
No. 15-2463/15-2525

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYSIDE CHURCH, *et al.*,

Plaintiffs-Appellants,

v.

VAN BUREN COUNTY and KAREN MAKAY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
Honorable Paul L. Maloney, District Judge

**PLAINTIFFS-APPELLANTS'
PETITION FOR REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Wayside Church, a nonprofit corporation organized under the laws of Illinois, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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**STATEMENT OF GROUNDS
FOR REHEARING EN BANC**

Plaintiffs-Appellants Wayside Church, Myron Stahl, and Henderson Hodgens (Petitioners) request rehearing *en banc* of a panel decision that involves a constitutional question of exceptional public importance. *See* Fed. R. App. P. 35(b)(1)(B); 6 Cir. R. 35. This case specifically concerns the constitutionality of the Michigan General Property Tax Act (Act), a law that allows local governments to foreclose on, and then sell, homes subject to delinquent taxes. *See* Mich. Comp. Laws § 211.60, *et seq.* Petitioners assert that Van Buren County (County) unconstitutionally took their private property when it applied the Act to retain hundreds of thousands of dollars in home sale proceeds beyond what was owed in taxes, penalties, fees, and interest (tax debt). For instance, the County sold Wayside Church's property for \$206,000 to satisfy a \$16,750 tax debt.

While the District Court heard these takings claims on the merits, ultimately rejecting them, *see Wayside Church v. Van Buren County*, 15-2463, 2017 WL 541008, at *2 (6th Cir. Feb. 10, 2017), the panel declined to decide whether the confiscation of excess tax sale proceeds was a taking. It specifically held that Petitioners' takings claims were (1) unripe in federal court under *Williamson County Reg'l Planning Agency v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185, 194-96 (1985), until certain state court remedies were utilized; and (2) barred by the Tax Injunction Act

and “comity.” *Wayside Church*, 2017 WL 541008, at *7–8. The panel therefore dismissed the suit.

The panel decision is troubling and it is wrong. In avoiding the takings issue, it allows local governments across Michigan to continue to take the excess value of private homes subject to a forced tax sale, without any justification or compensation. It leaves the owners without both their homes and the sale profits that might provide them with a new start. Given the importance of this issue, one would not expect the court to avoid the issue unless it was clear that there is an absolute jurisdictional bar. But there is none. Exhaustion of state remedies is not necessary for takings jurisdiction. Demanding that Petitioners re-start in state court is particularly unnecessary and wasteful here since state remedies for takings under the Act are either absent or wholly uncertain. Federal judicial enforcement of the Takings Clause is not only proper here; it is the wise and just course of action. Because this case raises statewide questions of significant constitutional importance, it is worthy of *en banc* review.

INTRODUCTION

The Petitioners in this case reflect a cross section of people owning property in the state of Michigan during the last recession. Wayside Church owned and operated a parcel of land as a youth camp. Myron Stahl owned a residential lot where he was building his retirement home. Henderson Hodgens owned a 20-acre farm with a home.

All fell on hard times and were unable to pay their 2011 property taxes. The County subsequently took the properties pursuant to the Act so it could sell them and collect the delinquent taxes.

The sales generated significantly more cash than the tax debt owed on each of the properties. For example, the County sold Wayside Church's parcel for \$206,000 to satisfy a debt of \$16,750. *Wayside Church*, 2017 WL 541008, at *1. It sold Stahl's property for \$68,750 to pay a \$25,000 debt. It sold Hodgens's property for \$47,750 to pay a \$5,900 debt. *Id.* All told, it took in \$274,850 in after-debt profits from the sales. But rather than simply keeping the amount needed to pay the tax debt, while refunding any remainder to the original owners, the County pocketed the sale profits under authority of the Act. *See Mich. Comp. Laws* § 211.78m(8). Thousands of people lose their property value under this scheme each year. ECF No. 16-2, ¶¶ 18-20.

Not surprisingly, the property owners in this case objected to the County's retention of sale proceeds that exceed tax debts and flow from the underlying value of their homes. Considering the appropriation of such funds to be an unconstitutional taking of their property, Petitioners began to investigate judicial remedies. Because of the absence of a prompt, certain and adequate state court remedy for takings arising under the Act, Petitioners filed a lawsuit in federal court. In so doing, they alleged in part that the County effected an unconstitutional taking when it kept the surplus proceeds from the sale of foreclosed private properties. *Wayside Church*, 2017

WL 541008, at *2. The claimants sought declaratory relief that the Act caused a taking and damages. *Id.* at *1.

By a 2-1 vote, the panel refused to address the critical constitutional issue. Applying a rigid and unjustifiable view of *Williamson County* and the Tax Injunction Act (TIA), 28 U.S.C. § 1341, it held that it could not hear any constitutional challenges to the Act. *Id.* at *7–8. In its view, aggrieved property owners must sue in state court though the state court remedy is uncertain, the issues are otherwise fit for federal adjudication, and (consistent with the TIA) the owners are not trying to halt tax collection. Dissenting Judge Kethledge disagreed, finding the case ripe for review and the County’s confiscation of tax sale profits the “sort of behavior [that] is called theft.” *Id.* at *8.

Ultimately, the panel decision allows Michigan county governments to continue reaping a financial windfall at the expense of thousands of ordinary foreclosed homeowners, while leaving those owners without any certain judicial avenue to vindicate their constitutional rights. The Court should grant the Petition and rehear the case.

I

THE PANEL DECISION RAISES AN IMPORTANT QUESTION AS TO WHETHER LOCAL GOVERNMENTS MAY CONSTITUTIONALLY POCKET THE EXCESS PROCEEDS OF HOME SALES DESIGNED TO SATISFY AN INFERIOR TAX DEBT

A. The Panel Decision Is Irreconcilable with the Takings Clause

The fundamental issue in this case is whether it is a taking for the County to keep the surplus funds generated from the sale of foreclosed and tax-indebted homes. The District Court thought not, while the dissenting judge on the appellate panel concluded the County's acts raised significant constitutional problems. *Id.* at *7-8 (Kethledge, J., dissenting). Under a fair reading of Supreme Court's jurisprudence, the issue is not that close. Money is property and any scheme that transfers substantial sums of private money to the government for no tax reason simply cannot be squared with takings law.

1. Takings Law

The Takings Clause prohibits the taking of private property for a public use without just compensation. This constitutional guarantee protects more than just real property. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2425 (2015). Indeed, the Supreme Court has held that it applies to a diverse array of interests, including personal property, money, interest on money, liens, mortgages, company equity (stocks), and

homes. *See, e.g., Horne*, 135 S. Ct. at 2426 (personal property); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2601 (2013) (money and real property); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 168 (1998) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (mortgages); *Starr Int'l Co., Inc. v. United States*, 106 Fed. Cl. 50, 72 (2012) (company equity—in the form of common stock), *appeal pending* No. 15-5133 (Fed. Cir., Aug. 14, 2015).

