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RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondents, David C. Bailey, and David C. Bailey and Cecelia Bailey, trustees of the David C. Bailey Trust ("Baileys"), as well as Counterclaim Respondent, International Development Corporation, respectfully submit this Response in Opposition to the Petition for Writ of Certiorari, filed by Petitioners Keller Heirs and Hoyt Royalty ("Petitioners"). The Petition for Writ of Certiorari should be denied because Petitioners have failed to raise a constitutional issue of sufficient import to justify use of this Honorable Court's time and resources, the split of authority Petitioners identify did not have an impact on the lower courts' decisions, and Petitioners' proposed application of law would create a constitutional crisis in the Commonwealth of Pennsylvania where one currently does not exist.

COUNTERSTATEMENT OF THE CASE

This matter comes before this Honorable Court by way of Petitioners' Petition for Writ of Certiorari, requesting review of the Supreme Court of Pennsylvania's decision in David C. Bailey, et al. v. George A. Elder, et al., No. 945 MAL 2015 (September 7, 2016), in which that court used its discretion to deny Petitioners' Petition for Allowance of Appeal to review the Superior Court of Pennsylvania's unpublished opinion, affirming the trial court's entry of summary judgment in favor of Respondents.[1] The Superior Court opinion is located at David C. Bailey, et al. v. George A. Elder, et al., 79

[1] Respondents are filing this Brief in Opposition to Writ of Certiorari with respect to the David C. Bailey, et al. v. George A. Elder, et al. action only. As such, the factual assertions contained herein will be limited to that case, and will not contemplate Herder Spring Hunting Club v. Heller, 143 A.3d 358 (Pa. 2016). Herder will be discussed, infra, to the extent that it is the binding authority through which the instant matter was decided in each of the courts below. However, as Respondents have not litigated this matter alongside the Herder matter, they will not now make extensive argument regarding the appropriateness of a Writ of Certiorari being granted in that case beyond merely stating that, for the reasons it is inappropriate to grant the Petition for Writ of Certiorari in the instant matter, it is similarly inappropriate in the Herder matter.

MDA 2015 (November 9, 2015). The Superior Court of Pennsylvania's Order affirmed the decision of the Honorable Judge Dudley N. Anderson's December 10, 2014 Opinion and Order granting Appellees summary judgment in their action to quiet title. That opinion is located at David C. Bailey, et al. v. George A. Elder, et al., No. 08-02, 327 (December 10, 2014).[2] The property in question is a 168-acre tract of land in Pine Township, Lycoming County, Pennsylvania (hereinafter "the Property").

1. The Pertinent Land Transactions

The facts underlying the land transactions in this matter are not in dispute and can be succinctly stated as follows: Prior to an 1893 sale, the Hoyts owned both the Property's surface and subsurface estates. However, on August 22, 1893, the Hoyts sold the surface estate, while reserving in the deed the subsurface interests, thus severing the surface and subsurface estates. Following the 1893 severance, the Hoyts maintained the oil and gas rights. However, neither the Hoyts nor any

[2] All three opinions are located in Petitioners' Appendices as Appendix H, I, and J, respectively.

subsequent owner of the surface estate filed proof of this reservation, or otherwise took any steps to alert the County Commissioner that the reservation was in existence. On June 10, 1910 the Property was sold at tax sale, after notice of the sale had been published in accordance with the requirements of the Act of 1815. Act of March 13, 1815, P.L. 177, 6 Sm.L. 299, § 1, 72 P.S. §§ 5981, 6001. Because the County Commissioner was never informed that the subsurface estate had been severed from the surface estate, the tax sale sold both the surface and subsurface estates. There was never any attempt to redeem said sale. The Baileys subsequently purchased the Property in 2001.

2. The Lycoming County Pennsylvania Court of Common Pleas Proceedings

Respondents filed an original action to quiet title in this case on October 7, 2008, seeking judicial determination as to the ownership status of the Property's previously severed oil and gas estate. Respondents obtained a default judgment, by way of Praecipe, on January 21, 2009. More than four (4) years later, Petitioners filed a petition to

strike and/or open the default judgment, which the court ultimately granted on May 30, 2013.

