University of Cincinnati Law Review

Volume 91 | Issue 3 Article 6

March 2023

Taking the American Dream – A Remedy for Home Equity Theft Following the Sixth Circuit's Ruling in Harrison v. Montgomery County, Ohio

Elizabeth Black

TAKING THE AMERICAN DREAM – A REMEDY FOR HOME EQUITY THEFT FOLLOWING THE SIXTH CIRCUIT'S RULING IN *HARRISON V. MONTGOMERY COUNTY, OHIO*

Elizabeth Black

I. INTRODUCTION

Homeownership is an essential component of the American Dream. A homeowner builds wealth by accumulating equity through paying down the debt owed against the property.[1] Building equity is one of the primary financial benefits to homeownership.[2] Ohio statutory law considers a debtor's equity as a protected interest in a variety of debt collection practices.[3] In a property foreclosure action for tax delinquency, Ohio typically requires the property to be sold at public auction with the proceeds of the sale covering the tax delinquency.[4] Any surplus equity would then be paid to the property owner.[5]

However, in 2008, Ohio introduced an option other than foreclosure via public auction for counties handling delinquent property taxes owed for abandoned or unoccupied land.[6] Instead of holding a public auction, the new Ohio law permits a "county board of revision" to "foreclose the state's lien for real estate taxes upon abandoned land."[7] The county is then authorized to transfer the property to a land bank rather than dispose of the property through an auction.[8] This option was created with the goal of economic redevelopment, allowing counties to initiate land revitalization efforts more efficiently.[9] This alternative process allows the county treasurer to transfer the property directly to the land bank without the obligation of holding a public auction.[10]

Upon transfer to the land bank, the property becomes "free and clear of all impositions and any other liens on the property, which shall be

1. Justin Pritchard, *How to Build Equity and Own More of Your Home*, BALANCE, https://www.thebalance.com/build-equity-315654 (Dec. 28, 2021).

2. *Share of Americans Perceiving Homeownership as Part of Achieving Their Personal American Dream from 2010 to 2018*, STATISTA, https://www.statista.com/statistics/504382/americans-perceiving-homeownership-as-achieving-personal-american-dream (last visited Mar. 2, 2023).

3. *See* OHIO REV. CODE ANN. §§ 5721.20, 2329.44, 1309.615, 1311.49 (West 2020).

4. Harrison v. Montgomery Cnty., 997 F.3d 643, 646 (6th Cir. 2021); *see also* § 323.25.

5. *Harrison*, 977 F.3d at 646.

6. *Id.*; *see also* OHIO REV. CODE ANN. § 323.65 (2020).

7. OHIO REV. CODE ANN. § 323.66 (2020).

8. § 323.78.

9. Merit Brief of Appellant Alana Harrison at *3, Harrison v. Montgomery Cnty., 997 F.3d 643 (6th Cir. 2021) (No. 20-4051), 2020 WL 7249164, at *3.

10. *Harrison*, 997 F.3d at 646.

deemed forever satisfied and discharged."[11] The consequence of foregoing public auction and instead transferring the property to a land bank is that Ohio will no longer collect the tax delinquency and the fair market value of the land becomes immaterial.[12] Instead, the county will simply transfer the property to the land bank "regardless of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel."[13]

This alternative approach to property foreclosure permits the government to extinguish the property owner's surplus equity upon transfer to the land bank.[14] However, the land bank transfer disregards the property owner's surplus equity interest, effectively committing "home equity theft."[15] Home equity theft occurs when the government seizes a property for tax delinquency and then keeps the full value of the property, even if the full value is greater than the amount necessary to pay off the delinquent taxes.[16] Home equity theft constitutes a taking under the Takings Clause of the Fifth Amendment of the United States Constitution, which prohibits the government from taking "private property . . . for public use, without just compensation."[17]

Alana Harrison, who inherited her deceased mother's home in Montgomery County, Ohio, fell victim to home equity theft.[18] The home was unoccupied and valued at approximately $22,600.[19] When Harrison failed to pay the $20,000 in property taxes on the home, Montgomery County started foreclosure proceedings.[20] Montgomery County bypassed the typical public auction foreclosure sale, choosing instead to transfer Harrison's property to Montgomery County's land bank. The transfer to the land bank avoided a public sale, but it also deprived Harrison a refund of the surplus profits valued at approximately $3,000.[21]

11. OHIO REV. CODE ANN. § 323.78(B) (2020).

12. *Harrison*, 997 F.3d at 646.

13. § 323.78(B).

14. Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellant and Reversal at *6, Harrison v. Montgomery Cnty., 997 F.3d 643 (6th Cir. 2021) (No. 20-4051), 2020 WL 7249164, at *6.

15. *Id*.

16. Ilya Somin, *Sixth Circuit Rules Property Owners Can Go to Federal Court to Argue Takings Clause Bars Seizure of Home Equity in Cases Where Property Is Foreclosed to Pay Off Tax Delinquencies*, REASON: THE VOLOKH CONSPIRACY (May 12, 2021, 6:08PM), https://reason.com/volokh/2021/05/12/sixth-circuit-rules-property-owners-can-go-to-federal-court-to-argue-takings-clause-bars-seizure-of-home-equity-in-cases-where-property-is-foreclosed-to-pay-off-tax-delinquencies-delinquencies.

17. U.S. CONST. amend. V.

18. *Harrison*, 997 F.3d at 646.

19. *Id*.

20. *Id*.

21. *Id*.

Harrison filed suit in federal court seeking to recover the surplus equity value of her mother's property, claiming that Montgomery County committed a taking without providing just compensation, violating federal and state takings clauses under the Fifth and Fourteenth Amendment.[22] The district court dismissed the case on claim-preclusion grounds[23] based primarily on two United States Supreme Court cases, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[24] and *San Remo Hotel, L.P. v. City & County of San Francisco*.[25] These two cases independently instituted barriers that unintentionally worked in tandem to create a "Catch-22"[26] for property owners seeking just compensation for the takings.[27]

However, the U.S. Supreme Court's 2019 decision in *Knick v. Township of Scott, Pennsylvania*[28] resolved the "Catch-22"[29] created by *Williamson County*[30] and *San Remo Hotel*[31] which barred property owners from bringing takings claims against state and local governments to federal court. The Supreme Court in *Knick* overruled the *Williamson County* requirement that a federal takings plaintiff must first exhaust all state remedies before seeking relief in federal court.[32]

Applying the holding in *Knic*k, the Sixth Circuit Court of Appeals, in a unanimous decision, reversed and remanded Harrison's case to the District Court to consider Harrison's takings claim in the first instance, concluding that Harrison is no longer required to exhaust all state remedies before bringing her takings claim to federal court.[33] The Sixth Circuit held that property owners challenging the seizure of home equity when their property is foreclosed due to tax delinquency may file their takings claim directly in federal court.[34]

This Comment seeks to underscore the important implications the *Harrison* decision will have for similar home equity theft cases in the Sixth Circuit and, hopefully, throughout the country as other circuit courts will likely adopt the Sixth Circuit's cogent reasoning. Under the *Harrison*

22. *Id*.

23. Harrison v. Montgomery Cnty., 482 F. Supp. 3d 652 (S.D. Ohio 2020), *rev'd and remanded*, Harrison v. Montgomery Cnty, 997 F.3d 643 (6th Cir. 2021).

24. 473 U.S. 172 (1985).

25. 545 U.S. 323 (2005).

26. Somin, *supra* note 16.

27. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019).

28. 139 S.Ct. 2162 (2019).

29. Somin, *supra* note 16.

30. 473 U.S. 172 (1985).

31. 545 U.S. 323 (2005).

32. *Knick*, 139 S. Ct. at 2177.

33. *Harrison*, 997 F.3d at 649.