When government action invades one of these protected property interests, courts focus on the nature of the governmental action to determine whether an unconstitutional taking has occurred. While regulatory actions that restrict the use of property are weighed under a balancing test, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), actions that physically invade or occupy a property interest are subject to a strict, per se test. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). A physical taking is unconstitutional absent compensation regardless of the circumstances of the taking or its economic impact. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

The most obvious example of a per se physical taking is when the government takes actual possession of property. But it also occurs when the government re-defines a pre-existing private interest as public property. Government may regulate property

rights, but it cannot “by ipse dixit . . . transform private property into public property without compensation.” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (“[T]he government’s power to redefine” property rights is “necessarily constrained” by the Constitution).

2. The Conversion of Private Equity into Public Funds Is a *Per Se* Taking

In this case, if the panel had engaged in straightforward application of takings law, it could and should have concluded a taking occurred here. *See Coleman through Bunn v. D.C.*, 70 F. Supp. 3d 58, 80 (D.D.C. 2014). The equity in homes exceeding any tax debt was private property until the moment the County sold the homes and kept the post-debt sales surplus. In so doing, the County physically invaded the owners’ money, and that is a quintessential taking. *See id; see also, Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003).

The County cannot avoid this conclusion by claiming the surplus proceeds were constitutionally unprotected public property when it kept the money. The Court rejected this very position in *Webb’s Fabulous Pharmacies*, 449 U.S. at 158–59. There, the Court considered whether it was a taking for a state to keep the interest earned on private, principal funds which had been deposited with a court. It answered in the affirmative, and in so doing held that the Takings Clause cannot be avoided by

the expedient of converting private funds into public funds: “Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as ‘public money’ because it is held temporarily by the court.” *Id.* at 164. The same principle applies here. The purported transformation of surplus private equity to public funds at the time of foreclosure or tax sale is not an end-around the Takings Clause; it confirms that an unconstitutional taking has occurred. *Id.* (a state “by *ipse dixit*, may not transform private property into public property”); *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 713 (2010) (states effect a taking when they re-characterize private property as public property).

The *Armstrong* case also exposes the County’s actions as unconstitutional takings. 364 U.S. at 49. There, a shipbuilder contracted by the United States defaulted and the United States took title to its unfinished boats and materials. *Id.* at 41. Material suppliers who had liens on some of the materials claimed the United States had unconstitutionally taken their liens when it took shipbuilder’s assets. *Id.* The Supreme Court agreed, and in so doing, rejected the argument that the property rights in liens simply disappeared when the government took title. *Id.* at 48. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id.* “This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the

liens.” *Id.* The government could take the underlying property subject to the “constitutional obligation to pay just compensation for the value of the liens.” *Id.* at 49.

Armstrong confirms what is already apparent from the face of the County’s action: the transfer of private equity into public coffers after the sale of homes and payment of outstanding debts is an obvious taking. As in *Armstrong*, the County, “for its own advantage,” destroyed the private value of the equity when it took possession of homes in which it had a limited interest. *See id.* at 48. More truthfully, it changed that value from a private interest into a public one. Whether planned or not, this transformation of a private interest to public property is a taking. The County thus has the “constitutional obligation to pay just compensation” or to return the private equity it takes. *See id.* at 49.

3. The County Took a Protected Monetary Interest

It is true that the County disputes that equity is “property” subject to takings protections, but this is a red herring. “Equity” is simply the fair market cash value of the property after all encumbering debts (like tax debts) are deducted. *See Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). It is, in short, money. And money demanded outside the tax process is protected by the Takings Clause from uncompensated confiscation. *Koontz*, 133 S. Ct. at 2600.

If there were any doubt, one need only consider that the Supreme Court has regularly applied the Takings Clause to other property interests that realize value only when an underlying property interest is worth more than any encumbrances. Common examples include interests in a lien, mortgage, or company equity in the form of common stock. *Armstrong*, 364 U.S. at 48 (Takings Clause protects liens); *Radford*, 295 U.S. at 601-02 (mortgages); *General Motors*, 323 U.S. at 378 (intangible property interest); *Starr Int'l*, 106 Fed. Cl. at 72 (equity in the form of common stock), *appeal pending* No. 15-5133 (Fed. Cir., Aug. 14, 2015). The post-debt equity on a home is in the same class as these interests and is entitled to the same constitutional protection. *Coleman*, 70 F. Supp. 3d at 80; *see also, McCallister v. McCallister*, 300 N.W.2d 629, 633 (Mich. Ct. App. 1980) (“home equity” treated as “property” in divorce proceeding); Mich. Comp. Laws § 552.19 (property rights in the value of real and personal estate).

B. The Panel Erred in Holding that Petitioners’ Takings Claims Are Barred in Federal Court

Although the question of whether the taking of surplus equity is an important one affecting local governments and home owners across the state of Michigan, and the answer is not particularly difficult, the panel avoided the issue. Rather than applying the precedent discussed above to declare the County’s retention of surplus equity an unconstitutional taking—an action that would bring clarity to Michigan’s

tax sale process, and fix a “gross injustice,” *Wayside Church*, 2017 WL 541008, at *8, the panel decided not to exercise jurisdiction. But the barriers it identified to its review are fictional.

1. The Case Is Ripe Under *Williamson County*

The panel primarily concluded it could not reach the takings claims in this case because they were not “ripe” under *Williamson County* without exhaustion of state court litigation. But, as dissenting Judge Kethledge made clear, this conclusion rests on a faulty and unjustifiably inflexible view of *Williamson County*’s state litigation doctrine. *See id.* at *8–9.

In *Williamson County*, the Supreme Court observed that some takings claims may not be ripe for federal courts until a plaintiff unsuccessfully seeks just compensation through state procedures. 473 U.S. at 194. However, plaintiffs do not need to resort to state court if state takings remedies are not “reasonable, certain and adequate . . . at the time of the taking.” *Id.* When the “availability of remedies and the procedure to obtain compensation” for a taking “are confusing and uncertain at best,” a federal takings claim is immediately ripe in federal court, regardless of other factors. *Kruse v. Vill. of Chagrin Falls*, 74 F.3d 694, 698 (6th Cir. 1996).

Furthermore, *Williamson County*’s state exhaustion doctrine is not a jurisdictional principle. As the Supreme Court has repeatedly clarified, it is only prudential in nature. *Stop the Beach*, 560 U.S. at 729; *Horne v. Dep’t of Agric.*, 133

S. Ct. 2053, 2062 (2013). This Circuit’s precedent is in accord. *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 541 (6th Cir. 2010). Unlike jurisdictional ripeness rules, prudential rules are discretionary, and may be waived when circumstances warrant. *Id.* (courts may dispense with *Williamson County* “when its application ‘would not accord with sound process.’”) (quoting *Lucas*, 505 U.S. 1003).

