No. 16-556

In the Supreme Court of the United States

HARRY KELLER AND ANNA KELLER, *et al.*,
Petitioners,

v.

HERDER SPRINGS HUNTING CLUB,
Respondent.

HOYT ROYALTY LLC, *et al.*,
Petitioners,

v.

DAVID C. BAILEY, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF FOR PETITIONERS

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SUMMARY

Respondents fail to offer a coherent justification for the Pennsylvania Supreme Court's recent reading and application of the unseated land tax statutes ("Statutes") from a federal due process standpoint. Although they admit that the effect of the Statutes "may seem unfair," Respondents argue that the tax sale proceedings were a valid exercise of the state's authority to collect unpaid taxes. Petitioners, however, do not contend that the Commonwealth of Pennsylvania was prohibited from collecting unpaid taxes through the Statutes' enacted process. Rather, Petitioners argue that since they had no statutory obligation to report their duly recorded, nonproducing subsurface interests to the taxing authorities, they could not lose their title to such property without receiving actual notice of the tax assessments and sales. The purpose of all taxing statutes, whether imposing *in rem* or *in personam* liability, is to collect revenue, not deprive owners of their property. Pennsylvania's current reading of the Statutes propagates the latter and countenances a violation of Petitioners' federal due process rights to the extent based solely on published notice of ad valorem taxes assessed and advertised in the name of the then defaulting surface estate owners.

Moreover, contrary to Respondents' contentions, the lower courts below did not engage in any analysis regarding whether "reasonably diligent efforts" would have identified Petitioners and uncovered their

recorded property rights before they were purportedly sold at the tax sales. Respondents weave conjecture and conclusory statements throughout their Response to convince this Court that *any* effort to identify Petitioners and their subsurface interests would have been unreasonable, and therefore actual notice was impossible. However, being little more than a "feint," the published notice of the underlying *in rem* tax sales fails to satisfy the due process requirements of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and the Pennsylvania Supreme Court's attempt to apply those decisions retroactively was illusory and only worked to perpetuate the identified split in authorities.

This Court should address the important question of whether the Statutes, as recently interpreted by Pennsylvania's highest court and under which title is claimed, violate the federal due process rights of owners of recorded, nonproducing oil, gas and other subsurface interests. Also, now is the time for this Court to squarely address the split in authority among the courts regarding whether *Mullane* and *Mennonite* apply to published *in rem* tax sales that predate those decisions and whether recorded subsurface estate owners are entitled to actual rather than constructive notice of tax sales that post-date their reservations. This Court should grant certiorari.

ARGUMENT

Respondents agree a split of authority exists on the important federal questions raised by Petitioners. Nevertheless, Respondents encourage this Court to ignore the split of authority and decline review for five primary reasons: (1) the Statutes permitted Pennsylvania to conduct *in rem* sales to collect taxes; (2) it would have been unreasonable to require the taxing authorities to provide actual notice of the *in rem* tax sales to Petitioners; (3) the Pennsylvania Supreme Court properly applied the holdings in *Mullane* and *Mennonite*; (4) actual notice was not required because Petitioners should be held to a higher standard of vigilance to protect their subsurface property rights; and (5) reaching back to undo constitutionally defective *in rem* tax sales will upend expectations of title and property ownership in Pennsylvania. None of Respondents' arguments support a denial of review.

I. The *Herder* Court's Current Interpretation of the Statutes Condones the Taking of Property that Is Divorced from the Stated Purpose of Collecting Taxes.

Respondents attempt to shield the Statutes from any substantive due process analysis because, in their view, the Statutes embodied a valid exercise of state authority to collect ad valorem taxes. (Opp.17.) Respondents' argument does not present a legitimate deterrent to review, as this Court recognized in *Boddie v. Connecticut*, 401 U.S. 371 (1971), that "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure

enacted in the legitimate exercise of state power is beyond question." *Id.* at 379.

