No. 09-1007

In The
Supreme Court of the United States

MOUNTAIN AMERICA, LLC, *et al.*,
Petitioners,

v.

DONNA HUFFMAN, ASSESSOR
OF MONROE COUNTY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the West Virginia Supreme Court of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondents offer the following as the appropriate issues to be considered with respect to the Petition for a Writ of Certiorari:

1. Whether the claims of all but one of the Petitioners were properly disposed of by the Supreme Court of Appeals of West Virginia on non-federal grounds and without reaching a federal question?

2. Whether the claims of the remaining Petitioner, Mountain America, LLC, were also disposed of by the Supreme Court of Appeals of West Virginia on state law grounds independent of the federal questions raised and adequate to support the judgment in favor of the Respondents?

3. In the alternative, whether the Supreme Court of Appeals of West Virginia correctly determined that this case is factually and legally distinguishable from *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia,* 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989)?

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STATEMENT OF THE CASE

Donna Huffman, the duly elected Assessor of Monroe County, West Virginia, is charged with determining yearly as of the 1st of July the true and actual value of all property located within the County. During the period from July 1, 2006, to January 31, 2007, Ms. Huffman and her staff ascertained the true and actual value of all property, real and personal, subject to *ad valorem* property taxation in Monroe County, West Virginia. As is her duty, the Assessor then assessed the real property at sixty percent (60%) of its fair market value. Transcript of *Hearing before the Monroe County Commission, Donald Evans, Clerk, Oliver Porterfield, President, Michael Shane Ashley, Commissioner, and Joyce Pritt, Commissioner, Sitting as the 2007 Board of Equalization and Review,* Feb. 7, 2007 [hereinafter "Tr."] pp. 68, 70-73. The tax levy is then extended on the assessed value.

Included in this valuation process for the 2007 tax year was a recent development known as Walnut Springs Mountain Reserve. Walnut Springs is a residential development comprised of approximately 1,000 acres located near Union, Monroe County, West Virginia. During the last few years, Mountain America, LLC and its affiliated entities have undertaken to develop Walnut Springs Mountain Reserve into a residential housing development. Mountain America, LLC and its affiliated entities have been selling lots or tracts of property located in the Walnut Springs Mountain Reserve development since September, 2004. Tr. Ex. P-4.

In assessing each property in the Walnut Spring Mountain Reserve development, Ms. Huffman verified

the property owner's name, address, and the description of the real property. Also, after each transfer of real property in Monroe County, Ms. Huffman mailed to the purchaser a "Classification and Sales Confirmation Questionnaire" to confirm that the sales price of the property was the actual market value of the real property transferred. In addition, she visually inspected the real property, determined the property class, recorded the neighborhood code, and determined the infrastructure of the development. Tr. pp. 99-103.

For assessment purposes, West Virginia assessors divide their counties into "neighborhoods" giving consideration to similarities such as parcel size, road, topography, costs, type, and quality of improvements. West Virginia State Tax Department Administrative Notice 2006-16 (January 31, 2006). A "neighborhood" is defined as "a geographical area exhibiting a high degree of homogeneity in residential amenities, land use, economic and social trends, and housing characteristics." *Id.* If a subdivision is unique, it may stand alone as a single neighborhood. *Id.* In Monroe County, West Virginia, there are approximately fifty (50) different neighborhoods for assessment purposes. Tr. p. 97.

During the period of July 1, 2005, to June 30, 2006, the purchase price of the unimproved real property sold by developer Mountain America, LLC and its affiliated entities was significantly higher than any other unimproved real property being sold anywhere else in Monroe County, West Virginia. Tr. p. 96. As a result of the significantly higher consideration being paid for the lots located in Walnut Springs Mountain Reserve and the unique nature of this development,

Donna Huffman, after consulting the West Virginia Department of Tax and Revenue, created a new neighborhood which contained all of the real property located in the Walnut Springs Mountain Reserve development. Tr. pp. 84, 96.

In calculating the 2007 real property assessments for the Walnut Springs Mountain Reserve neighborhood, Ms. Huffman compiled a list of sales prices in the development for the period from July 1, 2005, to June 30, 2006. Next, Ms. Huffman calculated the price per acre for each sale which occurred during the period from July 1, 2005, to June 30, 2006. Tr. pp. 97, 104-06. Once the price per acre for each sale was calculated, Ms. Huffman took the average of all sales during the period of July 1, 2005, to June 30, 2006. *Id.* The unit price per acre was calculated to be $29,236.00, a figure significantly higher than any other real property sales anywhere else in Monroe County. Tr. pp. 97-99.

Ms. Huffman then struck the two highest sales and the two lowest sales and recalculated the average price per acre. Tr. p. 97. The calculated unit price per acre then became $28,502.00. *Id.* Once Ms. Huffman entered the neighborhood information into the real estate mass appraisal software (CAMA) used in West Virginia, she again lowered the assessment per acre to $26,900.00 as an accommodation to the landowners. *Id.* After all of the neighborhood values were entered into the real estate mass appraisal software (CAMA), the software was used to calculate the residual property value for the property still owned by the developer. The residual property value for Walnut Springs Mountain Reserve was calculated to be approximately $5,400 per acre, a figure significantly

lower than the developer's asking price for other acreage previously sold in the development. Tr. pp. 105-06.

