No. _____

# In the Supreme Court of the United States

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL AND MICHIGAN DEPARTMENT OF TREASURY, PETITIONERS

v.

FEDERAL HOUSING FINANCE AGENCY, FEDERAL NATIONAL MORTGAGE ASSOCIATION, AND FEDERAL HOME LOAN MORTGAGE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the federal statutes that exempt Fannie Mae, Freddie Mac, and the Federal Housing Finance Agency from "all taxation" also excuse these entities from paying so-called privilege taxes, as in this case, a charge to record a real-property transfer.

## PARTIES TO THE PROCEEDING

Petitioners in this case are the Michigan Department of Treasury and the Michigan Department of Attorney General. The County of Oakland and Andrew E. Meisner (12-2135) as well as and Genesee County and Deborah Cherry (12-2136) were plaintiffs appellees below. Respondents are the Federal National Mortgage Association (Fannie Mae), the Federal Home Mortgage Loan Association (Freddie Mac), and the Federal Housing Finance Authority (FHFA).

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## JURISDICTION

The Sixth Circuit entered its judgment on May 20, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves the tax-exemption clauses in three federal statutes: (1) Fannie Mae's tax exemption, found at 12 U.S.C. § 1723(a)(c)(2); (2) Freddie Mac's tax exemption, 12 U.S.C. § 1452(e); and (3) the FHFA's tax exemption, 12 U.S.C. § 4617(j)(2).

In specific, all three Respondents are separately exempt from all state and local taxation. Fannie Mae's charter provides:

> The Corporation, including its franchise, capital, reserves, surplus mortgages or other security holdings, and income, shall be exempt from all taxation now or hereafter imposed by any State, . . . county, municipality, or local taxing authority, except that any real property of the corporation shall be subject to State, . . . county, municipal, or local taxation to the same extent as other real property is taxed.

12 U.S.C. § 1723(a)(c)(2).

Similarly, Freddie Mac's charter provides:

> The Corporation, including its franchise, activities, capital, reserves, surplus, and income, shall be exempt from all taxation now or hereafter imposed by any . . . State, county, municipal, or local taxation, except that real property of the Corporation shall be subject to State, . . . county, municipal, or local taxation to the same extent according to its value as other real property is taxed . . . .

12 U.S.C. § 1452(e).

Finally, the FHFA's charter provides:

> The Agency [as Conservator], including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any property of the Agency [as Conservator] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed . . . .

12 U.S.C. § 4617(j)(2).

Michigan law imposes a tax collectible by the county for the transfer of property that occurs in Michigan:

> Sec. 2. (1) There is imposed, in addition to all other taxes, a tax upon the following written

> instruments executed within this state when said instrument is recorded.
>
> (a) Contracts for the sale or exchange of real estate or any interest therein or any combination of the foregoing or any assignment or transfer thereof.

Mich. Comp. Law § 207.502.

Michigan law provides identical language in a parallel statute to allow the State also to impose this transfer tax:

> Sec. 2. (1) There is imposed, in addition to all other taxes, a tax upon the following written instruments executed within this state when the instrument is recorded:
>
> (a) Contracts for the sale or exchange of property or any interest in the property or any combination of sales or exchanges or any assignment or transfer of property or any interest in the property.

Mich. Comp. Law § 207.523.

The rate of the county transfer tax is 55 cents per $500.00 or 75 cents per $500 depending on the size of the county. Mich. Comp. Law § 207.504. Similarly, the state transfer tax is levied at the rate of $3.75 per $500 of the total valued of the property being transferred. Mich. Comp. Law § 207.525.

## INTRODUCTION

For more than a century, this Court has recognized that a federal exemption from "all taxation" does not excuse the exempted taxpayer from paying privilege taxes. *Plummer* v. *Coler*, 178 U.S. 115 (1900); accord, e.g., *United States* v. *Wells Fargo Bank*, 485 U.S. 351 (1988). Simply put, a privilege tax is a tax levied in exchange for a privilege of transacting business. These taxes are analogous to the fees imposed on the registration of a motor vehicle or on the use of a toll highway.

