No.

SUPREME COURT OF THE UNITED STATES

DAVID GREENE, JR., MARCIA GREENE,
and DAVID GREENE, III,

Petitioners,

v.

KANSAS DEPARTMENT OF REVENUE,
STEVE STOTTS, in his individual capacity and
official capacity,

Respondents.

On Petition for a Writ of Certiorari to
the Kansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

When a taking occurs subject to legal authority which is later struck down, does retention of the property without due process in and of itself violate the Fifth Amendment of the Constitution.

PARTIES TO THE PROCEEDING

Petitioners David Greene Jr., Marcia Greene, and David Greene, III were the appellants below. Respondent Kansas Department Of Revenue, and Steve Stotts, in his individual capacity and official capacity, were the appellees below.

RELATED PROCEEDINGS

Thirteenth Judicial District, Butler County, Kansas
David Greene Jr., Marcia Greene, and C&J Wholesale (Case No. BU-2018-CV-000002)
(Oct. 15, 2019)

Kansas Court of Appeals
David Greene Jr., Marcia Greene, and C&J Wholesale, LLC (Case No. 122379)
(May 14, 2021)

Thirteenth Judicial District, Butler County, Kansas
David Greene Jr., Marcia Greene, and David Greene, III (Case No. BU-2023-CV-000206)
(Apr. 9, 2024)

Kansas Court of Appeals
David Greene Jr., Marcia Greene, and David Greene, III (Case No. 128006)
(Sept. 26, 2025)

Supreme Court of the State of Kansas
David Greene Jr., Marcia Greene, and David Greene, III (Case No. 128006)
(Feb. 27, 2026)

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I. Petition for Writ Of Certiorari

David Greene, Jr., Marcia Greene, and David Greene, III, by and through Braxton T. Moral, respectfully petition this Court for a writ of certiorari to review the judgment of the Kansas Court of Appeals.

II. Opinions Below

The decision by the Kansas Court of Appeals denying Petitioners direct appeal is reported as *Greene v. Kan. Dep't of Revenue*, 576 P.3d 320 (Kan. Ct. App. 2025). The Kansas Supreme Court denied Petitioners' petition for review on February 27, 2026. Those orders are attached in the Appendix at 1a and 35a.

III. Jurisdiction

Petitioners' petition for review to the Kansas Supreme Court was denied on February 27, 2026. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the Kansas Supreme Court's judgment.

IV. Constitutional Provisions Involved

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of

> a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. Statement of the Case

Fourteen years ago, the Kansas Department of Revenue assessed a $460,000 tax against the Greenes and took $62,500 in property. In 2014, The Kansas

Board of Tax Appeals struck down that assessment. In 2023, the Kansas Department of Revenue finally gave the property back. The Kansas Supreme Court found no unconstitutionality in this action.

The Fifth Amendment of the United States must apply to takings that were, at the time of the taking, proper, but were later found to be improper. To explain, the property of American citizens cannot be retained by the government if the basis for the taking of that property is struck down. There is a split among the circuits on the correct manner to address situations like these. The First, Second, Sixth, Seventh, Tenth, and Eleventh circuits seem to implicate the Fifth Amendment as the correct vehicle and decline to apply the Fourth Amendment. The Third, Fourth, Ninth, and D.C. Circuit Courts seem to implicate the Fourth Amendment and reject the Fifth Amendment. The Supreme Court can resolve this split through applying its law on illegal exactions to the case at hand.

A. The Initial taking and the background of Petitioners.

In August of 2012, the Kansas Department of Revenue ("KDOR") levied a $460,000 tax assessment against David Greene and Marcia Greene for possession of a potpourri substance named "Diablo" that the Kansas Board of Pharmacy had deemed a controlled substance. In September of 2014, the Kansas Board of Tax Appeals (BOTA) determined that any assessments on the relevant chemical

substances in Diablo were invalid. The Kansas Court of Appeals then affirmed the BOTA's decision in 2016.

KDOR then amended the tax assessment to cover a new substance relating to a criminal investigation of nonparties, increased the assessment to $924,400, and expanded the assessment to include Wholesale. Petitioners objected to the amended assessment and it was abated in an informal appeal conference in September of 2016. KDOR did not appeal the abatement.

Nevertheless, KDOR continued to seek enforcement of the original $460,000 assessment and refused to return the property it had taken, putting the Greenes out of business. In January of 2018, Petitioners filed a petition for judicial review in Butler County District Court, where the District Court ruled in favor of Petitioners and determined that no outstanding tax assessments remained. The Kansas Court of Appeals affirmed this decision in May of 2021. Respondents retained the property.

Finally, in August of 2023, Petitioners filed suit against KDOR. Respondents immediately returned the property in October of 2023, but the damage was already done. Respondents filed a Motion to Dismiss, which was granted in relation to the Fifth Amendment issue with a single sentence. The Kansas Court of Appeals then affirmed the District Court's ruling. Petitioners' petition for review was then denied by the Kansas Supreme Court. This Petition follows.