Mountain America, LLC, in contravention of W.Va. Code § 39-1-13,[1] failed to place a plat of the Walnut Springs Mountain Reserve development of record in the Office of the Clerk of the County Commission of Monroe County, West Virginia. Tr. p. 97.[2] Walnut

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[1] This statute provides:

> **§ 39-1-13. Duty to record plat or plan of lots.**
>
> When any tract or parcel of land within the limits of any county of the State has been or shall be hereafter subdivided into lots by any partition of land or by order of the owner or owners, or his or their agent, or otherwise and any lot or lots have been sold or conveyed, or are offered for sale, from the tract or parcel of land so divided, according to a plat or plan of subdivision, without such plat or plan of subdivision having been filed for record, it shall be the duty of the owner or owners of such tract of land, or his or their agent, authorizing such plat or plan of subdivision of such tract of land to be laid out, to file such plat or plan for record in the office of the clerk of the county court [now county commission] and the office of the county assessor of the county wherein such land so divided is situate.

[2] W.Va. Code § 11-3-1b affords certain property tax relief to developers who have recorded a development plat or designation of land use with the appropriate county commission. Generally speaking, pursuant to this statute, a developer who has so recorded a plat with the county commission receives valuation of its unsold residue based on techniques which do not consider the sale prices of sold lots. The Petitioners admit to this Court that "[n]either Mountain America, nor any other entity or person developing Walnut Springs, has recorded a separate development

Springs Mountain Reserve is, however, subject to that certain "Amended and Restated Declaration of Covenants, Conditions, Restrictions, Reservations, and Easements for Walnut Springs Mountain Reserve, a Residential Home Development Near Union, West Virginia, dated April 8, 2005" ("Restrictive Covenants") which is of record in Monroe County. Tr. pp. 101, 107-08, Ex. A-10. The aforesaid Restrictive Covenants provide that the "lots shall be used for residential and personal recreation purposes; no business, commercial or professional enterprises which regularly attract customers, patrons, or clients shall be permitted or conducted thereon, except as approved by the Developer." Tr. Ex. A-10, p. 12. Consequently, Ms. Huffman assessed the residue of the Walnut Springs development as undeveloped residential property. Tr. pp. 80, 101-02. For the 2007 tax year, all of the real property owned by Mountain America, LLC and its related entities is assessed as "residue," Tr. p. 80, resulting in a lower assessment than would occur if the remaining real property was assessed as individual lots as marketed by the developer.

On or about January 9, 2007, the Assessor provided notice to Mountain America, LLC of an increase of assessment of real property for the forthcoming 2007

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plat or designation of land use." Petition p. 3. By not recording a plat, Mountain America is not eligible for the relief provided by W.Va. Code § 11-3-1b. As such, the Assessor and the County Commission have no obligation to afford such relief to Mountain America or to apply the valuation methodologies of W.Va. Code § 11-3-1b. Nonetheless, the Assessor obviously afforded significant relief to Mountain America by valuing the residue at $5,372.00 per acre when lots have sold for almost five times higher (approximately $30,000.00).

tax year. Tr. Ex. J1. Ms. Huffman provided Mountain America, LLC and the several dozen individual property owners a "Notice of Increase of Assessment" in which all of the landowners were notified of their real property assessments for the 2007 tax year. Specifically, and as required by law, Ms. Huffman notified the landowners that the assessed value of their parcels of real property located in Monroe County, West Virginia, would increase by at least ten percent (10%) from the previous tax year. *Id.*

On February 7, 2007, the Petitioners, by counsel, appeared before the Monroe County Commission sitting as the Board of Equalization and Review in order to protest the 2007 *ad valorem* tax assessments of their properties within Walnut Springs.

The principal evidence offered by the Petitioners at the February 7, 2007 hearing was the testimony and analysis of Todd Goldman. Mr. Goldman is a certified general real estate appraiser. However, Mr. Goldman presented a statistical analysis of a sampling of properties which compared the assessments of properties within Walnut Springs to those of properties located outside of Walnut Springs but within Monroe County.[3] Mr. Goldman also compared

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[3] No other comparable development exists in Monroe County offering amenities such as those touted by Walnut Springs Mountain Reserve. The Petitioners argue that Longview Estates, an older residential development, is a comparable development to Walnut Springs Mountain Reserve. However, Longview Estates is a modest development established in 1984 and has thirty-eight (38) property owners. Tr. Ex. P-2. Real property in Longview Estates has significantly lower market values and the average lot size per owner is significantly smaller. *Id.* Longview Estates has

assessments in the County to recent transactions. Tr. pp. 7-67.

Although Mr. Goldman is a real estate professional, he is not a statistician. His comparison of the assessments to those of other properties in the County is statistical in nature, although he is not qualified to give testimony of a statistical nature. Mr. Goldman testified that he made certain random selections in analyzing the over 12,000 taxable parcels of real estate in Monroe County (Tr. pp. 12-13, 79), although without applying proven statistical analysis it is impossible to know whether his conclusions are accurate to a reasonable degree of statistical certainty or are mere happenstance.

The Petitioners did not ask Mr. Goldman his opinion as to the fair market value of any land in the County (including their own), which opinion Mr. Goldman would have been qualified to give. The Petitioners, rather, chose to have Mr. Goldman testify only as to statistical issues.[4] Tr. pp. 7-67.

