No. ____

In The
Supreme Court of the United States

GERALDINE TYLER, on behalf of herself and all others similarly situated,
Petitioner,

v.

HENNEPIN COUNTY, and
MARK V. CHAPIN, Auditor-Treasurer,
in his official capacity,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Hennepin County confiscated 93-year-old Geraldine Tyler's former home as payment for approximately $15,000 in property taxes, penalties, interest, and costs. The County sold the home for $40,000, and, consistent with a Minnesota forfeiture statute, kept all proceeds, including the $25,000 that exceeded Tyler's debt as a windfall for the public. In all states, municipalities may take real property and sell it to collect payment for property tax debts. Most states allow the government to keep only as much as it is owed; any surplus proceeds after collecting the debt belong to the former owner. But in Minnesota and a dozen other states, local governments take absolute title, extinguishing the owner's equity in exchange only for cancelling a smaller tax debt, code enforcement fine, or debt to government agencies.

The questions presented are:

1. Whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Takings Clause?

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?

STATEMENT OF RELATED PROCEEDINGS

Tyler v. Hennepin County, No. 20-3730, U.S. Court of Appeals for the Eighth Circuit (Feb. 16, 2022).

Tyler v. Hennepin County, No. 20-CV-0889 (PJS/BRT), U.S. District Court for the District of Minnesota (Dec. 4, 2022).

Tyler v. State of Minnesota, No. 62-cv-19-6012, Minnesota's Second Judicial District (removed April 7, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Geraldine Tyler respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Eighth Circuit is published at *Tyler v. Hennepin County*, 26 F.4th 789 (8th Cir. 2022), reproduced in Petitioner's Appendix (App.1a) The district court's opinion dismissing the claims raised here (App.11a) is published at *Tyler v. Hennepin County*, 505 F.Supp.3d 879 (D. Minn. 2020). The Eighth Circuit's order denying rehearing is reproduced at App.50a.

JURISDICTION

On March 24, 2022, the Eighth Circuit Court of Appeals denied a timely motion for rehearing *en banc*. On May 13, 2022, this Court granted an application for an extension of time to file a petition for writ of certiorari, to and including August 10, 2022. On July 28, 2022, the Court further extended the deadline to August 19, 2022. This case arises under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation."

The Eighth Amendment to the U.S. Constitution provides, "Excessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part, "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."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The relevant portions of the Minnesota statutes at issue in this case are reproduced in the Appendix at App.52a.

RULE 29.4(c) STATEMENT

28 U.S.C. § 2403(b), which allows a State to intervene to defend the constitutionality of a state statute, may apply.

INTRODUCTION

This case presents important questions concerning the application of the Takings and

Excessive Fines Clauses to foreclosure actions in which local governments take more private property than necessary to pay a tax debt to the government. The issues split state and federal courts, and the court below departed from this Court's precedent in deciding them.

In 14 states, statutes permit various agencies to satisfy delinquent property taxes, utility bills, or other debts to government associated with real property by confiscating all title and "any equity [the owner] has accrued in the [subject] property, no matter how small the amount of taxes due or how large the amount of equity." *Tallage Lincoln v. Williams*, 485 Mass. 449, 453 (2020); *see infra* Section IV. The term "equity" in this context means the value of the property that exceeds all encumbering debts. *See Crane v. Commissioner*, 331 U.S. 1, 7 (1947).

The nationwide consequences of this practice are shocking, depriving thousands of vulnerable and often blameless owners of their entire interest in homes and land over debts as small as $8. *See, e.g.*, *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 437 (Mich. 2020) (county confiscated a middle-class home as payment for an $8 property tax debt). Individually, the loss for struggling property owners can be devastating; collectively, they lose hundreds of millions of dollars in equity every year. *See infra,* Section III.

Here, Tyler owed approximately $2,300 in delinquent property taxes, and nearly $12,700 in interest, penalties, and costs associated with her debt. The County foreclosed on her home and sold it for $40,000, collecting the debt, all interest and penalties, plus the surplus $25,000 as a windfall. *See* App.5a. Tyler does not contest the County's right to foreclose

to collect the debt she owed; she objects to it taking the remainder of her property and leaving her with nothing.

The Takings Clause or Excessive Fines Clause can and should provide a remedy for Tyler. The County unconstitutionally kept money to which it is not entitled. The moment a tax collector collects what he is owed, his power to take property is exhausted. *See, e.g., Rafaeli,* 505 Mich. at 437. Thus, the law traditionally imposes a duty on government when collecting taxes or a debt to sell seized property fairly and refund to the former owner any surplus profits after recovering what it is owed and paying any other liens. *See Martin v. Snowden*, 59 Va. 100, 137 (1868), *aff'd sub nom. Bennett v. Hunter*, 76 U.S. 326 (1869) (describing the practice in England, the colonies, and early America). By abandoning this traditional duty, and instead taking a windfall at Tyler's expense, Hennepin County effected an uncompensated taking or excessive fine. In holding otherwise, the courts below deepened a split among federal and state high courts concerning the Takings Clause and undermined this Court's takings and excessive fines precedents.

This Court should grant the petition.

STATEMENT OF THE CASE

A. Hennepin County takes property worth at least $40,000 as payment for a $25,000 debt

Ninety-three-year-old petitioner Geraldine Tyler purchased her home, a condominium at 3600 Penn Avenue North, in Minneapolis in 1999. App.2a. For a decade she lived alone at the property and paid her property taxes. *See id.* In 2010, after a frightening

confrontation with a neighbor, she became concerned about her safety and abruptly moved, renting an apartment in a senior community in a safer neighborhood. *Id.* She failed to pay her taxes on the Penn Avenue condo in subsequent years. *Id.*