Here, the Statutes, as applied to Petitioners, have deprived them of a protected right to their duly recorded subsurface interests while simultaneously excluding them, as opposed to the defaulting unseated surface estate owners, from participating in the process by which those interests are taken. As previously explained (Pet.23), the *Herder* Court's ruling singles out subsurface interest owners by permitting the state to ignore duly recorded reservations and merge those interests with the previously severed surface to collect taxes that were assessed and taxed only against the surface.

As this Court stated in *Loan Association v. Topeka*, 87 U.S. 655 (1875), "there can be no lawful tax which is not laid for a public purpose." *Id.* at 664. The *Herder* Court has sanctioned the state's purported taking of private property – that was not taxed – and selling it to a private individual. Thus, there can be no public purpose for which this tortured process benefits; rather, it serves the clear purpose of rejecting longstanding principles of American property law in favor of permitting the state to effectuate in secret a transfer of title to property with no semblance of due process to its owners.

Moreover, this Court's review of the federal due process question raised by Petitioners is not foreclosed simply because the Pennsylvania Supreme Court has spoken on how the Statutes should be interpreted. Rather, the United States Constitution allows this Court to analyze state law when a state court's interpretation impermissibly expands a statute's scope

beyond what proper statutory construction provides and in violation of what due process requires. *Bouie v. City of Columbia,* 378 U.S. 347, 361-362 (1964). *See also Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

The Statutes, as recently interpreted by the *Herder* Court, are constitutionally defective because they allow the state to take unassessed and untaxed private property without a corresponding public purpose. Therefore, Respondents' first stated basis supports no denial of review.

II. Whether "Reasonably Diligent Efforts" Would Have Ascertained the Identities of Petitioners Was Never Explored in the Courts Below.

Respondents argue that it would have been unreasonable for the taxing authorities to try to ascertain Petitioners' identities to afford them actual notice of the *in rem* tax sales. Neither the *Herder* Court, nor any of the lower courts, analyzed whether reasonable efforts could have been taken to provide actual notice to Petitioners or their ancestors. Respondents rely upon select passages from *City of Philadelphia v. Miller*, 49 Pa. 440 (1865), to support their theory, as espoused by the *Herder* Court, that notice by publication was sufficient for tax sales involving unseated land due to the "difficulties in ascertaining ownership information ... ." (Opp.36-37; App.40-42.) That generalization was limited in *Philadelphia*, however, to circumstances where an assessment of unseated land could be valid if it was in the name of someone "connected at some time with a title to the land, good or bad," due to the Court's

observation that "[l]and is often claimed by adverse owners ... ." *Philadelphia*, 49 Pa. at 451-52. Critically, the Pennsylvania Supreme Court did not state ascertaining the identity of an owner of unseated land was difficult; rather, it said the opposite: "Ten minutes will suffice to read over every name in the longest list of unseated lands in any township." *Id.*

It does not follow from *Philadelphia*'s discussion of notice to unseated land owners that any effort to ascertain ownership information for subsurface interests in unseated land would have been *per se* futile. Petitioners' reservations were undisputedly recorded in the county recorder's office, and they paid taxes on the very surface properties subject to the tax sales and were well known business and legal figures in their communities. The taxing authorities had multiple avenues to pursue to ascertain Petitioners' identities but pursued none of them. This failure alone warrants review. *See Tulsa Prof. Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) (remanding the case "for further proceedings to determine whether 'reasonably diligent efforts,' *Mennonite*, *supra* at 798, n.4, would have identified appellant and uncovered its claim").

III. The *Herder* Court Misapplied *Mullane* and *Mennonite*.

Respondents have a fundamental misunderstanding of the *Herder* Court's purported application of the principles of *Mullane* and *Mennonite*. As previously argued (Pet.29-30 n.5), there is a troubling split of authorities regarding whether *Mullane* and *Mennonite* should be applied retroactively to events that predate those decisions. As Justice Todd acknowledged in her concurrence, "the retroactive application of "*Mullane*

and *Mennonite* remains currently unresolved, as the high Court has not spoken to this question and there remains a substantial split of authority among state courts which have considered it." (App.45.) The *Herder* Court agreed that a split exists, and then stated it would apply those decisions retroactively to the facts. However, as Justice Todd notes, the *Herder* Court did the opposite.

