

**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

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GERALDINE TYLER, on behalf of herself and  
all others similarly situated,  
*Plaintiff-Appellant,*

v.

HENNEPIN COUNTY and MARK V. CHAPIN,  
Auditor-Treasurer, in his official capacity,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the District of Minnesota, No. 0:20-cv-00889  
Patrick J. Schiltz, District Judge

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**BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION  
SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL**

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## CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Dated: March 29, 2021

/s/ Daniel Benjamin Kohrman  
Daniel Benjamin Kohrman

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## STATEMENT OF INTEREST<sup>1</sup>

It is undisputed in this case that local Minnesota taxing authorities, to collect delinquent unpaid taxes of \$15,000 assessed against Geraldine Tyler's condo, sold the property and permanently seized the full proceeds (\$40,000), including \$25,000 above the amount of her tax debt and related costs. This act stripped Ms. Tyler of substantial financial resources, owned by her, that could have been available for her financial security. Given the devastating and disproportionate impact that such practices can have on the financial security of older Minnesota homeowners, this matter is of intense interest to amici AARP and AARP Foundation. For many reasons, older homeowners, especially those of modest means, are most vulnerable to financial and other harms due to tax foreclosures. They can least afford to be denied compensation for equity in their homes exceeding their tax debt.

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<sup>1</sup> This brief was not authored in whole or in part by any party or its counsel, and no person other than AARP, its members, AARP Foundation, or its counsel contributed any money intended to fund the preparation and submission of this brief. All parties consent to the filing of this brief.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation, through participation as amici curiae in federal and state courts, seek to protect older Americans' economic security, including their access to home equity pursuant to guarantees established by federal and state constitutional law.<sup>2</sup> This case presents a fundamental issue: whether public taxing authorities,

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<sup>2</sup> AARP and AARP Foundation have previously filed briefs as amici curiae challenging on constitutional grounds state tax foreclosure statutes like Minnesota's at issue in this case. *See Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 952 N.W.2d 434 (2020) (brief of amici supporting plaintiffs-appellants); *Wayside Church v. Van Buren Cty.*, 847 F.3d 812 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 380 (2017) (amicus brief supporting plaintiffs-appellants); *Coleman v. District of Columbia*, 70 F. Supp.3d 58 (D.D.C. 2009) (amicus brief supporting plaintiffs).

notwithstanding the Takings Clauses of the United States and the Minnesota Constitutions,<sup>3</sup> may confiscate, without “just compensation,” homeowners’ surplus equity, i.e., the value of their property exceeding that needed to satisfy delinquent tax obligations. AARP and AARP Foundation, to assist the Court in its deliberations, respectfully submit their views on this legal issue and ask that the Court consider the dire implications for older property owners of such unjust tax foreclosure practices.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

In this case Hennepin County sold plaintiff-appellant’s property at public auction and deposited the entire amount of the proceeds into County accounts, including funds exceeding the sums needed to pay all overdue taxes, fees, and other related costs. County tax officials retained approximately \$25,000 in surplus equity. Tyler claims that the County’s failure to return to her these surplus proceeds violates, among other laws, the Takings Clause of the Fifth Amendment to the United States Constitution and corresponding text in Article I, Section 13 of the Minnesota Constitution. *See Palazzolo v. Rhode Island*, 533 U.S.

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<sup>3</sup> See U.S. Const. amend. V; Minn. Const. art. I, § 13.

606, 617 (2001) (“The Takings Clause of the Fifth Amendment . . . prohibits the government from taking private property for public use without just compensation.”).<sup>4</sup>

Tyler originally filed suit in state court against the County and its chief taxing official.<sup>5</sup> The County removed this case to federal court and the District Court dismissed Tyler’s claims. In particular, the district court ruled that Tyler has endured no taking because she was denied no common-law right to the surplus such as the court found to exist in *Rafaeli, LLC v. Oakland Cty.*, under Michigan law. See 952 N.W. 2d at 473. That is, the District Court held, “even assuming that a common-law right to the surplus existed in Minnesota during the 19<sup>th</sup> and 20<sup>th</sup> centuries, the Minnesota Legislature unambiguously abrogated that common-law right . . . when it enacted 1953 Minn. Laws ch. 386 §§ 5-9,

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<sup>4</sup> Amici address herein only the Takings Clause claims raised by Plaintiffs-Appellants.