The panel’s conclusion that Petitioners must resort to state court to ripen their takings claims fails to give proper weight to the uncertainty of state remedies and the prudential nature of *Williamson County*. Michigan law shows that any potential state remedy for the taking here is “confusing and uncertain.” *Wayside Church*, 2017 WL 541008, at *8-9 (Kethledge, J., dissenting) (quoting *Kruse*, 74 F.3d at 698). The panel held that Petitioners should file their takings claims as “inverse condemnation” claims in a Michigan *circuit court*. *Wayside Church*, 2017 WL 541008 at *6. Yet, the Act, whose application Petitioners challenge, states that a party seeking monetary compensation for injuries under the Act must sue in “the [Michigan] *court of claims*.” Mich. Comp. Laws § 211.78l(2) (emphasis added). Meanwhile, other Michigan statutes declare that the court of claims itself cannot hear monetary claims for which there may be a potential remedy in *federal court*. Mich. Comp. Laws § 600.6440 (“No claimant may be permitted to file claim in said court . . . who has an adequate remedy upon his claim in the federal courts. . . .”). Such claims must be raised in federal court, not the court of claims. *Id.*

The panel is likely incorrect that a state circuit court can hear Petitioners' takings claims, where Michigan law says that such a claim must be filed in the court of claims, and that court is directed not to hear federal claims. But it is not necessary to decide that. What matters is that state law is so unsettled and uncertain that a state court that actually faces a takings claim against the Act could easily reach a contrary conclusion regarding forum availability. *Wayside*, 2017 WL 541008, at *9 (Kethledge, J., dissenting) ("no matter which court the plaintiffs choose, they will face a strong argument that they chose wrongly."). It could hold that circuit courts *cannot* hear Petitioners' claims. Such an indeterminate system is hardly a "certain" compensatory scheme. Indeed, if forced to navigate such a contradictory remedial maze, it is highly likely Petitioners will lose their takings claims through financial or procedural attrition by the time courts figure it out, a possibility that confirms the scheme's inadequacy. Cf. *Kruse*, 74 F.3d at 701.

Even if one could convince themselves that Michigan's Kafkaesque remedial regime is adequate in this context, the panel could and should have held that *Williamson County's* state exhaustion rule does not apply. As noted above, the state litigation doctrine does not limit jurisdiction. This court thus *has power to hear this takings case*, regardless of state remedies. *Horne*, 133 S. Ct. at 2062 n.6. When prudential considerations, such as fairness and judicial economy, counsel in favor of

review, there is no basis for shuffling a justiciable case off to state court, and doing so heaps injustice on injustice for property owners simply trying to protect their rights.

If there was ever a case demonstrating a prudential basis for immediate review, it is this one. Applying *Williamson County* and relegating Petitioners to an uncertain and potentially hostile state court system will, at worst, leave them without a forum for their claims, and at best, require them to engage in protracted, piecemeal procedural litigation. Neither result is justified by the ripeness doctrine. *See San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 346 (2005) (*Williamson County* does not require “piecemeal litigation or otherwise unfair procedures.”) (internal quotes omitted). Moreover, it is highly inefficient to send the claims to the state court system at this point. Doing so would waste the judicial and litigant resources already invested in the federal suit as well as the resources that would be spent in an uncertain and potentially futile detour to the state courts. It is also prejudicial to Petitioners. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) (sending a case to state court after initial federal litigation “delays resolution of the case, imposes additional costs . . . and wastes judicial resources.”).

Finally, nothing further is needed to render the core takings issues fit for review. There is no dispute that Petitioners’ money has been taken under state law, and that compensation has not been provided. There is a concrete controversy now, regardless of “alternative state remedies,” *Horne*, 133 S. Ct. at 2062 n.6. Since this

Court has jurisdiction, is perfectly capable of deciding the takings issue, and it is uneconomical and unfair to force Petitioners to start over again in state court, the case is ripe for prudential reasons. *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (2013) (“This is a proper case to exercise our discretion to suspend the state-litigation requirement In the interests of fairness and judicial economy, we will not impose further rounds of litigation”).

2. The Tax Injunction Act And Comity Do Not Bar the Takings Claims

The panel decision is also wrong in applying TIA and principles of “comity” to avoid the constitutional takings issue. TIA provides that “[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law” when there is a state court remedy. 28 U.S.C. § 1341.2. Similarly, “comity” sometimes bars taxpayers from raising constitutional claims against tax systems when doing so “would halt its operation” and state courts offer “plain, adequate, and complete” remedies. *Fair Assessment in Real Estate Ass’n, Inc. v. McNary*, 454 U.S. 100, 115 (1981).

Fairly understood, neither principle applies to bar the claims here for the simple reason that those claims do not challenge a tax or seek to stymie its collection. *BellSouth Telecomms. v. Farris*, 542 F.3d 499, 501 (6th Cir. 2008) (TIA only bars claims “in which state taxpayers seek federal-court orders enabling them to avoid

paying state taxes.”); *Hibbs v. Winn*, 542 U.S. 88, 107 (2004) (same). They seek compensation for a taking of property *other than the taxes* levied on them under state law. *Coleman*, 70 F. Supp. 3d at 68–69 (“Coleman’s challenge to the District’s taking of the surplus equity in his home, above and beyond the amounts the District has defined as the ‘tax,’ is not barred by the Tax Injunction Act.”). That their takings claims are loosely connected to a general administration of a tax scheme is irrelevant. *Hibbs*, 542 U.S. at 106 (TIA has never barred constitutional claims connected to “state tax administration.”).

Given the limited focus of Petitioners’ takings claims, determining that the County effected an unconstitutional taking of surplus equity would not halt the administration of the state’s tax scheme. The County could continue to collect property taxes and to sell homes to obtain delinquent taxes. It would only be compelled to avoid taking more equity than what is owed or to pay compensation when it does so. *See generally, Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005).

The panel decision is, in short, wrong on a constitutional issue of great importance to ordinary property owners who may, for many reasons, be unable to pay taxes on time. The County took \$189,250 from Wayside Church, gaining a windfall at the Church’s expense. Likewise, it owes Stahl and Hodgens compensation for taking thousands of dollars of their equity. This Court has jurisdiction, *Horne*, 133 S.

Ct. at 2062 n.6, and there is no prudential reason for declining to assert it. The panel should have proceeded to the takings issue and decided it in favor of Petitioners.

