No. 22-166

In The
Supreme Court of the United States

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

v.

HENNEPIN COUNTY, and DANIEL P. ROGAN, Auditor-Treasurer, in his official capacity,
Respondents.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

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?

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The decision of the Eighth Circuit Court of Appeals is published at *Tyler v. Hennepin County*, 26 F.4th 789 (8th Cir. 2022), and reproduced in the Appendix to the Petition for Writ of Certiorari (Pet.App.1a). The district court opinion is published at *Tyler v. Hennepin County*, 505 F.Supp.3d 879 (D. Minn. 2020), Pet.App.11a. The Eighth Circuit's order denying rehearing is reproduced at Pet.App.50a.

JURISDICTION

The lower courts had jurisdiction over this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. On March 24, 2022, the Eighth Circuit Court of Appeals denied a timely motion for rehearing *en banc*. This Court granted requests to extend the time to file a petition for writ of certiorari to and including August 19, 2022. The Petitioner filed the petition on that date, which was granted on January 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

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."

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

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

STATEMENT OF THE CASE

A. Factual Background

1. Geraldine Tyler and her home

In 1999, Geraldine Tyler, now 94 years old, purchased a one-bedroom condominium in Minneapolis and made it her home. Pet.App.2a. She lived there for more than a decade, and during that time she timely paid her property taxes. *Id.* In 2010, past age 80, she left her home out of concern for her health and safety and moved to an apartment building for seniors in a safe and quiet neighborhood. *Id.*; JA.4–5. Beginning in 2011, Tyler failed to pay property taxes on the condominium. *Id.*; Memo. of Hennepin County in Support of Mot. to Dismiss, Doc. 13 at 2 (Apr. 24, 2020).

2. Hennepin County confiscated Tyler's home that was worth more than her debt

In 2015, Hennepin County and its auditor-treasurer (collectively "County") took "absolute title" to Tyler's home to satisfy past due property taxes, extinguishing all interests she had in her property, including her equity. Pet.App.5a. At the time, Tyler owed $2,311 in accumulated property taxes. *See* Pet. 5. Penalties, interest, and costs ballooned Tyler's total debt to the County to $15,000.[1] Pet.App.12a. A year after confiscating Tyler's title, the County sold the property at auction for $40,000. JA.12–13, 48.

[1] Tyler never challenged the tax collection or foreclosure procedures or the amount of the $15,000 total debt, and neither are at issue before this Court. *See* JA.31–33.

Pursuant to Minnesota's tax statutes, the County did not pay Tyler for the excess value of her home—her equity—when it took absolute title nor when it sold the property for $25,000 more than what she owed. *See* Minn. Stat. § 282.08. Instead, the County kept the entire $40,000 to fund government operations—a $25,000 windfall for the public at Tyler's expense. *See id.*

3. The statutory scheme

Minnesota's tax statutes authorize government to take this kind of windfall when debtors owe property taxes or certain other types of government debts associated with real estate.[2] Once a property owner misses tax payment deadlines in either May or October, penalties of roughly 4–8% on the tax accrue within weeks of delinquency, and then another 1% per month is added until the end of the calendar year. Minn. Stat. § 279.01(1). Unpaid taxes become "delinquent" on January 1, *see id.* § 279.01, at which point interest accrues on the outstanding taxes at 10–28% annually. *Id.* § 279.03(1a). Counties also assess a service fee that includes *all* costs associated with collecting the debt. *Id.* § 279.092.

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[2] Minnesota's statutes allow other types of debt associated with the real estate, including utility bills and code enforcement violations, to be collected in the same manner as delinquent real estate taxes, including potential foreclosure with attendant loss of equity. *See* Minn. Stat. §§ 280.29, 284.251(5), 429.101 (may treat failure to shovel snow, weed abatement on private property, etc., as a special assessment); 429.061(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).

By February 15 of the year following the missed payment, the county auditor commences a lawsuit against the delinquent properties in state court. *Id.* § 279.05. If the property owner does not file an answer within 20 days, the court enters a judgment establishing a "lien" on the property.[3] *Id.* § 279.16. Then in May of that year, the auditor administratively transfers limited title to the property to the state for "the amount of taxes, penalties, interest, and costs owed." *Id.* §§ 280.001–280.01, 280.43. The state's title is subject to a right of redemption, allowing the debtor to regain title by paying the debt, and the debtor retains the right of possession and most other rights associated with ownership. *See, e.g.*, *id.* § 281.70 (describing auditor's limited right of entry to protect vacant premises from waste or trespass). If after notice the property owner fails to redeem the property by paying all taxes, penalties, and costs due within three years, "absolute title to such parcel . . . shall vest in the state." *Id.* § 281.18; *see also id.* § 281.25 (state holds title in trust for benefit of taxing districts). All interests of property owners who fail to redeem before the deadline, like Tyler, are forfeited to the government. Counties, as subdivisions of the state, have responsibility for obtaining and managing tax delinquent properties within their boundaries. A county may keep the property for a public purpose or sell it. *Id.* § 282.01; JA.48 (forfeited property may be used for public parks, other public uses, or sold at public auction). When a county sells the property, it reimburses itself for all expenses and then distributes the surplus proceeds to the county, city, and school

[3] In Tyler's case, the judgment was entered in April 2012. JA.5.

district. Minn. Stat. § 282.08. The homeowner gets nothing.