In 2015, the County seized her condo for her delinquent property taxes, foreclosed on it, and sold it for $40,000. App.4a. Tyler owed approximately $2,300 in property taxes, plus $12,700 in interest, penalties, and costs.[1] But the County kept the entire $40,000 for itself, returning none of the surplus to Tyler, pursuant to Minnesota's property tax statutes. App.4a–5a; *see* Minn. Stat. §§ 280.29, 280.41, 282.08. The $25,000 surplus is above and beyond the significant penalties, interest, and costs imposed by law. Penalties on delinquent taxes increase the debt by roughly 4–8% within a few weeks of delinquency, and then an additional 1% per month until the end of the calendar year. Minn. Stat. § 279.01 subd.1. Subsequent delinquency is charged interest of 10–28% on the outstanding taxes and penalties. Minn. Stat. § 279.03 subd. 1a. Counties also assess a "service fee" that includes all costs associated with collecting the debt

[1] Because Tyler's case was dismissed before she could conduct discovery, the trial court record does not reflect how much of the $15,000 was penalties, interest, and fees, but public records indicate that only $2,311 was property taxes. Carol Park & David J. Deerson, *Looking Up*, at Section 1, n.1, Pacific Legal Foundation (2021) at https://pacificlegal.org/minnesota-home-equity-theft/#section1. This sum is consistent with the annual tax data listed by the real estate website Zillow. *See* Zillow, *Home Details*, https://www.zillow.com/homedetails/3600-Penn-Ave-N-APT-105-Minneapolis-MN-55412/1720054_zpid/ (visited Aug. 4, 2022).

and the County is entitled to collect that fee with interest. Minn. Stat. § 279.092.

In most states, when government sells tax-delinquent property, it uses the proceeds to pay the debt and costs associated with the sale and refunds any surplus proceeds to the former owner.[2] This protection for debtors' equity is consistent with modern and historical debt collection procedures used in other contexts like mortgage foreclosures and executions on judgment. *See, e.g.*, Minn. Stat. § 550.20 ("No more shall be sold than is sufficient to satisfy the execution"); Minn. Stat. § 580.10 (surplus proceeds from mortgage foreclosure after paying debts returned to former owner); *Brown v. Crookston Agric. Ass'n*, 34 Minn. 545 (1886). But when it comes to collecting property taxes and some other government debts that attach to real estate, Minnesota's localities take absolute title, keeping all proceeds from a sale for various governmental entities, no matter how much the windfall exceeds the amount owed. *See* App.4a.; Minn. Stat. §§ 280.29; 284.251, subd. 5; 429.101 (may treat failure to shovel snow, weed abatement on private property, etc., as a special assessment);

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[2] Jenna Christine Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real. Prop. Tr. & Est. L. J. 93, 99–103 & n.38 (2019) (majority of states "require the foreclosing government unit to return surplus funds from a property tax foreclosure sale to the previous property owner"). *See, e.g.*, Ark. Code § 26-37-209; Conn. Gen. Stat. § 12-157(h); Del. Code tit. 9 § 879; Fla. Stat. §§ 197.522, 197.582; Ga. Code Ann. § 48-4-5; Idaho Code § 31-608(2)(b); Kan. Stat. § 79-2803; Ky. Rev. Stat. § 426.500; Mo. Rev. Stat. § 140.340; Nev. Rev. Stat. § 361.610.5; 72 Pa. Cons. Stat. Ann. § 1301.19; 72 Pa. Cons. Stat. Ann. § 1301.2; S.C. Code Ann. § 12-51-130; Tenn. Code Ann. § 67-5-2702; Va. Code Ann. § 58.1-3967; Wash. Rev. Code Ann. § 84.64.080; Wyo. Stat. § 39-13-108(d)(4).

429.061 subd. 3 (may collect special assessment in same manner as other municipal taxes); *see, e.g.*, City of Minneapolis Code of Ordinances, § 445.35 (failure to shovel snow off sidewalk treated as special assessment).

B. Tyler files lawsuit challenging the retention of the excess $25,000

In 2019, Tyler filed a putative class action alleging that by taking more than she and other property owners owed in taxes, penalties, interest, and costs, the County effected uncompensated takings, imposed excessive fines, and violated substantive due process under both the federal and state constitutions and 42 U.S.C. § 1983.[3] App.25a–26a. The County removed the case to federal court and moved to dismiss it for failure to state a claim. App.16a. On December 4, 2020, the United States District Court for the District of Minnesota dismissed all claims on that basis. App.49a.

On appeal, the Eighth Circuit affirmed dismissal. It rejected Tyler's argument that the Takings Clause protects her property interest in the surplus value of her property, which was recognized by the common law, as reflected in cases like *Farnham v. Jones*, 32 Minn. 7 (1884). *See* App.7a. The 1881 statute at issue in *Farnham* contained "no provisions in respect to the disposition of the surplus proceeds of the sale," but the court viewed this silence as "immaterial," because "the right to the surplus exists independently of such statutory provision." *Id.* at 11–12; App.8a. The Eighth Circuit held that "any common-law right to surplus

[3] She also alleged in the alternative that the County unjustly enriched itself by reaping windfalls at property owners' expense.

equity recognized in *Farnham* has been abrogated by statute," App.8a, and consequently dismissed the takings claim. App.7a.

The court based its decision on a questionable interpretation of dicta from this Court's opinion in *Nelson v. City of New York*, 352 U.S. 103, 110 (1956). App.10a ("*Nelson*'s reasoning on the Takings Clause controls this case."). In *Nelson*, the City of New York foreclosed on two properties to satisfy unpaid water bills. 352 U.S. at 105. The City foreclosed, kept one property and sold the other, retaining a windfall for the public. *Id.* at 106. The former owners alleged procedural due process and equal protection violations. *Id.* at 109. In their reply brief on the merits, they suggested for the first time that the City took property without just compensation. *Id.* The court denied the due process and equal protection claims and then in dicta asserted that the takings argument also failed because the City code gave the owners an opportunity to claim the surplus proceeds, which the owners failed to request. *Id.* at 109–110 (no takings claim because of "the absence of timely action to . . . recover[ ] any surplus"). Unlike New York City, however, Minnesota law gave Tyler no opportunity to claim the surplus proceeds from the sale of her property. App.10a. Nevertheless, the Eighth Circuit called this a "modest factual difference" that was "immaterial." App.9a–10a.