34. *Id.* at 652.

decision, a property owner seeking to recover surplus equity following a foreclosure transfer to a land bank now can go directly to federal court for relief. Sections II(A) and (B) of this Comment situate *Harrison* within the context of Ohio's claim preclusion doctrine and the Takings Clause of Fifth Amendment of the United States Constitution. Sections II(C) and (D) provide an illustration as to how, until recently, a property owner seeking to assert a takings claim did not have a clear path to federal court. These Sections examine the three relevant U.S. Supreme Court cases that determined whether Harrison's takings claim could proceed in federal court: *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[35] *San Remo Hotel, L.P. v. City & County of San Francisco*,[36] and *Knick v. Township of Scott, Pennsylvania*.[37] Section II(E) provides a discussion of the Sixth Circuit's unanimous 2021 decision in *Harrison*, which applied *Knick* to rightfully provide property owners a federal forum to challenge the seizure of surplus equity when their property was foreclosed due to tax delinquency.

Section III(A) encourages the U.S. District Court for the Southern District of Ohio to find for Harrison on remand, holding a government's extinguishment of surplus equity constitutes a taking under 42 U.S.C § 1983.[38] Section III(B) advocates for the Ohio General Assembly to amend the land bank statutes to provide a remedy for property owners to recoup the seized surplus equity. Finally, Section III(C) discusses the prevalence of home equity theft across the United States and urges other circuit courts to adopt the Sixth Circuit's reasoning in *Harrison* to provide property owners with an avenue to bring their § 1983 takings actions to federal court.

II. BACKGROUND

This Section begins by describing Ohio's claim preclusion doctrine, also known as res judicata, and recognizing the doctrine's purpose to promote judicial efficiency and provide finality of judgment. Section II(B) outlines the development and application of the Takings Clause of Fifth Amendment of the United States Constitution. Section II(C) provides an illustration as to how, until recently, a property owner seeking to assert a takings claim did not have a clear path to federal court because of two United States Supreme Court cases, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[39] and *San Remo*

35. 473 U.S. 172 (1985).

36. 545 U.S. 323 (2005).

37. 139 S. Ct. 2162 (2019).

38. § 1983 provides a remedy for seeking redress for the violation of a federally protected right.

39. 473 U.S. 172 (1985).

Hotel, L.P. v. City & County of San Francisco.[40] These two cases independently instituted barriers that inadvertently worked in tandem to create a "Catch-22"[41] for property owners seeking just compensation for the taking. Section II(D) illustrates how the U.S. Supreme Court's 2019 decision in *Knick v. Township of Scott, Pennsylvania*[42] resolved the "Catch-22"[43] created by *Williamson County*[44] and *San Remo Hotel*[45] which barred property owners from bringing takings claims against state and local governments to federal court. Section II(E) concludes with a discussion of the unanimous Sixth Circuit ruling in *Harrison v. Montgomery County, Ohio*.[46]

A. Claim Preclusion

Under the doctrine of claim preclusion, also known as res judicata, a final decision on the merits bars all subsequent actions arising from the same "transaction or occurrence."[47] This bar on successive litigation rests on the assumption that the parties had an ample opportunity to fully litigate the relevant claims in the initial proceeding.[48] Under Ohio law, claim preclusion has four elements:

> (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous [litigation].[49]

To determine whether the same "transaction or occurrence" is present is a case-specific question of fact; however, the same "transaction or occurrence" is defined as possessing a "common nucleus of operative facts."[50]

The Ohio Supreme Court has recognized that claim preclusion does not

40. 545 U.S. 323 (2005).

41. Somin, *supra* note 16.

42. 139 S. Ct. 2162 (2019).

43. Somin, *supra* note 16.

44. 473 U.S. 172 (1985).

45. 545 U.S. 323 (2005).

46. 997 F.3d 643 (2021).

47. Grava v. Parkman Twp., 653 N.E.2d 226, 229 (Ohio 1995); *see also* 21A TRACY BATEMAN ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 51:227 (Nov. 2021 ed.); Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).

48. Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals, 510 N.E.2d 373, 376 (Ohio 1987).

49. Hapgood v. City of Warren, 127 F.3d 490, 493 (6th Cir. 1997); *see also* 63 RACHEL M. KANE ET AL., OHIO JURISPRUDENCE, JUDGMENTS § 359 (3d ed. Feb. 2022).

50. Grava v. Parkman Twp., 653 N.E.2d 226, 229 (Ohio 1995).

act as a shield to protect the culpable party. Rather, the doctrine of claim preclusion functions as a "rule of fundamental and substantial justice, or public policy and of private peace."[51] Claim preclusion encourages judicial efficiency, conserves judicial resources, ensures finality of judgment, prevents inconsistent judicial holdings, and offers repose from the threat of further litigation of the same claim.[52]

Claim prelusion also promotes comity between the federal and state courts.[53] Comity is understood as the courts of one jurisdiction respecting the decisions and laws of other jurisdictions – whether state or federal – out of mutual respect and deference.[54] Further, through the Full Faith and Credit statute, Congress established the statutory requirement for federal courts to give the "same preclusive effect" a state court judgment would receive under state law.[55] Therefore, under 28 U.S.C. § 1738 and the comity principle, if a plaintiff is precluded from initiating a subsequent lawsuit under the claim preclusion doctrine, the plaintiff is similarly barred from bringing the claim in federal court.[56]

Claim preclusion rests on the assumption that the litigant had a "full and fair opportunity" to present its case in the first action.[57] However, this assumption assumes there were no formal impediments preventing the litigant from fully presenting its claim in the first action.[58] An important exception to claim preclusion is the existence of formal barriers limiting the party's ability to fully present its claim in the first action.[59] It is unfair to preclude a litigant from bringing another action that raises "phases of the claim" that the litigant "was disabled from presenting in the first" action.[60] The Ohio Supreme Court has recognized this exception to claim preclusion, allowing litigants to bring a subsequent action to have a "full and fair opportunity" for relief.[61]

B. The Federal Takings Clause

The Takings Clause of the Fifth Amendment of the United States

51. Davis v. Wal-Mart Stores, Inc., 756 N.E.2d 657, 659 (Ohio 2001) (quoting *id.* at 232 (Douglas, J., dissenting)).

52. Allen v. McCurry, 449 U.S. 90, 101 (1980).

53. *Id.* at 96.

54. Younger v. Harris, 401 U.S. 37, 46 (1971).

55. 28 U.S.C. § 1738; Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984).

56. Ohio *ex rel.* Boggs v. City of Cleveland, 655 F.3d 516, 519 (6th Cir. 2011).

57. Ohio Ky. Oil Corp. v. Nolfi, 5 N.E.3d 683, 688 (Ohio App. 5th Dist. 2013).

58. Harrison v. Montgomery Cnty., 997 F.3d 643, 648 (6th Cir. 2021).

59. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (AM. L. INST. 1982).

60. *Id.* § 26 cmt. c.

61. Grava v. Parkman Twp., 653 N.E.2d 226, 229 (Ohio 1995); *see also Ohio Ky. Oil Corp.*, 5 N.E.3d at 690.

Constitution, applicable to the states through the Fourteenth Amendment,[62] prohibits the government from taking "private property . . . for public use, without just compensation."[63] The founders understood the protection of private property as an essential element to individual freedom.[64] The Takings Clause ensures that an individual cannot be deprived of their property without a legitimate purpose for greater public use.[65] Further, the Takings Clause imposes an obligation for the government to fairly compensate the individual.[66] The United States Supreme Court has concluded that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[67]

The government typically affects a taking in two ways: physical or regulatory takings.[68] A physical taking occurs when the government, using its power of eminent domain, occupies or condemns the property for its own use.[69] A physical taking can also occur when the government authorizes a third party, or the general public, to utilize the private property.[70] The government's physical appropriation of an individual's property represents the "clearest sort of taking."[71] Therefore, the government's physical occupation of private property is a per se taking, imposing a "categorical duty to compensate" the property owner, no matter how negligible the infringement may be.[72]

A regulatory taking operates more indirectly than a physical taking.[73]

62. U.S. CONST. amend. XIV.

63. U.S. CONST. amend. V.

64. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021). Chief Justice John Roberts, quoting John Adams, emphasized how vital protection of private property is to our nation's promotion of individual freedom, "[P]roperty must be secured, or liberty cannot exist." *Id.* (quoting John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (C. Adams ed., 1851)).

