circuit thought maybe they should
15 follow that, and four might think they could distinguish it,
16 and I think it can be distinguished. I do not think it is
17 so applicable.

18 QUESTION: Was Monroe and Pape argued in the
19 Eighth Circuit?

20 MR. WEHRLE: I am sorry, Judge?

21 QUESTION: Was Monroe and Pape argued in the
22 Eighth Circuit?

23 MR. WEHRLE: That I am not going to say, Judge,
24 because I am not sure whether they were or not.

25 QUESTION: Mr. Wehrle, I will ask one other

1 question, if I may. Do I correctly assume that in your
2 view, anyway, your opposition does not take the position
3 that the state remedy is inadequate in any way?

4 MR. WEHRLE: No, sir, we say that the state remedy
5 is adequate. Yes, sir.

6 QUESTION: Do they agree with you on that?

7 MR. WEHRLE: Well, I know that for two years they
8 have appealed in the state and it is still pending. Two
9 years, they did not. 1975 and 1976 they did not appeal; on
10 1978 and 1979 they have appealed. So I assume that they
11 feel it is adequate.

12 QUESTION: I should ask them, but I wanted to get
13 your impression.

14 MR. WEHRLE: Yes, sir.

15 QUESTION: Mr. Wehrle --

16 MR. WEHRLE: Yes, ma'am.

17 QUESTION: -- would you agree that Congress simply
18 wasn't thinking of a damages suit under Section 1983 when it
19 enacted the Tax Injunction Act?

20 MR. WEHRLE: Well, I would have to say sort of a
21 qualified yes, because at that time I think all you had in
22 the Federal Courts were injunction actions, and I don't
23 think they thought sitting back then that somewhere along
24 the line, maybe back in 1981, that somebody was going to
25 come in and ask for damages, because what they were doing,

1 in my opinion, they were putting into a statute what the
2 Federal Courts had been doing. They were concerned, I
3 believe, about a number of things, and I think one of the
4 things they were concerned about was at that time cases
5 against local officials, but since there had not been that
6 type of action, only injunction suits, I think that is why
7 they worded it the way they did, but I think we must look at
8 the fact that it was taken after the Johnson Act, as we
9 state in our brief. It was almost the exact wording of the
10 Johnson Act, and there is no question, I don't think, about
11 that Act being a complete bar to any case filed in a Federal
12 District Court in regard to an administrative agency setting
13 utility rates in a state, and when we look at that history
14 and see that that was the Act that the Tax Injunction Act
15 was patterned after, then I don't think there is any
16 question, and when we look at the report that came out of
17 the Senate and the House, they didn't just say the reports
18 say that this was an action where the Federal District
19 Courts cannot enjoin. They said this is going to apply to
20 the jurisdiction of the Federal Courts.

21 I submit that when you look at what Senator Bohn
22 said with regard to it, because he read, he was a sponsor
23 and he read from the Johnson Act in his statement to
24 Congress, and he said, this Act is patterned after that one,
25 so if we look at that history, and we look at the intent,

1 and then what the Federal Courts have done over the years --

2 QUESTION: That is the question I wanted to ask
3 you, Mr. Wehrle, about what the Federal Courts have done.
4 In their reply brief -- I haven't read the cases, but your
5 opponent on Page 16 cites some cases in which he says, in
6 diversity cases the Federal Courts had rendered damage
7 awards prior to the enactment of the statute, and that that
8 should be taken into consideration.

9 MR. WEHRLE: Judge, I think if you read those
10 cases, they were applying state law.

11 QUESTION: Well, but they were damage -- there was
12 Federal jurisdiction to enter a damage judgment, even if it
13 was applying state law. We do not have an issue about what
14 kind of law.

15 MR. WEHRLE: They were applying state law, but I
16 think --

17 QUESTION: And the objection in the Tax Injunction
18 Act was to enjoin even in diversity cases applying state
19 law.

20 MR. WEHRLE: Yes, sir. Yes, sir.

21 QUESTION: And they limited the statute to the
22 injunction remedy, because they were concerned about the
23 Federal Courts interpreting the state law and giving that
24 remedy.