The issue here is whether Respondents Fannie Mae and Freddie Mac—each of which is putatively exempt from "all taxation"—must nevertheless pay a transfer tax, a state or local tax levied in exchange for the privilege of transferring property. Fannie and Freddie have apparently never contended that they are exempt from paying a motor-vehicle-registration fee or highway toll, but they argue that they do not have to pay a transfer tax.

The issue is critically important. As a result of the mortgage-foreclosure crisis, Fannie and Freddie, have transferred countless numbers of properties. Each transaction should have been subject to a transfer tax (amounting to less than 1% of the value of property transferred in Michigan). Yet while Fannie and Freddie pay the transfer tax in some jurisdictions, they refuse to do so in others, including Michigan. The result is a patchwork of tax collection and more than 50 pending lawsuits in which this issue is joined across the country.

The present suit is the first to be decided by a circuit court. But there is no need for further percolation. That is because the lower courts have been uniformly confused by this Court's decision in *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941), in which the Court held that a tax-exempt entity did not need to pay the North Dakota sales tax. But *Bismarck* is inapposite, because by its terms it involved a tax imposed directly on the person (like an income tax) rather than on the privilege the state provided. Yet all 16 federal courts save one have relied on *Bismarck* to hold Fannie and Freddie exempt from paying the transfer tax; and the one court that went the other way has now been reversed by the Sixth Circuit. Unless and until this Court clarifies what it meant in *Bismarck*, lower courts will continue depriving state and local governments of substantial tax revenues which they are legitimately owed.

The few million dollars at issue here represent mere peanuts to Fannie and Freddie, who are profiting billions each quarter since the United States bailout. But to the states and counties being deprived of the tax revenue Fannie and Freddie owe, this issue is a significant one. This is particularly so at a time when many state and local governments are dealing with budget crises as a result of the same collapse in the housing market which underlies Fannie's and Freddie's activities. Just as Fannie's and Freddie's employees cannot use a toll road without paying the accompanying fee, these entities cannot take advantage of the privilege of using a government's property-transfer system for free. The petition for a writ of certiorari should be granted.

## STATEMENT OF THE CASE

### A. Fannie Mae and Freddie Mac foreclosures in Michigan.

As a result of the foreclosure crisis, Fannie Mae and Freddie Mac began to acquire large amounts of foreclosed homes in Michigan and throughout the country. As these mortgages became delinquent, Fannie and Freddie foreclosed and eventually gained title to these foreclosed properties. But Fannie and Freddie are not in the business of holding property, so they attempted to sell these properties as quickly as possible.

Michigan law requires payment of a real estate transfer tax when property is sold for fair market value. See Mich. Comp. Laws § 207.501 *et seq*. (county transfer tax); § 207.521 *et seq*. (state transfer tax). Fannie's and Freddie's post-foreclosure sales would normally be subject to this tax. But they have decided not to pay the transfer tax in Michigan and numerous other states, asserting their tax-exemption statutes. This refusal became a significant issue during the foreclosure crisis when the number of foreclosed properties ballooned and property sales in Michigan (and elsewhere) rose accordingly.

### B. The difference between direct and indirect taxes, including income taxes, excise taxes, property taxes, and sales tax.

"[T]he Constitution recognizes the two great classes of direct and indirect taxes[.]" *Brushaber* v. *Union Pacific R. Co.*, 240 U.S. 1, 16 (1916). A direct tax is a tax demanded and collectible from the persons or property it is levied against. "Indirect

taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income." *Hylton* v. *United States*, 3 U.S. 171, 181 (1796). Such a tax is often added to the cost or price of the thing taxed, and ultimately the purchaser or consumer of the taxed thing pays the tax's value, even though the tax is collected from another party.

In a narrow, constitutional sense, direct taxes have long been defined as taxes on (1) property, taxes on the individual—often referred to as a "capitation tax," such as a "head tax" or "poll tax"—and (2) on income. This Court concluded that the 1894 federal income tax was a direct tax in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895). Congress later passed the Sixteenth Amendment to clarify that income taxes need not be apportioned, but that does not change this Court's analysis.

Indirect taxes exist in many forms, and can include duties, sales taxes, value-added taxes, and privilege taxes. But those types are examples, not limitations. As one commentator has noted:

> The founders understood indirect taxes, but not direct taxes, to be "shiftable." The burden was assumed to fall on the ultimate purchaser: even if the seller is legally obligated to remit the tax, the price paid will have the tax embedded in it. In contrast, direct taxes (subject to apportionment) are imposed directly on individuals who are expected to bear the burden of the taxes.