The court then adopted in full the district court analysis rejecting Tyler's federal excessive fines claim. App.10a ("We agree with the district court's well-reasoned order and affirm the dismissal of these counts on the basis of that opinion. *See Tyler v. Hennepin Cnty.*, 505 F.Supp.3d 879, 895–99 (D. Minn.

2020).”). Even though the County conceded that the forfeiture is at least partially “a deterrent to those taxpayers considering tax delinquency,” App.48a, the court held that it was not a punishment and therefore not a “fine” within the ambit of the Excessive Fines Clause. App.44a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD SETTLE THE QUESTION OF WHETHER JUST COMPENSATION IS DUE WHEN GOVERNMENT TAKES PROPERTY TO COLLECT A DEBT TO ITSELF AND KEEPS MORE THAN IT IS OWED

The Fifth Amendment imposes an obligation on the government to pay just compensation when it takes private property for a public use, *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071 (2021). The Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Here, the County foreclosed on Tyler’s home to collect delinquent taxes and related interest, penalties, and costs. In doing so, however, it shifted a public burden onto her by keeping the entire home for itself, worth far more than Tyler owed, as a windfall for the public. No one disputes that government may lawfully seize property to collect a debt. But when it takes more than what it is owed, it violates the Takings Clause. *See, e.g., Bogie v. Town of Barnet*, 270 A.2d 898, 900, 903 (Vt. 1970). That’s because the power to collect a debt is “exhausted the moment the

tax was collected," Thomas M. Cooley, *A Treatise on the Law of Taxation* 343 (1876), and retaining the surplus property invades a protected property interest of the debtor.

Under the Eighth Circuit's reasoning, however, even the smallest tax debt entitles the government to seize real estate and confiscate its entire value, including all of the debtor's equity interest. ("Equity" is the value of property that exceeds encumbering liens. *Crane*, 331 U.S. at 7.). This flouts historical tradition, the fairness and justice embodied by the Just Compensation Clause, and principles established by this Court.

A well-documented history of tax collection in the United States and England confirms that debtors have a discrete private property interest in the equity of property taken to pay a tax. *See infra* Section I.A; *cf. Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2428 (2022) (interpreting Establishment Clause based on "historical practices and understandings") (citation omitted); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2130 (2022) (interpreting Second Amendment in light of "the Nation's historical tradition of firearm regulation"). Moreover, this Court's takings decisions show that a property interest does not simply "vanish[ ] into thin air" because the government has a "paramount lien" in the property. *Armstrong*, 364 U.S. at 44–45, 48. Nor can the government "by *ipse dixit* . . . transform private property into public property without compensation simply by legislatively abrogating the traditional rule." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998) (internal quote omitted).

A. Taking more property than necessary to pay a tax debt violates deeply rooted property rights

Debtors have a deeply rooted right to be paid for their equity in property seized to pay a debt. *See, e.g.*, William Sharp McKechnie, Magna Carta, A Commentary on the Great Charter of King John 322–23 (2d ed. 1914) (Magna Carta limited how much property could be taken to satisfy a debt). While government may seize property to collect a tax, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 281 (1855), it exceeds its legitimate authority to collect the debt when it takes more than what is owed. *E.g., Tiernan v. Wilson*, 6 John 411, 414 (N.Y. 1822); Cooley, *supra* at 343.

Accordingly, common law principles dictate that when foreclosed property is sold, "[a]ny surplus [proceeds] remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner." 72 Am. Jur. 2d *State and Local Taxation* § 911 (1974). This is consistent with English law, as Blackstone explained: officials that seize property for delinquent taxes "are bound, by an implied contract in law" to return it if the debt is paid before sale, or to sell it and "render back the overplus." 2 William Blackstone, Commentaries on The Laws of England *452.

At the founding, and the adoption of the Fourteenth Amendment, the states broadly recognized that the taxing power justified taking only as much as was owed. *See Rafaeli*, 505 Mich. at 462–67 (tracing the long and consistent history of this protection). To protect the owner's equity interest, the tax collectors sold the property and refunded the

surplus to the former owner, or the law limited government to take only as much property as needed to satisfy the debt. *Id.*; *Douglas v. Roper*, No. 1200503, __ So. 3d __, 2022 WL 2286417, at *12 (Ala. June 24, 2022; *Martin*, 59 Va. at 136 (noting history of tax collection up to 1868); *Tiernan*, 6 John at 414; Cooley, *supra* 343 (all jurisdictions known to author protected debtors in one of these manners).

When tax collectors seized more than necessary or kept a windfall from the sale of the property, debtors could bring actions in trespass or conversion or otherwise seek to void the sale. For example, in *Seekins v. Goodale*, 61 Me. 400, 400 (1873), a tax collector who seized and sold more cloth than necessary to pay a debt was liable for trespass for the excess and had to pay fair market value to the debtor for the extra cloths that he sold. *See also Cone v. Forest*, 126 Mass. 97, 101 (1879) (tax collector liable for conversion); *cf. Knick v. Township of Scott*, 139 S.Ct. 2162, 2176 (2019) (takings claims originate in trespass). State courts historically rejected statutes that purported to authorize government to forfeit more property than necessary or to take a windfall at the expense of a debtor, finding such confiscations to be unconstitutional. *See Griffin v. Mixon*, 38 Miss. 424, 451–52 (1860) (taking of private property without just compensation); *Martin*, 59 Va. at 142–43, *aff'd on other grounds sub nom. Bennett v. Hunter*, 76 U.S. 326; *King v. Hatfield*, 130 F. 564, 579, 581–84 (C.C.D. W. Va. 1900) (statute unconstitutional because it lacked "provision for a sale thereof and the return of the proceeds").

Minnesota, too, followed the common law. When the legislature passed a statute in 1862 that said

property would be "forfeited to the State" for failure to pay taxes, the Minnesota Supreme Court said that any attempt to take more than the debt owed would be unconstitutional:

> Few questions are better settled, than that the Legislature cannot thus deprive a person of his property or rights. If the Legislature by this section attempted to do more than confer on the State the power to take such further steps as were necessary in the collection of the delinquent taxes, or in the perfection of tax titles, then it overstepped the limits which the constitution has fixed to its authority.