For example, the *Herder* Court repeatedly discussed the decisional law from the "relevant time" to buttress its flawed premise that published notice is constitutionally sufficient for *in rem* proceedings. (App.39-42.) However, by focusing on whether the "decisions from the relevant time" considered published notice to serve as an adequate instrument to satisfy the due process rights of an owner of unseated land, the *Herder* Court took the time machine and surveyed its surroundings, but forgot to take with it the principles of *Mullane* and *Mennonite*. Through this analysis, it fell short of the requirement pronounced in *Harper* that this Court's decision on federal law be given full retroactive effect on all events that predate the announcement of the rule. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

Critically absent from the *Herder* Court's analysis is whether, setting aside the supposed virtues of published notice, the taxing authorities reasonably could have done more. *Mullane* and *Mennonite* demand this question be given due consideration before a property owner's rights are snuffed out. If such a scheme existed in present day, it would not pass the constitutional smell test. *Harper* requires the same due process considerations in *Mullane* and *Mennonite*

be applied retroactively to statutory schemes that predate those decisions. The *Herder* Court did not comply with this rule of constitutional jurisprudence, justifying this Court's review.

IV. Petitioners Should Not Be Held to a Heightened Standard to Protect Their Property Rights.

Respondents submit this Court should overlook the constitutional violations of due process because Petitioners must be held to a heightened standard of vigilance to protect their property interests. Respondents rely primarily on this Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), for the proposition that Petitioners should have known that they were at risk into perpetuity of losing their property rights under the Statutes and notice by publication under the circumstances more than satisfied due process. (Opp.21-24.) *Texaco* is inapposite here because the statute there was a self-executing statute of limitations. This Court held in *Texaco* that the subsurface owners should have known that they were at risk of losing their rights if they did not develop their subsurface interests within the 20-year time window and were not entitled to any notice before the property reverted to the surface owner. *Texaco*, 454 U.S. at 529.

The self-executing nature of the statute in *Texaco* distinguishes that case from the *in rem* tax sale proceedings here. This distinction was thoroughly addressed in this Court's decision in *Tulsa*. The *Tulsa* Court rejected the idea that "notice reasonably calculated, under all the circumstances to apprise the property owner of the pendency of the action and afford

them an opportunity to present their objections" could be shirked by the state where the "legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits ... ." *Tulsa*, 485 U.S. at 487 (*quoting Mullane*, 339 U.S. at 314). Here, Petitioners did not lose their duly recorded property interest due to the passage of time, want of diligence or other adverse possession theory. Their recorded property rights were purportedly extinguished at tax sales triggered through no fault of Petitioners and to which a two year period of redemption applied despite the lack of actual notice being served upon Petitioners. Those circumstances fit squarely with this Court's jurisprudence that requires actual notice to the property owner when they could have been identified through "reasonably diligent efforts." *See Mennonite*, 339 U.S. at 798 n.4.

Respondents argued that Petitioners "had it coming" because they did not exercise sufficient diligence to keep apprised of tax sale proceedings that might affect their subsurface rights. That logic rests on the faulty assumption that the *Herder* Court's reading of the statute was commonly accepted during the time of the estate's severance. "It has long been established that 'laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly[.]'" *Texaco*, 454 U.S. at 535 (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). It is unclear after the *Herder* Court's interpretation of the Statutes how a property owner of reasonable intelligence would have known their subsurface interest could be jettisoned at a tax sale when the subsurface estate had never been assessed or taxed. The *Herder* Court has significantly

broadened the meaning of the Statutes without affording Petitioners any corresponding enlargement of due process protections. This Court has not hesitated to exercise its jurisdiction to correct such constitutional violations by state courts when the interpretation of state law exceeds the bounds of this Court's jurisprudence. *See, supra,* pp. 4-5.