65. Nader James Khorassani, *Must Substantive Due Process Land Use Claims Be So "Exhausting?"*, 81 FORDHAM L. REV. 409, 418 (2012).

66. U.S. CONST. amend. V; *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002).

67. Armstrong v. U.S., 364 U.S. 40, 49 (1960).

68. Khorassani, *supra* note 65, at 418.

69. *Cedar Point Nursery*, 141 S. Ct. at 2071; *see also* Khorassani, *supra* note 65, at 418. Examples of physical takings include: United States v. Gen. Motors Corp., 323 U.S. 373 (1945); United States v. Pewee Coal Co., 341 U.S. 114 (1951); United States v. Cress, 243 U.S. 316 (1917).

70. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831-32 (1987).

71. *Cedar Point Nursery*, 141 S. Ct. at 2071 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

72. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982) (holding the installation of plates, bolts, wires, and screws to an apartment building's exterior wall constituted a physical taking).

73. Brian T. Hodges, *Knick v. Township of Scott, PA: How a Graveyard Dispute Resurrected the Fifth Amendment's Takings Clause*, 60 SANTA CLARA L. REV. 1, 7 (2020).

A regulatory taking occurs when the government enacts regulations that restrict an owner's ability to use his own property.[74] *Pennsylvania Coal Co. v. Mahon*[75] established the general rule for regulatory taking: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[76] The Supreme Court later clarified the regulatory taking standard, finding that if the effects of the government's actions are "so complete as to deprive the owner of all or most of [their]interest in the subject matter, [it] amount[s] to a taking."[77]

To determine whether a government regulation "goes too far," the Supreme Court generally utilizes the *Penn Central* balancing test[78] which weighs factors including, but not limited to, "the regulation's economic impact on the claimant, the extent to which [the regulation] interferes with distinct investment-back expectations, and the character of the governmental action."[79] However, there is no established bright line rule or test to determine whether a government regulation equates to a taking.[80] Given this lack of clarity, a property owner who asserts a regulatory taking does not automatically receive a fair payment from the government.[81] Instead, the vague and indistinct factors from the *Penn Central*[82] balancing test are applied on a case-by-case basis to determine whether the government owes the property owner "just compensation" under the Takings Clause of the Fifth Amendment.[83] Due to the fact-specific and discretionary nature of the balancing test, property owners do not always receive the fair market value for their property. Therefore, oppressive governmental regulations that restrict the use of private property may not be protected by the Fifth Amendment.[84]

C. The Futile Pursuit - § 1983 Takings Claims Under Williamson County[85] *and* San Remo Hotel[86]

Landowners alleging a physical or regulatory taking may file a claim

74. *Cedar Point Nursery*, 141 S. Ct. at 2071.

75. 260 U.S. 393 (1922).

76. *Id*. at 415.

77. U.S. v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

78. 438 U.S. 104 (1978).

79. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 529 (2005); *see also* Cedar Point Nursery, 141 S. Ct. at 2072.

80. Khorassani, *supra* note 65, at 419.

81. Hodges, *supra* note 73, at 7.

82. 438 U.S. 104 (1978).

83. *Id*. at 124.

84. Hodges, *supra* note 73, at 8.

85. Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), *overruled by* Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

86. San Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323 (2005).

in federal court under 42 U.S.C. § 1983 for violations of the Fifth Amendment Takings Clause.[87] § 1983 operates as a vehicle for a litigant to assert a constitutional violation.[88] Until recently, a property owner seeking to assert a takings claim did not have a clear path to federal court.[89] Section II(C)(1) examines *Williamson County*'s two-part test to determine when a federal takings claim is ripe.[90] Under *Williamson County*, a federal court may hear a takings claim only after: (1) the plaintiff has received a final decision from the relevant state agency and (2) the plaintiff has exhausted all state remedies.[91] Section II(C)(2) addresses the *San Remo Hotel* holding that a state's resolution of a takings claim for just compensation has preclusive effect in any subsequent federal suit.[92] Section II(C)(3) addresses the tangible hardships property owners endured under the "Catch-22"[93] created by *Williamson County* and *San Remo Hotel*.

1. *Williamson County Regional Planning Commission* – The Ripeness Requirements

Williamson County imposed two ripeness requirements before a § 1983 takings claim could be pursued in federal court.[94] First, there must be a final decision from the relevant state regulatory agency.[95] Second, the property owner must exhaust all possible remedies in state court.[96] Unless both ripeness requirements are satisfied, a property owner's federal takings claim will be deemed premature.[97]

In *Williamson County*, a property developer brought a § 1983 takings claim against a regional planning commission that had rejected its proposal for a new housing subdivision.[98] The property developer, who had acquired the land through foreclosure, claimed that the regional planning commission's numerous zoning laws and excessive regulations amounted to a taking of the property.[99] The developer alleged the zoning

87. Philip K. Hartmann & Stephen J. Smith, *42 U.S.C. § 1983: First Stop – State Court (Sometimes)*, 35 URB. LAW. 719 (2003), https://www.jstor.org/stable/27895467.

88. Berger v. City of Mayfield Heights, 265 F.3d 399, 402 (6th Cir. 2001).

89. *See Knick*, 139 S. Ct. 2162. The Supreme Court dispensed with the *Williamson* requirement for a federal takings plaintiff to first exhaust all state remedies before seeking relief in federal court (2162).

90. *Williamson Cnty.*, 473 U.S. at 186.

91. *Id*.

92. 545 U.S. 323 (2005).

93. Somin, *supra* note 16.

94. *Williamson Cnty.*, 473 U.S. at 173.

95. *Id*. at 186.

96. *Id*.

97. *Id*. at 185.

98. *Id*. at 172.

99. *Id*. at 175.

ordinances and regulations went "too far"[100] and, as a result, was denied the "economically viable" use of the property in violation of the Fifth Amendment Takings Clause.[101] The district court found there was a taking, but concluded the property developer was not entitled to damages for a *temporary* taking.[102] The conclusion that the taking was temporary stemmed from the district court issuing a permanent injunction requiring the regional planning commission to apply more lenient zoning rules when the property developer resubmitted its application.[103] The property developer appealed, seeking monetary damages for the taking.[104] In a divided decision, the Sixth Circuit Court of Appeals reversed and remanded, finding that the evidence supported an award for taking of property, and the property developer acquired the right to develop the property according to its original plans.[105] The regional planning commission then appealed to the United States Supreme Court.[106]

The Supreme Court held that the property developer's federal takings claim was premature, failing to satisfy both ripeness requirements.[107] For the first ripeness requirement, the Supreme Court reasoned that the regional planning commission's denial did not constitute a final, reviewable decision.[108] The regional planning commission provided an opportunity for the developer to apply for a variance.[109] The developer did not want to apply for the variance prior to filing suit.[110] However, the variance application, if approved, likely would have increased the allowable use of the property. Therefore, the regional planning commission's denial did not conclusively determine whether the developer would be denied all reasonable use of its property.[111] The Supreme Court's insistence on a "final decision" stemmed from the *Penn Central* balancing test,[112] which emphasized "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations."[113] The Supreme Court stated that those

100. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

101. *Williamson Cnty.*, 473 U.S. at 182.