Baker v. Kelley, 11 Minn. 480, 488, 499 (1866). The principle was affirmed in *Farnham*, when the court held "immaterial" the fact that a tax collection statute was silent on whether a debtor was entitled to collect surplus proceeds from the sale of his property because "the right to the surplus exists independently of such statutory provision." 32 Minn. at 13. And, in *Burnquist v. Flach*, 213 Minn. 353, 359 (1942), the court again affirmed these principles, stating that "[i]t is not the policy of the state, nor should it be, to deprive owners of real estate of their interest therein on account of tax delinquency." *Id.* at 356 (internal quote omitted). The case involved a state agency that took the property for a highway by eminent domain, *after* the property had been foreclosed on by a county for tax delinquency. *Id.* at 355. The question arose whether just compensation should go to the former owner, even though title had been transferred by the tax forfeiture to the county. The court explained: "True, the title to the property is gone, but in its place

is its *value*, the *price* that the state highway department paid for it; i.e., the money stands in the place of the property itself." *Id.* at 809. The court ordered the surplus proceeds—the value of the property taken above and beyond the tax debt—to be returned to the former owner, commenting that any "unprejudiced mind" would recognize that "justice" demanded that result. *Id.*

While this Court has not yet decided whether a legislature can extinguish without compensation a debtor's right in the equity she holds in real property, it has repeatedly resisted federal attempts to confiscate more property than necessary to collect a tax debt. In *Bennett*, 76 U.S. at 335, 337, the Court considered the constitutionality of a Civil War-era property tax on landowners that was partly aimed at "suppress[ing] rebellion" in Confederate states and was applied to forfeit title and all equity in tax-delinquent property. This Court avoided the constitutional question by interpreting the statute's term "forfeit" to avoid such a harsh result, and allowing the debtor to redeem the property for taxes due plus costs at least up until sale to a third party. *Id.*

Then in *United States v. Taylor*, 104 U.S. 216, 219 (1881), this Court further interpreted the same congressional act to require the government to follow the traditional duty of refunding surplus proceeds when land was taken to pay tax debts. Relying on *Bennett*, the Court limited potentially confiscatory language regarding the proceeds of such sales to hold the former owner was entitled to the surplus proceeds. *Id.* at 219–21. Moreover, the statute of limitations did not bar the claim because a "good faith" construction

of the statute requires the government to act as trustee in selling and holding the funds for the former owner indefinitely. *Id.* at 221–22.

Lastly, building upon *Bennett* and *Taylor*, this Court held in *United States v. Lawton* that "[t]o withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and . . . take his property for public use without just compensation." 110 U.S. 146, 150 (1884). Later, in *Nelson*, this Court noted that *Lawton* did not answer the constitutional question of whether withholding surplus proceeds effects a taking because the statute in *Lawton* required a return of the surplus. *Nelson*, 352 U.S. at 110. Nevertheless, *Bennett*, *Taylor*, and *Lawton* affirmed that debtors have a protected property interest in their equity and rejected government attempts to confiscate it.

B. The decision below conflicts with this Court's takings decisions

The Eighth Circuit did not dispute that Minnesota's common law recognized debtors' rights in their equity. App.6a–7a. But the panel held that the property right was "abrogated" by statute. App.7a. The panel failed to address decisions of this Court that have found a taking of analogous property interests like mortgages, money, and interest on money, despite statutes that purport to authorize their confiscation. *See, e.g., Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 601–02 (1935) (Takings Clause protects "substantive rights in specific property," including the right to collect on a debt in a timely manner by seizing and selling that property); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 613 (2013) (Takings Clause protects money and

"a right to receive money that is secured by a particular piece of property"); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 168 (1998) (accrued interest); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (per se taking where government takes all economically viable uses of property).

Government may not use legislation to "transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 158–59, 164 (1980). *Webb's* held that government violated the Takings Clause by keeping the interest earned on private funds deposited with a court. The Court explained that the Takings Clause cannot be avoided by statutorily redefining private funds as public funds: "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. Even while temporarily foregoing possession, the depositors retained their ownership of the principal property including the established right to interest generated by principal. *Id.* ("The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.").

Likewise in *Phillips*, 524 U.S. at 167, the Court rejected Texas's attempt to abrogate the common law property right that depositors had in the interest accruing on their money. Like Tyler here, the Court relied upon the common law in England, early America, and the law of eighteen other states for its conclusion that the depositors held a traditionally protected property interest. *Id.* at 165 and n.5. The

Court concluded that "at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests." *Id.* at 167.

Minnesota law recognizes home equity as private property in many contexts. *See, e.g.,* Minn. Stat. § 580.10 (surplus proceeds from mortgage foreclosure after paying debts returned to former owner); Minn. Stat. § 550.20 ("No more shall be sold than is sufficient to satisfy the execution"); Minn. Stat. § 336.9-608; *Batsell v. Batsell*, 410 N.W.2d 14, 15 (Minn. Ct. App. 1987) (recognizing equity as proper subject of marital property division). Moreover, when property is seized and sold to collect a debt in non-governmental contexts, the proceeds are treated as equivalent to the real property itself. *See* Restatement (Third) of Property (Mortgages) § 7.4 (1997) ("The surplus stands in the place of the foreclosed real estate, and the liens and interests that previously attached to the real estate now attach to the surplus."); *Brown*, 34 Minn. 545. Thus, a law that purports to convert equity in tax-indebted properties into public property via tax foreclosure violates the Takings Clause in the same way as when real property itself is confiscated. The Takings Clause does not permit such a state-authored transformation of a traditional private interest to public property. *Webb's*, 449 U.S. at 164.