CONCLUSION

The Court should grant the Petition.

DATED: February 24, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing petition complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 3,897 words.

/s/ Christina M. Martin
CHRISTINA M. MARTIN

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2017, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Christina M. Martin
CHRISTINA M. MARTIN

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0030p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WAYSIDE CHURCH, an Illinois Not-For-Profit
(Ecclesiastical) Corporation; MYRON W. STAHL;
HENDERSON HODGENS, individually and on behalf
of a class of all others similarly situated,

Plaintiffs-Appellants/Cross-Appellees,

v.

VAN BUREN COUNTY, in its individual Michigan
municipal capacity and on behalf of a class of all
other Michigan counties similarly situated; KAREN
MAKAY, in her individual official capacity as
Treasurer of Van Buren County and on behalf of a
class of all other Treasurers of Michigan counties
similarly situated,

Defendants-Appellees/Cross-Appellants.

Nos. 15-2463/2525

Appeal from the United States District Court for
the Western District of Michigan at Grand Rapids.
No. 1:14-cv-01274—Paul Lewis Maloney, District Judge.

Argued: October 20, 2016

Decided and Filed: February 10, 2017

Before: CLAY, KETHLEDGE, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Owen Dennis Ramey, LEWIS, REED & ALLEN PC, Kalamazoo, Michigan, for Appellants/Cross-Appellees. Thomas G. King, KREIS, ENDERLE, HUDGINS & BORSOS, P.C., Kalamazoo, Michigan, for Appellees/Cross-Appellants. **ON BRIEF:** Owen Dennis Ramey, Ronald W. Ryan, LEWIS, REED & ALLEN PC, Kalamazoo, Michigan, James Shek, Allegan, Michigan, for Appellants/Cross-Appellees. Thomas G. King, KREIS, ENDERLE, HUDGINS & BORSOS, P.C., Kalamazoo, Michigan, for Appellees/Cross-Appellants. Christina

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CLAY, J., delivered the opinion of the court in which DONALD, J., joined. KETHLEDGE, J. (pp. 14–17), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Plaintiffs Wayside Church, Myron Stahl, and Henderson Hodgens (collectively “Plaintiffs”) appeal the district court’s order granting Defendants’ motion to dismiss the complaint, which asserted that Defendant Van Buren County and its Treasurer, Defendant Karen Makay (collectively “Defendants”), violated Plaintiffs’ Fifth Amendment rights by taking their property without just compensation. Defendants filed a cross-appeal arguing that the district court erred in determining that it could exercise jurisdiction over this case. For the reasons set forth below, we **VACATE** the judgment of the district court and **REMAND** with instructions to **DISMISS** the case for lack of subject matter jurisdiction.

BACKGROUND

Plaintiffs each owned real property in Van Buren County, Michigan in 2011 but failed to pay property taxes for that year. On March 1, 2012, pursuant to the General Property Tax Act (the “GPTA”), Mich. Comp. Laws § 211.1 *et seq.*, these properties became subject to forfeiture and foreclosure. On April 24, 2014, the Van Buren County Circuit Court issued a foreclosure judgment, and title to these properties passed in fee simple absolute to the Defendant County.¹ A few months later, Defendant Makay, the treasurer for the Defendant County, sold these properties at an auction, pursuant to Michigan Compiled Laws § 211.78m. The minimum bid for each of the properties was calculated by totaling “[a]ll delinquent taxes, interest, penalties, and

¹The GPTA provides that, after a hearing and a determination that foreclosure is warranted, the county’s circuit court shall issue a foreclosure order specifying, *inter alia*, “[t]hat fee simple title to property foreclosed by the judgment will vest absolutely in the foreclosing governmental unit,” with only limited exceptions. Mich. Comp. Laws § 211.78k(5)(b); *see also id.* § 211.78k(5)(d) (explaining that “the foreclosing governmental unit has good and marketable fee simple title to the property”).

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fees due on the property” plus the “expenses of administering the sale, including all preparations for the sale.” Mich. Comp. Laws § 211.78m(16)(a). Plaintiff Wayside Church’s former property had a minimum bid of \$16,750, but at the public auction held on August 5, 2014, the property was sold for \$206,000, meaning Defendant Van Buren County received surplus proceeds of \$189,250. The minimum bid for the property formerly owned by Plaintiff Stahl was \$25,000, but the property was sold at the same auction for \$68,750, resulting in a surplus of \$43,750. Finally, the property that had once been owned by Plaintiff Hodgens required a minimum bid of \$5,900, but was sold for \$47,750 at the same auction, meaning the Defendant County received \$41,850 in surplus proceeds.

In this suit, Plaintiffs seek return of the surplus funds because they allegedly possessed a cognizable property interest in each of their foreclosed properties and in the surplus proceeds generated by the sales, in connection with which Defendants were required to pay just compensation pursuant to the Fifth Amendment. Plaintiffs did not seek to challenge the process by which these asserted interests were taken; instead, Plaintiffs sought a declaratory judgment from the district court that, by not returning the surplus funds to the former owner-Plaintiffs, Defendants effectuated a taking without just compensation in violation of the Fifth Amendment.

On December 11, 2014, Plaintiffs initiated this suit in federal court by filing a complaint against Defendants asserting the following claims: Count I asserted that Defendants violated Plaintiffs’ rights under the Fifth Amendment by taking their property without just compensation; Count II asserted that Plaintiffs were entitled to monetary damages, pursuant to 42 U.S.C. § 1983, for the violation of their Takings Clause rights alleged in Count I; and Count III sought a declaratory judgment that the Michigan Circuit Court failed to enter judgment in accordance with a state statute and, thus, that the redemption period should have been tolled. In addition to asserting these claims against Defendants on their own behalf, Plaintiffs also sought to represent a class of former Michigan property owners who had lost title to their property for non-payment of taxes but whose former properties were sold for significantly more than the taxes owed.

On January 7, 2016, Defendants filed a motion to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), respectively. On November 9, 2015, the district

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court issued an opinion denying the motion to dismiss for lack of subject matter jurisdiction but granting the motion for failure to state a claim.²

Plaintiffs filed a timely appeal on November 30, 2015, arguing that the district court erred in dismissing its claims pursuant to Rule 12(b)(6). This appeal was docketed as No. 15-2463. On December 9, 2015, Defendants filed a cross-appeal, docketed as No. 15-2525, challenging the district court's order denying its motion to dismiss for lack of jurisdiction.

DISCUSSION

We are “bound to consider the 12(b)(1) motion first, since the Rule 12(b)(6) challenge becomes moot if this court lacks subject matter jurisdiction.” *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

A. Standard of Review

“Article III of the Constitution confines the federal courts to adjudicating actual ‘cases’ and ‘controversies.’” *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (citing U.S. Const. art. III, § 2). This command requires us to dismiss cases that are not ripe for review. “Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed.” *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002) (quoting *Bigelow v. Mich. Dep't of Nat. Res.*, 970 F.2d 154, 157 (6th Cir. 1992)).

