20-1809

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MCCONNELL DORCE, individually and on behalf of all others similarly situated, CECILIA JONES, individually and on behalf of all others similarly situated, SHERLIVIA THOMAS-MURCHISON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

—against—

CITY OF NEW YORK, NEIGHBORHOOD RESTORE HOUSING DEVELOPMENT FUND CO. INC., BSDC KINGS COVENANT HOUSING DEVELOPMENT FUND COMPANY, INC., MARIA TORRES-SPRINGER, COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, JOHN DOE 1 to 10, JANE DOE 1 to 10,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. Throughout its history, LDF has challenged policies and practices that deny housing opportunities to Black people. *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012) (racial discrimination in policing public housing residences); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, No. 95-309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to further fair housing

[1] The parties consent to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), LDF states that no party's counsel authored this brief either in whole or in part, and that no party's counsel, or person or entity other than LDF, LDF's members, and its counsel, contributed money intended to fund preparing or submitting this brief.

affirmatively); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106 (D.D.C. 1987) (redevelopment plans that unfairly eliminate affordable housing); *see also Novick v. Levitt*, 108 N.Y.S. 2d 615 (1951) (challenging eviction motivated by tenants entertaining Black guests in their Levittown, New York home); *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512 (1949) (challenging Stuyvesant Town's racial exclusion policy). LDF has also challenged tax foreclosure and water lien policies that disparately impact Black communities. *See Pickett v. City of Cleveland*, No. 19-2911 (N.D. Ohio filed Dec. 18, 2019); *MorningSide Cmty. Org. v. Sabree*, No. 16-008807 (Mich. Cir. Ct. filed July 13, 2016).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1996, New York City (the "City") amended its tax collection laws to enact Local Law No. 37, which created the Third Party Transfer In Rem Program ("TPT Program"). The TPT Program authorizes the City to convey tax delinquent, statutorily "distressed" or near-"distressed" residential properties directly to a predetermined third party—without the City taking ownership and managing the transferred properties—for rehabilitation and management and without collecting tax revenue. But the City has used the TPT Program to target and seize properties in Black and Latinx communities that are not statutorily distressed and that have a nominal tax-value ratio, or no tax liability at all. Since the enactment of Local Law No. 37, the City has completed ten rounds of property foreclosures and transfers

under the TPT Program. In the most recent rounds of foreclosures under the TPT Program, the City seized and transferred several homes in predominantly Black and Latinx neighborhoods without providing the owners adequate notice or an opportunity to redeem their properties from the Program.

Appellants McConnell Dorce, Cecilia Jones, and Sherlivia Thomas-Murchison's homes were seized through the TPT Program. None of the Appellants received notice that the City was foreclosing on their homes, and none of the Appellants received the excess equity built into their property. Appellants sued the City of New York and various actors under the TPT Program, alleging violations of the United States Constitution, the New York State Constitution, and New York General Business Law, and sought a declaratory judgment as well as injunctive relief and money damages because of the City's unlawful seizures under the TPT Program. The District Court, however, dismissed all of Appellants' claims as barred under either the *Rooker-Feldman* doctrine, the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), principles of comity, or because Appellants lacked standing. The District Court's ruling should be reversed.

Appellants' challenge to the TPT Program raises fundamental issues that go to the heart of the right to equal housing opportunity and deserves a federal court forum for resolution. The TPT Program exacerbates the racial wealth gap and homeownership disparities. Homeownership, and the accompanying equity and

stability, has long been a key component of wealth acquisition and economic growth for most American families. But federal, state, and local governmental laws, regulations, and policies have played a significant role in the creation and perpetuation of racial gaps in homeownership in New York City and throughout the country. The TPT Program is leading to the loss of homeownership in Black and Latinx communities and expropriating years of work and thousands—even millions—of dollars in home equity from them.

The TPT Program also continues a long history of race discrimination in tax assessment and collection systems. Predatory tax foreclosure systems were used throughout the Jim Crow era to discriminate against Black homeowners—a practice that future Supreme Court Justice Thurgood Marshall described in 1940 as "depriving Negroes of their property through subterfuge."[2] Today, Black property owners across the country are still subjected to unfair tax burdens when compared with their white counterparts. Similarly, numerous studies demonstrate that tax liens are disproportionately placed on homes in communities of color, and if the delinquent property owner fails to pay the past due balance, their property can be sold at a public auction to private purchasers or investors. These tax systems unduly and disparately burden Black and Latinx communities and deprive them of the economic stability and mobility enjoyed by white people. The TPT Program is a

[2] Thurgood Marshall, *Cold, Cold Ground*, The New Republic, Aug. 12, 1940, at 216.

particularly egregious example of this discrimination against Black homeowners. Appellants and others similarly situated should be able to challenge the legality of the program to the extent they unlawfully deprive Black homeowners of their homes without due process and in violation of the Fifth Amendment's Takings Clause.