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above ground utility lines, and well and septic systems. Tr. pp. 17-18, 39-40. Unlike Walnut Springs Mountain Reserve, Longview Estates does not have "private roads" or underground utility lines. See Tr. Ex. A-10.

[4] Mr. Goldman testified that the property in Walnut Springs was valued by the Assessor at an average value of 152% of the documented recent sales prices. Tr. Ex. P-2. However, Mr. Goldman utilized sales data from the period of September 1, 2004, to July 1, 2006, as the basis of his claim. *Id.* A closer look at the sales data reveals that during the tax period in question, July 1, 2005, to June 30, 2006, the Assessor valued the property in Walnut Springs at an accurate average value of 97.46% of the recent sales prices. Mr. Goldman used sales data from the period

Despite being a certified general real estate appraiser, Mr. Goldman did not appraise any of the Petitioners' properties at issue, or any other property which was the subject of his statistical analysis. In fact, Mr. Goldman was not asked by the Petitioners to appraise their properties. He testified that determining the fair market value of the properties at issue was not his assignment. Tr. p. 60. After a hearing of three hours, the Petitioners presented no evidence as to what their property was actually worth.[5] Further, at the hearing, Mountain America, LLC, the developer of Walnut Springs, did not advise the County Commission of what it had paid for the unsold lots or residue property, the listing price for these unsold lots which were then for sale, or other basic information as to the properties at issue.

Ms. Huffman, the Assessor, testified at the hearing that she worked with the West Virginia Department of Tax and Revenue in creating a new tax "neighborhood" comprising Walnut Springs[6] and in calculating the

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prior to July 1, 2005, in his calculation which skewed the average value.

[5] Further complicating matters, evidence was introduced at the hearing of a "rebate" program used by the developers of Walnut Springs where rebates or discounts were given to some purchasers of lots. However, the deed placed of record in the county stated the consideration paid by the purchaser to the developer without taking into account the "rebate" or discount given. Tr. at pp. 51-54, 106. Neither the Petitioners' expert nor the Assessor was aware of this "rebate" program when performing their assignments. Tr. pp. 54, 106.

[6] The map used by the Assessor for this purpose was provided by a representative of the developer. Tr. pp. 122-23.

assessments with respect to the Petitioners' properties at issue. Tr. p. 84. The Assessor explained the steps she took in arriving at the assessments. Tr. pp. 84-106. Representatives of the West Virginia Department of Tax and Revenue's property tax division were present at the hearing along with their counsel; however, the Department's representatives did not offer any evidence or testimony at the hearing. Tr. p. 3.

The County Commission, after considering the testimony and evidence presented at the hearing, issued a written order affirming the assessments on the basis that the methods of appraisal used by the Assessor were within the guidelines provided by law. See Petition at App. C.

On March 14, 2007, a "Petition for Appeal from Ad Valorem Property Tax Assessments" (the "Circuit Court Petition") was filed with the Circuit Court of Monroe County. On March 14, 2007, Judge Irons of the Circuit Court of Monroe County (the "Circuit Court") signed an Order, which had been prepared by counsel to the Petitioners, directing the Clerk of the Circuit Court to file the Circuit Court Petition along with a record of the proceedings before the County Commission, and further ordered that:

> ...an attested copy of this Order, together with a copy of the Petition, filed herein, be served by the Sheriff upon Donna Huffman, Assessor of Monroe County, West Virginia, and upon H. Rod Mohler, Prosecuting Attorney of Monroe County, West Virginia, *and Paul Papadopoulos, attorney for the Monroe County Commission* and John F. Hussell IV, attorney for the Assessor, *who shall file with this Court, and serve upon*

> *the Petitioners' counsel, within thirty (30) days from the service on her or him, respectively, a response to the Petition filed herewith.*

(emphasis added). See discussion at Appendix B, *infra.* In accordance with the Circuit Court's order prepared by counsel for the Petitioners, both the County Commission and the Assessor filed a response to the Circuit Court Petition.

Three procedural issues were then decided by the Circuit Court. First, on the Petitioners' motion to strike the County Commission's response or answer claiming that the County Commission did not have the right to file a response or any other pleadings in the case before the Circuit Court, the Circuit Court denied the Petitioners' motion noting, in part, that "a review of the record suggests that the Commission's response originates from the Petitioner's own order submitted to this Court and entered on March 14, 2007" and that this Court's opinion in *Allegheny Pittsburgh*[7] "demonstrates that the County Commission is a proper party ...." Order Den. Taxpayers/Pet'rs' Mot. to Strike, Appendix B, *infra.*

The Circuit Court then denied the Petitioners' motion to amend their petition. The Petitioners' proposed amended petition purported to delete all references to the County Commission filing a response and participating in the action, and to assert for the first time that the tax appeals system in West Virginia was inherently flawed. The Circuit Court denied this motion by its Order Denying Taxpayers/Petitioners

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[7] 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

Motion to Amend Petition for Appeal, dated July 17, 2007, in part, because the new constitutional claim was "beyond the scope of the original petition and constitutes a separate and distinct declaratory action." Indeed, the Circuit Court with much foresight held:

> Clearly, this assertion of unconstitutionality is a claim most properly raised in an independent action. If advanced in this proceeding, prejudice to the respondents would clearly result from an increased time and financial burden to defend against an argument first raised in the midst of the appeal. It would also greatly broaden the scope of the proceeding and defeat the statutory purpose of achieving an expeditious resolution of tax assessment issues.