25 MR. WEHRLE: But most of those, I think you will

1 see, they called them damages. They were refund actions,
2 but now we have some of these Circuits that actually have
3 held that the Tax Injunction Act applies even on refund
4 actions. I think it is the case out in California where the
5 Court said that this is going to affect the tax --

6 QUESTION: I was just questioning your analysis of
7 the state of the law at the time the statute was passed, is
8 all, and apparently there were precedents at that time --

9 MR. WEHRLE: There were precedents in regard to --

10 QUESTION: -- for Federal Courts both enjoining
11 and granting monetary relief --

12 MR. WEHRLE: Yes, sir.

13 QUESTION: -- and Congress clearly foreclosed
14 further injunctive relief, but did not, at least not as
15 clearly, foreclose --

16 MR. WEHRLE: Not as clearly, but I think Congress
17 knew at that time that there were suits under state law for
18 state refunds, but I do not think they felt at that time
19 there was going to be, say, a civil rights action brought
20 against a state official, and I think that --

21 QUESTION: Well, if I understood your answer to an
22 earlier question of mine, Mr. Wehrle, you take the position
23 that the Tax Injunction Act barred not only injunction suits
24 but also, and the Congress intended also to bar --

25 MR. WEHRLE: Yes, sir.

1 QUESTION: -- by the Tax Injunction Act damage
2 suits, don't you? Isn't that your position?

3 MR. WEHRLE: Yes, sir, but see, those cases were
4 not based upon a Federal statute. They were based upon
5 state statutes.

6 QUESTION: But neither were the injunction cases
7 that had been previously decided. They were also based on
8 state law.

9 MR. WEHRLE: Well, not necessarily. They were --

10 QUESTION: Some of them were. Some of them. The
11 major difficulty that Congress was concerned with was
12 foreign corporations coming in having the advantage of
13 diversity jurisdiction and getting injunctive relief under
14 state law. They didn't want that.

15 MR. WEHRLE: Well, they were getting injunction
16 relief from the Federal Court, though.

17 QUESTION: That is right.

18 MR. WEHRLE: That is right.

19 QUESTION: Well, these people are in Federal
20 Court, too.

21 MR. WEHRLE: Yes, but I would still submit that
22 the Tax Injunction Act, because of Congress' intention at
23 the time, and what the Federal Courts have done, not only
24 before but since then, they have extended it. We go from
25 injunction, to declaratory judgment, to refund, and now we

1 come to damage suits, and I submit that when we look at the
2 cases that have been decided in your various Circuits, we
3 look at the case involving -- the Monman case, out of the
4 City of Cambridge, and we are talking about suits for
5 declaratory judgments. When they said that declaratory
6 judgment action as well as this damage claim -- as well as
7 this damage claim -- is predicated upon the invalidity of
8 the assessment, and it is in essence an attack upon the tax
9 assessment, then they say that the Tax Injunction Act would
10 be a bar even though, even though it is brought under 1983,
11 and we look at the District Court case, the Advertiser claim
12 against Governor Wallace, that was a damage suit, strictly a
13 damage suit, and the Court found there, and let me quote for
14 just a moment from that, "The same principles which preclude
15 awarding anticipatory relief or a refund should also
16 preclude an award of damages sought in this case." They say
17 "The damage award Plaintiff seeks, especially its request
18 for punitive damages, still is designed to deter collection
19 of the taxes now being assessed by Defendants."

20 I think that -- we submit that when we are talking
21 about this cause of action, that if it has been any
22 deterrent effect upon the assessment, the collection, or the
23 levy of taxes by state officials or by county officials,
24 because the county officials in the first instance did the
25 things they complained about, then I think that what was

1 said in Advertiser is true. It is designed to deter the
2 collection of taxes being assessed by defendants, and we
3 submit that even though it as an eight to eight, we submit
4 that what Judge Nangle held in his decision, when he said
5 that he would in effect become an Appellate Court for
6 appeals from the local tax assessor, if he had to hear this
7 case, we submit that he is correct, he is right, and when we
8 look at the language of the Tax Injunction Act, we look at
9 the legislative history, we look at what the Courts have
10 done prior to it and since then, and we submit to this Court
11 that Judge Nangle should be affirmed in this case.

12 QUESTION: Before you sit down, may I ask one
13 other question?

14 MR. WEHRLE: Yes, sir.

15 QUESTION: Is there anything in this record that
16 is put in in behalf of the Defendants to explain the reason,
17 if there is one, for the classification that they challenge,
18 that is, the distinction between new homes and older homes?

19 MR. WEHRLE: As Mr. Newburger said, there had not
20 been a reassessment of all property in St. Louis County
21 until some time in the sixties. The new homes, so I don't
22 know how you look at it, Judge, but you could say the --
23 actually, and so the homes were being assessed at 33 and a
24 third percent of their market value, but because of
25 inflation the value had gone up. All homes were assessed at

1 33 and a third, and the new homes came on at their market
2 value, and they were assessed at 33 and a third.

3 The appeal to the Board of Equalization, they
4 reduced the assessment. Now, under Missouri law the
5 assessor is to assess property at 33 and a third, and so
6 that is why the assessor was faced with this. Under
7 Missouri law, I must assess property at 33 and a third
8 percent of its true market value. Now, even though the
9 Board of Equalization reduced that percentage last year, I
10 think I must follow state law, and that is why he put it
11 back at 33 and a third, because he must do that under state
12 law, and the notice goes out because that gives them a
13 chance -- under state law they must be notified if their
14 assessments increase, so they would have a right, and time
15 to take their appeal to the Board of Equalization or the
16 State Tax Commission.