Erik M. Jensen, The Apportionment of "Direct Taxes," 97 Colum. L. Rev. 2334, 2404 (1997).

As a practical matter, even though not subject to Article I definitions, a state income tax is a direct tax on the taxpayer. See, e.g., Kolarik, *Untangling Substantial Nexus*, 64 Tax Law 851 (2012).

### B. Facts and Proceedings Below

Oakland County, Michigan, and Michigan's Treasurer brought suit in the United States District Court for the Eastern District of Michigan, alleging that Fannie and Freddie are subject to the Michigan state and county estate transfer taxes despite their federal tax exemptions.

The Oakland County Plaintiffs sought millions of dollars in unpaid transfer taxes. Pet. App. 23a. The Michigan Attorney General and Department of Treasury intervened to support the County. In turn, the FHFA intervened to support Fannie and Freddie.

Shortly after the initial case was filed, Genesee County, another county in Michigan, filed a proposed class action against the same defendants. The parties agreed to expedite the certification process, and all 83 Michigan counties save Oakland and Macomb joined in the second case. The same parties intervened, and since the issues were identical, the parties agreed to consolidate the cases.

All parties sought summary judgment. The sole issue for resolution was whether the exemption for Fannie Mae and Freddie Mac (as well as FHFA) from "all taxation" included Michigan's transfer tax. In ruling that Fannie and Freddie *were not* exempt from the transfer tax, the district court relied on this

Court's decision in *Wells Fargo*, 485 U.S. 351. Pet. App. 29a–33a.

*Wells Fargo* concluded that the phrase "'all taxation' had an understood meaning, and that it only applied to direct taxes, not excise taxes." Pet. App. 32a. The parties agreed that Michigan's real-estate transfer tax was an excise tax, i.e., "a tax imposed upon the performance of an act . . . or the enjoyment of a privilege." *Dooley* v. *City of Detroit*, 121 N.W.2d 724, 729 (Mich. 1963). See Pet. App. 27a ("The parties agree that the Transfer Taxes are excise taxes, not direct taxes").

Accordingly, the district court concluded that Fannie, Freddie, and FHFA were not exempt from Michigan's transfer tax. Fannie, Freddie, and FHFA argued that *Wells Fargo* did not apply because it dealt with a statutory tax exemption of *property*, while this case involved the statutory exemption of an *entity*. But the district court rejected this argument. Pet. App. 33a.

Fannie, Freddie, and FHFA appealed the district court's decision to the Sixth Circuit, which reversed and remanded with instructions to enter summary judgment for the defendants. In its opinion, the Court of Appeals reaffirmed that statutes should be enforced according to their plain language. Pet. App. 10a.

On this, the Sixth Circuit found that neither "all" nor "taxation" were defined, and the statutes were unambiguous. Therefore, the court concluded, the statutes' plain meaning should apply, i.e., "all taxation" means all taxation. Pet. App. 11a–12a.

Additionally, the court noted that Congress created a "carve out" from the exemption, allowing taxes on real property, but not transfer taxes. *Id.*

The Sixth Circuit declined to extend the *Wells Fargo* interpretation of "all taxation" to the case at bar, agreeing with Respondents that there was a material distinction between *Wells Fargo*, which dealt specifically with the exemption of *property* from taxation, and this case, which dealt with the exemption of an *entity*. Pet. App. 17a. Based on this property-entity distinction, the court determined that *Bismarck*, 314 U.S. 95, was controlling. *Bismarck* involved entity exemptions similar to the exemption statute in this case. Pet. App. 12a.

The panel concluded that *Bismarck* stands for the proposition that when Congress exempts an entity from "taxation" or "all taxation," its language should be interpreted broadly. Pet. App. 9. The court also questioned, why, if *Wells Fargo* in fact applied equally to property and entity statutory tax exemptions, the case failed to mention *Bismarck* or any of this Court's earlier entity exemption cases. Pet. App. 18a. Finally, the Sixth Circuit determined alternatively that the tax here was on Respondents and that the State's reading would render the tax exemption "somewhat absurd" by effectively only exempting them from personal property taxes. Pet. App. 18a–19a.