The taking of Tyler's equity interest in her property bears analogy to the injustice condemned by this Court in *Armstrong*, 364 U.S. 40. In that case, a shipbuilder contracted by the United States defaulted on its obligation to build ships, and the United States took title to the unfinished boats and materials, pursuant to contractual and common law rights. *Id.*

The United States refused to compensate the suppliers who had liens in the seized boats and materials. *Id.* This Court held that the government effected a taking, because property rights in liens do not simply disappear when the government takes title to the subject property pursuant to a "paramount lien." *Id.* at 44–45, 48. Before the government took the property, the suppliers had a cognizable financial interest in the boats; afterwards, they had none. *Id.* The government could only take the underlying property subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id.* at 49.

The Eighth Circuit failed to address *Armstrong,* or the analogous holdings in *Webb's* and *Phillips*, thereby undermining this Court's takings decisions. The Court should grant the petition to clarify that the same Takings Clause protections that apply to liens and to interest on money also apply to a debtor's equity.

II. STATE AND FEDERAL COURTS CONFLICT OVER WHETHER GOVERNMENT MUST PAY JUST COMPENSATION WHEN IT TAKES PROPERTY TO COLLECT A DEBT AND KEEPS A WINDFALL

Federal and state courts are in conflict about whether government effects a taking when it confiscates more than it is owed while collecting a debt. The split arises primarily from this Court's dicta in *Nelson*, 352 U.S. 103. Confusion will persist and individuals in some jurisdictions will have no recourse to vindicate their constitutional rights unless this Court grants the petition and settles the issue.

Consistent with tradition and this Court's takings decisions, the high courts of Michigan, Minnesota, Mississippi, New Hampshire, Vermont, and Virginia, and federal district courts in Michigan, New York, Ohio, West Virginia, and the District of Columbia recognize a takings claim when government forecloses on property to collect delinquent taxes or related debts and keeps more than it is owed. *Griffin*, 38 Miss. at 436–37 (uncompensated taking); *Martin*, 59 Va. at 142–43 (violates due process of law by taking more than owed); *Rafaeli*, 505 Mich. at 468 (violates Michigan's Takings Clause when it kept the surplus proceeds); *Proctor v. Saginaw Cnty. Bd. of Comm'rs*, No. 349557, 2022 WL 67248, at *13 (Mich. Ct. App. Jan. 6, 2022) (recognizing federal takings claim properly raised); *Bogie v. Town of Barnet*, 270 A.2d 898, 900, 903 (Vt. 1970) (citing *Lawton* and holding retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation"); *Thomas Tool Services, Inc. v. Town of Croydon*, 145 N.H. 218, 220 (2000) (statute granting government surplus proceeds from tax sales violates state constitution's Takings Clause); *Polonsky v. Bedford*, 173 N.H. 226, 227–228, 230–231 (2020); *Baker*, 11 Minn. at 488, 499; *King*, 130 F. at 579 (violates constitutional mandate that taking of private property must be for a public use); *Dorce v. City of New York*, No. 19-cv-2216, __ F.Supp.3d __, 2022 WL 2286381, at *12 (S.D.N.Y. June 24, 2022) (denying motion to dismiss takings claim); *Tarrify Properties, LLC v. Cuyahoga Cnty.*, No. 1:19-CV-2293, 2021 WL 164217, at *3 (N.D. Ohio Jan. 19, 2021); *Freed v. Thomas*, No. 17-CV-13519, 2021 WL 942077, at *4 (E.D. Mich. Feb. 26, 2021) (taking where government retained surplus proceeds from sale of tax-

foreclosure); *Coleman through Bunn v. Dist. of Columbia*, 70 F.Supp.3d 58, 80 (D.D.C. 2014); *Coleman through Bunn v. Dist. of Columbia*, No. 13-1456, 2016 WL 10721865 *2–3 (D.D.C. June 11, 2016).

The state supreme courts of Indiana, North Dakota, Texas, and Alaska also criticize the idea that government could wholly extinguish equity or liens on tax-delinquent properties, and interpret tax sale statutes to avoid that result and the constitutional question. *Lake Cnty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004) (total confiscation would "produce severe unfairness" and likely violate the Takings Clause); *Shattuck v. Smith*, 69 N.W. 5, 12 (N.D. 1896) (statute would likely be unconstitutional "if [it] contained no provision that the surplus should go to the landowner"); *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191–92 (Tex. 1995) ("Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit."); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981) (refusing to interpret the law as confiscating the surplus). Similarly, the Sixth Circuit did not reach the merits in *Harrison v. Montgomery Cnty., Ohio*, 997 F.3d 643, 652 (6th Cir. 2021), but noted such takings claims "rest[] on the venerable proposition that 'a law that takes property from A. and gives it to B. . . . is against all reason and justice.'" *Id.* (citing *Calder v. Bull*, 3 U.S. 386, 388 (1798)).

In contrast, the Eighth Circuit here joined courts in Arizona, Illinois, Maine, Ohio, Oregon, Nebraska, New York, and Wisconsin to hold that the government does not effect a taking when confiscating more than it is owed in the process of debt collection. *See Continental Resources v. Fair*, 311 Neb. 184, 197

(2022); *City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Me. 1974); *Sheehan v. Suffolk Cnty.*, 67 N.Y.2d 52, 60 (1986); *Ritter v. Ross*, 207 Wis. 2d 476, 485 (Ct. App. 1996); *Balthazar v. Mari Ltd.*, 301 F.Supp. 103, 105 n.6 (N.D. Ill. 1969), *summarily aff'd*, 396 U.S. 114 (1969); *Automatic Art, LLC v. Maricopa County*, 2010 WL 11515708, at *5–6 (D. Ariz. Mar. 18, 2010); *Reinmiller v. Marion County, Oregon*, No. CV-05-1926-PK, 2006 WL 2987707, at *3 (D. Or. 2006); *U.S. Bank v. Walworth County*, 2:21-CV-00451-SCD (D. Wis. Jan. 6, 2022) (appeal pending Eighth Cir. No. 22-1168).