The TIA does not deny Appellants access to a federal forum to litigate their claims. The TIA limits the power of federal courts to interfere with state taxation proceedings. It does not, however, strip federal courts of jurisdiction to adjudicate *all* matters affecting state tax laws. The Supreme Court has applied the TIA only in cases where state taxpayers sought federal court orders enabling them to avoid paying taxes. Appellants do not challenge the amount or validity of any tax assessed or levied against their property. Therefore, the TIA does not apply.

The TIA's inapplicability here is clear for multiple additional reasons: (1) the City does not actually collect any delinquent taxes using the TPT Program's procedures, (2) the City uses the TPT Program to foreclose on properties that are not statutorily "distressed" (i.e. that do not have substantial tax delinquencies or that are not blighted as defined in the New York Administrative Code), and (3) *Luessenhop v. Clinton Cnty.*, 466 F.3d 259 (2d Cir. 2006), recognizes that federal courts have jurisdiction over procedural due process claims related to, but not directly seeking to restrain, state tax proceedings. The TIA also does not apply because some TPT Program transfers stem from unpaid water and sewer charges, which are not taxes

for TIA purposes. Because any revenues received from customers for water and sewer services are directed to a special fund and used for costs associated with those systems, they cannot be considered taxes. And state courts in New York have long held that water and sewer charges based on consumption or services rendered are not taxes.

The City's recent administration of the TPT Program constituted an *ultra vires* deprivation of wealth, and a federal court is not precluded from hearing and adjudicating Appellants' claims under the TIA. The Court should reverse the District Court's dismissal of Appellants' claims on TIA grounds.

ARGUMENT

I. NEW YORK CITY'S TPT PROGRAM PERPETUATES RACE-BASED WEALTH DISPARITIES.

Homeownership is one of the primary indicators of wealth but has been disproportionately denied to Black people. The TPT Program perpetuates and exacerbates this disparity and strips Black and Latinx homeowners in New York City of wealth they have accumulated for decades. That it does so in the name of "tax collection" is reflective of tax and other governmental programs that have had a long-lasting, detrimental impact on Black communities.

A. The TPT Program Discriminates Against Black and Latinx Communities in New York City.

The racial wealth gap has long been a tragic fixture in American society. It is so deeply entrenched that "the ratio of white family wealth to Black family wealth

is higher today than at the start of the century."[3] Homeownership and the accompanying equity and stability are key components of wealth acquisition and growth for most American families. According to the Federal Reserve, in 2016, the average homeowner had $231,400 in household wealth, while the average renter had only $5,200 in household wealth.[4] In 1960, there was a 27-point gap between Black homeownership (38 percent) and white homeownership (65 percent).[5] United States Census Bureau data from the second quarter of 2020 demonstrates that the gap is larger today—29 points—and that Black Americans continue to have the lowest rate of homeownership in the country:[6] 47 percent of Black households own their homes compared to 76 percent of white households. Homeownership by Latinx households also trails behind white households by 25 points, with a rate of 51 percent.[7] New York City is not immune from stark racial disparities in homeownership. In 2018,

[3] Kristen McIntosh, et al., *Examining the Black-White Wealth Gap*, Brookings Institute (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/.
[4] *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 Fed. Reserve Bulletin, 13, tbl. 2, https://www.federalreserve.gov/publications/files/scf17.pdf.
[5] Urban Institute, *Reducing the Racial Homeownership Gap*, https://www.urban.org/policy-centers/housing-finance-policy-center/projects/reducing-racial-homeownership-gap (last visited Aug. 31, 2020).
[6] U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership: Second Quarter 2020*, 9, tbl. 7 (July 28, 2020), https://www.census.gov/housing/hvs/files/currenthvspress.pdf.
[7] *Id.*

27 percent of Black households and 17 percent of Latinx households in New York City owned their homes, compared to 43 percent of white households.[8]

Racist federal, state and local governmental policies have played a significant role in the creation and perpetuation of racial gaps in homeownership.[9] One of the most prominent examples of the government's role was right outside of the City, on Long Island: Levittown. A sprawling suburban development of 17,500 homes built after World War II, Levittown was financed by the Federal Housing Administration "on condition that . . . it be all white."[10] Black veterans and their families were completely excluded from this homeownership opportunity that was made possible only because the developers were, in their own words, "100 percent dependent on Government."[11] Similarly, New York City facilitated the development of Stuyvesant Town, a 9,000 unit, "white people only" housing complex built in Manhattan in the 1940s.[12] In order for Stuyvesant Town to be built, "New York City condemned and

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[8] *Snapshot of Homeownership in New York City*, N.Y. Univ. Furman Ctr.: The Stoop (Dec. 17, 2019), https://furmancenter.org/thestoop/entry/snapshot-of-homeownership-in-new-york-city [hereinafter Furman Ctr. *Snapshot*].

[9] *See generally* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017); Ira Katznelson, *When Affirmative Action Was White, An Untold History of Racial Inequality in Twentieth Century America* (2005).