<sup>5</sup> “In Minnesota, county auditors are tasked with the enforcement of state property tax laws. . . . Because all counts in the amended complaint are pleaded against both Hennepin County and [its Auditor Treasurer, Mark V.] Chapin, and because neither defendant raises any argument or defense not raised by the other, [amici, herein, like] the [District] Court refers to [defendants] collectively as ‘the County.’” *Tyler v. Hennepin Cty.*, No. 0:20-cv-00889-PJS-BRT, 2020 WL 7129894, \*1 n.1 (D. Minn. Dec. 4, 2020).

later codified at Minn. Stat. § 282.08.” *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*11. Section 282.08, the District Court reasoned, “provides a comprehensive and detailed scheme for the distribution of the surplus and does not give the former owner a right to any of those proceeds.” *Id.* Moreover, the District Court observed, “Minnesota’s tax-foreclosure scheme, unlike either the federal statute at issue in [*United States v. Lawton*], 110 U.S. 146 (1884)] or the New York City Code at issue in *Nelson [v. City of New York*, 352 U.S. 103 (1956)], does not give the property owner even a conditional right to the surplus.” *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*9.

The District Court’s decision should be reversed. While taxing authorities have a legitimate interest in collecting delinquent taxes, the Takings Clause prevents them from confiscating private property for a public purpose “without just compensation.” This includes taking equity in real property, for the public purpose of extinguishing tax delinquencies, by foreclosing on properties without returning to former owners the value of such properties in excess of the amount required to cover delinquent taxes.

Decisions of the U.S. Supreme Court indicate that private property owners, including those subject to tax foreclosure, have a strong basis to expect that surplus equity, following deduction of taxes and foreclosure expenses owed, will be returned to them. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (“[w]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a . . . parcel of real property, a ‘*per se* [takings] approach’ is the proper mode of analysis . . .”). The state cannot confiscate the whole value of property being taken to satisfy delinquent taxes simply by declaring that the interest of the delinquent taxpayer is forfeit. *See, e.g., Webb’s Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 164 (1980).

A decision by this Court that Tyler may be deprived of the entire equity in her property simply because she did not pay delinquent property taxes would let stand a “gross injustice.” *Wayside Church*, 847 F.3d at 823 (Kethledge, J., dissenting); *see also Rafaeli, LLC v. Oakland Cty.*, 952 N.W. 2d at 483-84 (“when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax foreclosure sale

in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less.”). If the District Court’s decision is affirmed, windfalls will continue to accrue to Minnesota counties and other public authorities.<sup>6</sup> And all too often, these will come at the expense of the State’s most economically vulnerable citizens, including many older homeowners.

As amici explain below, older persons are disproportionately at risk of losing their homes to tax foreclosures due to a combination of factors that make it increasingly difficult for many older people to manage their finances. These include limited and declining (or at best fixed) incomes, rising healthcare and housing (and other) costs, a growing incidence of disabling health conditions, including cognitive decline or dementia, as well as other challenges, such as no longer

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<sup>6</sup> The District Court noted that once a property such as Ms. Tyler’s “is sold, the proceeds of the sale, are, of course, not applied to the unpaid taxes, because the tax deficiency [i]s cancelled at the time of final forfeiture.” Rather, proceeds are distributed to cover “municipal improvements and environmental cleanup that increased the value of the property,” “special assessments,” “forest development or county parks or recreational” projects, and, finally, to county, school district and municipal governments. *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*2; *see id.* at 22.



having a bank-managed escrow account (because owners no longer carry a mortgage).

This Court should recognize that vulnerable property owners like Geraldine Tyler, as well as older homeowners generally, have a vital property interest in their surplus equity. The Court should rule that these concerns support legal precedents favoring protection of this fundamental property interest by the Takings Clauses of the U.S. and State Constitutions. Hence, the Court should reverse and remand this case to the District Court for further proceedings addressing Ms. Tyler’s claims.