## REASONS FOR GRANTING THE PETITION

This Court should grant the writ for two reasons.

First, there is a substantial question about whether the Sixth Circuit improperly narrowed *Wells Fargo* and undermined this Court's historic analytic framework for evaluating taxes. Traditionally, this Court examines the "nature and effect" of the tax when considering a tax exemption. *Macallen Co*. v. *Massachusetts*, 279 U.S. 620, 626–27 (1929). Consistent with this principle, in a line of precedent dating back more than 100 years, this Court recognized that "certain privileges of ownership, such as the right to transfer the property . . . could be taxed" even where there was an exemption from "all" taxation. *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 355–56 (1988) (citing *Plummer* v. *Coler*, 178 U.S. 115 (1900)). In particular, the Sixth Circuit's decision is wrong because it failed to recognize the transfer tax as a privilege tax and thus failed to follow this Court's decisions in *Wells Fargo* and *Plummer*. The panel also overlooked that Fannie and Freddie can pay privilege taxes consistent with their tax exemptions.

Second, the issue presented has spread too many of the circuits and requires this Court's immediate review to prevent a significant revision to this Court's holding in *Wells Fargo* from occurring without this Court's approval. State and local governments should not experience a different result for transfer-tax liability incurred during the mortgage foreclosure crisis based on how quickly their litigation against Fannie and Freddie progressed through the circuits. This Court's immediate intervention is warranted.

## I. The conclusion that an exemption from "all taxation" shields Respondents from a tax on the privilege of transferring property requires limiting this Court's prior case law.

### A. This Court recognizes that the evaluation of a tax exemption begins with the "nature and effect" of the tax.

This Court long ago acknowledged that differences between taxes are "often very difficult to be expressed in words." *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U.S. 397, 413 (1904). So there has never been a precise test for distinguishing between types of taxes. See, e.g., *Bromley* v. *McCaughn*, 280 U.S. 124, 136 (1929) ("Whatever may be the precise line which sets off direct taxes from others, we need not now determine.") But in *Macallen Co.* v. *Massachusetts*, 279 U.S. 620 (1929), this Court recognized "a *duty* to consider [a tax's] nature and effect." *Id.* at 626–27 (emphasis added).

In *Macallen*, this Court considered whether a Massachusetts franchise tax could reach tax-exempt federal bonds. The state called the tax an "excise"—or privilege—tax. *Id.* at 622. This Court rejected the state's characterization of the tax, and held that it was an attempt to tax federal bonds:

> [N]either state courts nor legislatures, by giving the tax a particular name, or by using some form of words, *can take away our duty to consider its nature and effect.* And this Court must determine for itself by independent inquiry whether the tax here is what . . . it is declared to be, namely, an

> excise tax . . . or, *under the guise of that designation*, *is in substance and reality a tax on the income [from federal bonds*].

*Id*. at 625–26 (citations omitted; emphasis added). In considering whether a tax exemption bars a tax, then, the crucial "distinction . . . is between an attempt to tax the [tax-exempt] property . . . [and] a legitimate tax upon the privileges involved in the use thereof." *Id*. at 628.

### B. A tax on the privilege of transferring property is not a tax on persons or property.

The analysis in *Macallen* is predicated on the understanding of the difference between taxing the property itself and taxing the privilege of using the property. Since *Plummer*, this Court has consistently recognized that a tax can be *on* a privilege. While the matter of taxing a privilege was not new in 1900, *Plummer*—and its companion case, *Murdock* v. *Ward*, 178 U.S. 139 (1900)—marked the first time this Court had directly addressed it.

*Plummer* considered whether New York's estate tax could reach tax-exempt federal bonds when transferred under New York's estate laws. *Plummer*, 178 U.S. at 117. After an exhaustive review of state and federal precedent regarding privilege taxes, the Court concluded that New York could tax "the right to take property by will." *Id*. at 134. Most important, "the incidental fact that such property" consists of tax-exempt federal bonds "does not invalidate the tax." *Id*. The key was that the estate tax "is a tax not upon [tax-exempt] bonds," but rather was a tax on

"rights and privileges [of transfer] created and regulated by the State," and nothing more than "the price exacted by the State for the privilege." *Plummer*, 178 U.S. at 131, 135.