[10] Rothstein, *supra* note 9, at 71.

[11] *Id.* at 72.

[12] *Id.* at 106. The current population of the neighborhood in which the Stuyvesant Town complex is located is 72 percent white. *See* Demographic Profile of Stuyvesant Town - Cooper Village, N.Y.C. Dept. of City Planning, Population Fact

cleared eighteen square city blocks and transferred the property" to the developer,[13] and "[a]bout 40 percent of those evicted were African American or Puerto Rican."[14]

Today, New York City's TPT Program is leading to the loss of homeownership in Black and Latinx communities. The TPT Program was created in 1996 in response to the City's lack of capital resources to address abandoned properties it took ownership of in the 1960s and 1970s.[15] However, "[w]hat began as a focused anti-abandonment initiative . . . has become something far more expansive, far more excessive and far more entangled with America's treacherous history of race and homeownership."[16] Every borough—except Staten Island[17]—is represented among homes included in the most recent TPT round. Approximately 50 percent of these properties were concentrated in just 11 neighborhoods[18] (in the

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Finder, https://popfactfinder.planning.nyc.gov/profile/391/demographic (last visited Sept. 1, 2020).

[13] Rothstein, *supra* note 9, at 106.

[14] *Id.* at 107.

[15] *Oversight – Taking Stock: A Look into the Third Party Transfer Program in Modern Day New York*, N.Y.C. Council, Comm. on Hous. and Bldg, Comm. on Oversight and Investigations, Briefing Paper at 2-3 (2019), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3968975&GUID=17B27FCE-9E66-4803-AB35-7792BA254245&Options=&Search= [hereinafter *Oversight – Taking Stock*].

[16] N.Y.C. Council, Hr'g of Comm. on Hous. and Bldg., Comm. on Oversight and Investigations, (July 22, 2019) Hr'g Tr. at 10 (statement of Member Ritchie Torres), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3968975&GUID=17B27FCE-9E66-4803-AB35-7792BA254245&Options=&Search=.

[17] *Oversight – Taking Stock*, *supra* note 15, at 13.

[18] *Id.* at 14.

remaining four boroughs) where residents are primarily people of color.[19] This is striking as Staten Island has both the highest homeownership rate in New York City (69 percent)[20] and the largest white population in New York City (60.1 percent).[21] Yet, the populations in the 11 neighborhoods targeted by the TPT Program range from 57 percent Black and Latinx (Bedford, Brooklyn)[22] to 96 percent Black and Latinx (University Heights, Bronx).[23]

Appellant McConnell Dorce's story is but one example of the devastating impact the City's TPT Program has had on families of color.[24] Mr. Dorce is an

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[19] Demographic Profile of Selected Neighborhoods, N.Y.C. Dept. of City Planning, Population Fact Finder, https://popfactfinder.planning.nyc.gov/#12.25/40.724/-73.9868 (last visited Aug. 31, 2020).

[20] Furman Ctr. *Snapshot*, *supra* note 8.

[21] *Id.*

[22] Demographic Profile of Bedford, N.Y.C. Dept. of City Planning, Population Fact Finder, https://popfactfinder.planning.nyc.gov/profile/756/demographic (last visited Aug. 31, 2020).

[23] Demographic Profile of University Heights, N.Y.C. Dept. of City Planning, Population Fact Finder, https://popfactfinder.planning.nyc.gov/profile/1058/demographic (last visited Aug. 31, 2020).

[24] *See, e.g.*, Stephen Witt & Kelly Mena, *City Takes Property from Working Class Latinos*, Kings County Politics (Oct. 9, 2018), https://www.kingscountypolitics.com/city-takes-property-from-working-class-latinos/ (detailing the story of six Latinx co-op shareholders in East Williamsburg, Brooklyn); Stephen Witt & Kelly Mena, *City Sits on Brownstone as Elderly Women Waits on Bated Breath*, Kings County Politics (Oct. 26, 2018), https://www.kingscountypolitics.com/city-sits-on-brownstone-as-elderly-woman-waits-on-bated-breath/ (chronicling the story of an elderly Black resident of Crown Heights, Brooklyn whose paid-off Brownstone has been in the family for over 30 years).

elderly Black resident of East New York, Brooklyn—one of the 11 neighborhoods that has a 95 percent Black and Latinx population.[25] Mr. Dorce owned his four-unit property free of any mortgage as of 2012. Joint App'x A38 ¶ 80.[26] Mr. Dorce purchased the property in the 1970s for $25,000, and his tenants included several family members.[27] Mr. Dorce had substantial equity in the property but lost it all after the TPT Program stripped him of ownership of his property. *Id*. A39 ¶ 81, A40 ¶ 94.

As City Councilmember Robert Cornegy put it, the TPT Program is "deeply problematic for black and brown homeowners."[28] Black and Latinx homeowners in New York City have often overcome nearly insurmountable barriers to homeownership and now risk losing, or have lost, millions in equity at the hands of the government.