“Challenges to subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) ‘come in two varieties: a facial attack or a factual attack.’” *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012) (quoting *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007)). “A facial attack on the subject-matter jurisdiction”—like the one Defendants make here—“questions merely the sufficiency of the pleading.” *Gentek Bldg. Prods., Inc.*, 491 F.3d at 330 (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)). “When reviewing a facial attack, a district court takes the allegations in the

²The district court reached the opposite conclusion on the jurisdictional question as the district court in *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546 (E.D. Mich. June 4, 2015), which found that the Tax Injunction Act and the comity doctrine bar plaintiffs from challenging the GPTA in federal court.

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complaint as true,” just as in a Rule 12(b)(6) motion. *Id.* (citing *Ohio Nat’l Life Ins. Co.*, 922 F.2d at 325). This Court reviews facial challenges to subject matter jurisdiction *de novo*. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004) (citing *Cob Clearinghouse Corp. v. Aetna U.S. Healthcare, Inc.*, 362 F.3d 877, 880 (6th Cir. 2004)).

A factual attack, on the other hand, raises a factual controversy requiring the district court to “weigh the conflicting evidence to arrive at the factual predicate that subject-matter does or does not exist.” *Gentek Bldg. Prods., Inc.*, 491 F.3d at 330 (citing *Ohio Nat’l Life Ins. Co.*, 922 F.2d at 325). “Where a trial court’s ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court’s factual findings unless they are clearly erroneous.” *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996) (citing *Ohio Nat’l Life Ins. Co.*, 922 F.2d at 326) (additional citations omitted). “However, review of the district court’s *application of the law* to the facts is *de novo*.” *Id.* (citing *Ynclan v. Dep’t of Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)).

Because the district court treated the challenge as a facial attack and made no factual findings in reaching its decision, the appeal is treated the same way. *See DLX, Inc.*, 381 F.3d at 516. This Court thus reviews the judgment of the district court *de novo*. Moreover “where subject matter jurisdiction is challenged under Rule 12(b)(1), as it was here, the *plaintiff* has the burden of proving jurisdiction in order to survive the motion.” *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986).

B. Analysis

Defendants argue that we lack jurisdiction for two reasons: (1) Plaintiffs’ claims are not ripe for review; and (2) the Tax Injunction Act and principles of comity prevent jurisdiction from being exercised in federal court. We address these arguments in turn below.

1. Ripeness of Takings Clause Claims

“Applicable to the States through the Fourteenth Amendment, the Takings Clause of the Fifth Amendment ‘provides that private property shall not be taken for public use, without just

compensation.” *Wilkins v. Daniels*, 744 F.3d 409, 416 (6th Cir. 2014) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005)). “As its text makes plain, the Takings Clause ‘does not prohibit the taking of private property, but instead places a condition on the exercise of that power.’” *Lingle*, 544 U.S. at 536 (quoting *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 314 (1987)). The Takings Clause’s purpose is “not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” *Id.* at 537 (quoting *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 315). Consequently, “a State does not violate the Takings Clause ‘until it refuses to compensate the owner.’” *Wilkins*, 744 F.3d at 417 (quoting *Hensley v. City of Columbus*, 557 F.3d 693, 695–96 (6th Cir. 2009)). Such compensation is not required to be “paid in advance of, or contemporaneously with, the taking.” *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). Therefore, a takings claim is not ripe “unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.” *Id.* at 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)).

In *Williamson County*, the Supreme Court established a two part test to determine when a takings claim is ripe. “A federal court may hear a takings claim only after: (1) the plaintiff has received a ‘final decision’ from the relevant government actor; and (2) the plaintiff has sought ‘compensation through the procedures the State has provided for doing so.’” *Wilkins*, 744 F.3d at 417 (quoting *Williamson Cty.*, 473 U.S. at 186, 194–95). For plaintiffs to be obligated to seek redress in the state courts before litigating in federal court, the state procedures must be “reasonable, certain, and adequate . . . at the time of the taking.” *Williamson Cty.*, 473 U.S. at 194 (quotation omitted).

This Court has previously acknowledged that the *Williamson County* test is not strictly jurisdictional but only “prudential,” and need not be followed “when its application ‘would not accord with sound process.’”³ *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 541 (6th Cir. 2010) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 (1992)).

³The dissent makes much of the fact that the test set forth in *Williamson County* is only prudential. Dissent Op. at 14–15. However, the Tax Injunction Act, discussed *infra* at 12–13, utilizes substantially the same test and is jurisdictional, rather than prudential.

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However, the requirement that aggrieved parties first seek compensation for the alleged taking in state court before bringing suit in federal court “will often serve important federalism interests.” *Wilkins*, 744 F.3d at 418. These interests are especially strong where, as here, the case “turn[s] on whether the plaintiff has a property interest as defined by state law.” *Id.* Therefore, we engage in the *Williamson County* analysis to determine whether jurisdiction is proper. *See Miles Christi Religious Order*, 629 F.3d at 541 (continuing to follow *Williamson County* test after acknowledging that it is not jurisdictional because the Court “fail[ed] to see why this prudential requirement should be ignored here”).

Defendants do not contest here that the first part of the test is satisfied and, instead, only appeal the district court’s determination that no adequate state procedures existed in which Plaintiffs could challenge the alleged taking. Defendants claim, as they did before the district court, that Plaintiffs could have challenged the tax law on constitutional grounds in state court or brought an inverse condemnation action. The district court, however, found that such avenues of relief were foreclosed by the text of the GPTA.

Specifically at issue is the provision in the GPTA that addresses actions seeking monetary damages after foreclosure, codified as Michigan Compiled Laws § 211.78l. This section provides as follows:

If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

Mich. Comp. Laws § 211.78l(1). These actions must be brought in a special court, called the Court of Claims, as “[t]he court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.” *Id.* § 211.78l(2). That court, however, cannot hear actions brought against the state of Michigan or any arm thereof if the claimant “has an adequate remedy upon his claim in the federal courts.” *Id.* § 600.6440. Therefore, according to Plaintiffs, there is no adequate state forum for their claims, as they are required to seek redress in

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the Court of Claims; but that court cannot hear cases where a federal remedy exists. Consequently, Plaintiffs contend that federal court is the only forum where they can seek relief.