VI. Reasons for Granting this Writ

A. There is confusion and conflict in the law surrounding the Fourth and Fifth Amendment.

As this court is well aware and responsible for, the Fifth Amendment of the United States provides substantive due process protections which protect citizens from the taking of their property without due process. The question in this case is whether the Fifth Amendment is the correct vehicle for challenging a taking that, while initially lawful, has been determined to be unlawful and nevertheless the property has been retained.

The Tenth Circuit has examined this question in *Springer v. Albin,* 398 Fed.Appx. 427 (10th Cir. 2010). In *Springer*, the Tenth Circuit examined a taking in the context of a search warrant. Agents for the IRS seized $19,000 from the plaintiff. Agents then returned $17,000 at a later date. The Tenth Circuit held that, because the initial taking was valid, theft of the $2,000 afterwards was not violative of the 4th Amendment. Instead, the Tenth Circuit references the 5th Amendment as perhaps the proper vehicle for pursuing such a claim, but does not address the argument as it was not briefed. Nevertheless, in analyzing the plaintiff's claims the *Springer* court highlighted the confusion among the circuits on how to handle these claims.

In *Shaul v. Cherry Valley-Springfield Central School District*, 363 F.3d 177, 179 (2d Cir. 2004), the

Second Circuit held that defendants' failure to return property did "not, by itself, state a separate Fourth Amendment claim of unreasonable seizure." The Second Circuit in *Shaul* further clarified that "[t]o the extent the Constitution affords Shaul any right with respect to a government agency's retention of lawfully seized property, it would appear to be procedural due process." The Second Circuit echoes the position of the Tenth Circuit.

Lee v. City of Chicago, 330 F.3d 456 (7th Cir. 2003) contains a similar issue. In *Lee*, the City of Chicago seized Plaintiff's car. This seizure was uncontestably valid originally. Nevertheless, after searching the car and completing the seizure, the car was not returned to Plaintiff without the payment of a fee. Furthermore, the car was damaged by the City, and Plaintiff was not compensated. After a lengthy examination of the Fourth Amendment considerations, the Seventh Circuit concluded that:

> [T]he Fifth and Fourteenth Amendments' texts, histories, and judicial interpretations can better aid a court in balancing the competing interests at stake. *See, e.g.*, *Miller*, 774 F.2d at 195-96; *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1342-43 (9th Cir. 1977)(finding city's practice of establishing possessory lien for towing and storage fees without opportunity for hearing deprived owners of due process). Indeed, Lee raises a substantive-due-

> process challenge here, and we address it below. For all the reasons discussed, we believe this is a better approach." *Id.* at 466.

Plaintiff's Fifth Amendment case was dismissed for failing to properly state his claim, but the Court agreed that the Fifth Amendment remains the correct vehicle for such a claim. Judge Wood's concurrence correctly highlights the issue in Petitioners' view, "[t]aking the Fourth and Fifth Amendment theories one at a time gives rise to a risk that we might reject each one in turn, thinking that the other would remain available to a proper plaintiff." *Id.* at 472. This confusion is exactly why this Court must act and provide needed clarity to the issue.

On the other hand, the D.C. Circuit Court of Appeals takes the opposite approach. *Asinor v. District of Columbia*, 467 U.S. App. D.C. 524, 111 F.4th 1249 (2024). It creates a standard, requiring that the continued retention of property after a valid seizure be reasonable. The court goes on to deny that the Fifth Amendment is the correct vehicle for recovery. The Concurrence elaborates on the confusion created by the circuit split:

> Five circuits – the First, Second, Sixth, Seventh and Eleventh – have held in precedential opinions that the Fourth Amendment does not support a claim for the government's retention of legally seized property. *Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017);

> *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004); *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999); *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003); *Case v. Eslinger*, 555 F.3d 1317, 1330 (11th Cir. 2009). Only the Ninth Circuit disagrees. *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017). Granted, we should hesitate before rejecting a robust consensus from our sister circuits but here, I believe, their reasoning lacks the power to persuade because they fail to discuss the key Supreme Court precedent, *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

Id. at 1261-62. The D.C. Circuit's position, highlights the split amongst the circuits on this issue.

As mentioned above, the 9th Circuit agrees with the D.C. Circuit. In *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017), the court similarly invokes the Fourth Amendment:

> The Fourth Amendment doesn't become irrelevant once an initial seizure has run its course. *See Jacobsen*, 466 U.S. at 124 & n.25; *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012); see also *Manuel v. City of Joliet*, 137 S. Ct. 911,

> 914, 920, 197 L. Ed. 2d 312 (2017) (holding that the Fourth Amendment governed the entirety of plaintiff's 48-day detention). A seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force. Thereafter, the government must cease the seizure or secure a new justification. Appellees have provided no justification here.

The 9th Circuit believes the Fourth Amendment to be the appropriate method to deal with unlawful retention of a seizure.