102. Hamilton Bank of Johnson City v. Williamson Cnty. Reg'l Plan. Comm'n, 729 F.2d 402, 404 (6th Cir. 1984), *rev'd*, 473 U.S. 172 (1985).

103. *Id*.

104. *Id*.

105. *Id*. at 402.

106. *Williamson Cnty.*, 473 U.S. at 184.

107. *Id*. at 200.

108. *Id*. at 194.

109. *Id*. at 192-94.

110. *Id*.

111. *Id*. at 193.

112. 438 U.S. 103, 124 (1978).

113. *Williamson Cnty.*, 473 U.S. at 191.

essential factors cannot be properly evaluated until the relevant state administrative agency has arrived at a final decision as to how the land will be affected by the regulations at issue.[114]

For the second ripeness requirement, the Supreme Court concluded property owners must seek just compensation under state law in state court before bringing a federal § 1983 takings claim.[115] Consequently, the developer's takings claim failed to satisfy the second ripeness requirement since the developer did not attempt to obtain just compensation through the procedures provided by the state.[116] The Supreme Court reasoned that a taking does not give rise to a federal constitutional right to just compensation.[117] Instead, a taking entitles a property owner to state law procedure that will eventually result in just compensation.[118] In the absence of an available state procedure, the federal constitutional right to just compensation attaches immediately.[119]

However, if a state provides "an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation."[120] Therefore, under *Williamson County*, the Supreme Court held that a property owner who claims the government has taken their property and therefore owes them "just compensation" under the Taking Clause of the Fifth Amendment is barred from filing in federal court until (1) securing a final decision from the relevant state regulatory agency and (2) exhausting all remedies in state court.[121]

2. *San Remo Hotel* – The Preclusion Bar

Twenty years after *Williamson County*,[122] the Supreme Court in *San Remo Hotel* held that a state's resolution of a takings claim for just compensation has preclusive effect in any subsequent federal suit.[123] In *San Remo Hotel*, the owners of the San Remo Hotel applied to convert residential rooms into tourist rooms, requesting a conditional use permit under the applicable zoning laws.[124] The city planning commission granted the hoteliers' requested conversion and conditional use permit,

114. *Id.*
115. *Id.* at 195.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 200.
122. 473 U.S. 172 (1985).
123. San Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323 (2005).
124. *Id.* at 329.

but only after imposing numerous conditions.[125] The most significant condition was for the hoteliers to pay a $567,000 "conversion fee."[126] The hoteliers argued the "conversion fee" failed to "'substantially advance a legitimate government interest' and . . . '[t]he amount of the fee imposed [wa]s not roughly proportional to the impact' of the proposed tourist use of the San Remo Hotel."[127]

The hoteliers initially brought a state mandamus action, complying with *Williamson County*'s second ripeness requirement of exhausting all state remedies prior to bringing the takings claim to federal court.[128] The hoteliers' state action complaint clearly underscored that the hoteliers were only seeking relief under the takings clause of the state constitution, reserving their Fifth Amendment claim for a later federal suit if the state action proved to be unsuccessful.[129] Two months later, the hoteliers filed suit in federal court, alleging a § 1983 takings claim in violation of the Fifth Amendment.[130] Ultimately, the California state courts rejected the hoteliers' various state law takings claims.[131] The federal suit remained active, with the hoteliers advancing taking claims identical to those previously rejected in the California state courts.[132]

In order for the takings claim to not be barred from the suit due to claim preclusion, the hoteliers asked the federal court to exempt the claim from the reach of the full faith and credit statute.[133] The full faith and credit statute is relevant to the doctrines of claim preclusion and collateral estoppel, principally to prohibit parties from relitigating issues that have been resolved by "courts of competent jurisdiction."[134] The full faith and credit statute provides: "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such

125. *Id*.

126. *Id*.

127. *Id*. at 331 (quoting San Remo Hotel, L.P. v. City & Cnty of S.F., 41 P.3d 87, 95 (Cal. 2002)).

128. *Id*. at 330.

129. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2169 (2019).

130. *Id.*

131. *San Remo Hotel*, 545 U.S. at 323.

132. *Id.*

133. *Id.*; *see also* 28 U.S.C. § 1738.

134. *San Remo Hotel*, 545 U.S. at 336-37. The importance of the Full Faith and Credit Clause is emphasized through the Supreme Court's policy rationale: "[The rule] is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." *Id.* at 337 (quoting S. Pac. R.R. Co. v. United States, 168 U.S. 1, 49 (1897)).

State."[135]

The hoteliers argued that the general preclusion principles under the full faith and credit statute must be cast aside due to the ripeness requirement under *Williamson County*.[136] The Supreme Court rejected the hoteliers' request, holding that it would not create an exception to the full faith and credit statute in order to provide a federal forum whenever property owners must first litigate in state court under *Williamson County*'s state exhaustion requirement.[137] The Supreme Court concluded it was not free to disregard the full faith and credit statute, regardless of the potential merit of the hoteliers' argument.[138] Therefore, the hoteliers were precluded from bringing their takings claim in federal court.[139]

3. "Catch-22" – The Preclusion Trap Created by *Williamson County* and *San Remo Hotel*

The Supreme Court's holdings in *Williamson County* and *San Remo Hotel* created a "Catch-22."[140] As discussed in Section II(C)(1), in *Williamson County*, the Supreme Court established a two-part test to determine when a federal takings claim is ripe.[141] A federal court may hear a takings claim only after: (1) the plaintiff has received a final decision from the relevant state agency and (2) the plaintiff has exhausted all state remedies.[142] As explained in Section II(C)(2), in *San Remo Hotel*, the Supreme Court held the Full Faith and Credit statute required the federal court to give preclusive effect to the state court's final decision.[143] In combination, *Williamson County* and *San Remo Hotel* "created a Kafkaesque system under which going to state court was both an essential prerequisite to getting into federal court, but also an absolute bar to doing so."[144]

In particular, the exhaustion requirement under *Williamson County* created tangible hardship and injustice for property owners. For example, in *Wayside Church v. Van Buren County*, the Sixth Circuit Court of

135. 28 U.S.C. § 1738.

136. *San Remo Hotel*, 545 U.S. at 323.

137. *Id*.

138. *Id*. at 347.

139. *Id*.

140. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019).

141. Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

142. *Id*.

143. 545 U.S. at 323.

144. Ilya Somin, *Knick v. Township of Scott: Ending a Catch-22 That Barred Takings Cases from Federal Court*, 2018-19 CATO SUP. CT. REV. 153, 156 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450572 (last visited Mar. 5, 2023).

Appeals held that the failure to exhaust state remedies barred a takings claim to recover surplus equity after a Michigan tax foreclosure sale.[145] In *Wayside Church*, the Wayside Church property owners failed to pay their 2011 property taxes.[146] Pursuant to Michigan's General Property Tax Act (the "GPTA"), the Wayside Church property became subject to foreclosure.[147] At the public auction, the property sold for $206,000 to satisfy a $16,750 tax delinquency.[148] Van Buren County, the defendant, refused to refund the $189,250 surplus to Wayside Church.[149] Wayside Church filed a federal § 1983 takings claim in federal court.[150] The Sixth Circuit, acknowledging the state exhaustion requirement under *Williamson County*, held that the Wayside Church failed to fully pursue its claim in state court and was therefore barred from seeking relief in federal court.[151] The Sixth Circuit vacated the case, directing the Wayside Church to pursue this action in state court instead.[152]

Wayside Church then petitioned the Supreme Court for a writ of certiorari but was denied.[153] In 2018, Wayside Church sought to reopen the case, recognizing the legal landscape was shifting.[154] The district court granted the motion to reopen, but held the case in abeyance pending decisions in similar cases from the U.S. Supreme Court[155] and the Michigan Supreme Court.[156] During the abeyance period, counsel for Wayside Church sought to consolidate the case with another related case.[157] The district court denied the motion for consolidation, which further stalled proceedings.[158] However, following favorable outcomes in both the U.S. Supreme Court and the Michigan Supreme Court, litigation remains ongoing.[159]

145. 847 F.3d 812 (2017).