## ARGUMENT

### **I. TAKINGS CLAUSE PRINCIPLES LIMIT THE PROCEEDS FROM A TAX FORECLOSURE THAT GOVERNMENT MAY CLAIM TO THE SHARE NEEDED TO PAY OVERDUE TAXES AND RELATED COSTS.**

The District Court’s analysis and the County’s briefing before that court stressed a supposed absence of any affirmative guarantee—in the form of a “constitutional provision, statute, or case”<sup>7</sup>—establishing a

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<sup>7</sup> *Tyler v. Hennepin Cty.*, No. 0:20-cv-00889-PJS-BRT (D. Minn.), Memorandum of Defendants Hennepin County and Mark V. Chapin in

former owner’s right to the surplus value of property sold in accordance with the Minnesota tax foreclosure statute. This ignores the persuasive reasoning of *Rafaeli*, that state common law may give rise to the property right at issue and that the legislature cannot override that right through a tax foreclosure statute or otherwise. *Rafaeli, LLC v. Oakland Cty.*, 952 N.W. 2d at 473. As Appellant Tyler’s brief observes, Minnesota and American common law, the Supreme Court of Minnesota, and other authorities firmly establish the common-sense proposition that this State’s citizens possess a property right in their own surplus home equity. *Tyler v. Hennepin Cty.*, No. 20-3730, Appellant’s Brief (“App. Br.”), at 12-20.

Moreover, the District Court’s decision and the County’s defense of its confiscatory conduct both rely, with varying degrees of specificity, on a related, remarkable proposition: that a state legislature can avoid a “taking” by state taxing authorities—and their corresponding duty to provide “just compensation”— simply by declaring that, by *the time of a tax sale*, the owner’s interest already has been extinguished and, thus,

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Support of Motion to Dismiss, ECF No. 13 (Apr. 24, 2020) (“Def. Mem.”), at 18; see *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*27.

there is no property to “take.” This error infects the County’s argument that “a plaintiff must have an interest in the property that the government has allegedly taken and must possess this interest at the time of the taking[.]” Def. Mem. at 13. It is also underlays the District Court’s conclusion that “nothing . . . gives the former owner of a piece of property that has been lawfully forfeited to the state and then sold to pay delinquent taxes a right to any surplus.” *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*27-28.<sup>8</sup> This simplistic, temporally-focused interpretation of Takings Clause jurisprudence is seriously flawed. The District Court’s ruling based on these erroneous foundations should be reversed.

A preliminary question is whether constitutional Takings Clause principles apply where the property owner has under-paid property taxes—a civil statutory matter—and the state, in response, has seized surplus equity far exceeding the tax debt and costs. Amici respectfully submit that the Takings Clause should, and under established

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<sup>8</sup> In issuing this sweeping summary, the District Court ignored its own acknowledgment that “proceeds of the sale” of properties subject to tax forfeiture “are, of course, not applied to the unpaid taxes, because the tax deficiency [i]s cancelled at the time of the final forfeiture.” *Id.* at 5.

jurisprudence does, have clear application in such circumstances, as here. It is well-established that the Fifth Amendment “stands as a shield against the arbitrary use of governmental power.” *Webb’s Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 164 (1980).

Furthermore, in general, depriving a private property owner of their property interest for a public purpose is a taking *per se*. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (quoting *Brown v. Legal Foundation of Wash.*, 538 U. S. 216, 235 (2003)) (finding that “[w]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a ‘*per se* [takings] approach’ is the proper mode of analysis under the Court’s precedent.”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430, 436 (1982) (holding that the government’s taking physical control over a property interest for public use is a taking *per se*).

To be sure, the Takings Clause “does not proscribe the taking of property; it proscribes taking without just compensation.” *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Yet, the effect of the District Court’s ruling is that the right to

just compensation evaporates once a property owner is divested of a property interest. That cannot be the law.

The state in this case has confiscated surplus value wholly unrelated to the “public purpose” for which foreclosure is carried out, simply by declaring that the interest of the delinquent taxpayer is forfeit. The State of Minnesota may not “by *ipse dixit*” secure such a windfall for itself. *Webb’s Fabulous Pharmacies, Inc.*, 449 U.S. at 164 (holding that the State of Florida could not “transform private property into public property without compensation, even for the limited duration of [a required] deposit [of private funds] in court” by “recharacterizing the [private] principal [required to be deposited in court] as ‘public money’ because it is held temporarily by the court.”). Here, as in *Webb’s*, the State’s attempt to “transform private property into public property without compensation” is “the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent.” *Id.* See also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (“[T]he government’s power to redefine [property rights] is necessarily constrained by constitutional limits.”).