This Action eventually moved forward on Respondents' July 19, 2013 Second Amended Complaint. In its three count Second Amended Complaint, Respondents alleged fee simple ownership of the Property's previously severed oil, gas, and mineral estate by way of a subsequent purchase of the Property, which was reunited by way of the 1910 tax sale.

With respect to the 1910 tax sale, Respondents, in their Second Amended Complaint, alleged that 1) the subject matter premises was sold at tax sale on June 10, 1910, 2) that there was no separate assessment for taxes of the subsurface estate at the time of the 1910 tax sale, 3) that the owner of the subsurface estate failed to notify the Commissioner of the severance of the subsurface estate at any time prior to the tax sale, 4) that the taxes at the time of the 1910 tax sale assessed the entire unseated estate as a whole, and 5) that neither the surface nor the subsurface rights were ever redeemed following the 1910 tax sale.

Petitioners filed an Answer, New Matter and Counterclaim in response to the Second Amended Complaint, alleging that Hoyt Royalty was the owner of the oil and gas estate. However, Petitioners either outright admitted or failed to dispute the above-referenced material facts in their responsive pleading; the Hoyts have never challenged the above-referenced material facts in either their pleadings or their discovery responses.

In light of the above, Respondents filed a Motion for Summary Judgment on September 9, 2014. In their motion, Respondents argued that because the Hoyts failed to report their oil, gas, and mineral estate, they were divested of their interest following the 1910 tax sale and their subsequent failure to redeem their interests. Petitioners filed several responses alleging, among other things, that the tax sale did not comply with relevant notice and due process requirements. On December 10, 2014, largely relying on the Superior Court of Pennsylvania's Herder decision, the trial court granted the Respondents' Motion for Summary Judgment, and declared them the owners of the Property's Oil and Gas Estate.

3. Pennsylvania Superior Court Proceedings

Petitioners filed a timely Notice of Appeal to the Pennsylvania Superior Court. In the Superior Court proceedings, the litigants briefed essentially the same issues and arguments that had been decided in the Lycoming County Court of Common Pleas. On November 9, 2015, the Pennsylvania Superior Court entered an Order affirming Judge Dudley's December 10, 2014 Order. This decision was also largely predicated upon the Pennsylvania Superior Court's Herder decision.

4. Pennsylvania Supreme Court Proceedings

Petitioners filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. However, as the Supreme Court had already granted a Petition for Allowance of Appeal in the Herder matter, the court decided to hold the instant matter in abeyance pending the outcome of its decision in Herder. After the Supreme Court of Pennsylvania affirmed the Superior Court of Pennsylvania's ruling in the Herder matter, it entered an order denying the Petition for Allowance of Appeal on September 7, 2016. On October 19, 2016, Petitioners filed

a timley Petition for Writ of Certiorari with this Honorable Court.

REASONS FOR WRIT DENIAL

The granting of a petition for writ of certiorari is not a matter of right, but of sound judicial discretion; and a petition for a writ of certiorari will be granted only for compelling reasons. U.S. Supreme Court Rule 10. Specifically, Rule 10 states, with respect to the considerations this Honorable Court uses to determine whether or not to grant a petition for writ of certiorari:

The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

1. a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

2. a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a

> United States court of appeals;
>
> 3. a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

See also Fay v. Noia, 372 U.S. 391, 436 (1963) (the issuance of a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor); Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 73 (1955) (given

its discretionary power of review, this Court decided the case before it was not one in which there were special and important reasons for granting the writ of certiorari).

As this Honorable Court has further espoused:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Rice, 349 U.S. at 79 (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). See also Powell v. Nevada, 511 U.S. 79, 86-87 (1994) (Thomas, J., dissenting) Cf. Magnum Import Co., Inc. v. Coty, 262 U.S. 159, 163 (1923) (jurisdiction to bring up cases by certiorari was not conferred

on the Supreme Court merely to give the defeated party in the circuit court of appeals another hearing). Thus, the primary function of this Court on a petition for a writ of certiorari is not to decide whether the court below correctly decided the case, but to determine whether the case raises legal issues of sufficient importance to the public to warrant this Honorable Court's review.

Even if a petition raises a substantial or interesting question, review should not be allowed unless legal issues of importance to the public are involved.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [citations omitted] "Special and important reasons" imply a reach to a problem

> beyond the academic or the episodic.

Rice, 349 U.S. at 74.