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[25] Demographic Profile of East New York, N.Y.C. Dept. of City Planning, Population Fact Finder, https://popfactfinder.planning.nyc.gov/profile/2414/demographic (last visited Aug. 31, 2020).

[26] The facts as recited herein are based on the allegations in Appellants' Class Action Complaint, ECF No. 7.

[27] Stephen Witt & Kelly Mena, *City Seizes Multiple Properties as Real Estate Scandal Grows* (Sept. 21, 2019), https://www.kingscountypolitics.com/city-seizes-multiple-properties-as-real-estate-scandal-grows/.

[28] N.Y.C. Council, *City Council Housing Chair Expresses Concern Over Mayor's Plan to Expand Seizure of Private Residential Properties* (Jan. 10, 2019), https://council.nyc.gov/robert-cornegy/2019/01/10/housing-chair-concerned-by-expansion-of-property-seizures/.

B. The TPT Program Continues a Long History of Government Programs that Take Black People's Homes from Them.

Although the TPT Program is not a tax-collection tool, its discriminatory outcomes are comparable to tax and other governmental programs that have had a long-lasting, detrimental impact on Black communities. For more than a century, federal, state, and local governments have used various underhanded tactics to legalize the seizure of Black people's homes. For instance, predatory foreclosure systems were used throughout the Jim Crow era to target Black homeowners—a practice that future Supreme Court Justice Thurgood Marshall described in 1940 as a means to "depriv[e] Negroes of their property through subterfuge."[29] Describing property tax schemes against Black communities as a "potent instrument of white supremacy,"[30] historian Andrew Kahrl has noted that Black communities have been exploited by such schemes since they gained the ability to purchase property:

> Almost from the moment African Americans ceased to be taxable property and began having their property taxed, they became subject to discriminatory administrative practices and the victim of structural inequities in its levying and enforcement, both of which allowed local governments to subtly shift the tax burden onto the backs of racial minorities, and in some states created opportunities for real estate speculators and investors to prey on hard-pressed homeowners through acquiring liens on tax-delinquent properties.[31]

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[29] Marshall, *supra* note 2.
[30] Andrew W. Kahrl, *Unconscionable: Tax Delinquency Sales as a Form of Dignity Taking*, 92 Chicago-Kent L. Rev. 905, 910 (2017).
[31] *Id.* at 905.

Presently, Black people remain unfairly burdened by state and local tax systems. For example, the routine overvaluation of Black homeowners' properties has resulted in them bearing a significantly higher property tax burden than their white counterparts.[32] A 2017 examination of the property tax system in Cook County, Illinois found that people living in working-class, minority communities were more likely to receive property tax bills that assumed their homes were worth more than their true market value while residents in wealthier, whiter communities received tax bills that were not based on the full value of their homes.[33]

Consequently, homeowners in predominately Black and Latinx communities throughout Cook County were more likely to pay more in taxes as a percentage of their home values than their counterparts in more affluent, white neighborhoods.[34] Several local community groups subsequently filed a lawsuit against the Cook County assessor, challenging the assessor's property valuation methods under the Fair Housing Act ("FHA"), the Equal Protection Clauses of the U.S. and Illinois

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[32] Teresa Wiltz, *Black Homeowners Pay More than "Fair Share" in Property Taxes*, Pew Trusts: Stateline (June 25, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/25/black-homeowners-pay-more-than-fair-share-in-property-taxes; Andrew Van Dam, *Black Families Pay Significantly Higher Property Taxes than White Families, New Analysis Shows*, Wash. Post (July 2, 2020), https://www.washingtonpost.com/business/2020/07/02/black-property-tax/.

[33] Jason Grotto, *An Unfair Burden*, Chicago Trib. (June 10, 2017), https://apps.chicagotribune.com/news/watchdog/cook-county-property-tax-divide/assessments.html.

[34] *Id.*

Constitutions, and the Illinois Civil Rights Act.[35] The parties reached a settlement and the case was voluntarily dismissed after a new assessor was elected and implemented substantial reforms aimed at addressing the racial disparities.[36]

The discriminatory tax assessment system in Chicago is not unique. A recent nationwide study by economists from the University of Utah and Indiana University found that Black and Latinx households pay 10 to 13 percent more in property taxes each year than white residents.[37] The study, which analyzed over a decade of sales and tax assessment data for approximately 118 million homes, concluded that property tax assessments were higher in areas with more Black and Latinx communities in almost every state.[38]

Similarly, lien systems across the country have a disproportionate impact on communities of color. Many states authorize local governments to place liens on properties for nonpayment of property taxes and other municipal charges.[39] If the

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[35] First Amended Complaint for Injunctive and Other Relief, *Brighton Park Neighborhood Council v. Berrios*, No. 2017-CH-16453 (Ill. Cir. Ct. Mar. 7, 2018).
[36] *See* Agreed Order of Dismissal, *Brighton Park Neighborhood Council v. Berrios*, No. 2017-CH-16453 (Ill. Cir. Ct. Nov. 6, 2019).
[37] Van Dam, *supra* note 32.
[38] *Id*.
[39] *See generally* John Rao, Nat'l Consumer Law Ctr., *The Other Foreclosure Crisis: Property Tax Lien Sales* (2012), https://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales-report.pdf.