The District Court gave short shrift to Tyler’s arguments that Minnesota common law gives rise to a right to the surplus value of property sold in tax forfeiture proceedings. On the one hand, the District Court acknowledged the Michigan Supreme Court’s reasoning, in *Rafaeli*, that “the ratifiers would have commonly understood this common-law property right to be protected under Michigan’s Takings Clause at the time of the ratification of the Michigan Constitution in 1963.” *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*28 n.14 (quoting *Rafaeli*, 952 N.W. 2d at 472). Yet, the District Court casually observed that “[c]ommon-law rights may, of course be abrogated by statute.” It concluded:

Even assuming that a common-law right to the surplus existed in Minnesota during the late 19<sup>th</sup> and 20<sup>th</sup> centuries, the Minnesota Legislature unambiguously abrogated that common-law right . . . when it enacted 1953 Minn. Laws ch. 386 §§ 5-9, later codified at Minn. Stat. §282.08.

*Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*27. This abrogation, the District Court said, is shown by virtue of the fact that “Minn. Stat. § 282.08 provides a comprehensive and detailed scheme for the distribution of the surplus and does not give the former owner a right to any of those proceeds.” *Id.* However, this ignores the *Rafaeli* Court’s

observation that “[w]hile the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by [the State’s] Takings Clause.” 952 N.W. 2d at 473.

The District Court justified its dismissal of *Rafaeli* by reference to the Michigan Supreme Court’s discussion of a former owner’s right to property in surplus generated in the tax forfeiture process as a “vested” right under state common law. *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*28 n.14 (noting that “Tyler has not pointed to any authority suggesting that Minnesota recognizes a distinction between ‘vested’ and ‘ordinary’ property rights [and ] [e]ven if she had, Tyler has not identified a continuous, historical recognition of a former property owner’s right to the surplus in Minnesota comparable to the common-law tradition in Michigan.”). Amici are dubious that either the common-law tradition or state constitutional Takings Clause jurisprudence is as different in Michigan and Minnesota as the District Court suggests. Nor are Amici persuaded that federal Takings Clause principles, which are equally applicable in both states, justify greater deference to the provisions of Minnesota’s tax forfeiture law than to Michigan’s, given that both do not expressly provide for a former

owner's property right in the surplus above the amount of delinquent taxes owed.

Even less persuasive is the County's argument that "[h]ere the only practice Plaintiff complains is unconstitutional is the government's sale of properties that the government unquestionably owns *at the time they are sold.*" Def. Mem. at 13 (emphasis supplied). This analysis emphasizes the dispossessed property owner's supposed lack of a property interest at the time of the tax sale when, instead, a proper Takings Clause analysis should focus on government actions that dispossessed the property owner whenever they occurred, and whether such actions effectuated a taking and triggered a corresponding duty to provide "just compensation." Here it was the foreclosure itself, not the sale of foreclosed property, that effectuated the taking and triggered a duty to restore surplus equity.<sup>9</sup>

By improperly focusing on the timing of the sales of plaintiff-appellant's property as the relevant trigger of a duty to restore to Tyler

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<sup>9</sup> See *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*2 ("If the property owner does not exercise her right of redemption under § 281 or make a confession of judgment under § 279.37, final forfeiture occurs. Absolute title to the property vests in the state . . . Minn. Stat. §§ 281.18, 282.07.").



their surplus equity, the County ignores the fundamental mandate of the Takings Clause, which “places a condition on the [government’s] exercise of” the power to take private property in the first instance. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 314 (1987). Minnesota’s statutory enactment that purports to eliminate a private owner’s property interest in the surplus equity upon a tax foreclosure should be subject to these conditions as well.

“The Court has repeatedly held that just compensation normally is to be measured by ‘the market value of the property at the time of the taking.’” *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)). Indeed, the Supreme Court has recognized, at least implicitly, that a “former owner” may retain a protected property interest subject to the Takings Clause. That is, “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the *former owner*. . .” *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (citation omitted) (emphasis added). That formulation is directly contrary to the

very language invoked by the District Court to dismiss Tyler’s Takings Clause claim. *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*28 (“nothing in the constitutions of the United States or Minnesota, nothing in any federal or state statute, and nothing in federal or state common law gives *the former owner* of a piece of property that has been lawfully forfeited to the state and then sold to pay delinquent taxes a right to any surplus.” *Tyler v. Hennepin Cty.*, 2020 WL 7129894 at \*27-28 (emphasis supplied).

The District Court’s ruling that Geraldine Tyler does not state a claim for just compensation pursuant to the Fifth Amendment cannot be squared with Takings Clause jurisprudence. This Court should reverse and remand for a proper constitutional analysis.