The *Herder* Court's interpretation of the Statutes exceeded all bounds of due process protection afforded to property owners of duly recorded subsurface interests. Unlike the self-executing statute in *Texaco*, the Statutes have been distorted beyond recognition and their entire purpose and effect is to work a deprivation of property rights with no semblance of due process. This Court should grant review and should not "abdicate [its] responsibility to enforce the explicit requirements of" the United States Constitution. *Bush*, 531 U.S. at 115.

V. Invalidating Constitutionally Defective Tax Sales of Duly-Recorded Severed Oil and Gas Interests Will Not Disrupt Settled Expectations.

Respondents posit this Court should not intervene because it would "throw Pennsylvania property rights into turmoil." (Opp.42.) However, Respondents' parade of horrors, where every title in Pennsylvania allegedly will be in question if the *Herder* Court's decision is struck down, ignores that the current understanding of the Statutes embraces a phenomenon of recent vintage.

Historically in Pennsylvania, it did not follow that the default of a surface owner on his taxes would

enable the joinder of previously-severed subsurface interests at a subsequent tax sale. Generations of Pennsylvanians and Pennsylvania state and federal courts all abided by the Pennsylvania Supreme Court's reasoning in *F.H. Rockwell & Co. v. Warren County*, 77 A. 665, 666 (Pa. 1910), that subsurface interests could only be taxable as "land" if there was some basis for discovering and valuing it, and that "[a] mere naked reservation of oil and gas ... without any other facts to base a valuation upon is not sufficient to warrant the assessment of taxes." *See, e.g., New York State Nat'l Gas Corp. v. Swan-Finch Gas Devel. Corp.*, 278 F.2d 577, 579-580 (3d Cir. 1960) (*citing F.H. Rockwell* to support the conclusion that the purchasers of mineral rights at unseated land tax sales did not acquire the unassessed, nonproducing natural gas rights). Also, in *Luther v. Pennsylvania Game Com.*, 113 A.2d 314 (Pa. 1955), the Pennsylvania Supreme Court declared that due process inhibits a state from taking one's duly recorded subsurface rights via a tax sale based on assessments made solely in the name of the subsequent seated surface estate owner. *Luther*, 113 A.2d at 315-316. Further, in *Mullane*, this Court rejected the notion that the requirements of federal due process differ depending on whether the proceedings were *in rem* versus *in personam*. *Mullane,* 339 U.S. at 312-13. Thus, prior to the *Herder* decision, case law established that title to duly severed, nonproducing subsurface rights could not be transferred via a tax sale based on assessments made in the name of a subsequent unseated surface owner. *See, e.g., Day v. Johnson,* 31 Pa. D. & C.3d 556, 559 (Pa. Ct. Com. Pl. Warren Cnty. 1983).

This historical perspective explains why none of the unseated surface owners following Petitioners' recorded reservations except for Respondents claimed title to the nonproducing oil, gas and other subsurface interests under their lands. Consequently, there is no basis to conclude that a ruling in Petitioners' favor would give rise to a tsunami of title litigation or call into question many titles. The due process issues raised by these proceedings are limited to instances where duly recorded subsurface interests have been held continuously by successors in title and where the current surface owner only now seeks to obtain a windfall by extinguishing those recorded interests through an unconstitutional interpretation of the Statutes. Thus, while *Herder's* decision impacts thousands of acres of subsurface interests in Pennsylvania, reversing that decision will not throw Pennsylvania property rights into chaos. Instead, it will affirm what historically has been thought to be the case: that is, absent actual notice, title to duly severed, nonproducing subsurface rights cannot be transferred via a tax sale based on assessments made in the name of a subsequent unseated surface estate owner.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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December 14, 2016