delinquent property owner fails to pay the past due balance, their property can be sold at a public auction to private purchasers or investors.[40]

Numerous studies demonstrate that such liens are disproportionately placed on homes in Black communities. A 2019 report issued by LDF detailed how the City of Cleveland's water lien practices disproportionately impacted Cuyahoga County's Black neighborhoods.[41] For example, in 2018 the county's population was over 62 percent white and nearly 30 percent Black.[42] That year, Cleveland placed 66.3 percent of water liens in predominantly Black Census tracts in the county and only 21.5 percent of such liens in majority-white Census tracts.[43] LDF determined that Cleveland disproportionately placed liens in Black neighborhoods compared to white areas even when comparing geographic units with the same median income.[44] In December 2019, LDF filed a class action complaint in the U.S. District Court for the Northern District of Ohio challenging Cleveland's discriminatory water lien

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[40] *Id*.

[41] Coty Montag, NAACP Legal Def. & Educ. Fund, Inc., *Water/Color: A Study of Race and the Water Affordability Crisis in America's Cities* (2019), https://tminstituteldf.org/publications/2383/.

[42] U.S. Census Bureau, Am. Cmty. Survey, *Cuyahoga Cty. 2018 Comparative Demographic Estimates*, https://data.census.gov/cedsci/table?g=0500000US39035&tid=ACSCP1Y2018.CP05.

[43] Montag, *supra* note 41, at 50.

[44] Complaint, *Pickett*, No. 19-cv-2911(N.D. Ohio Dec. 18, 2019), ECF No. 1.

policy as violative of the FHA, the Due Process and Equal Protection Clauses of the U.S. and Ohio Constitutions, and the state civil rights law.[45]

Similar racial disparities exist in other major metropolitan areas. The Philadelphia City Council passed a resolution in October 2018 calling for a moratorium on residential property foreclosures after finding that tax and municipal charge foreclosures were disproportionately concentrated in Black neighborhoods.[46] Likewise, an analysis of liens in New York City for one-to-three family homes in 2016 found that the City was six times more likely to sell a lien in a majority Black neighborhood than in a majority white neighborhood.[47] As a result of systemic, illegal over-assessments, tax foreclosures occurred in Black neighborhoods in Wayne County, Michigan, at a rate 10 to 15 times the rate of tax foreclosures in non-Black areas—a disparity which in 2016 led LDF to file a lawsuit challenging the discriminatory foreclosures under the FHA and the Due Process Clause of the U.S. Constitution.[48]

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[45] *Id.*

[46] Michael D'Onofrio, *City Council Calls for Moratorium on Sheriff Sales*, Phila. Trib. (Oct. 6, 2018), https://www.phillytrib.com/news/city-council-calls-for-moratorium-on-sheriff-sales/article_87ef9708-712b-5dfd-8390-f213114c7842.html.

[47] Coal. For Affordable Homes, *Compounding Debt: Race, Affordability and NYC's Tax Lien Sale*, 4–5 (2016), https://s28299.pcdn.co/wp-content/uploads/2014/02/CAH-tax-lien-sale-report-final.pdf.

[48] *MorningSide*, No. 16-008807 (Mich. Cir. Ct. July 13, 2016).

The City's method of identifying homes in Black and Latinx neighborhoods for foreclosure under the TPT Program—and specifically under the tenth round of TPT foreclosures and transfers—reflects similar disparities. A federal court is an appropriate forum to adjudicate Appellants' challenges regarding the lawfulness of the program.

II. THE TAX INJUNCTION ACT DOES NOT BAR APPELLANTS FROM VINDICATING THEIR CLAIMS IN FEDERAL COURT.

Appellants had their property stripped under the City's TPT Program and asserted federal constitutional and state law claims challenging, among other things, the City's unlawful seizure of their property without compensation. The District Court dismissed Appellants' claims under, *inter alia*, the TIA, which prohibits federal district courts from entertaining requests for relief that would enjoin, suspend, or restrain a state's tax assessment, levy, or collection efforts. But the TIA is inapplicable in this case because Appellants are not seeking to avoid their tax liability. Additionally, the water and sewer charges are not taxes under the TIA, and thus Appellants' challenge to the City's efforts to collect them using the TPT Program is not barred from a federal forum under the TIA.

A. The TIA Was Designed to Shield State Tax Collection Efforts from Taxpayers Seeking to Avoid Tax Liability.

The TIA prohibits federal courts from obstructing state taxation proceedings: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law . . . ." 28 U.S.C. § 1341. The purpose of the

TIA is to encourage taxpayers to pursue refund suits after their taxes have been collected instead of proactively attempting to restrain tax collection efforts. But the TIA does not strip federal courts of jurisdiction to adjudicate all matters affecting state tax laws. To the contrary, the Supreme Court has confirmed that the plain language of the TIA limits the statute's reach.