17 QUESTION: Incidentally, this does not apply to
18 taxes within the City of St. Louis, this case.

19 MR. WEHRLE: No, sir. St. Louis County and St.
20 Louis City are two separate entities, Judge.

21 CHIEF JUSTICE BURGER: Do you have anything
22 further, Mr. Newburger?

23 ORAL ARGUMENT OF DAVID J. NEWBURGER, ESQ.,

24 ON BEHALF OF THE PETITIONER -- REBUTTAL

25 MR. NEWBURGER: Thank you, Your Honor.

1 There are a couple of points that I would like to
2 specifically address that the Justices raised in the course
3 of the argument.

4 If I might, Justice O'Connor, address the question
5 that you asked first, don't we think that Congress really
6 wasn't thinking about injunctions, I must admit that there
7 are two answers to that. First of all, we have specified
8 these two cases at Page 16 of the reply brief, in which the
9 Courts quite clearly took the view that a damage action
10 could be brought. I think that Congress could have found
11 those cases. Whether they found them or didn't, I don't
12 know, but that leads me perhaps to the second most important
13 portion of the answer to that question, and that is that
14 Congress very clearly established the jurisdictional bar,
15 and specified with specific words what the jurisdictional
16 bar was going to be.

17 The jurisdictional bar was against actions or
18 suits, rather, to enjoin, suspend, or restrain. It says
19 nothing about actions for damages. I think the language of
20 the statute is terribly plain, and under those circumstances
21 I think if the bar is to be extended because of policy
22 considerations, that it should be extended by Congress and
23 not the Court.

24 That brings me to the question that Justice
25 Blackmun raised. What speculation can one have for why the

1 Eighth Circuit evenly divided on the question? And I think
2 that what -- and I, if I may, will exercise the discretion
3 to speculate myself. I think that the telling argument that
4 makes the case terribly convincing on behalf of Petitioners
5 is that there is no precedent in the comity cases, and there
6 is no way to read the Tax Injunction Act to draw the
7 conclusion that this action should be barred.

8 The comity cases have confined themselves to areas
9 of equity. This is not an equity action. The Tax
10 Injunction Act, as I suggest, is plain on its face. Well,
11 what was the concern? Why was it a four-four split? I
12 submit that the reason that it is a four-four split is
13 because we are raising a troublesome question. We are
14 suggesting that the Federal Courts in some way may become
15 involved in reviewing what is going on in the state
16 assessment processes.

17 I submit that that concern, however, was
18 overstated or overworried in the Eighth Circuit for these
19 reasons. First of all, this is not an effort to take money
20 from the state coffers. It is an action against
21 individuals. Second, there are all kinds of good faith
22 defenses that are available. If we get to the merits and we
23 can't prove what we are saying, we are going to lose.

24 QUESTION: Don't you agree, though, that in the
25 course of your litigation, to succeed you are going to have

1 to prove that the assessment was illegal, that it violated
2 the equal protection clause?

3 MR. NEWBURGER: Two answers to that. First of
4 all, as far as the second claim for relief is concerned, I
5 won't have to prove that, the second claim being this
6 computer letter that automatically picked people up. As far
7 as the first claim for relief is concerned, I will have to
8 show that the classification that occurred was palpably
9 arbitrary.

10 QUESTION: And have a judgment of the Court that
11 it violated the equal protection clause.

12 MR. NEWBURGER: That's right, Your Honor, but the
13 point that I would make in light of that, when one talks
14 about our worrying about being in the state processes, if
15 what we are going for is simply a new political process or a
16 new policy process within the state, we would not undertake
17 the burden of proving palpably arbitrary classification.
18 The question, if we are going to the future policy of what
19 is going to go on to the state, we will do that in the state
20 Courts. We have done that in the state Courts.

21 What we are saying here is that in the course of
22 going through the process of raising the question in the
23 state Courts, these people became mad at us, and they took
24 out after us, and in the course of doing that they violated
25 our constitutional rights, and we have a right under Section

1 1983 to obtain the Federal Court protection of our
2 constitutional rights if we can show that they purposely set
3 about to violate those rights. If we can't prove that, then
4 we can't prevail. We ask the Court to send us back and give
5 us our day in Court so that we can demonstrate that we can
6 indeed prove that.

7 Thank you very much, Your Honor.

8 CHIEF JUSTICE BURGER: Thank you, Counsel. The
9 case is submitted.

10 (Whereupon, at 3:07 o'clock p.m., the case in the
11 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:
FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., et al., Vs. GENE MC NARY, et al.

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