## **II. OLDER HOMEOWNERS FACE A DISPROPORTIONATE RISK OF EXPERIENCING SEVERE HARM DUE TO TAX FORECLOSURES.**

Homeownership is the lynchpin of well-being for older Americans.<sup>10</sup> As of the fourth quarter of 2020, approximately 28 million

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<sup>10</sup> See generally Kermit Baker et al., *Housing America’s Older Adults 2019*, Joint Ctr. for Hous. Stud. of Harv. Univ. 1 (2019) (hereafter *Housing America’s Older Adults*), <https://bit.ly/31mEETO>.

(80.2 percent) of 34.93 million householders over age 65 owned their homes.<sup>11</sup> Indeed, “[o]lder Americans often use[ ] their home equity in retirement to finance health care, home maintenance, and other large expenses and as a safety net that could be used to meet unexpected needs.” Lori A. Trawinski, *Nightmare on Main Street: Older Americans and the Mortgage Market Crisis*, AARP Pub. Pol’y Inst. 3 (July 2016), <https://bit.ly/3lU9mwJ>. “For most older people, the home is . . . their most valuable asset.” *Id.*

Yet, for many reasons, older people face disproportionate risk of losing their homes to tax foreclosures. These include fixed incomes, rising costs, higher incidence of disability, and having no escrow account to cover property taxes (because owners have no mortgage payment or have a subprime or reverse mortgage). John Rao, *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat’l Consumer Law Ctr. at 5, 8-10 (Jul. 2012), <http://bit.ly/1MLTZMc> (hereafter “*The Other Foreclosure Crisis*”); see also Odette Williamson & Jillian McLaughlin,

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<sup>11</sup> *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2020*, U.S. Census Bureau (Feb. 2, 2021), <https://bit.ly/3rtU2rU>; *America’s Families and Living Arrangements: 2020*, U.S. Census Bureau (2020), <https://bit.ly/2Pz9khD>.

*Tax Lien Sales Put Low-Income, Seniors, and the Disabled at Risk of Foreclosure*, 34 Bifocal 1 (Oct. 2012), <https://bit.ly/2VgQhtJ> (hereafter “Williamson & McLaughlin, *Tax Lien Sales*”).

Thus, it is Minnesota’s older, most vulnerable citizens who are most likely to be victimized by Minnesota’s tax foreclosure law and feel the effects most strongly. Home equity is a fundamental source of family stability and financial security for this population. *See, e.g.*, William M. Rohe & Mark Lindblad, *Rexamining the Social Benefits of Homeownership after the Housing Crisis*, Harv. Univ. Joint Ctr. for Hous. Stud. (Aug. 2013), <https://bit.ly/3sscWAD>.

**A. Older homeowners face extraordinary economic pressures that make them disproportionately vulnerable to tax foreclosures.**

Rising costs, coupled with low income, play a significant role in making many older people extremely vulnerable to losing their homes through tax foreclosures. *See Aging In Place: Facilitating Choice and Independence*, U.S. Dep’t of Hous. and Urb. Dev. (Fall 2013), <https://bit.ly/3rloGDH>. One problem is that a growing share of older households are carrying housing and other debt into their retirement years. *Housing America’s Older Adults*, *supra* at 7. In 2016, 46 percent

of homeowners aged 65-79, and 26 percent of homeowners over 80, had mortgage debt. *Id.*

Older adults who own their homes also have other significant housing related costs, including taxes, utilities, insurance, and repairs and maintenance; yet, such costs are often difficult to afford for older adults who no longer work and have limited retirement income. *Id.* at 6-7. More than one in four homeowners 65 and older is cost-burdened (paying more than 30 percent of income for housing). *Id.* at 8. That percentage is even greater among homeowners still paying off mortgage debt, with 43 percent of homeowners 65 and older having cost burdens. *Id.* Older adults with housing cost burdens may cut back on other necessary budget items—burdened households in the bottom quartile of expenditures spend only \$195 a month on food, while those without burdens spend an average of \$368. *Id.* at 9. Similarly, they spend 50% less on average for out-of-pocket healthcare than those without burdens. *Id.*

Older persons also are more likely to take on debt to aid or pay the debts of a family member, thereby making them more vulnerable in adverse economic conditions. *Id.* at 8. As basic expenses such as

housing, utilities, prescription drugs, and health care continue to rise, many people now enter their retirement years incurring costs for basic needs that exceed their modest or limited incomes.<sup>12</sup> Increasingly, this includes their own, or family members' school debt. The share of households aged 50-64 with student loan debt doubled from 7 percent of households in 2001 to 16 percent in 2016. *Housing America's Older Adults, supra* at 7-8.