In assessing whether the TIA precludes federal court jurisdiction, the Supreme Court has looked to whether the relief sought would *in fact* "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" under the TIA. *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 7–8 (2015). The Supreme Court has interpreted the word "collection" to refer to the act of obtaining payment of taxes due. *Id*. at 10 (citing Black's Law Dictionary 349 (3d ed. 1933)) (defining "collect" as "to obtain payment or liquidation" of a debt or claim). Although tax collection agencies can use various means to collect the amount of taxes due, *id.*, it is the act of collecting tax arrears that determines the existence of federal court jurisdiction under the TIA. *See id*. at 12 ("The TIA is keyed to *the acts* of assessment, levy, and collection themselves . . . .") (emphasis added). The Supreme Court has also defined "restrain" as used in the TIA narrowly to mean "to prohibit from action; to put compulsion upon . . . to enjoin." *Id*. at 13; *see also id*. at 13 (interpreting "restrain" as used in the TIA to "capture[] only those orders that stop (or perhaps compel) acts of 'assessment, levy and collection'"). Thus, under the plain text of the TIA, federal

courts lack jurisdiction to enjoin a state law that would "stop" states from actually "obtaining payment of taxes."

This plain-text narrow construction of the TIA is consistent with Congress's intent in enacting the statute. In *Hibbs v. Winn*, 542 U.S. 88 (2004), the Supreme Court explained that Congress enacted the TIA to enjoin taxpayers from obstructing state tax collection efforts. Specifically, the TIA served two primary objectives:

> "(1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to *stop taxpayers*, with the aid of a federal injunction, *from withholding large sums*, thereby disrupting state government finances."

Id. at 104 (emphasis added). More succinctly, "in enacting the TIA, Congress trained its attention on taxpayers who sought to *avoid paying their tax bill* by pursuing a challenge route other than the one specified by the taxing authority." *Id*. at 104–05 (emphasis added); *see also Luessenhop*, 466 F. 3d at 267 (explaining that the TIA precludes jurisdiction only where state taxpayers seek federal court orders enabling them to "avoid paying state taxes"). The TIA does not, however, strip federal courts of jurisdiction to adjudicate all matters affecting state tax laws: "Nowhere does the legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of tax administration." *Hibbs*, 542 U.S. at 105 (citations and quotations omitted).

And the Supreme Court has not applied the TIA so broadly; the Court has "interpreted and applied the TIA only in cases Congress wrote the Act to address, i.e., cases in which state taxpayers seek federal-court orders enabling them to avoid paying taxes." *Id*. at 107. In *Hibbs*, the Supreme Court rejected the taxing authority's argument that the TIA protects all "matters of state tax administration . . . from lower federal-court interference," *id*. at 105–06, and distinguished other cases where the TIA did apply: "[a]ll involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes)." *Id*. (distinguishing, *inter alia*, *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) (action seeking to prevent Oklahoma from collecting taxes State imposed on nonresident motor carriers), and *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100 (1981) (taxpayers, alleging unequal taxation of real property, seeking damages measured by alleged tax over-assessment)). This Circuit has adopted the same interpretation of the TIA. *See Luessenhop*, 466 F.3d at 266–67 (*Hibbs*'s interpretation of the TIA is controlling notwithstanding factual or contextual distinctions between cases).

Thus, the reach of the TIA is not very far: federal courts are barred from exercising jurisdiction under the TIA only where taxpayers are attempting to avoid paying state or local taxes.

B. The TIA Does Not Bar Appellants' Claims.

Appellants here do not seek a federal court order to avoid paying taxes. They do not challenge the amount or validity of any tax assessed or levied against their property. *See Luessenhop*, 466 F.3d at 268 (holding the TIA does not bar federal courts from adjudicating the merits of their claims where the taxpayer does not dispute the assessments or amounts owed). Nor do Appellants challenge the City's authority to collect taxes as a general matter. *See id*. (holding the TIA does not bar federal court jurisdiction where the taxpayer does not contest the government's authority to collect property taxes). Appellants instead challenge the lawfulness of the TPT Program to the extent it authorized the City to seize their property without procedurally adequate notice and without remitting excess equity in the seized properties. On this basis alone, the TIA does not strip federal courts of jurisdiction to hear Appellants' claims.

But the TIA does not apply in this case for several additional and related reasons: (1) the City does not actually collect any delinquent taxes using the TPT Program's procedures, (2) the City uses the TPT Program to foreclose on properties that are not statutorily distressed (i.e., that do not have substantial tax delinquencies or are not blighted as defined in the New York Administrative Code), and thus that should fall without the TPT Program's procedures, and (3) Appellants' challenge to

the inadequate notice they received of the *in rem* foreclosure proceedings is not a challenge to avoid payment of taxes.