Respondents respectfully submit that Petitioners have failed to articulate, in their petition for writ of certiorari or elsewhere, a single reason that this Honorable Court should review the decisions of the lower courts. As Respondents argue, supra, Pennsylvania courts decided Herder and the instant case properly, there are no due process violations contained in these matters, the due process standards enumerated in Mullane and Mennonite were satisfied, this matter is not an appropriate case to decide the split of authority as to whether or not Mullane and Mennonite are to be applied retroactively, and finally, that if this Honorable Court invalidated the 1910 tax sale, it would create a constitutional crisis in Pennsylvania, wherein determining title to property would become extremely difficult and many property owners would run the risk of becoming dispossessed of property they have held for generations.

I. Contrary To Petitioners' Assertions, This Matter Creates No Constitutional Crisis And Petitioners' Due Process Rights Were Not Violated

Petitioners misstate or missaply relevant authority in several places in their Petition for Writ of Certiorari. For instance, this matter quite simply did not constitute the public taking of private land for the use of another private individual because the Property was sold to pay an undisputed tax bill. Additionally, Petitioners misstate the law insofar as they have argued that the subsurface estate was not taxable, when pursuant to relevant authority, it clearly was. Petitioners also failed to make any attempt to protect their property interests. Finally, Petitioners focus much of their argument on the notion that Herder, and by extension the instant matter, somehow create a constitutional crisis in Pennsylvania by creating a new and heretofore unknown interpretation of Pennsylvania law. This argument is meritless. The Pennsylvania Supreme Court's decision in Herder, as well as the Superior Court's decision in Bailey, carefully adhered to years of established precedent. Accordingly, this

Honorable Court should deny the Petition for Writ of Certiorari.

A. Petitioners Misapply The Missouri Case Because The Instant Matter Is Not The Public Taking Of Property For The Private Use Of Another

Petitioners object to the 1910 tax sale in the Bailey matter as the unconstitutional taking of private land for the use of another. Petitioners rely on Missouri Pacific Railway Co. v. Nebraska, 164 U.S. 403 (1896) for the proposition that the 1910 tax sale is invalid for that reason. In Missouri, a railroad company had granted permission for two grain elevators to be erected, by and for the use of others, on its property. Id. at 407. When a third party applied for permission to erect another grain elevator, the railroad declined. Id. The disappointed party filed suit, requesting the State of Nebraska to compel the railroad to permit the erection of the grain elevator on its property. Id. at 405. The Supreme Court of Nebraska held that there was relevant statutory authority that, under the particular circumstances of the case, permitted the courts to compel the railroad to permit the erection of

the third grain elevator on its land. Id. at 410-411. This Honorable Court reversed, holding that "[t]he taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States." Id. at 417.

Missouri is, however, not on point with the facts that underline the instant matter. Unlike in Missouri, in this matter the Commonwealth of Pennsylvania did not take the Property for the purpose of giving it to another private individual for private use. Rather, it took the Property for its own use, to sell it, as it was compelled to do in order to recover the money it lost from not collecting land taxes that were due and owing. Thus, Pennsylvania did not simply take land rights from Petitioners and give them to Respondents, as happened in Missouri. Pennsylvania sold those rights as a valid mechanism through which it could collect past due taxes. Petitioners have not offered any explanation for why this valid tax sale is in any way similar to the public taking of private land for the use of another

private individual. Accordingly, Petitioners' reliance on Missouri is misplaced, and so this Honorable Court should not consider it when deciding on the instant Petition for a Writ of Certiorari.

B. Petitioners Have Misapplied Relevant Pennsylvania Law To The Extent That The Subsurface Estate Was Capable Of Being Valued, Separately Assessed, And Taxed, Contrary To Petitioners' Assertions

Petitioners also argue that the subsurface estate could not be assessed because it was not producing oil and gas at the time, rendering it incapable of valuation. This is false. The Pennsylvania Supreme Court rejected this argument nearly twenty five years ago in Bannard v. New York State Natural Gas Corp., 293 A.2d 41, 49 (Pa. 1972) and more recently in Herder, 143 A.3d at 364-368.

In Bannard, the Supreme Court explained that "[a]cceptance of this proposition would undoubtedly lead to confusion and speculation, for no one would know what had actually been sold." 293 A.2d at 49. It was also predicted that "protracted collateral investigation and

litigation" would result, such as that which exists here, where rights in a subsurface estate are being litigated more than a century later. Id.