This reasoning provides that the tax on the privilege of inheriting property is also "not a tax *on* persons." Specifically, *Plummer* reasoned that the "effect of this [estate] tax is to take from the property a portion, or percentage of it, for the use of the State. . . . *It is not a tax on persons*." *Plummer*, 178 U.S. at 131 (emphasis added) (internal quotes omitted). This is just an extension of the concept that the tax is *on* the privilege.

The transfer privilege is a creature of state law. The *Plummer* Court noted that state law created and regulated the ability to transfer property by estate. *Id*. And state law also creates and regulates the privilege of transferring real property within its borders as a matter of state sovereignty. *United States* v. *Fox*, 84 U.S. 315 (1877) ("[T]he disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of Federal authority."). See also *United States* v. *Perkins*, 163 U.S. 625, 630 (1896).

### C. *Wells Fargo* reaffirms the rule that taxing a privilege does not violate a federal tax exemption.

In *Wells Fargo*, the United States sought to enforce its estate tax against housing project-related promissory notes, or "project notes," which a federal statute said were "exempt from *all* taxation" under 42 U.S.C. § 1437i(b)2 (emphasis added).

Recognizing the estate tax as a privilege tax and referencing *Plummer*, the *Wells Fargo* Court held that the exemption was irrelevant:

> Well before [this exemption] was passed, an exemption of property from all taxation had an understood meaning: the property was exempt from direct taxation, *but certain privileges of ownership*, *such as the right to transfer the property*, *could be taxed*. Underlying this doctrine is the distinction between an excise tax, which is levied upon the use or transfer of property even though it might be measured by the property's value, and a tax levied upon the property itself. The former has historically been permitted even where the latter has been constitutionally or statutorily forbidden.

*Wells Fargo*, 485 U.S. at 355–56 (emphasis added). So while the United States argued that § 1437i(b) meant that project notes could be transferred tax-free, the Court held that the statute "stands for exactly the opposite." *Id*. at 356.

### D. Michigan's transfer tax works exactly like the estate tax at issue in *Plummer*, one of the cases relied on in *Wells Fargo*.

Michigan's transfer tax works the same as New York's estate tax in *Plummer*. Each taxes a state-created privilege. Each tax reduces the value of property transferred as the state's price for the privilege of being able to transfer property in the state. And of course, a person pays the tax in each.

Examining Michigan's state transfer tax act confirms this point. Michigan law levies the transfer tax at $3.75 per $500 "of the total value of the property being transferred." Mich. Comp. Laws § 207.525(1). Section 522(g) defines "value" as "the current or fair market worth in terms of legal monetary exchange at the time of the transfer." Transfers for consideration of $100 or less are tax exempt. Mich. Comp. Laws § 207.526(1). And if there is a multi-part transaction, § 532(1) limits the tax "to the extent of new consideration given for the property." This is all substantially identical to *Plummer*'s estate tax, which only affected transfers of value, and took a percentage of that value, reducing the amount transferred. *Plummer*, 178 U.S. at 116–18. In each case, the state is essentially charging a price for allowing parties to use the transfer privilege.

Under Michigan's rules, the property transferred is subject to a tax on its value in exactly the same manner that the property transferred was subject to New York's estate tax in *Plummer*. In both cases, an actual person has to pay the tax, even though the tax itself was charged for the privilege of engaging in the

transaction. But the tax is taken from the value of the property transferred. Here, for example, Fannie and Freddie should receive a foreclosed property's sales price *less* the amount of the tax the State levies for the privilege of transferring real property in Michigan.

In sum, Michigan's transfer tax, like the estate tax in *Plummer*, is a tax on the value of the transferred property, charged in exchange for the privilege of transferring real property. *Plummer*, 178 U.S. at 132 ("[i]f a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."). Accord *Perkins*, 163 U.S. at 629–30. The transfer tax is no different than an estate tax and is like a fee for the privilege of vehicle registration or a fee for the privilege of driving on a toll road.

