

NACo MEMBERSHIP CALL

**UNPACKING SUPREME COURT
DECISIONS ON WOTUS AND PROPERTY
TAX FORFEITURE LAWS**

**THE LOCAL
GOVERNMENT
LEGAL CENTER**



A photograph of a row of white, two-story houses with dark shutters and dormer windows. In the foreground, a large white sign with a black border and red text reads "FORECLOSURE". The sky is blue with scattered white clouds. A blue and white graphic element is on the left side of the image.

Tyler v. Hennepin County

FORECLOSURE

Facts

The Plaintiff in this case owned a condominium in Minneapolis and stopped paying taxes. She owed \$15,000 in unpaid state property taxes, penalties, costs, and interest.

The Plaintiff received notice of foreclosure, failed to answer, and then never tried to redeem the property during the 3-year period. She also did not seek to repurchase the property.

Hennepin County sold the property for \$40,000 and kept the surplus pursuant to state law.



Issues

(1) Whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Fifth Amendment's takings clause; and

(2) whether the forfeiture of property worth far more than needed to satisfy a debt, plus interest, penalties, and costs, is a fine within the meaning of the Eighth Amendment

Holding: 9-0 Authored by Chief Justice Roberts

- County violated the Takings Clause by keeping the surplus equity.
- Court relied on history and precedent to support its holding.
- History dating back to Magna Carta supports the notion that a “government may not take more from a taxpayer than she owes...”



Excessive Fines Clause?

- Because the majority concluded this was a Taking, the Court did not reach the excessive fines question.
- Justices Gorsuch and Jackson would have likely found an Excessive Fines Clause violation (or at least believed that the lower courts analysis on this front was incorrect).

Local Government Legal Center Brief

- Argued principles of federalism dictate that the Court should not interfere with the administration of state taxes in cases like this where adequate procedural safeguards exist.
- Discussed practical implications of a ruling in favor of the property owner, including the significant costs local governments incur in selling tax forfeited properties as well as the fact that such a ruling would provide a perverse incentive for property owners to abandon their properties rather than sell them as they would not need to bear those costs.

Implication for Counties

- Thirty-six states require excess equity to be returned to property owner.
- State laws will need to be updated and counties should avoid keeping any surplus equity from foreclosed property sales going forward.
- Open question what amount is owed to the property owners?
- Lawsuits against counties to follow?
- Open question on interest and fees for tax debt. The Court said these are not takings, but if a county tried to increase fees for any sort of punitive purpose, that could run afoul of the excessive fines clause.

Sackett v. EPA

- **Issue:** What wetlands are considered WOTUS under the Clean Water Act?

Priest Lake, the body of water near Michael and Chantell Sackett's property in Idaho. (APete via Shutterstock)



Facts

- The Sacketts began backfilling a housing lot near Priest Lake, Idaho.
- The Clean Water Act prohibits discharging pollutants including gravel into “navigable waters,” defined as “waters of the United States.” (WOTUS). Under the CWA, WOTUS includes **“wetlands” that are “adjacent”** to navigable water.
- The EPA determined that the wetlands on the Sacketts’ lot ultimately fed into Priest Lake and issued a notice directing the couple to cease backfill activities and restore the property, under threat of fines exceeding \$40,000 per day.



Ninth Circuit Applies the Justice Kennedy “Significant Nexus” Test from *Rapanos*

- Found in favor of the EPA. The court considered competing definitions of WOTUS from *Rapanos v. United States*.
- In *Rapanos*, **Justice Scalia** had a narrow description of wetlands that would be considered WOTUS – those with “continuous surface connection” to permanent waters. In contrast, **Justice Kennedy** had found that wetlands with a “significant nexus” to navigable waters are WOTUS
- The Ninth Circuit adopted the more expansive Kennedy “significant nexus” test, asking whether the wetlands in question “significantly affect” navigable waters.

Supreme Court Adopts Narrow Definition of “Adjacent” Wetlands (5-4)

- Court rejects the “significant nexus” test from *Rapanos*.
- Congress indicated “adjacent” wetlands constitute WOTUS. Court interprets “adjacent” narrowly - to mean “adjoining”
- According to the Supreme Court, wetlands “adjacent” to navigable waters will only fall within the CWA if they are “as a practical matter indistinguishable” from WOTUS—meaning that there must be “**a continuous surface connection**” to navigable waters.
- Court indicates there may be temporary interruptions to continuous connections due to low tides or dry spells.

Kavanaugh Concurrence in the Judgment

- Justice Kavanaugh (joined by 3 other Justices) would have interpreted adjacent more broadly, to not require a continuous surface connection.
- These would include both wetlands bordering covered waters and “wetlands separated from covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.”

IMLA / NACo / NLC Amicus Brief

- Supported neither party.
- Argued the Supreme Court should clarify that water supply and treatment, flood control and stormwater management infrastructure is not WOTUS under the CWA.
- While express clarity is not provided, the narrower interpretation of WOTUS will necessarily lead to less local government infrastructure that is covered by WOTUS. Infrastructure that is not “waters” itself, seems unlikely to be covered by WOTUS.

Open Questions / Next Steps

- EPA will likely issue a new rule to define what a “continuous surface connection”
- There will likely be more litigation over that definition and in general over what a “continuous surface connection” means.
- How “temporary” do interruptions to the surface connection need to be for the wetlands to still be covered (what if they dry up in the summer)?

**Additional
Resources:
*Tyler v.
Hennepin
County***

**Currently allowed to keep surplus equity
without exception**

Alabama, Arizona, California, Colorado,
Illinois, Maine, Massachusetts, Minnesota,
Nebraska, New Jersey, New York, Oregon and
South Dakota

**Currently allowed to keep surplus equity
for a particular public use**

Alaska, Idaho, Nevada, Ohio, Rhode Island
and Texas

**Currently allowed to keep surplus equity
from commercial property sale**

Montana

**Additional
Resources:
*Tyler v.
Hennepin
County***

- [NACo blog: *Tyler v. Hennepin County*](#)
- [County governance profiles](#)
- [LGLC Amicus Brief](#)

**Additional
Resources:
Sackett v.
*EPA***

- [NACo WOTUS Action Center](#)
- [LGLC Amicus Brief](#)

Audience Q&A

- “Raise Hand” to be recognized or use the chat/Q&A function
- Slides and a recording will be available on the event page after the call
- Follow up questions? Email Rachel Mackey at rmackey@naco.org



THANK YOU FOR JOINING!