See Appendix A, *infra.*

The Circuit Court then ruled that Mountain America, LLC was the only property owner which perfected an appeal to the Circuit Court under W. Va. Code § 11-3-25 and ordered that "this matter shall proceed with Mountain America as the sole appellant" and that "the style shall be amended to delete the term, 'et al.'" Order Granting Mot. to Confirm, Appendix C, *infra.*

With all of the relevant procedural motions decided, the Circuit Court proceeded to address the merits of Mountain America, LLC's appeal. By an Order Denying Plaintiff's Petition For Appeal From Ad Valorem Property Tax Assessments dated January 25, 2008, the Circuit Court affirmed the decision of the County Commission on the grounds that "the Assessor acted in the conformity with the statutory authority,

state regulations, and case law" and "valued the property appropriately within the guidelines prescribed by the West Virginia Code."[8] See Petition at Appendix B. Judge Irons of the Circuit Court further found that "the County Commission properly weighed the evidence before it and did not err in its decision to uphold the assessments made by the Assessor." *Id.*

The Supreme Court of Appeals of West Virginia, in a unanimous opinion, affirmed the Circuit Court as more fully discussed herein. *Mountain America, LLC v. Huffman*, 224 W.Va. 669, 687 S.E.2d 768 (W.Va. 2009); See Petition Appendix A. It is from this opinion of West Virginia's highest court which the Petitioners seek relief.

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[8] The Petitioners incorrectly assert that the Assessor failed to follow and was unfamiliar with certain state guidelines. E.g. Petition pp. 7, 11-14. However, the County Commission, the Circuit Court and West Virginia's highest court found to the contrary.

REASONS FOR DENYING THE PETITION

This Honorable Court should deny the Petition for a Writ of Certiorari ("Petition") for lack of jurisdiction, as the Supreme Court of Appeals of West Virginia, in its unanimous decision: (a) disposed of the claims of all but one of the Petitioners on non-federal grounds and without reaching a federal question, and (b) disposed of the claims of the remaining Petitioner, namely the developer Mountain America, LLC, on state law grounds independent of the federal questions addressed and adequate to support the judgment in favor of the Respondents. In the alternative, should this Court find adequate jurisdiction with respect to any or all of the Petitioners, the Petition should be denied as the Supreme Court of Appeals of West Virginia properly applied both state and federal law principles including this Court's opinion in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*.[9]

I. No "Federal Question" Was Decided Below with Respect to Sixty-One of the Sixty-Two Petitioners

The record in this matter is clear that no "federal question" was decided by the Supreme Court of Appeals of West Virginia with regard to any Petitioner who failed to perfect their appeal to the Circuit Court. Rather, the Supreme Court of Appeals affirmed the Circuit Court of Monroe County's ruling that sixty-one of the sixty-two Petitioners failed to properly perfect an appeal to the Circuit Court on the grounds that

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[9] 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

these sixty-one Petitioners failed to comply with jurisdictional appeal procedures required by the West Virginia statutes and Rules of Civil Procedure. See Appendix C, *infra*. The opinion of West Virginia's highest court in this case speaks directly to this point:

> Because we conclude that the circuit court did not err in finding that Mountain America was the only party that properly perfected its appeal before the circuit court, we decline to set aside the circuit court's July 18, 2007, order and we proceed to consider the remaining assignments of error only as they pertain to Mountain America.

687 S.E.2d at 780. Further, the West Virginia court held that, because the circuit court properly dismissed all but one of the Petitioners from the appeal before it, "[t]he other taxpayers were not parties to the tax valuation appeal before the circuit court" and "[a]ccordingly, they continue to remain strangers to this Court." *Id.* at fn. 15.

It has long been held that, on appeal of a decision of the highest state court, where the case was disposed of in the state court before the federal question presented by the pleadings was reached, and such federal question was not and need not have been decided because the state court's decision was based on non-federal grounds, this Court has no jurisdiction. E.g. *Crossley v. City of New Orleans*, 108 U.S. 105, 2 S.Ct. 300, 27 L.Ed. 667 (1883) ("...the case was disposed of before the federal question presented by the pleadings was reached, and that question was not and need not have been decided. Under these circumstances we have no jurisdiction."); *Lynch v.*

People of New York Ex. Rel. Pierson, 293 U.S. 52, 54, 55 S.Ct. 16, 79 L.Ed. 191 (1934) ("It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, *and that it was actually decided....*")(emphasis added).

The opinion of the Supreme Court of Appeals of West Virginia clearly evidences that the claims of sixty-one Petitioners (all other than Mountain America, LLC) were disposed of entirely on state law grounds and before any federal questions raised by said Petitioners were reached.[10] As such, the Respondents respectfully assert that the claims of such sixty-one Petitioners do not fall within the jurisdiction of this Court.

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[10] The above-cited portions of the opinion undoubtedly constitute a "clear statement" under *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), discussed *infra*. See also *Sochor v. Florida*, 504 U.S. 527, 533-34, 112 S.Ct. 2114, 119 L.Ed.2d 326, 337-38 (1992) (jurisdiction was denied where a passage in the Supreme Court of Florida's opinion "indicates with requisite clarity that the rejection of Sochor's claim was based on the alternate state ground that the claim was 'not preserved for appeal'.").