First, the City does not actually collect tax revenue using the TPT Program. The *in rem* foreclosure procedure the City uses to seize and transfer distressed properties is different than the standard procedure the City uses to collect tax delinquencies. Outside the TPT Program and generally for non-distressed buildings, the City collects on tax liens by "sell[ing] the lien to a trust, which, in turn, uses the liens as collateral to issue bonds, whose proceeds pay off the City's liens." *In Rem Tax Foreclosure Action No. 53 Borough of Brooklyn*, No. 8700/2015, 2019 WL 1431423, at *3 (Sup. Ct. Kings Cty. Mar. 28, 2019); *see also* N.Y. Admin. Code § 11-319. This procedure generates actual tax revenue for the City to collect and resolves outstanding tax debts with the collected funds.

Under the TPT Program, however, the City obtains a foreclosure judgment against the property and conveys the property to new owners. *See* Joint App'x A23-25 ¶¶ 31–34. The City does not sell seized property to generate money in satisfaction of outstanding tax liabilities. *See id*.at A39 ¶ 89, A42 ¶ 106, A44 ¶ 124. Instead, the City transfers the seized property to a developer without collecting any of the tax arrears that were the basis of the foreclosure and property seizure. *See id*. at A40 ¶¶ 90-91, A42 ¶¶ 107–08, A44, ¶ 125. The City's failure to collect the unpaid taxes that precipitated the foreclosure proceeding is fatal to the application of the TIA under

the plain text of the statute, which requires the taxing authority to actually collect taxes and precludes federal court jurisdiction only where the taxpayer seeks to stop the taxing authority from collecting taxes.

Second, the City uses the TPT Program to foreclose on properties that do not have substantial tax delinquencies and are not statutorily distressed. Under the TPT Program, the City's Department of Finance and Department of Housing, Preservation and Development ("HPD") identify properties that the agencies determine are experiencing financial and physical distress. *Id*. A16–17 ¶ 9. The New York Administrative Code defines a property as "distressed" if it has a lien to value ratio of 15 percent or more, and either an average of five serious housing violations per dwelling unit or $1,000 or more in emergency repair liens. *See* N.Y. Admin. Code § 11-401(4).[49] However, the City has used the TPT Program to foreclose on

[49] N.Y.C. Dep't of Hous. Pres. & Dev., Multifamily Disposition and Finance Programs, https://www1.nyc.gov/site/hpd/services-and-information/multifamily-disposition-and-finance-programs.page (last visited Sept. 1, 2020) ("HPD's [TPT Program] designate[s] qualified sponsors to purchase and rehabilitate distressed vacant and occupied multi-family properties in order to improve and preserve housing affordable to low-to moderate-income households.").

properties that are not distressed,[50] including Appellants' property.[51] The City has done so under, *inter alia*, N.Y. Admin. Code § 11-405(a), which requires the Commissioner of Finance to include in a foreclosure proceeding all non-distressed parcels on the same block as a distressed property, and to treat them like a distressed property under the TPT Program (i.e., to use summary *in rem* proceedings to foreclose on the properties). Under this provision, the City has wide latitude to deviate from the purported tax policies underlying the TPT Program. And it has. The City has used the TPT Program to foreclose on properties that lack substantial tax arrears—and then to transfer the property without actually collecting any tax revenue from the transfer. This misuse of the TPT Program underscores that the program is

[50] In the most recent round of properties selected for foreclosure under the TPT Program, half of the properties—more than 200 properties—were not statutorily distressed because "they were not subject to a tax lien with a lien to value ratio greater than or equal to 15%." *Oversight – Taking Stock*, *supra* note 15, at 9 (citing HPD Data on TPT Properties Selected for Round X). "Specifically, the average lien to value ratio for these 210 properties was only 3%, far below the 15% required to meet the statutory definition of distressed." *Id.* "Moreover, 155 of these 210 properties did not have five or more B or C violations per dwelling unit. Ultimately, four of the 65 properties transferred to Neighborhood Restore had lien to value ratios below 15% and were therefore not statutorily distressed." *Id.*

[51] In their Complaint, Appellants allege that their properties did not meet the statutory definition of distressed. *See* Joint App'x A39 ¶ 86, A41 ¶ 103, A44 ¶ 121.

not actually a tax-collecting mechanism impervious to federal judicial review under the TIA.

Third, Appellants' procedural due process claims challenging the City's failure to provide adequate notice of the foreclosure proceedings are not foreclosed by the TIA. *Luessenhop* is directly on point. In *Luessenhop*, the plaintiffs filed actions under 42 U.S.C. § 1983 alleging that local taxing authorities provided inadequate notice of pending foreclosure proceedings and subsequent public sales of their properties. *Id*. at 261–264. The defendants sought to dismiss the plaintiffs' claims under the TIA, but this Court rejected that argument:

> In the instant appeals, the plaintiffs' complaints are grounded in the means employed by the local governments to inform individuals that, due to their tax delinquency, title to their property will be transferred to the sovereign and sold at a public auction. Although the TIA has been interpreted to cover local taxes, *Wells* [*v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975)] and *Hibbs* suggest that the challenges here do not trigger the TIA because the taxpayers are not seeking to utilize federal courts as a conduit to empty state coffers.