Petitioners' valuation argument also fails because it is predicated on several fundamental misconceptions. First, the Supreme Court's statement in F.H. Rockwell & Co. v. Warren County, 77 A. 665 (Pa. 1910), that a "mere naked reservation of oil and gas in a deed without any other facts to base a valuation upon is not sufficient to warrant the assessment of taxes" is mere *dictum*, rather than binding authority. Second, it plainly ignores that other methods of valuation, aside from oil and gas production, existed. See, e.g., Rockwell, 77 A. at 666 (listing development in the neighborhood, sales of oil and gas lands in close proximity or "any other element of value" as bases for valuation.); Appeal of Mead, 43 Pa. D. & C.2d 369 (Pa. Com. Pl. 1967) (assessing a flat nominal rate for oil and gas not in production).

Third, the argument improperly focuses solely on the oil and gas rights underlying the Property. Notably absent from Petitioners' argument are minerals, which were also

reserved in the 1893 Deed. Therefore, all subsurface rights (oil, gas *and* minerals) formed the separate estate, and if any one of those interests could have been valued, the subsurface estate was subject to valuation and assessment. See Bannard, 293 A.2d at 49. See, e.g., Coolspring Stone Supply, Inc. v. County of Fayette, 929 A.2d 1150 (Pa. 2007) (finding subsurface limestone is subject to taxation); Northern Coal & Iron Co. v. Burr, 42 Pa. Super. 638 (1910) (noting coal was separately assessed from surface); Logan v. Washington County, 29 Pa. 373 (1857) (severed interest in coal was subject to taxation apart from surface).

The Pennsylvania Supreme Court expressly acknowledged the taxability of the subsurface estate interests pursuant to the Acts of 1806 and 1815 in Herder and, as noted, Petitioners acknowledge that they must accept that Court's interpretation of the state statutes: "Accordingly, courts interpreting Pennsylvania law have a long history of accepting the concept of a tax sale reuniting severed estates of unseated property and perfecting previously defective titles." Herder, 143 A.3d at 364-368. Thus, insofar as Petitioners have misstated and missaplied the above-reference Pennsylvania

authority, this Honorable Court should deny the Petition for Certiorari.

C. Petitioners Had A Duty To Protect Their Property Rights

Petitioners would have this Honorable Court believe that they were but passive figures in the divestment of their previously severed subsurface property rights. In fact, they were active participants. While it is true that, in Herder, the Pennsylvania Supreme Court declined to follow the Superior Court's ruling that Petitioners had a duty to record the subsurface severance with the county commissioners, it cannot be overstated that Petitioners still had a duty to protect their property interests.

Though the instant matter was not settled on a theory of adverse possession, a brief look into that jurisprudence is helpful when disposing of Petitioners' argument. In Pennsylvania, a party looking to acquire title to real property through "adverse possession must prove actual, continuous, exclusive, visible, notorious, distinct and hostile possession of the land for twenty-one years." Piston v. Hughes,

62 A.3d 440, 443 (Pa. Super. 2013) (citation omitted). If the party looking to acquire title does all of the above, and the landowner sits on his rights, he will be dispossessed of his property, even though he took no affirmative action. Thus, Petitioners' argument that they cannot be dispossessed of their property when they took no action is completely without merit.

Additionally, just because Petitioners were not obligated under the Act of 1806 to file the deed reservation with the county commissioners does not absolve them from the obligation to know that, without that filing, their property was at risk, in perpetuity, to be sold at tax sale. As this Honorable Court explained in Texaco, Inc. v. Short:

> All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. ***This is especially the case with respect***

> *to those statutes relating to the taxation* or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and *safeguarding his interest* in it.

454 U.S. 516, 532 n. 25 (1982) (emphasis added).

Respondents declined to protect their property interests, though they could have easily done so in one of several different ways. One way they could have protected their property interests was by recording it with the subsurface reservation with the county commissioners, even if the Act of 1806 did not require that *they* do so. Another way they could have protected their property interests would have been by, in the property sale contract, requiring that the buyer make the appropriate filing with the county commissioners as required by the Act of 1806, and then following up to make sure that they had done so. Finally,

they could have simply raised their issues with the tax sale during the redemption period, obviating the need for this later litigation. Petitioners did none these things. They, instead, sat on their rights for a hundred years, expecting this Honorable Court to help well after the fact. Respondents respectfully submit that this Honorable Court should not reward this behavior, and should accordingly decline the Petition for Writ of Certiorari.