II. The Decision of West Virginia's Highest Court with Respect to the Claims of Petitioner Mountain America, LLC Also Rests on Independent and Adequate State Law Grounds

A. Petitioner Mountain America, LLC Failed to Meet Its Burden of Proof Under West Virginia Law

When a highest state court is presented with and determines both federal and non-federal questions, this Court will not review questions of federal law decided by the state court if the state court's decision rests on state law grounds independent of the federal question and adequate to support the judgment. This Court has stated, in cases where questions of both state and federal law exist, that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201, 1214 (1983).[11] In addition, "the Long 'plain statement'

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[11] "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. See, e.g., Fox Film Corp. v. Muller, 296 US 207, 210, 80 L Ed 158, 56 S Ct 183 (1935); Klinger v Missouri, 13 Wal 257, 263, 20 L Ed 635 (1872). This rule applies whether the state law ground is substantive or procedural. See, e.g., Fox Film, supra; Herndon v. Georgia, 295 US 441, 79 L Ed 1530, 55 S Ct 794 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court

rule applies regardless of whether the disputed state-law ground is substantive (as it was in Long) or procedural, as it was in Caldwell v. Mississippi, 472 U.S. 320, 327...(1985)." *Harris v. Reed*, 489 U.S. 255, 261, 109 S.Ct. 1038, 103 L.Ed.2d 308, 316 (1989).[12] The

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> has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. See Herb v. Pitcairn, 324 US 117, 125-126, 89 L Ed 789, 65 S Ct 459 (1945)("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion")."

Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640, 655 (1991).

[12] This Court has denied jurisdiction even when the federal question was decided erroneously when state law provided distinct and sufficient grounds to support the judgment of the state court. E.g. *Kennebec R. Co. v. Portland R. Co.,* 81 U.S. 23, 20 L.Ed. 850 (1871) ("Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the state court could rest even if it had been in error as to the effect of the act of 1857, in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the state court we cannot take jurisdiction, because we could not reverse the case though the Federal question was decided erroneously in the court below, against the plaintiff in error."); *Jenkins v. Loewenthal*, 110 U.S. 222, 3 S.Ct. 638, 28 L.Ed. 129 (1884) ("Either of these defenses, if sustained, bars the action. The second involves a federal question; the other does not. The court in its decree sustained them both and, among other things, found as a fact that the defendants were innocent purchasers for value. As this finding is broad enough to maintain the decree, even though the federal question involved in the other defense was decided wrong, we affirm the decree, without considering that

"independent and adequate state ground" doctrine is at play here, as although the Supreme Court of Appeals of West Virginia found that the rights of Petitioner Mountain America, LLC under federal law were not violated, the West Virginia court also based its decision to uphold the *ad valorem* assessments of Mountain America's residue property on independent and adequate state grounds.

In this regard, the Supreme Court of Appeals of West Virginia, applying well-established West Virginia law, affirmed the tax assessment of Mountain America's residue properties on the grounds that "Mountain America has not sufficiently sustained its burden of proof" because Mountain America "did not offer any evidence of the true and actual value" of its property. 687 S.E.2d at 768. Under West Virginia law, "[a] taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous." Syl. Pt. 5, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (W. Va. 2008).

As indicated above, Mountain America, LLC is the developer of Walnut Springs. For the tax year at issue, 2007, the Assessor assessed five parcels or tracts of land owned by Mountain America, LLC, and all five of these tracts of land are "residue" in that they

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question or expressing any opinion upon it. *Murdock v. Memphis*, 20 Wall., 590 [87 U.S., XXII., 429], sustains this practice."); *Hale v. Akers*, 132 U.S. 554, 10 S.Ct. 171, 33 L.Ed. 442 (1889); *Hammond v. Johnston*, 142 U.S. 73, 12 S.Ct. 141, 35 L.Ed. 941 (1891).

represent lots or other property which at the time of assessment had not yet been sold by the developer.

The Assessor valued Mountain America's residue at $5,400.00 per acre, which values were confirmed by the County Commission sitting as the Board of Equalization and Review. Tr. at pp. 84, 106. Lots within Walnut Springs Mountain Reserve have sold for an average of $30,481.00 per acre. Tr. at 84. With lots within Walnut Springs selling at an average of $30,481.00 per acre, the Assessor's valuation of Mountain America's residue at only $5,400.00 represents less than twenty percent of the average sale price per acre. The total tax bill (for tax year 2007) with regard to Mountain America's five parcels of residue is approximately $9,500.00.

Perhaps not surprisingly, Mountain America did not offer at the hearing any evidence as to the true and actual value of its residue. As stated earlier, Mountain America's principal witness at the hearing before the County Commission, Todd Goldman, is a certified general real estate appraiser. Tr. at pp. 9, 54-55. However, at no time did Mr. Goldman testify as to what he believed was the "true and actual value" (or fair market value) of any of Mountain America's residue property. Despite being an appraiser, Mr. Goldman appraised nothing at all. Tr. at 60. No appraisals from any source were offered. Further, Mountain America did not introduce any evidence as to what it paid for its residue. In addition, there was no evidence submitted for the County Commission's consideration as to what Mountain America's listing/asking price was for any of this unsold residue property. Clearly, Mountain America, LLC failed to give the County Commission basic, required

information regarding its residue in what appears to be an attempt to avoid the awkward position of a developer claiming that its unsold lots are not worth the prices sold lots have realized. It is understandably against a developer's interests to put evidence into the record in a legal proceeding that its unsold lots are not worth $5,400.00 an acre (as assessed) when other comparable lots in its development have sold for over $30,000.00 an acre.