Id. at 266 (citation omitted). That same reasoning applies to Appellants' procedural due process claims. Appellants allege and challenge that the City instituted *in rem* foreclosure proceedings against property owners without providing them notice reasonably calculated to inform them of the proceeding, and that both as codified and as implemented, the TPT Program's notice provisions fall short of what is required under the Due Process Clause of the United States and New York Constitutions. *See* Joint App'x A47–A49 ¶¶ 144–156. Under a straightforward

reading of *Luessenhop*, these challenges are not barred by the TIA, and the Court should allow these claims to proceed in federal court.

C. The Water and Sewer Debt of Appellants and the Putative Class Cannot be Considered Taxes under the TIA.

The TIA applies only to taxes. *See, e.g.*, *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975). Here, each of the Appellants lost their properties through the TPT Program entirely or partly because of water and sewer debt. Even if the City had used the TPT Program to collect Appellants' tax debts—which it did not—the TIA does not apply to water and sewer debt because they are not "taxes." The TIA thus does not bar Appellants from litigating their claims in federal court.

The Second Circuit applies a straightforward test to determine whether a charge or an assessment is a tax under the TIA: assessments imposed primarily for revenue-raising purposes are "taxes," while levies assessed for regulatory purposes (even if they also raise revenues) are not. *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 737 F.3d 228, 231 (2d Cir. 2013); *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 713 (2d Cir. 1993), *rev'd on other grounds, N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995). To determine whether a charge is assessed primarily for "revenue raising purposes," courts look to how the funds are managed and handled. *Entergy*, 737 F.3d at 231. Proceeds deposited into a state's general fund are seen as serving the general benefit of a state and are typically considered taxes, while funds directly allocated to the agency that

administers the collection, for the purpose of providing a narrow benefit to or offsetting costs for the agency, are not taxes. *Id.* (citing *Travelers*, 14 F.3d at 713–14).

Applying this test, water and sewer charges assessed in New York City are clearly not taxes for TIA purposes. Rates for these services are set and controlled by the New York City Water Board.[52] Under New York law, the Water Board must place revenues derived from customer fees and rates in a special fund, known as the local water fund, for the purpose of carrying out its powers and duties. N.Y. Pub. Auth. § 1045-j(2). Funds received from customers may be used only for statutorily designated purposes, including to administer, maintain, repair, and operate the water and sewerage systems and to pay any debts and liabilities incurred by those systems. *Id.* at § 1045-j(1). Because any revenues received from customers for water and sewer services are directed to a special fund and used for costs associated with those systems, they cannot be considered taxes. While any surplus funds from water and sewer are deposited into the city's general fund, *id.*, this is only after all specific payments relating to the water and sewerage systems have been made. The assessment is therefore primarily for regulatory, rather than revenue-raising, purposes, which means they are not taxes. *See Entergy Nuclear*, 737 F.3d at 231.

[52] N.Y.C. Dept. of Envt'l Protection, How We Bill You, https://www1.nyc.gov/site/dep/pay-my-bills/how-we-bill-you.page (last visited Aug. 31, 2020).

Indeed, outside of the TIA context, state courts in New York have long held that water and sewer charges based on consumption or services rendered are not taxes. *See, e.g.*, *State Univ. of N.Y. v. Patterson*, 42 A.D.2d 328, 329 (N.Y. App. Div. 1973); *Robertson v. Zimmermann*, 268 N.Y. 52, 64 (N.Y. App. Div. 1935); *Pub. Serv. Equip. Council v. City of New York*, 90 Misc. 2d 270, 271 (N.Y. Sup. Ct. 1977); *Battista v. Bd. of Estimate*, 51 Misc. 2d 962, 968 (N.Y. Sup. Ct. 1966); *Silkman v. Bd. of Water Comm'rs*, 152 N.Y. 327, 327 (N.Y. Sup. Gen. Term 1893). New York City bases its rates entirely on consumption.[53] Accordingly, water and sewer charges incurred by customers in New York City are not taxes.

CONCLUSION

The City's use of the TPT Program to strip homeowners of their property in the name of tax collection is unlawful. Federal court review and adjudication is not barred by the TIA. For the foregoing reasons, this Court should reverse the District Court's dismissal of Appellants' claims on TIA grounds.

[53] *Id.*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and this circuit's Local Rules 29.1(c) and 32.1 (a)(4)(A) because it contains 6306 words.

This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, and is in Times New Roman, 14-point font.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2020, I uploaded an electronic copy of the foregoing Brief for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. to the Court's electronic filing system, thereby electronically serving it upon all counsel of record.

Three (3) hard copies of the foregoing Brief for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. have been deposited for delivery by courier to:

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