146. *Id*. at 815.

147. *Id*.

148. *Id*.

149. *Id*.

150. *Id*. at 816.

151. *Id*. at 822.

152. *Id*.

153. Wayside Church v. Van Buren Cnty., No. 14-CV-1274, 2020 WL 12761500, at *1 (W.D. Mich. Oct. 20, 2020).

154. *Id*.

155. *See* Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019). *See* Section II(D) for a detailed discussion of this case.

156. *Wayside Church*, 2020 WL 12761500, at *1; *see also* Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434 (Mich. 2020). *See* Section II.E for a detailed discussion of the *Rafaeli* case.

157. *Wayside Church*, 2020 WL 12761500, at *2.

158. *Id*.

159. Christina M. Martin & J. David Breemer, *Michigan County Takes and Sells Properties with Tax Debts, Keeps Proceeds*, PAC. LEGAL FOUND., https://pacificlegal.org/case/wayside-church-v-van-buren-county-michigan (last visited Mar. 5, 2023).

D. The Door Opens – Pursuing § 1983 Takings Claims After Knick v. Township of Scott, Pennsylvania[160]

The U.S. Supreme Court's 2019 decision in *Knick v. Township of Scott, Pennsylvania*[161] resolved the "Catch-22"[162] created by *Williamson County*[163] and *San Remo Hotel.*[164] The Supreme Court, in a 5-4 decision, concluded a property owner may bring a § 1983 takings claim anytime the government takes property without just compensation.[165] *Knick* eliminated the requirement that a federal takings plaintiff must first exhaust all state remedies before seeking relief in federal court.[166] Following the *Knick* decision, property owners now have the option of immediately filing a federal claim when a local government action takes their private property.[167]

In *Knick*, plaintiff Rose Mary Knick owned 90 acres of land in Scott Township, Pennsylvania.[168] The property included a small graveyard where the ancestors of Knick's neighbors are buried.[169] In December 2012, Scott Township passed an ordinance, applicable to both public and private cemeteries, requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours."[170] The ordinance also included an authorization for Scott Township code enforcement officers to "'enter upon any property' to determine the existence and location of a cemetery."[171] A year later, a Scott Township code enforcement officer found several grave markers on Knick's property.[172] The code enforcement officer notified Knick that she was violating the ordinance by failing to open the cemetery to the public during the day.[173]

Knick sought declaratory and injunctive relief in state court, asserting Scott Township's ordinance effected a taking of her property.[174] In response, Scott Township withdrew the violation notice, agreeing to stay

160. Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

161. 139 S. Ct. 2162 (2019).

162. Somin, *supra* note 16.

163. Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985),

164. San Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323 (2005).

165. *Knick*, 139 S. Ct. at 2179. Chief Justice Roberts authored the majority opinion, which Justices Thomas, Alito, Gorsuch, and Kavanaugh joined.

166. *Id*. at 2177.

167. *Id*.

168. *Id*. at 2168.

169. *Id*.

170. *Id*.

171. *Id*.

172. *Id*.

173. *Id*.

174. *Id*.

enforcement pending state court proceedings.[175] The state court then declined to rule on Knick's claims for relief because, without an ongoing enforcement action, Knick could not demonstrate the irreparable harm necessary for equitable relief.[176] Knick proceeded to file a § 1983 federal takings action in federal court, claiming the ordinance violated the Takings Clause of the Fifth Amendment.[177] The district court dismissed Knick's federal takings claim under *Williamson County*,[178] finding that she had not exhausted all possible remedies in state court.[179] On appeal, the Third Circuit Court of Appeals noted that the ordinance was "extraordinary and constitutionally suspect," but affirmed the district court's holding based on *Williamson County*.[180] Knick then petitioned the U.S. Supreme Court, asking the Court to reconsider the holding of *Williamson County* requiring property owners to seek just compensation under state law in state court before bringing a § 1983 takings claim in federal court.[181]

The U.S. Supreme Court concluded that *Williamson County*'s state exhaustion requirement imposed an "unjustifiable burden on takings plaintiffs, conflict[ed] with the rest of [its] takings jurisprudence, and had to be overruled."[182] The Court's decision put an end to denying takings plaintiffs a federal forum to litigate claims against state and local governments.[183] Chief Justice John Roberts, writing for the majority, underscored the consequences of the "Catch-22" created by *Williamson County*'s[184] state-litigation requirement and *San Remo Hotel*'s[185] claim preclusion requirement:

> The state-litigation requirement relegates the Takings Clause "to the status of a poor relation" among the provisions of the Bill of Rights. Plaintiffs asserting any other constitutional claim are guaranteed a federal forum under § 1983, but the state-litigation requirement "hand[s] authority over federal takings claims to state courts." Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the

175. *Id*.

176. *Id*.

177. *Id*.

178. Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

179. *Knick*, 139 S. Ct. at 2169.

180. *Id*. (quoting Knick v. Twp. of Scott, 862 F.3d 310, 314 (3d Cir. 2017)).

181. *Id*.

182. *Id*. at 2167.

183. *Id*.

184. Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

185. San Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323 (2005).

> Framers envisioned when they included the Clause among the other protections in the Bill of Rights.[186]

The U.S. Supreme Court reasoned that the Takings Clause entitles a property owner to bring a § 1983 takings claim "as soon as a government takes [their] property for public use without paying for it."[187] Unlike the *Williamson County* Court's interpretation of the Takings Clause, the *Knick* Court concluded that the Takings Clause allows property owners to bring takings claims to federal court without first enduring state action.[188] The mere availability of a state remedy does not infringe on a property owner's ability to bring a federal constitution claim.[189] The U.S. Supreme Court overruled the state exhaustion requirement of *Williamson County*, allowing a property owner to bring constitutional claims under § 1983 directly following a state or local government's violation of the Takings Clause by taking property without just compensation.[190]

The dissenting opinion, authored by Justice Elena Kagan, found that the majority's decision "transgresse[d] all usual principles of *stare decisis*."[191] The dissent viewed the *Williamson County* holding as respectful to the original understanding of the Fifth Amendment's Taking Clause.[192] According to the dissent, under this original understanding, a government can take property as long as it provides a reliable mechanism to pay the compensation owed, even if the payment comes sometime after the taking.[193] Further, the dissent was concerned the majority's holding in *Knick* would "channel a mass of quintessentially local cases involving complex state-law issues into federal courts."[194] The dissent understandably wanted to keep federal and state issues separate; however, in holding steadfastly to the flawed precedent of *Williamson County*, the dissent disregards how *Williamson County*'s state-exhaustion requirement creates an unjustifiable "Catch-22" for the property owner.

186. *Knick*, 139 S. Ct. at 2169-70 (citations omitted).

187. *Id*. at 2170.

188. *Id*.

189. *Id*. at 2171.

190. *Id*. at 2173; *see also* McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668, 672 (1963) (observing that it would defeat the purpose of § 1983 "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court").

191. *Id*. at 2181 (joined by Ginsburg, Breyer, and Sotomayor, JJ.).

192. *Id*.

193. *Id*.

194. *Id*.