The district court agreed with Plaintiffs and found that “the only cause of action permitted by the GPTA is one for lack of notice (due process); specifically, the law allows a cause of action against a county treasurer for monetary damages *only* when a property owner ‘claims that he or she did not receive any notice required under this act.’” (R. 38, PageID #409 (quoting Mich. Comp. Laws § 211.78l).) The court went on to note that the Court of Claims was the only court that could hear any challenges to the GPTA, but that federal claims were barred in that forum. The district court concluded that because the “Michigan Court of Claims has exclusive and original jurisdiction over claims under the GPTA against the County Treasurer,” and because “Michigan absolutely divests jurisdiction from the Michigan Court of Claims where a plaintiff ‘has an adequate remedy upon his claim in the federal courts,’” the state had failed to provide an adequate remedy. (*Id.* at 410 (quoting Mich. Comp. Laws § 600.6440).) Based on this analysis, the court concluded that the claim was ripe for review under the *Williamson County* test.

This analysis, however, suffers from two fatal flaws. First, and most importantly, in reading the above quoted section, the district court read subsection (1) to bar all actions challenging the GPTA except those challenging the notice procedures. However, the plain language of the text does not require such a restrictive reading. Instead, the statute limits a plaintiff to monetary damages when two conditions are present: (1) the former owner’s rights have been extinguished by foreclosure proceedings for failure to pay property taxes; *and* (2) the former owner is challenging whether he received the notice required by other provisions in the GPTA. While the first condition is undoubtedly present in the case at bar, Plaintiffs here have stated explicitly that they are *not* challenging the notice provided to them, either on statutory or constitutional grounds. Because Plaintiffs’ Takings Clause claim does not meet both criteria, the restrictions on relief do not apply to this action.

Second, the district court erred in determining that the Court of Claims has exclusive jurisdiction over *all* claims challenging the GPTA. In arriving at that conclusion, the court conflated the terms “section” and “act.” It is clear from the text that the Michigan legislature

used the term “act” to refer to the entire GPTA and the term “section” to refer to the more specific provisions in the act. For example, in providing definitions for the GPTA, the text states that “[a]s used in this section and sections 78a through 155 . . . (a) ‘Foreclosing governmental unit’ means . . . [t]he treasurer of a county.” Mich. Comp. Laws § 211.78(8). This language makes clear that “section” refers to individual parts of the general statute, and not the entire GPTA. *See also id.* § 211.78l (“If a judgment for foreclosure is entered under section 78k, . . .”). By contrast, when referring to the entire statutory scheme, the legislature clearly indicated so, as seen in the provision regarding the purpose of the GPTA, which states, “Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.” *Id.* § 211.78(1).

By the plain reading of the language at issue in this case, then, it is apparent that the word “section” in the phrase limiting jurisdiction to the Court of Claims—“The court of claims has original and exclusive jurisdiction in any action . . . under this section”—the legislature was limiting jurisdiction for claims brought pursuant to § 211.78l, not claims brought pursuant to the entire GPTA. As established above, § 211.78l only discusses claims by former owners challenging the notice provisions, which is not the case here. Therefore, Plaintiffs were not required to bring their actions in the Court of Claims and therefore were not subject to the bar that “[n]o claimant may be permitted to file claim in [the Court of Claims] against the state nor any department, . . . arm or agency thereof who has an adequate remedy upon his claim in the federal courts.” *Id.* § 600.6440. Consequently, the district court erred in concluding that the GPTA provided no remedy for Plaintiffs’ constitutional claims.

Moreover, reading the statute in the way directed by the district court would mean the statute would be unconstitutional, which would violate the constitutional avoidance statutory construction rule. *See Carey v. South Dakota*, 250 U.S. 118, 122 (1919) (“Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted.” (citations omitted)); *see also In re Treasurer of Wayne Cty. for Foreclosure*, 732 N.W.2d 458, 462 (Mich. 2007) (requiring courts to “presume a statute is constitutional and

construe it as such, unless the only proper construction renders the statute unconstitutional” (citation omitted). If the district court were right in its interpretation, the Michigan legislature would have created a statutory scheme by which plaintiffs were barred from asserting all but one federal right—due process notice—in state court. Such a scheme could not stand, as “[a] jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear.” *Haywood v. Drown*, 556 U.S. 729, 739 (2009); *see also Felder v. Casey*, 487 U.S. 131, 138 (1988) (“Under the Supremacy Clause of the Federal Constitution, ‘[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,’ for ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’” (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962))). The Michigan Supreme Court also recognized the same limitation when discussing § 211.78l of the GPTA, and held that, in the context of a due process claim to the statute, “[b]ecause the Legislature cannot create a statutory regime that allows for constitutional violations with no recourse, that portion of the statute . . . is unconstitutional and unenforceable.” *In re Treasurer of Wayne Cty.*, 732 N.W.2d at 463. We therefore conclude that § 211.78l of the GPTA does not bar Plaintiffs from filing their Takings Clause claims in state court.

Pursuant to *Williamson County*, we still must determine whether Plaintiffs are generally allowed to bring their Takings Clause and § 1983 claims in Michigan state court, independent of § 211.78l of the GPTA, or whether there were no “reasonable, certain, and adequate” procedures for challenging a taking, thereby allowing Plaintiffs to seek redress in federal court first. The Michigan Court of Appeals has previously held that “[t]he Court of Claims is the proper forum in which to seek redress where a plaintiff alleges an already accomplished inverse condemnation by the State of Michigan.” *Lim v. Mich. Dep’t of Transp.*, 423 N.W.2d 343, 345 (Mich. Ct. App. 1988) (citing *Hill v. State Highway Comm’n*, 170 N.W.2d 18 (Mich. 1969)) (additional citations omitted). Jurisdiction would normally lie in that court as it has exclusive jurisdiction over all claims “statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief . . . against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.” Mich. Comp. Laws § 600.6419(1)(a).

Plaintiffs' action, however, is not an action against the State of Michigan. Instead, Plaintiffs have sued Van Buren County and the county treasurer, as the county treasurer is the one responsible for effectuating the alleged taking of Plaintiffs' properties. *See* Mich. Comp. Laws §§ 211.78(8)(a), 211.78k(5). (*See also* R.16-2, Judgment & Order of Judicial Forfeiture, PageID #181–82.) Counties, however, “are never within the jurisdiction of the Court of Claims.” *Doan v. Kellogg Cmty. Coll.*, 263 N.W.2d 357, 359 (Mich. Ct. App. 1977); *see also Cameron v. Monroe Cty. Probate Court*, 579 N.W.2d 859, 862 (Mich. 1998) (determining that the circuit court had jurisdiction over a complaint against a county court because “[t]he state was not made a party to the complaint, nor did the court attempt to order the state to pay the complaint”). Thus, *Lim* is inapplicable to Plaintiffs' case and does not require them to file in the Court of Claims. *See Lim*, 423 N.W.2d at 345.