D. The Pennsylvania Courts Followed Established Legal Precedent In Their Herder and Bailey Decisions

At its heart, this matter concerns the duties and obligations imposed by the Act of 1806. The 1806 Act states:

> It shall be the duty of every person hereafter becoming a holder of unseated lands, by gift, grant or other conveyance, to furnish to the county commissioners, or board for the assessment and revision of taxes, as the case may be, a statement signed by

such holder, or his, her, or their agent, containing a description of each tract so acquired, the name of the person or persons to whom the original title from the Commonwealth passed, and the nature, number and date of such original title, together with the date of the conveyance to such holder, and the name of the grantor, within one year from and after such conveyance, and on failure of any holder of unseated lands to comply with the injunctions of this act, it shall be the duty of the county commissioners to assess on every tract of land, respecting which such default shall be made when discovered, four times the amount of the tax to which such tract or tracts of land would have been otherwise liable, and to enforce the collection thereof, in the same manner that

> taxes due on unseated lands are or may be assessed and collected: Provided, That nothing in this section shall be construed as giving greater validity to unexecuted land warrants than they are now entitled to, nor to the detriment of persons under legal disabilities, provided such person or persons comply with the foregoing requisitions within the time or times limited, respectively, after such disability shall be removed.

Section 1 of the Act of 1806, March 25, PL 644, 4 Sm.L. 346, presently codified as 72 P.S. § 5020-409.

Interpreting the Act of 1806, the Pennsylvania Supreme Court, in Herder, recently held that a tax sale under essentially identical circumstances as the ones at bar successfully reunited a previously severed subsurface estate. Herder concerned the disputed ownership of a 460 acre of land. The

Herder defendants traced their interest to an 1899 deed that transferred surface ownership but reserved gas, oil, and subsurface mineral rights to the predecessors in title to the defendants. Id. at 360.

At the time of the deed transfer and severance, the lands conveyed were unseated lands, and in 1935 the Centre County Commissioners acquired title to the property when it was offered for sale for unpaid real estate taxes. Id. However, no buyers came forward at that time. Id. In 1941, the Commissioners sold the property to the Herder plaintiffs, who subsequently filed an action to quiet title. Id.

The Herder trial court entered an order in favor of the defendants, granting them oil, gas and mineral rights. Id. at 363. This decision was subsequently overturned by the Pennsylvania Superior Court, which held that the mineral rights were owned by the Herder plaintiff by reason of a title wash at tax sale. Id. at 363. The Superior Court reasoned that, pursuant to the Act of 1806, any person acquiring an interest in unseated lands was required to provide a statement to the taxing

authorities, who were typically the County Commissioners or the Board of Assessment with the details of the interest acquired. Herder Spring Hunting Club v. Keller, 93 A.3d 465, 472 (Pa. Super. 2014). If a person did not provide such, then it was presumed that the taxes levied against the property were for all interests in the property, including surface and subsurface. Id. Specifically, the Superior Court held that "[i]f a parcel of unseated land was valued as a whole, and the taxes on that land were not paid, thereby subjecting that property to seizure and tax sale, then all that was valued, surface and subsurface rights, were sold pursuant to any tax sale, absent proof within two years, of the severance of rights." Id. at 472.

Applying these concepts to the Herder case, the Superior Court reasoned that since the Herder defendants did not provide proof that they or their ancestor in interest notified the County of their retention of the mineral rights after severing the subsurface interest in 1899, the County Treasurer obtained the property as a whole in 1935. Id. at 473. Similarly, when the party acquired title from the Commissioners in 1941 and transferred it

as a whole in 1959, the Herder Springs plaintiff obtained title to both the surface and subsurface estates. Id.

The Pennsylvania Supreme Court affirmed the Order of the Superior Court, except, relevantly, that the Supreme Court did not find that Petitioners had an affirmative duty to file its deed reservation with the county commissioners because they did not become a "holder of unseated lands" as a result of the deed reservation. Herder, 143 A.3d at 372.