Older Minnesotans' vulnerability to foreclosure is likely to be exacerbated by the COVID-19 pandemic, as in 2020 aggregate retirement deficits were projected to increase by 11.2% or \$412.77 billion.<sup>13</sup> Many older adults have lost income because of the pandemic, with 21 percent of homeowners over age 65 reporting loss of employment income in 2020. Jennifer Molinsky, *Ten Insights About Older Households from the 2020 State of the Nation's Housing Report*,

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<sup>12</sup> Jack VanDerhei, *Retirement Savings Shortfalls: Evidence From EBRI's 2019 Retirement Security Projection Model®*, Emp. Benefit Rsch. Inst. (Mar. 7, 2019), <https://bit.ly/2NUlnps>.

<sup>13</sup> Jack VanderHei, *Impact of the COVID-19 Pandemic on Retirement Income Adequacy: Evidence From EBRI's Retirement Security Projection Model®*, Emp. Benefits Rsch. Inst. (Apr. 23, 2020), <https://bit.ly/3cpihTN>.

Joint Ctr. for Hous. Studs. of Harvard Univ. (Dec. 17, 2020), <https://bit.ly/3w2iMew>. Five percent of older homeowners reported having fallen behind on housing payments. *Id.* Initial job losses from the pandemic hit older adults harder than similarly situated younger workers. Kenneth Terrell, AARP, *Unemployment's Toll on Older Workers Is Worst in Half a Century* (Oct. 21, 2020), <https://bit.ly/3c3hDLK>. During the first six months of the COVID-19 pandemic, workers aged 55 and older were 17 percent more likely to lose their jobs than employees a few years younger. *Id.*

Finally, economic security is particularly tenuous for older people in the lowest income brackets, who suffer hunger or food insecurity due to income shortfalls. An estimated 5.3 million seniors, or 7.3% of the U.S. senior population, were food insecure in 2018. James P. Ziliak & Craig Gundersen, *The State of Senior Hunger in America in 2018*, Feeding America 4 (May 21, 2020), <https://bit.ly/3d5SZte>. “[F]or those with incomes below the poverty line, 29.5% were food insecure.” *Id.*

In sum, it is older Minnesotans of modest means, struggling with chronic income shortfalls, who are most likely to struggle paying their property taxes. That means they also are the group most likely to lose

all the equity surplus in their homes as a result of Minnesota's confiscatory property tax foreclosure law.

**B. Many older people are at risk of tax foreclosures because they no longer pay their taxes into an escrow account.**

For many people with a mortgage, a portion of their property taxes are collected with their monthly payment and held in an escrow account until the taxes are due. At that time, the mortgage servicer pays taxes directly to the taxing authority. Ironically, paying off one's mortgage—a potential sign of greater economic security—often plays a significant role in greater vulnerability to tax delinquency and tax foreclosure. See Williamson & McLaughlin, *Tax Lien Sales*, *supra*. Upon paying off a mortgage, homeowners assume responsibility for setting aside sufficient funds to pay taxes when they come due and for making payment themselves. This adjustment can create significant problems for older homeowners, particularly for those who have difficulty with financial decision making or have diminished capacity or disabilities. They may not understand the process, inadvertently miss payment



dates, or be unable to set aside sufficient funds to pay tax bills when required. *Id.*

Similarly, homeowners who have reverse or subprime mortgage loans face challenges paying their taxes. Reverse mortgages, a product largely serving older homeowners, generally do not feature escrow accounts for taxes. Hence, as with older homeowners who no longer make mortgage payments, those with reverse mortgages must manage tax (and insurance) payments on their own.<sup>14</sup> “[A] lack of understanding that they were required to pay these charges” was “the most significant factor” for the recent surge in (mostly older) reverse mortgage borrowers “losing their homes to foreclosure.” Sarah B. Mancini &