The burden of proof, however, cannot be met otherwise, and this principle of West Virginia law was applied by West Virginia's high court, which specifically held:

> Mountain America had the burden of proving that the Assessor's valuation was excessive, but it did not offer any evidence of the true and actual value of the residual property. At the hearing before the County Commission, Mountain America did not offer an appraiser's opinion of the value of its residue, any evidence as to what it paid to purchase this residue, or any evidence as to the listing price for any unsold residue property.

687 S.E.2d at 786. In addition, the Supreme Court of Appeals of West Virginia concluded that "[o]ther than disagreeing with the approved values the Assessor obtained by following the appraisal methods prescribed by West Virginia law, Mountain America has not demonstrated by clear and convincing evidence that the Assessor's assessment of its property was incorrect." *Id.* at 787.

The Respondents respectfully submit that the lack of any evidence presented by Petitioner Mountain America, LLC in support of its challenge of the Assessor's valuation of its five tracts of residue property not only easily allowed West Virginia's highest court to find that Mountain America simply failed to meet its burden of proof under State law, but constitutes independent and adequate state law grounds to support a judgment in favor of the Respondents despite any federal questions raised.

B. Mountain America, LLC's Due Process Claims Were Disposed of on Independent and Adequate State Law Grounds

The Supreme Court of Appeals of West Virginia addressed due process[13] issues as they pertain to Petitioner Mountain America, LLC,[14] generally described as: (1) whether the County Commission is a proper party in West Virginia property tax appeals proceedings, (2) whether W.Va. Code § 11-3-24 contains "constricted" time frames for appeal, and (3) whether the burden of proof applied was excessive.

1. Mountain America's contention that the County Commission is not properly a party to property tax appeals in West Virginia is unfounded. West Virginia's highest court noted that "County Commissions have made numerous appearances in

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[13] These claims arise under both the Fifth Amendment, U.S. Const., Amendment V, and Article III, Section 10 of the West Virginia Constitution.

[14] The due process claims of all of the other Petitioners were not addressed by West Virginia's highest court as discussed, *supra*.

these types of appeals before this Court," 687 S.E.2d at 782-3, and cited in its opinion over a dozen reported cases in West Virginia where the appropriate county commission was a party. *Id.* at fn. 19. In addition, it is noted that, in the case of *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*[15], the County Commission of Webster County was clearly a party to that case decided by this Court as evidenced by the case style.

Further, Mountain America's assertion that the County Commission improperly filed an answer or response in the Circuit Court is disingenuous. Mountain America has failed to advise this Court that the County Commission filed an answer or response in the Circuit Court because the County Commission was ordered to do just that by the Circuit Court at the specific request of counsel to the Petitioners who prepared and submitted the order. See Appendix B. Despite the fact that counsel to the Petitioners asked the Circuit Court to require an answer or response of the County Commission, Mountain America surprisingly argues to this Court that, in filing an answer or response, the County Commission shows bias. In addition, the Supreme Court of Appeals noted that "[t]he County Commission's response was necessarily due to the fact that in making a ruling upholding the Assessor's valuation of Mountain America's residual property, the County Commission...was not statutorily required to issue a written opinion...[t]hus, by virtue of requiring a response to a petition for appeal from a County Commission decision, the circuit court was able to

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[15] 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

obtain information regarding the County Commission's reasoning in upholding the Assessor's valuation." 687 S.E.2d at 783.

With regard to Mountain America's "direct pecuniary interest" assertions, the Supreme Court of Appeals of West Virginia ruled:

> Furthermore, as to Mountain America's second argument regarding the direct pecuniary interest of the County Commission members in this case, to the extent that we have made the determination, as further discussed below, that the Assessor's valuation of Mountain America's residual property was not excessive, we need not address Appellant's argument that the members of the County Commission received increased salaries as a result of the assessment. Moreover, we seriously question whether a pay increase of $660.00 would in fact constitute a substantial pecuniary interest prohibiting the County Commission from adjudicating this dispute. *See, e.g., Gibson v. Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488, 500 (1973)(reiterating that "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes").

687 S.E.2d at 783. As such, the West Virginia court, in a *Long* "plain statement," clearly disposed of such due process claim on state law grounds and declined to fully address such claim. As shown *supra*, Mountain America's protest of the County Commission's involvement in this matter lacks merit and was

addressed by West Virginia's highest court by the application of West Virginia law.