The 4th Circuit's position on this issue was elusive to some of the courts considering this issue, but Petitioners would contend that it also holds that the Fourth Amendment is the appropriate vehicle for recovery in *Mom's, Inc. v. Willman*, 109 F. App'x 629, 637 (4th Cir. 2004). The court held that "[t]he Fourth Amendment regulates all such interference, and not merely the initial acquisition of possession."

Finally, the 3rd Circuit rounds out the 4th Amendment cluster of circuits in *Honda Lease Tr. v. Malanga's Auto.*, 152 F.4th 477, (3d Cir. 2025). It begins its analysis by acknowledging that the question of "[w]hether the prolonged detention of legally seized property implicates the Fourth Amendment is an issue that has divided our sister circuits." *Id.* at 489. The Third Circuit goes on to agree with the Ninth and D.C. Circuits in its holding that "when the government seizes property, the Fourth

Amendment requires that its initial seizure and continued retention be reasonable." *Id.*

Cases have continued to arise on this issue. For example, the United States District Court for the District of Colorado in *Hicks v. City & Cnty. of Denver*, Civil Action No. 22-cv-01136-CNS-JPO, 2025 LX 155507, at *12 (D. Colo. Apr. 4, 2025) held as follows:

> [I]n cases that "involve both the seizure and detention of personal property," courts are to "analyze the propriety of the initial seizure by police under the Fourth Amendment," whereas the "ultimate disposition of the property [must] comply with the protections of procedural due process." Id. at 93 (citing *Winters v. Bd. of Cnty. Comm'rs*, 4 F.3d 848, 853, 856 (10th Cir.1993), and *Kripp v. Luton*, 466 F.3d 1171, 1173 (10th Cir.2006) (distinguishing Fourth Amendment claim regarding illegal search and seizure from claim alleging deprivation of property in forfeiture process, which was "essentially a Fifth Amendment due process claim"))

This case reaffirmed the Tenth Circuit's position on the issue, deeming the Fifth Amendment the correct constitutional vehicle for these claims, but makes mention of the circuit split and would benefit from the Court's clarification.

For all of this confusion, there is an answer. As this Court knows, there is law surrounding the concept of an "illegal exaction." "An illegal exaction claim exists when 'the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Ecco Plains, LLC v. U.S.*, 728 F.3d 1190 (10th Cir. 2013) *citing Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed.Cir.1996).

To further expand, "[t]he classic illegal exaction claim is a tax refund suit alleging that taxes have been improperly collected or withheld by the government. *See e.g., City of Alexandria v. United States*, 737 F.2d 1022, 1028 (Fed. Cir. 1984). An illegal exaction involves a deprivation of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the Constitution." *Norman v. United States*, 429 F.3d 1081 (Fed. Cir. 2005).

This Court should affirm that Appellee's actions constitute an illegal exaction as prohibited in *Ecco Plains*, which reaffirms the 5th Amendment constitutional prohibition on the retention of property after the legal basis for taking that property has vanished. This Court should clarify and confirm that such takings are a violation of the 5th Amendment.

This court should clarify that a taking, which is initially compliant with a proper legal backing, is

unconstitutional if that legal backing is struck down and the property is not returned. It should further clarify that the taking in this suit is an illegal exaction as defined by this court, and the Tenth Circuit, on numerous occasions beforehand. By doing so, this Court would remedy the current six-four split among the circuits.

B. The Kansas Court of Appeals's holding is an incorrect interpretation of Federal law.

The Kansas Court of Appeals, and the Kansas Supreme Court by denying review, has set precedent in Kansas that is contrary to U.S. Supreme Court precedent. It is the position of courts in Kansas that taxation cannot amount to a taking. By extension, taxation cannot amount to a taking that is violative of the Constitution. This flies in the face of caselaw from across the country and needs correction from this Court. This error, among others, necessitates review.

In its examination of Petitioners' claim, the court contends that the assessment and taking of the property do not constitute a "taking" under the Fifth Amendment. In support of this position the Kansas Court of Appeals cites *Board of County Comm'rs v. Cashatt*, 23 Kan. App. 2d 532, 933 P.2d 167 (1997).

Petitioners are confused by this citation. *Cashatt* involves the valuation of a property for purposes of taxation. It has absolutely nothing to do with the taking of property. The Kansas Court of Appeals' position that such a case prohibits taxation from being considered a taking, ignores the explicit

rulings of the United States Supreme Court in *Norman*, *Ecco Plains*, and *Aerolineas Argentinas*.

In this case, property was taken from Petitioners pursuant to a tax assessment. That property was then retained when that assessment was struck down by the Kansas Board of Tax Appeals and the Kansas Court of Appeals. This is a textbook illegal exaction case, a legal principle that courts in Kansas do not believe exists. The Kansas Court of Appeals and Kansas Supreme Court said taxation cannot constitute a Fifth Amendment violation. Petitioners plead for correction from this Court.

Courts in Kansas have essentially overridden Supreme Court precedent establishing the concept of an “illegal exaction.” This conflict with precedent must be remedied.

VII. Conclusion

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the Kansas Court of Appeals.

Respectfully submitted,

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