Furthermore, the argument that the Michigan jurisdictional scheme essentially requires that all claims against political subdivisions of the state be litigated in federal court when there is an adequate federal remedy ignores the Michigan state courts' interpretation of its own jurisdictional statutes. In *Gordon v. Sadasivan*, 373 N.W.2d 258 (Mich. Ct. App. 1985) (*per curiam*), the Court of Appeals of Michigan addressed the situation where a circuit court dismissed a suit brought pursuant to § 1983 for lack of jurisdiction, as it thought the case belonged in the Court of Claims. *Id.* at 259–60. The *Gordon* court first recognized that “state courts exercise concurrent jurisdiction over § 1983 claims.” *Id.* at 261. After determining that there was an adequate remedy that the plaintiff could have pursued in federal court, as his claim was not barred by the Eleventh Amendment, the Michigan Court of Appeals determined that the Court of Claims lacked subject matter jurisdiction over the claim pursuant to Michigan Compiled Laws § 600.6440. *Id.* However, the court further determined that the *circuit court* did, in fact, have jurisdiction over the plaintiff's § 1983 claims. *Id.* Put another way, the *Gordon* court noted that, while § 600.6440 may divest the Court of Claims of jurisdiction when there is a remedy available in federal court, the result is not that *no* remedy can be sought in state court; instead, the proper forum to litigate such claims is the circuit court.⁴ *Id.* Based on this interpretation of

⁴Indeed, the circuit courts of Michigan routinely decide cases involving causes of action for which a remedy in federal court exists. *See, e.g., Mudge v. Macomb Cty.*, 580 N.W.2d 845 (Mich. 1998); *Dampier v. Wayne*

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the relevant jurisdictional statutes, we find that Plaintiffs were not barred from bringing their actions in the state circuit court and thus were not deprived of a state forum for vindicating their federal constitutional rights.

Because the clearer reading of the relevant statutes allows Plaintiffs to bring their cases, including their federal claims, in state court, and because this Court is required to read statutes to be constitutional if possible, we conclude that Plaintiffs have failed to establish that jurisdiction in federal court is proper because the state provided no “reasonable, certain and adequate [procedures] at the time of the taking.” *Williamson Cty.*, 473 U.S. at 194 (quotation omitted). The district court thus erred in finding that it had jurisdiction to entertain this action.

2. Tax Injunction Act and Comity

The district court also determined that the Tax Injunction Act does not bar jurisdiction here. That Act declares that “[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1341. This statute is jurisdictional, *Hedgpeath v. Tennessee*, 215 F.3d 608, 611–12 & n.4 (6th Cir. 2000), and prevents federal courts from awarding declaratory or injunctive relief to plaintiffs who challenge state tax laws. *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 586–87 (1995).

Another similar but distinct limitation on federal court jurisdiction over challenges to state tax laws is the principle of comity. This principle “prohibits ‘taxpayers . . . from asserting § 1983 actions against the validity of state tax systems in [the lower] federal courts.’” *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 541 (6th Cir. 2004) (alterations in original) (quoting *Fair Assessment in Real Estate Ass’n, Inc. v. McNary*, 454 U.S. 100, 116 (1981)). “While this comity principle reflects some of the same concerns that led Congress to enact the Tax Injunction Act, 28 U.S.C. § 1341, it stands on its own bottom, and extends to cases seeking monetary damages as well as injunctive or other equitable relief.” *Id.* (footnote omitted) (citing *Fair Assessment*, 454 U.S. at 110). Only when the states do not provide a “plain, adequate, and complete” remedy

Cty., 592 N.W.2d 809 (Mich. Ct. App. 1999); *Morden v. Grand Traverse Cty.*, 738 N.W.2d 278 (Mich. Ct. App. 2007) (per curiam).

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in their courts should the federal courts be able to exercise jurisdiction despite the principle of comity. *Id.* (quoting *Fair Assessment*, 454 U.S. at 116).

Plaintiffs here brought an action for both a declaratory judgment and monetary damages, and, thus, both the Tax Injunction Act and comity are at play. Because the two doctrines only allow federal courts to exercise jurisdiction when states courts cannot provide “plain, adequate, and complete” remedies, only one analysis is required. *Fair Assessment*, 454 U.S. at 116 n.8 (“We discern no significant difference, for purposes of the principles recognized in this case, between remedies which are ‘plain, adequate, and complete,’ as that phrase has been used in articulating the doctrine of equitable restraint, and those which are ‘plain, speedy and efficient,’ within the meaning of § 1341.” (citations omitted)). “[S]tate remedies are plain, adequate, and complete if they provide the taxpayer with a full hearing and judicial determination at which the taxpayer may raise any federal constitutional objections to the tax.” *In re Gillis*, 836 F.2d 1001, 1010 (6th Cir. 1988) (footnote omitted). As has already been discussed above in the ripeness context, the district court and Plaintiffs erred in concluding that Plaintiffs could not challenge the GPTA on constitutional grounds in state court. In fact, such a plain, adequate, and complete avenue for redressing their claims was available. We therefore conclude that the district court erred in finding that the claims were not barred by the Tax Injunction Act and the doctrine of comity, and as a result, mistakenly determined that it could exercise subject matter jurisdiction over Plaintiffs’ claims. Consequently, the district court lacked jurisdiction to entertain this action.

CONCLUSION

For the foregoing reasons, we **VACATE** the judgment of the district court and **REMAND** with instructions to **DISMISS** the action for lack of subject matter jurisdiction.

DISSENT

KETHLEDGE, Circuit Judge, dissenting. In this case the defendant Van Buren County took property worth \$206,000 to satisfy a \$16,750 debt, and then refused to refund any of the difference. In some legal precincts that sort of behavior is called theft. But under the Michigan General Property Tax Act, apparently, that behavior is called tax collection. The question here is—or at least in my view should be—whether the County’s action is a taking under the federal Constitution.

Our court declines to answer that question because it holds—under the Supreme Court’s decision in *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)—that the plaintiffs here must seek a remedy in state court rather than federal. I respectfully disagree with that conclusion. To begin with first principles: the federal courts indisputably have jurisdiction over this case, *see* 28 U.S.C. § 1331, and the federal courts “have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). But *Williamson County* singles out takings claims for disfavored treatment so far as the availability of a federal forum is concerned. Specifically, if a plaintiff alleges that a State has violated the federal Takings Clause, and state law provides a “reasonable, certain, and adequate” remedy for the violation, then the plaintiff must pursue that remedy in state court. *Williamson County*, 473 U.S. at 194. As the majority points out, however, this doctrine is merely “prudential,” which is to say discretionary and judge-created. *See Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733-34 (1997). Thus we may dispense with it “when its application ‘would not accord with sound process.’” *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 541 (6th Cir. 2010) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 (1992)).