2. With regard to the "constricted" time frame allegations, the Supreme Court of Appeals of West Virginia held:

> Although Mountain America makes generalized arguments that the notice system set forth in West Virginia Code § 11-3-24 violates due process, it has not advised this Court of how it specifically suffered prejudice as a result of the "constricted" time frame upon appeal to the Board of Equalization and Review. There is no allegation that the hearing afforded Mountain America violated West Virginia Code § 11-3-24. Rather, the hearing afforded was in compliance with statutory requirements. Mountain America, however, has not explained what evidence it was prevented from presenting at the hearing due to insufficient time. In fact, Mountain America had adequate time to hire a real estate appraiser who appears to have performed the analysis asked of him by the Appellants, and who testified on its behalf at the hearing. However, the appraiser did not present any evidence to the County Commission as to what Mountain America paid for the land at issue, and what it expended in developing and improving the land. Mountain America also failed to present any evidence regarding the appraisal of its property which was prepared during the lending process, or to ask the appraiser to appraise its property for submission as evidence. It also failed to present evidence as to the listing price for any of the lots

> it had for sale in Walnut Springs. For these reasons, we find that Mountain America has not met its burden to prove by clear and cogent evidence the requisite facts establishing that the time frame for a tax assessment appeal under West Virginia Code § 11-3-24 is so unreasonable or arbitrary as to amount to a denial of due process of law in this case.

687 S.E.2d at 784. Therefore, applying the principle that a West Virginia taxing statute cannot be found to deny due process of law unless the taxpayer proves "by clear and cogent evidence facts establishing unreasonableness or arbitrariness," 687 S.E.2d at 782 (citing Syl. Pt. 4, *Norfolk & W. Ry. Co. v. Field*, 143 W.Va. 219, 100 S.E.2d 796 (W.Va. 1957) and Syl. Pt. 2, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W.Va. 524, 170 S.E.2d 362 (W.Va. 1969)), the West Virginia court found insufficient evidence to support Mountain America's assertions of constricted time frames.

3. With regard to Mountain America's assertion that its due process rights were violated due to the imposition of an excessive burden of proof, the Supreme Court of Appeals of West Virginia below applied a "clear and convincing evidence" standard which the court had set forth in its *Woodlands* opinion. 223 W.Va. 14, 672 S.E.2d 150 (2009). In essence, this claim by Mountain America constitutes an appeal of *Woodlands*. West Virginia's highest court in *Woodlands*, citing *Lavine v. Milne,* 424 U.S. 577, 96 S.Ct. 1010, 47 L.Ed.2d 249 (1976), correctly pointed out that this Court "has admonished that, '[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not

an issue of federal constitutional moment'." 672 S.E.2d at 165. Rather, in *Woodlands* the West Virginia court engaged in a thorough and lengthy analysis of its own previous opinions in tax assessment cases, cases from other states involving taxation which require the same or similar burden of proof and analogous decisions and bodies of law before affirming the "clear and convincing evidence" standard. *Id.* at 160-69.

C. Petitioner Mountain America, LLC's Equal Protection Allegations Are Not Supported by the Factual Record in this Case and Are, at Best, Premature

Petitioner Mountain America, LLC, citing this Court's opinion in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989), also claims a violation of the Equal Protection Clause of the Fourteenth Amendment.[16] However, the facts and legal logic of *Allegheny Pittsburgh* are not as similar to this case as Mountain America asserts. In fact, Mountain America completely misconstrues the *Allegheny Pittsburgh* case. Rather, the Supreme Court of Appeals of West Virginia correctly ruled that the proper application of *Allegheny Pittsburgh* mandates denial of the relief sought by Mountain America, LLC in this case.

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[16] U.S. Const. Amend. XIV.

1. The Properties at Issue are Not "Comparable"

The taxpayers in *Allegheny Pittsburgh* showed that other "comparable" property (coal) in Webster County, West Virginia, was worth substantially the same as their property but that comparable property was "intentionally and systematically" assessed at lower values by the county. *Id.* at Syl. Pts. 2 and 3. In fact, the parties in *Allegheny Pittsburgh* stipulated that the coal properties were indeed "comparable." *Id.* at fn. 3.

Mountain America, in its first, second and third questions presented for review and in an attempt to liken its case with *Allegheny Pittsburgh*, represents to this Court that its properties were "comparable" to neighboring real estate which was assessed at lower values. In fact, many of Mountain America's arguments to this Court require an assumption or finding that the properties are indeed "comparable." However, Mountain America fails to advise this Court that this important question of fact, i.e. whether the land in Walnut Springs Mountain Reserve and that of their neighbors are actually "comparable", was decided by both the Circuit Court and West Virginia's highest court against Mountain America. The Circuit Court reasoned that:

> ... there is not evidence in record to show that such property was intentionally and systematically under valuated as required by West Virginia state law .... Instead, it appears from the record that the property that surrounds the property in question has always sold for prices much below the price of lots in Walnut Springs. This in turn causes the

> adjoining property to sell for and be assessed at a much lower rate. Although the record is not clear as it might be, it appears that the lots contained in Walnut Springs have been developed and contain many amenities not available on the adjoining lands and are only available in the new neighborhood, thus causing the adjoining lands to sell for much lower prices and the resulting assessments.

Order Denying Plaintiff's Petition for Appeal from Ad Valorem Property Tax Assessments dated January 25, 2008; See Petition App. B. Similarly, the Supreme Court of Appeals held:

> Below, Mountain America was not able to show that the properties within Walnut Springs were in fact "comparable" to surrounding properties. In fact, rather than being comparable, Walnut Springs lots were touted to be unique, superior, and more valuable than surrounding properties. The higher sales prices for Walnut Springs property are likely due to the fact that the lots contain amenities only available in this particular neighborhood. Herein, the record before the circuit court showed that the property that surrounded the property in question has always sold for prices much below the price of lots in Walnut Springs, and thus, the lower sales prices cause the adjoining property to be assessed at a much lower rate.