### E. The Sixth Circuit's decision here substantially constrains this Court's past precedent.

The Sixth Circuit's decision was predicated on one small and understandable mistake: that this Court's decision in *Wells Fargo* involved a tax on property rather than a tax on a person. This distinction was present in *Wells Fargo*, but this Court did not rely on that distinction as dispositive. But as a consequence of this decision, the Sixth Circuit was led to follow this Court's decision in *Bismarck*, thus blurring the point that the tax at issue here is a tax on the privilege of transferring property, not a direct tax on Fannie and Freddie.

### 1. The Sixth Circuit significantly limited the application of *Wells Fargo* in distinguishing it.

The district court below relied on this Court's decision in *Wells Fargo*, determining that precedent was "dispositive." Pet. App. 32a ("*Wells Fargo* is dispositive of Plaintiff's case. Like the exemption in *Wells Fargo*, the exemptions here exempt Defendants from 'all taxation.'") This analysis was based on the fact that the transfer tax at issue here was a privilege tax, just like the estate tax at issue in *Wells Fargo*. Pet. App. 32a.

The Sixth Circuit rejected this analysis, concluding that the tax exemption at issue in *Wells Fargo* was not relevant because the tax exemption at issue there was on property, not on an entity like Fannie or Freddie. Pet. App. 17a ("While it is true that *Wells Fargo* says that the phrase 'all taxation' had an understood meaning, contrary to plaintiffs' argument, that understood meaning applied to an "exemption of *property* from all taxation . . .," *Wells Fargo*, 485 U.S. at 355 (emphasis added), not an exemption of an entity.") It concluded that this point was controlling, particularly where the exemption from "all taxation" admitted no exception.

But the distinction on which the panel below relied was nowhere pivotal to the analysis for this Court in *Wells Fargo*. *Id*. at 355. This Court in *Wells Fargo* noted that the exemption at issue there was on property as opposed to a person or a business, but the Court attributed no significance to that fact. The Sixth Circuit's decision to apply a tax-on-the-property/tax-on-the-person analysis significantly

limits the universe of cases to which *Wells Fargo* applies: only property exemptions, not other kinds of exemptions.

This conclusion does not follow from *Wells Fargo*. The key point in *Wells Fargo* was not *how* the tax was assessed, but the fact that the tax was on the privilege of transferring property. *Wells Fargo*, 485 U.S. at 355. The same reasoning applies equally here. The Michigan transfer is a tax on the privilege of transferring property in Michigan.

Insofar as the Sixth Circuit relied on the plain statutory language "all taxation," this analysis conflicts directly with *Wells Fargo*. *Id*. at 355–56. The Sixth Circuit suggests that this Court in *Wells Fargo* determined that "all taxation" was a term of art and refused to give it its ordinary meaning. Not so. This Court, instead, determined that taxation on property is different than a privilege tax on the use of that property. The same is true here. Taxing Fannie or Freddie is different than a tax on their exercise of the privilege of transferring property in Michigan.

The panel below also relied on the fact that this Court did not address *Bismarck* in its *Wells Fargo* decision, looking to find a way to reconcile the decisions. But the proper distinction was that the tax at issue in *Bismarck* was not a tax on the exercise of a privilege but was on the business itself.

### 2. The *Bismarck* decision was not controlling because it did not involve privilege taxes.

Instead of following *Wells Fargo*, *Plummer* and the other privilege-tax cases, the Sixth Circuit followed *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941). But *Bismarck* and its predecessors dealt with taxes *on* persons or property, *not* taxes on the privilege of transferring property.

The *Bismarck* Court reversed a North Dakota Supreme Court decision construing the North Dakota sales tax as "imposed on retail sales." *Federal Land Bank* v. *Bismarck Lumber Co.*, 297 N.W. 42, 44 (N.D. 1941). A state justice dissented from the state supreme court's majority's holding, writing that the sales tax was "a tax laid directly *upon the Bank* as a purchaser within this state." *Bismarck*, 297 N.W. at 635 (emphasis added). This Court agreed with the dissenting state justice and held that "the sales tax is laid *upon* the purchaser" rather than as a tax for the privilege of engaging in the sale of goods. 314 U.S. at 99 (emphasis added). *Bismarck*, by its own terms, "cannot be distinguished" from an earlier case, *Federal Land Bank of New Orleans* v. *Crosland*, 261 U.S. 374 (1923), so it helps to consider *Crosland* as well. *Bismarck*, 314 U.S. at 103.