We have neither certainty nor sound process here. Whether Michigan substantive law provides a remedy for the type of taking alleged here is hardly certain. True, Michigan law provides a cause of action for so-called “inverse condemnations,” in which the government takes

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a property interest without a formal exercise of eminent domain. *See Merkur Steel Supply, Inc. v. Detroit*, 680 N.W.2d 485, 495 (Mich. Ct. App. 2004). And in adjudicating those claims the Michigan courts have recognized what they call “de facto” takings, for which “no exact formula” exists. *Id.* But the Michigan courts have not yet determined, as a matter of state law, whether a local government’s appropriation of property pursuant to the taxing power generally, or to the General Property Tax Act in particular, is a taking to the extent the government takes property worth more than the amount of taxes owed. Perhaps the Michigan courts will recognize this kind of inverse-condemnation claim as viable, not least because of the gross injustice—both equitably, and from the standpoint of the interests protected by takings law—caused by the kind of governmental action on display here. (In the County’s defense, the Michigan Act appears actually to *require* the County to short the taxpayer the difference between the value of the property forfeited and the amount of taxes and penalties owed. *See* M.C.L. § 211.78m(8).) But it overstates matters to say the Michigan courts’ recognition of this type of inverse-condemnation claim is “certain.”

Equally problematic is the jurisdictional uncertainty that awaits the plaintiffs in state court. When they file their inverse-condemnation claim there, they must choose between two courts: the state circuit court, which is a trial court of general jurisdiction, or the state court of claims, which (like its federal counterpart) has jurisdiction over monetary claims “against the state or any of its departments[.]” *See* M.C.L. §§ 600.605 (circuit court), 600.6419 (court of claims). But no matter which court the plaintiffs choose, they will face a strong argument that they chose wrongly. The majority suggests the plaintiffs should file in circuit court, which is remarkable given the statute’s plain statement that the court of claims’s jurisdiction over monetary claims against the state or its departments “is exclusive[.]” M.C.L. § 600.6419(1), and given the Michigan Court of Appeals’s plain holding that “[t]he Court of Claims is the proper forum in which to seek redress where a plaintiff alleges an already accomplished inverse condemnation[.]” *Lim v. Mich. Dep’t of Transp.*, 423 N.W.2d 343, 345 (Mich. Ct. App. 1988). Perhaps, as the Majority suggests, the Michigan courts will distinguish *Lim* on the ground that the plaintiffs here are suing a subdivision of the State rather than the State itself. But perhaps not, since counties are instrumentalities of the State. *See, e.g., Wayne Cty. Bd. of Comm’rs v. Wayne Cty. Airport Auth.*, 658 N.W.2d 804, 828 (Mich. Ct. App. 2002); *Pomann, Callanan &*

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Sofen, P.C. v. Wayne Cty. Dep't of Soc. Servs., 419 N.W.2d. 787, 789 (Mich. Ct. App. 1988). And the Michigan Court of Appeals has held that a monetary claim against a county agency belongs in the court of claims, whose exclusive jurisdiction “encompasses all claims against the state and its instrumentalities for money damages.” *Pomann, Callanan & Sofen*, 419 N.W.2d. at 789.

That said, the jurisdiction of the court of claims over this case is likewise uncertain: under another statutory provision, no claimant “who has an adequate remedy upon his claim in the federal courts” may bring suit against the state or its departments in the court of claims. M.C.L. § 600.6440. Given that the plaintiffs assert a federal constitutional claim and that the federal courts exist in part to provide a remedy for such claims, § 600.6440 seems to direct these plaintiffs to litigate their claims in federal court rather than state.

Thus, as read by the majority, *Williamson County* sends these plaintiffs to state court, while state law directs them back to federal. The majority resolves this dilemma by declaring the state jurisdictional regime unconstitutional to the extent it would require a federal constitutional claimant to bring suit in federal court. Maj. Op. at 9-12. And thus, contrary to what the Michigan statutes actually say, the majority opines that the plaintiffs may bring suit in the state circuit court.

At this point one senses we have lost our constitutional bearings. The plaintiffs have asked us to adjudicate a claim arising under the federal Constitution, which is the most important type of claim that we can adjudicate. The claim itself is substantial: that, when a state takes fee simple to property in satisfaction of a tax obligation, the state effects a taking to the extent the property is worth more than the taxes and penalties owed. Complaint ¶ 4. Congress has granted us jurisdiction over that claim. We have a strict duty to exercise that jurisdiction. Meanwhile, the state jurisdictional statute, specifically § 600.6440, expresses an affirmative preference that we adjudicate the claim. And yet—in the interest of “federalism,” no less—we reject the State’s preference, declare the state jurisdictional regime (as set forth by the statute’s plain terms) unconstitutional as applied here, disregard our strict duty to exercise the jurisdiction assigned to us by Congress, and send the plaintiffs back to state court, where they face procedures that as a

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practical matter are “confusing and uncertain[.]” *Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 698 (6th Cir. 1996). The result is not “sound process” but a welter of contradictions.

One further irony remains. The majority cites *Haywood v. Drown*, 556 U.S. 729 (2009), as support for its conclusion that Michigan’s jurisdictional regime cannot, consistent with the federal Constitution, mean what its relevant jurisdictional provisions say. In *Haywood*, the Supreme Court held that state jurisdictional statutes that are designed to discriminate against “disfavored federal claim[s]” or that serve “as a device to undermine federal law” violate the Supremacy Clause. 556 U.S. at 738-39, 741. But here, in clear contrast to *Haywood* (which involved suits brought by inmates against corrections officers), there is no reason at all to think that, in directing federal takings claims to federal court, the State sought to undermine or discriminate against those claims in any way. Quite the contrary: if anyone has undermined the adjudication of federal takings claims against states and local governments, it is the federal courts—by the application of *Williamson County*.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 15-2463/2525

WAYSIDE CHURCH, an Illinois Not-For-Profit
(Ecclesiastical) Corporation; MYRON W. STAHL;
HENDERSON HODGENS, individually and on behalf
of a class of all others similarly situated,
Plaintiffs - Appellants/Cross - Appellees,

v.

VAN BUREN COUNTY, in its individual Michigan
municipal capacity and on behalf of a class of all other
Michigan counties similarly situated; KAREN MAKAY,
in her individual official capacity as Treasurer of Van Buren
County and on behalf of a class of all other Treasurers
of Michigan counties similarly situated,
Defendants - Appellees/Cross - Appellants.

Before: CLAY, KETHLEDGE, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is
VACATED and REMANDED with instructions to DISMISS the case for lack of subject-matter
jurisdiction.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