Like the Eighth Circuit here, most of these courts relied on this Court's *dicta* in *Nelson* to conclude that the Takings Clause does not protect debtors like Tyler. *Nelson* should be easily distinguished because the City's statute allowed debtors to collect the surplus proceeds from a judicial sale. *Nelson*, 352 U.S. at 106 (rejecting takings claim "in the absence of timely action to . . . recover[ ] any surplus"). Minnesota, however, has no such procedure. *See* App.9a; Minn. Stat. § 282.08. *Nelson* declined commenting on whether government's retention of the windfall would be a taking where state law "precludes an owner from obtaining the surplus proceeds of a judicial sale." *Id.* That question is presented here.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURTS' DISMISSAL OF THE EXCESSIVE FINES CLAIM CONFLICTS WITH THIS COURT'S PRECEDENT

The courts below dismissed Tyler's claim that the forfeiture of her property in excess of that needed to satisfy her debt of $2,300 plus interest, penalties, and

costs violated the Excessive Fines Clause of the Eighth Amendment. The district court held that the "tax-forfeiture scheme bears none of the hallmarks of punishment," and therefore "does not impose a 'fine' within the meaning of the Excessive Fines Clause." App.44a. The Eighth Circuit affirmed the dismissal for failure to state a claim "on the basis of that opinion" without further analysis. App.9a–10a. In doing so, the lower courts ruled in conflict with precedent of this Court.

A. The decisions below undermine *Austin* and *Bajakajian*, which established the applicability of the Excessive Fines Clause to civil punishments

The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609–10 (1993)). In *Austin*, the Court held that the civil forfeiture of a mobile home and auto body shop used in an illicit drug sale was "punishment," and therefore a fine subject to the Eighth Amendment. The government had argued that the forfeiture was not a punishment or a fine, because it served only remedial purposes by removing instrumentalities of crime from society. The Court observed, however, that "a civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." 509 U.S. at 610–11 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)) (emphasis added). Forfeitures of property—a type of "payment[] in kind—are thus 'fines' if they constitute punishment

for an offense." *Bajakajian*, 524 U.S. at 328. The Eighth Amendment unmistakably applies when a civil sanction is "at least partially punitive." *Timbs v. Indiana*, 139 S.Ct. 682, 690 (2019).

The holding in *Austin* hinged on two factors that have analogs in Minnesota's tax-forfeiture scheme. First, the Court noted that the civil forfeiture statute provided affirmative defenses for innocent owners whose property was misused for criminal activity by others without consent, knowledge, or willful blindness of the owner. *Austin*, 509 U.S. at 619. These exemptions implicate the "culpability of the owner in a way that makes them look more like punishment, not less." *Id*. Second, forfeitures under that statute were neither fixed in amount nor linked to the public harm caused by the property owner's actions. *Id*. at 621. They "vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental," defying description as "remedial." *Id*. at 622 n.14.

Although the district court opined that Minnesota's scheme was not intended to punish, the confiscation of substantial excess property above the debt owed, interest, and reasonable costs or late fees can "only be explained as [] serving either retributive or deterrent purposes." *Halper*, 490 U.S. at 448. *See also Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 554 (Minn. 2003) (an unusually harsh penalty on employers who disregard wage levy notices from the state, far beyond costs needed to investigate or recover lost revenue, is punishment because it can only be explained by and "*must* be calculated to deter").[4] The

[4] Notably, in *Bennett v. Hunter*, this Court described as "highly penal" the notion that the government could take all title

scheme at least partially serves the goal of punishing or deterring property owners who do not make timely tax payments. Indeed, the County concedes as much. App.48a ("The County further asserts that . . . 'the ultimate possibility of loss of property serves as a deterrent to those taxpayers considering tax delinquency.'" (quoting County's district court brief)). A "modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part." *Bajakajian*, 524 U.S. at 331, n.6. Analyzing Minnesota's forfeiture scheme according to *Austin*'s two factors further confirms its status as punishment.

As in *Austin*, the value of property forfeited under Minnesota's law "var[ies] so dramatically that any relationship between" the debt owed "and the amount of the sanction is merely coincidental." *Austin*, 509 U.S. at 622 n.14. Tyler lost her property, worth at least $40,000, to satisfy a $15,000 debt that already included interest, penalties, and costs. Had her property been worth twice as much with the same debt, the penalty would be capriciously greater. And hundreds of others subject to the same law in Minnesota have lost their entire homes in the past decade to satisfy debts that, on average, were just eight percent (8%) of the value of those homes.[5]

(including surplus equity) after a forced sale to collect delinquent tax, where the debt was much smaller. The Court rejected that interpretation of a federal tax statute, contrary to the government's argument, and adopted another to avoid such a harsh result. 76 U.S. at 336.

[5] *See supra* Park & Deerson (on average, homeowners in Minnesota subject to the foreclosure-forfeiture scheme lost homes worth $207,000 to satisfy debts of $17,000).

Deterrence or punishment is the only plausible point of these draconian forfeitures.

Likewise, the redemption provision of Minnesota's law bears analogy to the "innocent owner" defense discussed in *Austin*, which allowed owners who lacked culpability to escape forfeiture. Here, a property owner may escape the confiscation of the excess property by taking diligent action to redeem the property by paying the full debt after foreclosure. The state thereby eliminates forfeiture of excess property for those who demonstrate prompt atonement for their presumed negligence in failing to pay taxes on time.[6]

The type of offense here differs from *Austin*—the offense of depriving the sovereign of timely revenue and causing the trouble of collections versus the offense of allowing one's property to be used in criminal activity—but that does not change the fact that the forfeiture here works a "payment to a sovereign as punishment for some offense, and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin*, 509 U.S. at 622 (quotation and citation omitted).[7]

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[6] One must say "presumed negligence" because property owners often fall prey to the forfeiture of their entire homes due to mistakes of law or circumstances of extreme poverty, health or cognitive disability, and other factors that lack culpability meriting punishment. *See* John Rao, The Other Foreclosure Crisis, Nat'l Consumer Law Ctr. 5, 9, 33, 38 (July 2012), https://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales-report.pdf.