In *Crosland*, this Court held that the tax before it was a tax *on* property and *not* a privilege tax. The *Crosland* Court reversed a state Supreme Court decision construing Alabama's mortgage recording tax as "a privilege" tax. *Crosland* v. *Federal Land Bank*, 93 So. 7, 8 (Ala. 1922). One state justice also dissented from that decision, stating that the

*Crosland* tax "purports to be a 'privilege or license tax,' but it is a tax on the mortgage debt, and *is a property tax*." *Id*. at 14 (emphasis added).

This Court followed the dissenting state justice's lead, and concluded the tax was *on* mortgages. It concluded that Alabama had "levied a general tax *on* mortgages, and explained that "[t]he characterization of the act by the [state] Supreme Court . . . does not bind this Court." *Crosland*, 261 U.S. at 378–79 (emphasis added). Finally, this Court stated it did not matter who paid the tax, only what the tax was *on*: "The statute says that the lender must pay the tax, but whoever pays it[,] it is *a tax upon the mortgage* and that is what is forbidden by the law of the United States." *Id*. (emphasis added).

So *Crosland* involved a tax on property, and *Bismarck* involved a tax on persons. The proper way to harmonize *Wells Fargo* with *Bismarck* is to recognize that this Court did not need to discuss *Wells Fargo* or the other privilege tax cases because there were no privilege taxes at issue. Such a reading of *Bismarck* honors the analytic framework employed in *Wells Fargo*. In contrast, the Sixth Circuit's distinction curtails the breadth of *Wells Fargo* and contradicts its analysis. The Sixth Circuit's reliance on *Bismarck* was misplaced.

### 3. The Sixth Circuit wrongly concluded that the tax was on Fannie and Freddie, not on the privilege of transferring property.

The other significant reason the Sixth Circuit rejected the State's argument was its conclusion that "[t]hose statutes expressly state that the transfer taxes are laid directly on defendants." Pet. App. 18a, citing Mich. Comp. Laws § 207.502(2) ("The tax shall be upon the person who is the seller or grantor."); § 207.523(2) ("The person who is the seller or grantor of the property is liable for the tax imposed under this act."). This conclusion is predicated on a misunderstanding of privilege taxes.

There is always a person or business that pays the tax. This fact does not mean the tax is laid directly *on* the business who must remit the payment, and is not a tax levied on a privilege. In other words, who pays the tax does not matter as long as the tax is not on the tax-exempt item. The Sixth Circuit failed to examine the true "nature and effect" of the statute as required under *Macallen*, *Id.* 279 U.S. at 626–27. It is always the case that someone pays the tax. And here the transfer tax is not on the property nor is it on Fannie or Freddie; the tax is for the privilege of engaging in the real-property transfer. This point is illustrated by this Court's analysis in other cases, like *West* v. *Oklahoma Tax Commission*, 334 U.S. 717, 725 (1948), which is referenced by *Wells Fargo*. 485 U.S. at 355–56.

In *West*, this Court upheld a transfer tax on a Native American's estate even though the estate was "held in trust by the United States." 334 U.S. at 725. The United States argued that property titled in its name was exempt from "any form of state taxation." But the *West* Court held that the exemption did not affect privilege taxes on the *transfer* of that property. 334 U.S. at 726. Explaining why ownership of the property did not matter, the *West* Court stated that the tax was on the privilege of receiving the benefit:

> An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. . . . It is the transfer of these incidents, rather than the trust properties themselves, that is the subject of the inheritance tax in question.

*West*, 334 U.S. at 727.

Thus, even though the estate tax would burden the United States by "deplet[ing] the trust corpus and . . . creat[ing] lien difficulties," *West* held that "until Congress has . . . indicated . . . that *the transfer* be immune from the inheritance tax," the transfer was taxable. *West*, 334 U.S. at 727 (emphasis added). If Congress wanted to immunize the transfer privilege from taxation, Congress would have done so expressly.