E. Utilizing the Knick Decision to Combat Local Government Home Equity Theft – Harrison v. Montgomery County, Ohio

1. Facts and Procedural History

Alana Harrison inherited her deceased mother's home in Montgomery County, Ohio.[195] The home was unoccupied and valued at around $22,600.[196] When Harrison failed to pay approximately $20,000 in property taxes on the home, Montgomery County's Treasurer started foreclosure proceedings.[197]

i. Ohio's Property Foreclosure Process – Public Auction vs. Land Bank

Ohio allows county treasurers to bring foreclosure actions against tax-delinquent properties.[198] The county treasurer may "enforce the lien for the taxes" on the property "in the same way mortgage liens are enforced," by filing a lawsuit.[199] A judicial proceeding follows, typically resulting in the county selling the land at public auction with the proceeds of the sale covering the tax delinquency.[200] If there are leftover proceeds from the sale, the county "shall pay such excess to the owner."[201] Ohio's public auction process allows for the county treasurer to collect owed property taxes while also protecting the owner's interest in keeping any surplus equity.[202]

In 2008, Ohio introduced another option for handling delinquent property taxes owed for abandoned or unoccupied land.[203] Instead of using judicial foreclosure proceedings and holding a public auction, the new Ohio law permits a "county board of revision" to "foreclose the state's lien for real estate taxes upon abandoned land."[204] The county is then authorized to transfer the property to a land bank rather than dispose of the property through an auction.[205] This option was created with the goal of economic redevelopment, allowing counties to initiate land revitalization efforts more efficiently.[206] Ohio also implemented "Land

195. Harrison v. Montgomery Cnty., 997 F.3d 643, 646 (6th Cir. 2021).
196. *Id.*
197. *Id.*
198. *Id.*
199. OHIO REV. CODE ANN. § 323.25 (2020).
200. *Harrison*, 997 F.3d at 646; *see also* § 323.25.
201. § 5721.20.
202. *Harrison*, 997 F.3d at 646.
203. *Id.*; *see also* § 323.65.
204. § 323.66.
205. § 323.78.
206. Merit Brief of Appellant Alana Harrison at *3, Harrison v. Montgomery Cnty., 997 F.3d 643

Reutilization Programs" to empower counties to "foster either the return of such nonproductive land to tax revenue generating status or the devotion thereof to public use."[207] The Ohio General Assembly created county land banks, a special type of entity, to help counties operate their "Land Reutilization Programs."[208] Land banks are either public or quasi-governmental entities created to acquire, hold, manage, and eventually redevelop vacant or foreclosed properties in order to return the properties to productive use.[209]

If a county treasurer utilizes this alternative option, and there is an interested land bank, this process allows the county treasurer to transfer the property directly to the land bank without the obligation of holding a public auction.[210] Upon transfer to the land bank, the property becomes "free and clear of all impositions and any other liens on the property, which shall be deemed forever satisfied and discharged."[211] The consequence of foregoing public auction and instead transferring the property to a land bank is that Ohio will no longer collect the tax delinquency and the fair market value of the land becomes immaterial.[212] Instead, pursuant to the statute, the County Board of Revision will simply transfer the property to the land bank "regardless of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel."[213] While the county does not collect the tax delinquency through this process, it alternatively has increased control in the ultimate fate of the property.[214]

Ohio law does offer some protections for owners of abandoned property in this alternative approach.[215] The County Board of Revision must first run a title search to identify the property owner[216] and then provide notice to the identified persons holding a legal or equitable interest.[217] Property owners may decide to transfer their case from the County Board of Revision to the appropriate court of common pleas or

(6th Cir. 2021) (No. 20-4051), 2020 WL 7249164, at *3.

207. *Id*. (quoting OHIO REV. CODE ANN. § 5722.02(A) (2020)).

208. *Id*. at *4.

209. *Land Banks*, LOC. HOUS. SOLS., https://localhousingsolutions.org/housing-policy-library/land-banks (last visited Mar. 5, 2023).

210. *Harrison*, 997 F.3d at 646.

211. OHIO REV. CODE ANN. § 323.78(B) (2020).

212. *Harrison*, 997 F.3d at 646.

213. § 323.78(B).

214. Merit Brief of Appellant Alana Harrison at *3, Harrison v. Montgomery Cnty., 997 F.3d 643 (6th Cir. 2021) (No. 20-4051), 2020 WL 7249164, at *3.

215. *Harrison*, 997 F.3d at 646.

216. OHIO REV. CODE ANN. § 323.68(A)(1) (2020).

217. § 323.66.

municipal court.[218] Alternatively, property owners can terminate the County Board of Revision's foreclosure proceeding and subsequent land bank transfer by paying all outstanding taxes.[219] After the County Board of Revision's decision to foreclose and transfer to a land bank, the property owner still has twenty-eight days to pay the outstanding tax delinquency and reclaim the land.[220] Property owners may also appeal the County Board of Revision's decision in a court of common pleas.[221] The only option the Ohio statute does not provide to the property owner is a way to obtain any excess equity in the property after it is transferred to the land bank.[222]

ii. Harrison Faces Foreclosure

In August 2017, the Montgomery County Treasurer filed an expedited foreclosure action against Alana Harrison in the Montgomery County Board of Revision ("Board of Revision").[223] Harrison answered the Montgomery County Treasurer's complaint, stating she was "'new to this'" and wanted "'to save [her] mom[']s home.'"[224] Harrison further expressed that she was unaware that the taxes at issue had not been paid.[225] However, Harrison was unable to pay the outstanding property taxes.[226] The Board of Revision foreclosed the property, finding that the tax delinquency totaled $19,664.[227] The fair market value for Harrison's home equaled $22,600, meaning Harrison retained a surplus equity interest of $2,936.[228]

The Board of Revision bypassed the typical public auction foreclosure sale, choosing instead to transfer Harrison's property to Montgomery County's land bank ("Land Bank").[229] The transfer to the land bank avoided a public sale, but it also deprived Harrison a refund of the surplus profits valued at approximately $3,000.[230] Ohio statutory law also permits

218. §§ 323.691(A)(1), 323.70(B).

219. § 323.72.

220. § 323.65(J).

221. § 323.79.

222. Harrison v. Montgomery Cnty., 997 F.3d 643, 647 (6th Cir. 2021).

223. Merit Brief of Appellant Alana Harrison at *9, Harrison v. Montgomery Cnty., 997 F.3d 643 (6th Cir. 2021) (No. 20-4051), 2020 WL 7249164, at *9.

224. *Harrison*, 997 F.3d at 647.

225. Merit Brief of Appellant Alana Harrison at *10, Harrison v. Montgomery Cnty., 997 F.3d 643 (6th Cir. 2021) (No. 20-4051), 2020 WL 7249164, at *10.

226. *Harrison*, 997 F.3d at 647.

227. *Id*.

228. *Id*.

229. Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellant and Reversal at *3, Harrison v. Montgomery Cnty., 997 F.3d 643 (6th Cir. 2021) (No. 20-4051), 2020 WL 7249164, at *3.

230. *Harrison*, 997 F.3d at 647.

the costs for the foreclosure actions be paid "in whole or in part from the delinquent tax and assessment collection funds" at the county treasurer's discretion.[231] Therefore, the Montgomery County Treasurer decided to use Harrison's surplus equity interest to cover the $2,045 administrative costs,[232] leaving approximately just $891 from the net surplus.[233]

iii. Procedural History

Harrison did not appeal the Board of Revision's final decision in state court.[234] Instead, Harrison filed class action in federal court seeking to recover the surplus equity value of her mother's property and the equity of others similarly situated.[235] Harrison claimed Montgomery County committed a taking without providing just compensation, violating federal and state takings clauses under the Fifth and Fourteenth Amendments.[236] The district court dismissed the case on claim-preclusion grounds.[237] Under the claim preclusion doctrine a "'valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of' the same 'transaction or occurrence.'"[238] The district court concluded that Harrison had multiple opportunities to challenge the tax foreclosure procedure, reasoning that Harrison could have appealed the Board of Revision's decision and brought the takings claim before a court of common pleas.[239] Because Harrison failed to take advantage of these opportunities, the district court held her takings claim was now barred.[240] Harrison then appealed to the Sixth Circuit Court of Appeals.[241]

2. The Sixth Circuit's Unanimous Decision

On May 11, 2021, in a unanimous decision, the Sixth Circuit Court of Appeals held that property owners challenging the seizure of home equity when their property is foreclosed due to tax delinquency may file their §

231. *Id*. (quoting OHIO REV. CODE ANN. § 323.75(B)(2)).