[7] This was the conclusion of the Southern District of New York in a recent case when, ruling opposite to the district court and Eighth Circuit in this case, it denied a motion to dismiss an Excessive Fines Clause challenge to the forfeiture of surplus

The district court below denied the analogy to *Austin* principally on the premise that this Court has "rejected the notion that a penalty or forfeiture must be deemed punitive if the government receives more than what is necessary to make it whole." App.42a, citing *Bajakajian*, 524 U.S. at 331. The district court supported its conclusion with a cite to Justice Kennedy's dissent in *Bajakajian*, which alleged a contradiction in the majority's reasoning because colonial era customs fines for failure to declare cargo were not deemed punitive despite "amount[ing] to many times the duties due on the goods." 524 U.S. at 345 (Kennedy, J., dissenting).

Those early customs cases are distinguishable from this case because they involved confiscation to eliminate the instrumentalities of customs violations, while the penalty imposed on Tyler does not take any instrumentality of crime. None of the ancient justifications for harsh *in rem* seizures of ships or undeclared goods arriving in ports during the colonial era are applicable to her or her home. Those ships and goods could be easily moved and made unavailable to satisfy a judgment, and their owners were often located in foreign lands not subject to personal jurisdiction of local courts. Tyler's land is fixed and she lives in a senior community in Minnesota. Moreover, in discussing these same customs violations, Justice Scalia noted in his *Austin* concurrence that in-kind assessments discharging an obligation to the government—which surely include the foreclosure of the surplus value of Tyler's home—were within the meaning of "fine" at the time of the

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property conducted under New York City's similar property tax forfeiture law. *See Dorce*, 2022 WL 2286381, at *16.

founding. *Austin*, 509 U.S. at 624 (Scalia, J., concurring).

The lower courts' dismissal of Tyler's Excessive Fines Clause claim conflicts with this Court's explanation of the Eighth Amendment in *Austin* and *Bajakajian*.

B. The lower courts' decision conflicts with standards established by this Court in *Kokesh v S.E.C.* for determining when a civil sanction constitutes a punishment

Kokesh v. S.E.C., 137 S.Ct. 1635, 1639 (2017) confirms the punitive nature of a statute that takes more than necessary to remedy a harm. *Kokesh* was not an Excessive Fines Clause case, but one that determined the meaning of the term "penalty" in a statute of limitations governing federal prosecution "for the enforcement of any civil fine, penalty, or forfeiture." *Id.* (quoting 28 U.S.C. § 2462). At issue was whether the U.S. Securities and Exchange Commission was subject to a five-year limitation period in seeking disgorgement of money as a remedy for the violation of securities laws.

After defining a "penalty" as "a punishment . . . imposed and enforced by the State for [an] . . . offense against its laws," *id.* at 1642 (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)), Justice Sotomayor writing for the Court engaged in a careful discussion of the concept of punishment that bears directly on Excessive Fines questions, including the one presented by Tyler. "When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Id.* at 1644 (citation omitted).

Disgorgement, she observed, is in many cases a punishment because it "go[es] beyond compensation" for loss, stripping the penalized person of more funds than needed to provide restitution or compensation for a loss. This element of the sanction can only be understood as having a deterrent effect, and "[s]anctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'" *Id.* at 1643–44 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) and citing *Bajakajian*, 524 U.S. at 329 ("Deterrence . . . has traditionally been viewed as a goal of punishment.")).

Just like the remedy of disgorgement, Minnesota's tax forfeiture scheme goes beyond compensation, taking all of a tax-delinquent property from its owner—which in many cases, including Tyler's, is substantially more than needed to satisfy the debt owed plus reasonable interest, penalties, and costs.

The district court determined that the "primary purpose" of the law was to "compensate the government for lost revenues," which it held precluded application of the Excessive Fines Clause. App.45a. But this conclusion, affirmed by the Eighth Circuit, is contrary to *Kokesh*'s analysis of the Court's Excessive Fines jurisprudence, which "emphasized 'the fact that sanctions frequently serve more than one purpose.'" *Kokesh*, 137 S.Ct. at 1645 (quoting *Austin,* 509 U.S. at 610). "'A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Id.* (quoting *Bajakajian,* 524 U.S. at 331, n.6).

Minnesota's scheme strips property owners of more than needed to satisfy their debts plus reasonable interest, penalties, and costs to compensate the government for loss. Just as in *Kokesh*, Minnesota's statute "go[es] beyond compensation," and accordingly has the effect of punishing property owners for violating a public law. *Id*. (quotation omitted). The Eighth Amendment applies when a civil sanction is "at least partially punitive," *Timbs*, 139 S.Ct. at 690, and therefore applies to the penalty imposed on Tyler.

This Court has counseled that "[t]here is good reason to be concerned [about] fines, uniquely of all punishments" because most types of punishment cost a state money whereas "fines are a source of revenue . . . . [I]t makes sense, therefore, to scrutinize government action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991). The penalty imposed on Tyler in this case, resulting in a large windfall to the government—and the even greater sums commonly captured in other similar cases—are testimony in support of that concern.

IV. THIS CASE RAISES A PRESSING NATIONAL PROBLEM TURNING ON FEDERAL QUESTIONS THAT THIS COURT SHOULD RESOLVE

For most homeowners, their house is their most important asset. Every year, many who fall behind on their taxes lose all of the equity they have in those homes across the 14 states that allow government or private investors to seize a windfall when collecting delinquent property taxes. *See, e.g.*, Ralph Clifford, *Massachusetts Has a Problem: The*

Unconstitutionality of the Tax Deed, 13 U. Mass. L. Rev. 274 (2018) (localities in Massachusetts took $56 million in equity from property owners in just one year); Park & Deerson, *Looking Up*, Pacific Legal Foundation (2021)[8] (twelve Minnesota counties took more than $11 million windfall from homeowners by selling tax foreclosures for more than owed and keeping the surplus); Ashton Nichols, et al., *Taxpayers Lose Out on at Least $11.25 Million, Homeowners and Banks Lose up to $80 Million in Little-Known Foreclosure Process That Skips Sheriff's Sales*, Eye on Ohio: Ohio Center for Journalism (Mar. 3, 2020).[9] Forfeiture of home equity has been called "unconscionable," *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 5831013, at *2 (E.D. Mich. Nov. 7, 2018), *rev'd and remanded*, 976 F.3d 729 (6th Cir. 2020) and a "manifest injustice that should find redress under the law," *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546, at *3 (E.D. Mich. June 4, 2015), by some courts, while Judge Kethledge has commented that "[i]n some legal precincts that sort of behavior is called theft." *Wayside Church v. Van Buren County*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting), *reopened under Rule 60*, No. 14-CV-01274, ECF No. 64.