## II. The issue is ripe for review.

The Sixth Circuit is the first federal appellate court to decide the issue presented. As noted below, there are more than 50 other pending cases in federal courts across the country against Fannie and Freddie. Pet. App. 9a n.5. At the time of decision, eleven district courts in six other circuits (D.C., Third, Fourth, Seventh, Eighth, and Eleventh) had reached a decision. See *Hager* v. *Fed. Nat. Mortg. Ass'n*, 882 F. Supp. 2d 107 (D.D.C. August 9, 2012); *Hertel* v. *Bank of America N.A.*, 2012 WL 4127869 (W.D. Mich. Sept. 18, 2012); *Nicolai* v. *Fed. Hous. Fin. Agency*, 2013 WL 899967 (M.D. Fla. Feb. 12, 2013); *Fannie Mae* v. *Hamer*, 2013 WL 591979 (N.D. Ill. Feb. 13, 2013); *DeKalb Cnty.* v. *Fed. Hous. Fin. Agency*, 3:12-cv-50230 (N.D. Ill. Feb. 14, 2013); *Delaware Cnty., Pa.* v. *FHFA*, No. 2:12-cv-4554 (E.D. Pa. Mar. 26, 2013); *Hennepin Cnty.* v. *Fannie Mae*, No. 12-cv-2075 (D. Minn. Mar. 27, 2013); *Vadnais* v. *Fannie Mae*, No. 12-cv-1598 (D. Minn. Mar. 27, 2013); *Montgomery Cnty., Md.* v. *Fed. Nat. Mortg. Ass'n*, 2013 WL 1832370, No. DKC 13-0066 (D. Md. Apr. 30, 2013); *Cape May Cnty., N.J.* v. *Fed. Nat'l Mortg. Ass'n*, No. 12-cv-4712 (D.N.J. Apr. 30, 2013). The case is pending in at least three circuit courts. See *Dist. of Columbia ex rel. Hager* v. *Fed. Nat'l Mortg. Ass'n*, No. 12-7095 (D.C. Cir.); *Dekalb County* v. *Fed. Housing Finance Agency*, (No. 13-1558) (7th Cir.); *State of Nev. ex rel. Hager* v. *Countrywide Home Loans Serv.*, L.P., No. 11-17491 (9th Cir.).

In the 12 weeks since this decision was rendered, at least seven other federal district courts have cited the Sixth Circuit decision in rejecting the claims of state and local governmentals that Fannie and

Freddie should be subject to taxes such as the ones at issue here. See *Com'rs of Bristol Co.* v. *Federal Nat. Mortg. Ass'n*, 2013 WL 4095021 (D. Mass. Aug. 9, 2013) (transfer tax); *Randolph Co., Ala.* v. *Fed. Nat. Mortg. Ass'n*, 2013 WL 3947614 (M.D. Ala. July 31, 2013) (transfer tax); *Board of Co. Com'rs of Kay Co., Okla.* v. *Fed. Hous. Fin. Agency*, 2013 WL 3841503 (D. D.C. Jul 26, 2013) (documentary tax); *Doggett* v. *Fed. Hous. Fin. Agency*, 2013 WL 2920388 (M.D. Fla. June 13, 2013) (documentary tax); *McNulty* v. *Fed. Hous. Fin. Agency*, 2013 WL 3147641 (M.D. Pa. June 19, 2013) (transfer tax); *City of Providence* v. *Federal Nat. Mortg. Ass'n*, 2013 WL 3816429, *5 (D. R.I. July 24, 2013) (transfer taxes); and *Milwaukee Co.* v. *Fed. Nat. Mortg. Ass'n*, 2013 WL 3490899 (E.D. Wis. Jul 10, 2013) (transfer tax).

The trajectory of this litigation is clear: until this Court steps in and clarifies *Wells Fargo* and *Bismarck*, lower courts will continue ruling against state and local governments. And a grant of certiorari a year or two from now, after the issue has percolated, will mean that some state and local governments will receive the benefit of this Court's ruling retroactively, while other governments will not. Given the substantial transfer-tax liability generated during the housing crisis, that is an unfair burden for the governments who, by sheer coincidence, had their cases decided more expediently by circuit courts. Accordingly, Michigan respectfully requests that this Court grant the petition and reaffirm that a federal tax exemption does not exempt an entity from a transfer tax levied in exchange for the privilege of participating in a government-regulated activity.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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