232. These administrative costs included $1,883 for court costs, $125 for a sheriff's fee, $36 for a county recorder fee, and $1 to the county auditor. *Harrison*, 997 F.3d at 647.

233. *Id*.

234. *Id*.

235. *Id*.

236. *Id*.

237. Harrison v. Montgomery Cnty., 482 F. Supp. 3d 652 (S.D. Ohio 2020), *rev'd and remanded*, Harrison v. Montgomery Cnty., 997 F.3d 643 (6th Cir. 2021).

238. *Id*. at 662 (quoting Grava v. Parkman Twp., 653 N.E.2d 226, 229 (Ohio 1995)).

239. *Id*.

240. *Id*. at 665.

241. *Harrison*, 997 F.3d at 648.

1983 takings claim in federal court.[242] The Sixth Circuit reversed and remanded the case to the district court to consider Harrison's takings claim in the first instance.[243] The Sixth Circuit found for Harrison because (1) following the US Supreme Court's ruling in *Knick*, Harrison was no longer required to exhaust all state remedies before bringing her takings claim to federal court;[244] (2) Harrison's taking claim for home equity theft did not violate the Tax Injunction Act;[245] and (3) comity principles did not impede Harrison from bringing her takings claim against a local government in federal court.[246] Each of these reasonings will be explored in the subsequent paragraphs.

First, in light of the U.S. Supreme Court's ruling in *Knick*, Harrison is no longer barred from bringing her § 1983 takings action to federal court.[247] Prior to the holding in *Knick*, Harrison would have been required to assert her takings claim in state court.[248] *Knick* eliminated the *Williamson County* state exhaustion requirement, which in conjunction with the preclusive effect of *San Remo Hotel*, effectively blocked a property owner from bringing a § 1983 action in federal court.[249] Ohio's claim preclusion doctrine rests on the assumption that a plaintiff had a "full and fair opportunity" to present their case in the first action.[250] Accordingly, an important exception to the claim preclusion doctrine is the is the existence of formal barriers limiting the party's ability to fully present its claim in the first action.[251] The Sixth Circuit emphasized how *Knick* cleared the way for property owners to bring their claims directly to federal court for review as soon as a state or local government effectuates a taking.[252] Therefore, following the *Knick* decision, the Sixth Circuit concluded that Harrison could file a § 1983 action in federal court under the Takings Clause after Montgomery County's Board of Revision issued its final decision to transfer the property to a land bank.[253]

Second, Harrison's taking claim for the recovery of her surplus equity does not violate the Tax Injunction Act.[254] The Tax Injunction Act provides that "district courts 'shall not enjoin, suspend or restrain the

242. *Id.* at 652.
243. *Id*.
244. *Id*. at 649.
245. *Id*. at 652.
246. *Id*.
247. *Id*. at 649.
248. *Id*.
249. *Id*.
250. *See* Section II(A); Ohio Ky. Oil Corp. v. Nolfi, 5 N.E.3d 683, 688 (Ohio App. 5th Dist. 2013).
251. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (AM. L. INST. 1982).
252. *Harrison*, 997 F.3d at 650.
253. *Id*.
254. *Id*. at 651; *see also* 28 U.S.C. § 1341.

assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had' in state court."[255] The Tax Injunction Act only prohibits challenges to the "assessment, levy or collection" of taxes.[256] The U.S. Supreme Court has defined "collection" as "the act of obtaining payment of taxes due."[257] The Sixth Circuit reasoned that Montgomery County's "seizure and extinguishment of surplus equity is not an 'an act of obtaining payment of taxes due.'"[258] Harrison was not seeking to challenge Montgomery County's "collection" of taxes owed, or even to recover the property.[259] Rather, Harrison sought to recover Montgomery County's seizure of surplus equity, the amount remaining after satisfying the debt owed.[260]

Further, the Sixth Circuit determined that in transferring Harrison's property to the Land Bank, Montgomery County did not collect the delinquent taxes.[261] As discussed in Section II(E)(1)(i), upon transferring to a land bank, the property becomes "free and clear of all impositions and any other liens on the property, which shall be deemed forever satisfied and discharged."[262] Therefore, because Harrison was challenging the extinguishment of the surplus equity, not the tax collection itself, the Sixth Circuit concluded that the Tax Injunction Act does not bar Harrison's claims.[263]

Third, Harrison filing a § 1983 action in federal court against a local government does not violate comity principles.[264] Comity is recognized as the courts of one jurisdiction respecting the decisions and laws of other jurisdictions – whether state or federal – out of mutual respect and deference.[265] Ordinarily, comity principles restrict plaintiffs from bringing "§ 1983 actions against the validity of state tax systems in federal courts."[266] The Sixth Circuit reasoned that "takings suits in federal courts to recover excess equity as a result of state tax foreclosure sales do not violate the principles of judicial federalism."[267] Harrison challenged

255. *Harrison*, 997 F.3d at 651 (quoting 28 U.S.C. § 1341).

256. *Id*.

257. Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 10 (2015).

258. *Harrison*, 997 F.3d at 652 (quoting *Brohl*, 575 U.S at 10).

259. *Id*.

260. *Id*.

261. *Id*.

262. OHIO REV. CODE ANN. § 323.78(B) (2020).

263. *Harrison*, 997 F.3d at 651.

264. *Id*. at 652.

265. Younger v. Harris, 401 U.S. 37, 46 (1971); *see also* Section II(A).

266. *Harrison*, 997 F.3d at 652 (quoting Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 (1981)).

267. *Id*. (quoting Freed v. Thomas, 976 F.3d 729, 737 (6th Cir. 2020)).

Ohio's seizure of her surplus equity.[268] She did not challenge the tax foreclosure itself.[269] Therefore, Harrison's use of § 1983 to challenge a local government's confiscation of surplus equity did not violate comity principles.[270]

3. Procedural Posture on Remand

Montgomery County's petition for a rehearing en banc was denied by the Sixth Circuit on June 10, 2021.[271] The Sixth Circuit's ruling in Harrison was a procedural decision, clearing the way for Harrison's takings claim to be heard in federal court.[272] The merits of Harrison's case are currently being litigated, on remand, in the United States District Court for the Southern District of Ohio.[273] However, the Sixth Circuit underscored the need for the lower court to consider the "historical evidence about the meaning of a taking in 1791 and 1868 with respect to this kind of government action."[274] The court appeared to recommend that the district court should find for Harrison, alluding to the injustice of the Ohio statute at issue by stating, "Harrison's argument rests on the vulnerable proposition that 'a law that takes property from A, and gives it to B . . . is against all reason and justice.'"[275]

III. DISCUSSION

The Sixth Circuit's *Harrison* decision is significant in that it was the first to apply the recent *Knick* holding "to open up a previously barred category of takings cases to federal review."[276] A property owner seeking to recover surplus equity following a foreclosure transfer to a land bank now can go directly to federal court for relief.[277] As noted in Section II(E)(3), the Sixth Circuit's ruling was procedural in nature. The merits of Harrison's case are currently being litigated, on remand, in the U.S. District Court for the Southern District of Ohio.[278] However, pending a

268. *Id*.