In five states, foreclosing agencies retain the windfall for their own use: Minnesota, Maine, and Oregon's municipalities routinely seize a windfall for the government's benefit when foreclosing tax

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[8] https://pacificlegal.org/minnesota-home-equity-theft/#section1 (visited July 26, 2022).

[9] https://eyeonohio.com/taxpayers-lose-out-on-at-least-11-25-million-homeowners-and-banks-lose-up-to-80-million-in-little-known-foreclosure-process-that-skips-sheriffs-sales/.

delinquent properties.[10] In Ohio and California, surplus proceeds from a foreclosure are ordinarily returned to the former owner, but the law permits confiscation of the entire value when municipalities claim the indebted property for a public use or economic revitalization. *See State ex rel. Feltner v. Cuyahoga Cnty. Bd. of Revision*, 160 Ohio St. 3d 359, 366 (2020), *cert. denied*, 141 S.Ct. 1734 (2021) (Fischer, J., concurring); Jon Coupal & Joshua Polk, *Stop home equity theft by the state of California*, The Orange County Register (Mar. 27, 2022).[11] These statutes create an incentive for government to foreclose on owners. Indeed, until a recent Michigan Supreme Court decision ended the practice, some counties in that state relied on projected windfalls to balance their budgets. *See, e.g.*, Joel Kurth, et al., *Sorry we foreclosed your home. But thanks for fixing our budget*, Bridge Magazine (June 6, 2017).[12]

Six states—Arizona, Colorado, Nebraska, New Jersey, Montana, and Illinois—grant a foreclosed home's entire equity windfall to private investors in tax liens.[13] For example, public records from 19 New

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[10] Me. Rev. Stat. Ann. tit. 36 § 949; Minn. Stat. Ann. § 280.29; Or. Rev. Stat. § 312.100.

[11] https://www.ocregister.com/2022/03/27/stop-home-equity-theft-by-the-state-of-california/.

[12]https://www.bridgemi.com/urban-affairs/sorry-we-foreclosed-your-home-thanks-fixing-our-budget.

[13] Ariz. Rev. Stat. § 42-18205; Colo. Rev. Stat. § 39-11-115; *Continental Resources*, 311 Neb. at 186–87; *Winberry Realty P'ship v. Borough of Rutherford*, 247 N.J. 165, 173 (2021) (describing New Jersey statutes that allow private investor who purchases tax lien for amount of tax debt to foreclose and take full title without sale); Mont. Code Ann. §§ 15-18-211, 15-18-219 (issuing a deed to whoever holds a tax lien, but requiring sale

Jersey cities reveal that between 2014 and 2020, 683 homes were taken for delinquent taxes with a loss of an estimated $140 million in equity. On average, New Jersey homeowners lost 92% of the value of their home, or $219,000, above the tax debt that was owed, which averaged $16,800. Angela C. Erickson, *The size and scope of home equity theft: Shining a spotlight on New Jersey* (Nov. 15, 2021).[14]

In Alabama,[15] Massachusetts, and New York, municipalities have discretion as to the disposition of the surplus. In some cases, they retain the surplus for public use or distribute it to tax-lien investors.[16] In Massachusetts, for instance, tax-delinquent owners lose roughly $56,000,000 per year in the foreclosure process. Clifford, *supra* at 282–83; *see also* Angela C.

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and a return of surplus proceeds only for certain residential properties); 35 Ill. Comp. Stat. §§ 200/22-40, 200/21-90.

[14] https://pacificlegal.org/size-and-scope-of-home-equity-theft-new-jersey/.

[15] Alabama's law appears to be in transition in recent months after its Supreme Court held that surplus proceeds from the auction of tax-delinquent property were protected at common law and in Alabama. *See Douglas*, 2022 WL 2286417, at *12; *but see* Ala. Code §§ 40-10-28(a)(1) (appearing to allow counties to take surplus); § 40-10-198 (counties may sell tax liens that give investors right to take surplus).

[16] *Tallage*, 485 Mass. at 451 (describing Massachusetts system which sometimes takes a windfall for cities and sometimes for private investors); *see, e.g., Dorce*, 2022 WL 2286381, at *12 (describing city's ordinance that sometimes protects debtors and sometimes benefits private parties); *Hetelekides v. Cnty. of Ontario*, 147 N.Y.S.3d 811, 813 (App. Div. 2021) (describing how county kept $160,000 windfall from former owner purchasing property back at tax auction).

Erickson, et al., *Violating the Spirit of America: Home Equity Theft in Massachusetts*.[17]

Windfall statutes like Minnesota's have devastating consequences for homeowners who fall behind on their taxes for non-blameworthy reasons, including cognitive decline, physical or mental illness that led them to financial difficulty, or simple poverty. Elderly property owners, like Tyler, are especially susceptible to losing their property in this way when they leave their residences for senior living or medical facilities and fail to recognize the consequence of allowing a foreclosure to occur. *See* Jennifer C.H. Francis, Comment, *Redeeming What is Lost: The Need to Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 Geo. Mason U. Civ. Rts. L.J. 85 (2014). As Justice Thomas wrote about other types of forfeitures, "[t]hese forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture." *Leonard v. Texas*, 137 S.Ct. 847 (2017) (Thomas, J., concurring in denial of certiorari) (citations omitted).

This case identifies a pressing national problem that has festered for decades in the lower courts. This Court should put the controversy to rest by deciding the important federal questions of whether these statutes violate the Takings and Excessive Fines Clauses. This case presents an excellent vehicle to address them.

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[17] https://pacificlegal.org/home-equity-theft-in-massachusetts/#section4-2 (visited July 26, 2022).

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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