Rather than departing from established precedent, as Petitioners suggest, Herder is in line with a long line of relevant Pennsylvania precedent regarding the sale of unseated land for unpaid taxes. In 1858, the Supreme Court of Pennsylvania held that, unlike sheriff sales that merely extinguish the titles of the defendant, tax sales extinguish all previous titles. Reingoth v. Zerbe Run Imp. Co., 29 Pa. 139 (1858).

In 1901, the Pennsylvania Supreme Court decided a case very similar to the one at bar. In Hutchinson v. Kline, the Court held that title washes were valid. 49 A. 312 (1901). The

owners in Hutchinson reserved subsurface mineral rights prior to sale. Id. at 313. Later, the owner of the surface estate, Kline, permitted the land to be sold at tax sale. Id. at 317. The court held that the tax sale purchaser received title to both the surface and subsurface estates as a result of the tax sale. Id. at 318, 319. The Court reasoned that, pursuant to the Act of 1806, the previous owners of the subsurface estate had a duty to report the severance to the tax assessors for separate assessment, and that it was their duty to prove that they had done so. Id. Their failure to do so meant that the surface and subsurface estates were assessed together and subsequently sold together. Id.

Hutchinson is not an outlying case. In Moore v. Commonwealth of PA Dep't of Environmental Resources, the Commonwealth Court held that an unassessed mineral estate is subject to extinguishment by the occurrence of a tax sale of the servient estate. 556 A.2d 905, see also Proctor v. Sagamore Big Game Club, 166 F. Supp. 465 (1958).

Thus, any argument or insinuation on the part of Petitioners that Herder should be

invalidated as a departure from established precedent must fail. Herder merely applied the law, as it stood at the time of the tax sale, to the sale and its subsequent effects. The lower courts in the instant matter did the same thing. Accordingly, there is no new reading or application of Pennsylvania law in this matter, and so the Petition for Writ of Certitorari should be denied.

II. This Is Not An Appropriate Case To Resolve The Split Of Authority As To Whether Or Not Mullane and Mennonite Are To Be Applied Retroactively

Petitioners appear to argue that this Honorable Court should grant their Petition for Writ of Certiorari in the instant matter to settle the split of authority that has developed as to whether or not Mullane and Mennonite should be applied retroactively. In Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950), this Court held that notice by publication failed to meet the due process requirements of the Fifth and Fourteenth Amendments where the identity and residence of a participant was known. A New York bank

created a trust covering 113 participants and sought judicial settlement of the trust, sending notice to the participants by publication only, despite the fact that the trustee had the names and addresses of some of the participants on hand, while others were unknown. Id. at 309-310. The beneficiary's guardian appealed, arguing that notice by publication violated the participants' due process rights under the Fourteenth Amendment. Id. at 311.

The Court noted that the requirement, to satisfy due process, is for "notice ***reasonably calculated, under all circumstances***, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 314 (emphasis added). With respect to the appropriateness of resorting to notice by publication, this Court noted that it "has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not ***reasonably possible or practicable*** to give more adequate warning." Id. at 317 (emphasis added). As the Court further noted,

> We recognize the practical difficulties and costs that

> would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the name of due process.

Id. at 317-318. The Court thus held that, while notice by publication was inadequate with respect to parties whose identities and locations were known, it was acceptable for parties whose identities and locations were unknown. Id. at 320.

A generation later, this Honorable Court built upon the foundation it laid in Mullane in the case of Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983). In Mennonite, an Indiana statute required the county auditor to post notice of a tax sale on the county courthouse, and provide notice to the owner of the property by certified mail, but did not require any additional notice be given to a

mortgagee. Id. at 792-793. The County sought to sell a property at tax sale, complying with the statutory authority, which did not give the mortgagee actual notice of the sale. Id. at 794. When the new purchaser of the property filed an action to quiet title, the original mortgagee of the property opposed, arguing that it was deprived its due process rights in connection with the sale because it received no prior notice. Id.