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<sup>14</sup> Reverse mortgages insured through the Home Equity Conversion Mortgage (HECM) Program permit borrowers 62 years or older to obtain a lump sum or line of credit based on the value of their home. They are not required to make payments on the reverse mortgage while they continue to live in the home, but they must carry hazard insurance and make tax payments. Reverse mortgage servicers are required to protect the security for the mortgage by paying property tax on the borrower’s behalf if taxes become delinquent. This shifts to the borrower the risk of foreclosure, as HUD requires the servicer to declare the mortgage due and payable if the borrower does not repay property taxes advanced. *See* U.S. Dep’t of Hous. and Urb. Dev., *Home Equity Conversion Mortgage (HECM) Financial Assessment and Property Charge Requirements*, Mortgagee Letter 2014-22 (Nov. 10, 2014), <http://1.usa.gov/1MYKrnM>.

Odette Williamson, *Reversing Course: Stemming the Tide of Reverse Mortgage Foreclosures Through Effective Servicing and Loss Mitigation*, 26 Elder L.J. 85, 102 (2018) (citing 2012 Report to Congress by the Consumer Financial Protection Bureau).<sup>15</sup> In addition, “the vast majority of subprime mortgage loans made prior to 2008 did not include an escrow account”; indeed, “[s]ome lenders used the lower monthly loan payment to induce consumers into believing the loans were affordable.” *The Other Foreclosure Crisis*, *supra* at 5.

**C. Older homeowners are at increased risk of losing their home to a tax foreclosure because they have a significantly higher incidence of disability and associated incapacity.**

“Homeowners most at risk [of losing their homes to tax foreclosure] are those who have fallen into default because they are incapable of handling their financial affairs, such as individuals suffering from Alzheimer’s, dementia, or other cognitive disorders.” *The*

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<sup>15</sup> In November 2016, HUD reported nearly 90,000 reverse mortgages in default on property charges, mostly consisting of tax or insurance shortfalls. *Id.*; see also *Policy Brief: Protecting Senior Homeowners from Reverse Mortgage Foreclosure*, Ctr. for NYC Neighborhoods (Aug. 2017), <https://bit.ly/3w7wFIo> (reporting that “[n]ationwide, reverse mortgage defaults from taxes and insurance doubled from 2015 to 2016”).

*Other Foreclosure Crisis*, supra at 5. The risk of having such disorders increases exponentially with advancing age. See Daniel C. Marson & Charles P. Sabatino, *Financial Capacity in an Aging Society*, 36 *Generations: J. of the Am. Soc. on Aging*, Summer 2012, at 6-11; see also Stacey Wood & Peter A. Lichtenberg, *Financial Capacity and Financial Exploitation of Older Adults: Research Findings, Policy Recommendations and Clinical Implications*, 40 *Clinical Gerontologist* 3-13 (2017); Peter Boersma, Lindsey I. Black, & Brian W. Ward, *Prevalence of Multiple Chronic Conditions Among US Adults, 2018*, 17 *Preventing Chronic Disease* 1-4 (2020).

Older people also are at risk of foreclosure because government notices often use small, difficult to read font sizes and due to legalistic or archaic language in such notices that is hard to understand. Vision impairments generally, and especially severe conditions such as cataracts and macular degeneration, are disproportionately prevalent in older people. *Common Eye Disorders*, Ctr. for Disease Control (Apr. 23, 2013), <https://bit.ly/3crzUm9>.

The factors that make older people particularly vulnerable to becoming delinquent on their taxes also make them least able to save

their homes and avoid the devastating loss of their equity. Some will be forced into nursing homes prematurely, and others may be forced to rely on government benefits. The Fifth Amendment Takings Clause was designed to prevent such effects of “arbitrary use of governmental power.” *Webb’s Fabulous Pharms*. 449 U.S. at 164.

### CONCLUSION

For the reasons set forth above, amici curiae AARP and AARP Foundation urge the Court to reverse the decision of the District Court.

March 29, 2021

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because the brief contains 5,267 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: March 29, 2021

/s/ Daniel Benjamin Kohrman  
Daniel Benjamin Kohrman

## CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2021, I filed the foregoing Brief of Amici Curiae AARP and AARP Foundation Supporting Plaintiff-Appellant and Reversal with the Clerk of the United States Court of Appeals for the Eighth Circuit via the CM/ECF system, which will send notice of such filings to all registered CM/ECF users.

Dated: March 29, 2021

/s/ Daniel Benjamin Kohrman  
Daniel Benjamin Kohrman

## Kiren Mathews

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