687 S.E.2d at 788. Property in Walnut Springs Mountain Reserve, enhanced by private roads, large lots, underground utilities, voluminous restrictive covenants which for example call for an "Architectural

Design Review Board" and contain "Equestrian Provisions" which mandate the manner of care, feeding, visitation, pasturing and fencing of horses within the development,[17] has not been shown or determined as a finding of fact to be "comparable" to other property in Monroe County as Mountain America asserts. The West Virginia courts properly made this finding of fact based on the record of this case.[18]

2. Unlike the Assessor in *Allegheny Pittsburgh*, The Assessor of Monroe County Followed West Virginia Law

In *Allegheny Pittsburgh,* the Webster County Assessor was portrayed by this Court as a renegade who acted "on her own initiative" to apply the tax laws in an unconstitutional manner and "contrary to that of the guide published by the West Virginia Tax Commission as an aid to local assessors ..." 488 U. S. at 346. Here, the Assessor of Monroe County did not act on her own initiative or contrary to guidance of the Department of Tax and Revenue. Rather, she worked directly with the Department of Tax and Revenue when compiling the assessments at issue, Tr. p. 84, and complied in all respects with West Virginia law. The Supreme Court of Appeals found that the Assessor

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[17] Tr. Ex. A-10.

[18] This finding supports the Assessor's designation of Walnut Springs as a neighborhood pursuant to Administrative Notice 2006-16 (W.Va. State Tax Dept. January 31, 2006).

had not abused her discretion[19] and the Circuit Court held:

> After reviewing all the relevant evidence, listening to the arguments of both parties and consulting the pertinent legal authorities, the Court is of the opinion that the Assessor acted in conformity with the statutory authority, state regulations, and case law pertaining to her position as a county Assessor and in doing so, she valued the property appropriately within the guidelines prescribed by the West Virginia Code.

Petition App. B. The actions of the Assessor here were contrary to the actions of the Webster County Assessor in *Allegheny Pittsburgh*. As such, the facts and circumstances of this case are further distinguished.

3. Petitioner Mountain America's Equal Protection Arguments are, at Best, Premature

In *Allegheny Pittsburgh*, this Court held:

> As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes ... [citation omitted]

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[19] 687 S.E.2d at 787.

> ... it does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.

488 U. S. at 344. Walnut Springs Mountain Reserve is a new development and the 2007 tax year at issue here is the first in which a dispute has arisen.[20] Even if this Court adopts Mountain America's contention that the Walnut Springs properties are "comparable" and that disparate treatment may have occurred, the rule of law set forth in *Allegheny Pittsburgh* does not afford Mountain America relief at this time. Mountain America, in essence, asks this Court to afford "immediate general adjustment" of its taxes while denying Monroe County the opportunity, as articulated in *Allegheny Pittsburgh*, to make "seasonable attainment of a rough equality."[21] Rather, the Supreme Court of Appeals understood and

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[20] To the contrary, in *Allegheny Pittsburgh*, the taxpayers showed that the assessor had failed to make valuation adjustments to comparable land for "more than 10 years." 488 U.S. at 344.

[21] The record in this case shows that Ms. Huffman, since taking office, has submitted a detailed plan of action to the State Property Valuation Training and Procedures Committee (PVC) to address any deficiencies in assessment of real property in Monroe County. Tr. pp. 91-95. In fact, the State's final ratio study with respect to Monroe County's appraisals of real property for tax year 2006 showed full compliance by Ms. Huffman. Tr. Ex. A-8. If the Petitioners intend to challenge whether West Virginia's myriad of statutes, regulations and procedures designed to insure equal valuations statewide are flawed, the record in this case is totally inadequate for that purpose.

properly applied this Court's mandate in *Allegheny Pittsburgh*[22] when holding:

> As a matter of practicality, not all property in the county can be revalued at one time. For this reason, West Virginia Code § 11-1C-1 requires a county assessor to revalue every parcel in the county every three years. Walnut Springs is a new development and the 2007 tax year is the first year in which an assessment dispute has arisen. Thus, assuming a disparity did exist between the Walnut Springs assessments and other properties found to be comparable thereto, the Assessor would necessarily be given the opportunity to make "seasonable attainment of a rough equality" over a short period of time. Accordingly, we affirm the circuit court's ruling finding that Mountain America failed to show that other such property was intentionally and systematically under valuated.

687 S.E.2d 789. Review of the West Virginia court's decision is not warranted here as this Court has given guidance on this issue and it has been followed.

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[22] The West Virginia court also applied West Virginia law that "[t]he Equal and uniform clause of Section 1 of Article X of the West Virginia Constitution *more than* requires a taxpayer whose property is assessed at true and actual value to show the fact that other property is valued at less than true and actual value.... To obtain relief, he must prove that the undervaluation was intentional and systematic." 687 S.E.2d at Syl. Pt. 11.

CONCLUSION

As discussed above, the Petitioners' claims contain decisive jurisdictional defects. In the alternative, should this Court find adequate jurisdiction with respect to any of the Petitioners' claims, the unanimous opinion of the Supreme Court of Appeals of West Virginia in this matter is consistent with West Virginia and federal law and this Court's previous opinion in *Allegheny Pittsburgh*. As such, the Respondents, Donna Huffman, the Assessor of Monroe County, West Virginia, and the Monroe County Commission, respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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