The Mennonite Court held that a mortgagee was entitled to notice, as laid out in Mullane, because it has a legally protected interest in the property. Id. at 798. The Court further noted that the notice requirements of Mullane were not satisfied by mailing notice to the property owner because the property owner is not in privity with the mortgagee. Id. The Court observed that, "unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane." Id. at 798. However, the Court was careful to further explain that a governmental body was not "required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." Id. at n.4. As is plain below, the

Pennsylvania Supreme Court in Herder, and thus the Pennsylvania Superior Court in the instant matter, did not violate the due process instructions contained in Mullane and Mennonite, and this is not the appropriate case to decide the circuit split as to whether or not those decisions should be applied retroactively.

A. The Lower Courts' Decisions Did Not Conflict With This Court's Decisions In Mullane And Mennonite

As stated above, Mullane permits notice by publication where the names, interests, and location of parties are unknown and cannot be reasonably ascertained. Mullane, 339 U.S. at 315-317. Additionally, this Honorable Court has held that "this Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent." Jones v. Flowers, 547 U.S. 220, 226 (2006). Moreover, as stated above, the government is not "required to undertake extraordinary efforts" in providing notice. Mennonite, 462 U.S. at 798.

Petitioners confuse the difference between the *possibility* of ascertaining the identity and

location, and then subsequently serving notice, of a potential party in interest, and being able to do so *reasonably*. The Pennsylvania Supreme Court noted in City of Philadelphia v. Miller, that notice by publication was often proper in cases involving unseated land because of the difficulty then present in determining who the holder of a tract of unseated land actually was, and because the two-year redemption period provided for an ample opportunity for a landowner to obtain recourse against a tax sale. 49 Pa. 440, 450-52 (Pa. 1865). As the same court later noted in Herder,

> As this Court has found the notice provision of the Act of 1815 to be reasonable given the difficulties of ascertaining ownership information relating to unseated landowners and the protection provided by the redemption period, we will not upset that conclusion based on preconceived notions of what is reasonable in the age of the Internet.

143 A.3d at 372.

Petitioners' error is in assuming that the county treasurer could have reasonably known, or been made aware, of Petitioners' deed reservation. Regardless of who was at fault for not submitting the appropriate filing to the county commissioners pursuant to the Act of 1806, the simple fact is that the county treasurer had no actual notice that Petitioners had reserved the Property's subsurface estate. Accordingly, the county treasurer could only have been made aware of Petitioners' deed reservation prior to the tax sale if it combed through the deed books, checking every single deed, searching for other possible parties in interest, but not knowing exactly what it was they were looking for. Taken to its logical conclusion, Petitioners' argument would place the burden on every local taxing authority in the Commonwealth of Pennsylvania to inspect every deed that encompassed a parcel of property from the present date all the way back to the original land grants from the English crown to William Penn, to ensure that it was not accidentally selling a reserved interest in the land. Respondents respectfully submit that such an undertaking is not reasonable, and it

is not what Mullane and Mennonite require; rather, it is onerous. As such, the due process clearly does not demand it. Thus, because, under the circumstances, the due process requirements set out by Mullane and Mennonite were satisfied in this matter, the Petition for Writ of Certiorari should be denied.

B. Pennsylvania Already Applies Mullane And Mennonite Retroactively

Petitioners simultaneously argue that the petition for writ of certiorari should be granted to resolve the split on authorities as to whether or not Mullane and Mennonite are to be applied retroactively, and that Pennsylvania currently applies Mullane and Mennonite retroactively. Petitioners' brief cites First Pennsylvania Bank, N.A. v. Lancaster County Tax Claim Bureau, 470 A.2d 938, 941 (Pa. 1983), for the proposition that Pennsylvania has already decided to apply Mullane and Mennonite retroactively.

Petitioners cannot have it both ways. If Petitioners are arguing that Pennsylania has recognized that Mullane and Mennonite apply retroactively, but then failed to actually do so, then Petitioners are not actually asking this

Honorable Court to resolve the split among authorities; they are asking this Court to correct an isolated misapplication of the law. Even assuming, *arguendo*, that did misapply its own previous reading of the law, this would not be an appropriate case to warrant certioriari to resolve this split because, by Petitioners' own admission, Pennsylvania already subscribes to the notion that Mullane and Mennonite should be retroactively applied. In that instance, this Honorable Court should deny the Petition for Writ of Certiorari because correcting an isolated misapplication of law is not the purpose of this Court. If Petitioners are, instead, arguing that Pennsylvania does not currently apply Mullane and Mennonite retroactively, the instant matter is still not an appropriate case for this Honorable Court to decide this issue because, as stated, supra, the retroactive application of Mullane and Mennonite had no bearing on the outcome of this case. Thus, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