269. *Id*.; *see also* Freed v. Thomas, 976 F.3d 729, 737 (6th Cir. 2020).

270. *Id*.

271. *Id*. at 643.

272. Somin, *supra* note 16.

273. *Harrison v. Montgomery County Ohio*, PACERMONITOR, https://www.pacermonitor.com/public/case/30021772/Harrison_v_Montgomery_County_Ohio (last visited Mar. 5, 2023).

274. *Harrison*, 997 F.3d at 652.

275. *Id*. (quoting Calber v. Bull, 3 U.S. 3 (1798)).

276. Somin, *supra* note 16.

277. *Id*.

278. Harrison v. Montgomery County Ohio, PACERMONITOR, https://www.pacermonitor.com/public/case/30021772/Harrison_v_Montgomery_County_Ohio (last visited Mar. 5, 2023).

final decision on the merits, the *Harrison* decision in the Sixth Circuit will have important implications for similar home equity theft cases in the Sixth Circuit and, hopefully, throughout the country as other circuit courts adopt the Sixth Circuit's cogent reasoning.[279]

Section III(A) recommends the U.S. District Court for the Southern District of Ohio find for Harrison on remand, holding that seizure of surplus equity constitutes a taking without just compensation in violation of the Takings Clause of the Fifth Amendment. Section III(B) advocates for the Ohio General Assembly to amend the land bank statutes to provide a remedy for property owners to recoup the seized surplus equity. Section III(C) discusses the prevalence of home equity theft across the United States and urges other circuit courts to adopt the Sixth Circuit's reasoning in *Harrison* to provide property owners with an avenue to bring their § 1983 takings actions to federal court.

A. A Finding on the Merits – Home Equity Theft Constitutes a Taking

The U.S. District Court for the Southern District of Ohio should find for Harrison on remand, holding that seizure of surplus equity constitutes a taking without just compensation in violation of the Takings Clause of the Fifth Amendment. Equity is a protected property interest which rightfully imposes a duty on foreclosing parties to sell the property and refund the surplus proceeds to the property owner.[280] A property owner's equity is traditionally protected through a foreclosure sale of the property.[281] However, Montgomery County opted to transfer Harrison's property to a land bank, avoiding a sale at auction.[282] There was no surplus equity in Harrison's case because there was no tax sale. Instead, Montgomery County foreclosed on Harrison's property in a nonjudicial proceeding and transferred title to another county entity, a land bank.[283]

The land bank transfer extinguished Harrison's surplus equity, violating her constitutionally protected property interest.[284] A government can seize property for public use, but under the Takings Clause of the Fifth Amendment, the government must provide the property owner just compensation for the taking.[285] By confiscating the

279. Somin, *supra* note 16.

280. Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioner at *10, Ohio *ex rel.* Feltner v. Cuyahoga Cnty. Bd. of Revision, 141 S. Ct. 1714 (2021) (No. 20-567), 2020 WL 7059266, at *10.

281. *Id.* at *12.

282. Harrison v. Montgomery Cnty., 997 F.3d 643, 646 (6th Cir. 2021).

283. *Id.*

284. *Id.*

285. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002).

surplus equity, Montgomery County effectuated a physical taking.[286] Physical appropriation is a "categorical taking which 'requires courts to apply a clear rule.'"[287] Even a property burdened by a tax lien is still protected by the U.S. Constitution.[288] The fair market value for Harrison's property was $22,600.[289] Following the satisfaction of the tax delinquency, Harrison's surplus equity totaled $2,936.[290] Montgomery County should only be entitled to the $19,664 tax delinquency. Montgomery County should not be permitted to avoid paying the property owner the surplus equity by transferring title to the land bank. Montgomery County committed a physical taking requiring just compensation under the Takings Clause of the Fifth Amendment.

Looking beyond the constitutional takings violation, the Ohio land bank statute's procedure of extinguishing a property owner's surplus equity is unjust. The district court should consider how its decision will affect property owners who lose their lifesavings, inheritances, and other substantial property interests as a result of this practice. Further, property owners who lose their property to tax-related foreclosures often are elderly or suffer from poverty, chronic illness, or cognitive problems.[291] Ohio property owners should not have to endure a governmental taking without compensation of the equity that had built up through years of payments, improvements, and appreciation. Therefore, the district court should find for Harrison on remand, holding that the seizure of surplus equity constitutes a taking under the Takings Clause of the Fifth Amendment.

B. A Statutory Remedy for Surplus Equity Following a Land Bank Transfer

This Comment advocates for the Ohio General Assembly to amend the land bank statutes to provide a remedy for property owners to recoup the seized surplus equity.[292] The land bank statute provides no provision for the property owner to demand and receive their surplus equity. The Ohio General Assembly should adopt a procedural safeguard to protect equity

286. *See* Armstrong v. United States, 364 U.S. 40, 48 (1960) (holding taking occurred when government waived liens without just compensation).

287. Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioner at *7, Ohio *ex rel.* Feltner v. Cuyahoga Cnty. Bd. of Revision, 141 S. Ct. 1714 (2021) (No. 20-567), 2020 WL 7059266, at *7 (quoting Yee v. Escondido, 503 U.S. 519, 523 (1992)).

288. Jones v. Flowers, 547 U.S. 220, 226 (2006).

289. Harrison v. Montgomery Cnty., 997 F.3d 643, 646 (6th Cir. 2021).

290. *Id*.

291. Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellant and Reversal at *12, Harrison v. Montgomery Cnty., 997 F.3d 643 (6th Cir. 2021) (No. 20-4051), 2020 WL 7907025, at *12.

292. OHIO REV. CODE ANN. §§ 323.78(B), 5721.20.

as an inherent property interest. Further, by providing a mechanism for property owners to receive the surplus equity following a land bank transfer, a takings violation would be avoided, thus minimizing potential burdens on the courts. Statutory protections would enable just compensation for property owners while allowing the government to efficiently utilize the property for a greater public use.

C. Sixth Circuit Holding in Harrison *to Serve as Model*

Unfortunately, Alana Harrison's situation is not unique. While most states recognize the principle that the government is only entitled to collect as much as is owed, home equity theft is a prevalent issue across the county. Home equity theft is currently allowed in twelve states – Oregon, Arizona, Colorado, Nebraska, South Dakota, Minnesota, Illinois, Alabama, New York, Maine, Massachusetts, and New Jersey – and in Washington D.C.[293] In nine states, including Ohio, there are statutory loopholes to make home equity theft possible.[294] Absent statutory solutions, the applicable federal courts should adopt the Sixth Circuit's logic in their efforts to provide property owners with a forum to bring their § 1983 takings claims challenging a state or local government's seizure of their surplus equity.

IV. CONCLUSION

Home equity theft constitutes a physical taking and is a violation of the Takings Clause of the Fifth Amendment of the U.S. Constitution. Following the resolution of the "Catch-22" in *Knick*, the Sixth Circuit in *Harrison* held property owners challenging the seizure of home equity when their property is foreclosed due to tax delinquency may file their takings claim in federal court. The *Harrison* decision will have significant implications for property owners fighting home equity theft in both the Sixth Circuit and across the country. Equity is a protected property interest. State counties cannot be permitted to simply forego a property sale and extinguish the homeowner's surplus equity by transferring the property to a land bank. The Sixth Circuit's persuasive reasoning in *Harrison* is an appropriate model for other federal courts to provide a clear path for property owners to recover their confiscated surplus equity.

293. Christina M. Martin et al., *Ending Home Equity Theft*, PAC. LEGAL FOUND., https://pacificlegal.org/home-equity-theft (last visited Mar. 1, 2023).

294. *Id.*