III. Petitioners' Requested Application Of The Law Would Create A Crisis In Pennsylvania, Wherein No One Could

Be Absolutely Certain That They Own Clean Title Of Their Land

The main crux of the instant Petition for Writ of Certiorari is a fiction wherein scores of Pennsylvanians are having their previously reserved subsurface rights taken from them through no fault of their own, and assigned to a new owner. Petitioners even put forward a hypothetical in an attempt to highlight their interpretation of "the practical impact of the Herder Court's ruling."[3] In this hypothetical, a couple purchase a tract of unseated land in Pennsylvania, but later sells to a another individual who plans to turn the tract of land into farm land. The couple reserves the subsurface rights in the deed, but no one bothers to make the appropriate filing with the county commissioners pursuant to the Act of 1806. Later, the property is sold at tax sale when the farmer fails to pay his real estate taxes. Because the subsurface reservation was never recorded with the county commissioners, the tax sale reunites the previously severed surface and subsurface estates, and the original

[3] Petition for Writ of Certiorari at pp. 20-22.

couple has now been divested of the subsurface estate.

Petitioners request certiorari in the hopes that this Honorable Court will stop the above-referenced practice. However, there are serious issues with utilizing this hypothetical. First and foremost, it assumes that this practice is ongoing. It is not. As clearly stated by the Pennsylvania Supreme Court in Herder, "[t]he Acts of 1806 and 1815, which amended the Act of 1804, have been repealed in large part. See e.g. 1947, July 7, P.L. 1368, No. 542, 72 P.S. § 5860.801 (repealing the Act of 1804 and 1815 as to certain taxing districts)." Herder, 143 A.3d at 365 fn. 8. The legislation that permitted the sort of title washing tax sales that are contemplated in Herder and in the instant matter was extinguished nearly seventy years ago. To the extent that this Honorable Court's time should be used to correct ongoing injuries, or injuries that are repeatable to others, Respondents respectfully submit that, because the relevant Pennsylvania law has been long since repealed, this Court's intervention is unnecessary.

Second, any controversy that comes to the courts as a result of one of these sales is also from a sale that occurred at least that long ago. Thus, the couple from Petitioners' hypothetical, assuming they are not long dead, has sat on their rights for longer than half of the justices on this Honorable Court have been alive. Putting aside for a moment the fact that Petitioners could have easily redeemed their interest within the statutory redemption period over one hundred years ago, to sit on one's rights for generations before turning to the Supreme Court of the United States for help does not lend a compelling reason for granting a petition for writ of certiorari.

Finally, and most importantly, overturning the Pennsylvania Supreme Court on the issue of substantive due process would throw Pennsylvania property rights into turmoil. Suddenly, every landowner in the Commonwealth of Pennsylvania would be required to frantically check every deed transfer from Pennsylvania's colonial days until the present for fear that, due to some oversight that occurred before they were born, they may not own the interest in their land that they think they do. Scores of Pennsylvanians who currently

own, occupy, and take care of their land could be divested of the subsurface estate that they paid for when they purchased their property. That interest could be taken from people who actually paid for it and given to people who did not know that they had a claim to it, and whose claim had been surrendered when their great grandparents sat on their rights.

Put simply, while the result in both Herder and the instant matter may seem unfair, it is still the correct result. First, because the practice that led to this situation no longer occurs and so new injuries from the practice have not been dealt in generations. Second, because reversing Herder would create the possibility for many new injuries from now until the end of time because the accuracy of deeds in Pennsylvania would become so unpredictable. For these reasons, Respondents respectfully request that this Honorable Court deny Petitioners' request for a writ of certiorari in this matter.

CONCLUSION

Thus, for all of the foregoing reasons, Respondents, David C. Bailey, and David C. Bailey and Cecelia Bailey, trustees of the David C. Bailey Trust, as well as Counterclaim Respondents, International Development Corporation, respectfully request that this Honorable Court deny Petitioners' Petition for Writ of Certiorari in this matter.

Respectfully Submitted,

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**There is no parent or publically held corportion owning 10% or more of the corportion's stock*