B. Procedural History

In 2019, Tyler filed a putative class action in state court against the County alleging, *inter alia*, that the County took her equity in violation of the federal Takings Clause and imposed an excessive fine.[4] Pet.App.25a–26a. The County removed the case to federal court, then moved to dismiss for failure to state a claim. Pet.App.16a. On December 4, 2020, the United States District Court for the District of Minnesota dismissed all claims. Pet.App.49a.

The Eighth Circuit affirmed dismissal on February 16, 2022. It rejected Tyler's argument that the Takings Clause protects her property interest in the value of her property that exceeded what she owed in taxes, interest, penalties, and costs on the grounds that no such property interest exists. The court acknowledged that Minnesota cases like *Farnham v. Jones*, 32 Minn. 7, 11–12 (1884), recognized such an interest. Pet.App.7a–8a. However, it held that "any common-law right to equity recognized in *Farnham* has been abrogated by statute." Pet.App.8a. It also rejected Tyler's federal excessive fines claim on the grounds that the forfeiture of Tyler's equity was not a fine within the meaning of the Excessive Fines Clause, adopting in full the district court analysis. *Id.* ("We agree with the district court's well-reasoned

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[4] The State of Minnesota also was originally named as a defendant but was dismissed without prejudice because the County alone takes the property, sells it, and divides the proceeds. JA.38–39; JA.77–78 (noting that neither the State nor County objected to the State's dismissal on this basis).

order and affirm the dismissal of these counts on the basis of that opinion."). The district court's analysis turned on three points: (1) its belief that the home-forfeiture scheme's "primary purpose is to compensate the government for lost revenues due to the non-payment of taxes," (2) the fact that in some cases forfeited property may be worth less than a property owner's debt, and (3) property owners are given "multiple opportunities . . . to avoid forfeiture." Pet.App.41a–42a. Thus, even though the County conceded that the forfeiture is at least partially "a deterrent to those taxpayers considering tax delinquency," Pet.App.48a, and the County took substantially more from Tyler than she owed, the court held that confiscation of Tyler's equity was not a punishment and therefore not a "fine." Pet.App.44a.

This Court granted Tyler's Petition for Writ of Certiorari on January 13, 2023.

SUMMARY OF ARGUMENT

Hennepin County took absolute title to Geraldine Tyler's home to satisfy a $15,000 debt consisting of approximately $2,300 in delinquent property taxes plus $12,700 of accumulated interest, collection costs, and penalties. It sold the home for $40,000 and kept the surplus proceeds of $25,000 as a windfall to fund city, county, and school district operations. The central issue in this case is whether property owners indebted to the government are protected by the Takings and Excessive Fines Clauses when government confiscates property worth more than it is owed to collect a debt. A fair application of this Court's precedents instructs that one or both of these clauses must apply. Under no circumstances can government have an unbounded ability to confiscate

entire properties of any size for even the most minimal tax debts.

Hundreds of years of Anglo-American legal tradition, common law, and Minnesota law recognize that home equity is private property and impose a general duty on creditors to return to debtors the excess value of property seized to satisfy debt. *See infra* at 14–22. A minority of states, including Minnesota, have declared by statute that government creditors alone enjoy an exception to the rule. These states confiscate hundreds of millions of dollars in equity from thousands of property owners each year, falling hardest on the elderly and infirm who, for a multitude of honest reasons, do not or cannot pay their debts in time to avoid forfeiture. *See* Angela C. Erickson, *Thousands Lose Their Wealth to Home Equity Theft*, Pacific Legal Foundation (last visited Feb. 29, 2023);[5] JA.51–52 (district court noting "disproportionate impact on the poor, the elderly, the infirm"). Yet, government may not "sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998). Nor may it "transform private property into public property without compensation" by mere say-so. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). While it is sometimes necessary for government to seize real property to collect a debt, its debt-collection authority terminates when the debt is satisfied; it has no entitlement to more. Confiscating equity triggers the constitutional duty to

[5] https://homeequitytheft.org/size-and-scope.

provide just compensation for taking private property for public use.

If not remedied by just compensation under the Takings Clause, then the forfeiture of Tyler's equity operates as a punishment for the public offense of failing to timely pay her property tax. The Excessive Fines Clause applies when a civil sanction is at least partially punitive. *Austin v. United States*, 509 U.S. 602, 622 (1993). Consistent with existing precedent, and the history and meaning of the Eighth Amendment, the Court should hold that the forfeiture of the equity or surplus proceeds is a fine subject to the Excessive Fines Clause.

ARGUMENT

I. Government Takes Property Without Just Compensation When It Collects a Debt and Keeps More than It Is Owed

The Fifth Amendment protects private property from uncompensated appropriation "without any distinction between different types" of property. *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). The private property interest at issue in this case is Tyler's home equity, the value she possessed in her property above the amount of her total debt. It is a property interest in profits or proceeds left over from the sale of a physical thing. *See, e.g., Russello v. United States*, 464 U.S. 16, 22 (1983) ("Every property interest, including a right to profits or proceeds, may be described as an interest in something."). *Cf. Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens "constitute compensable property"). This Court's prior decisions, hundreds of years of Anglo-American law, and Minnesota's treatment of equity as

private property in virtually all other contexts confirm that equity is private property within the meaning of the Takings Clause. *See infra* at 11–22.

The government may not take a property owner's equity by legislatively redefining it, *Phillips*, 524 U.S. at 167, nor does equity simply "vanish[] into thin air" because the government has a "paramount lien." *Armstrong*, 364 U.S. at 44–45, 48. Yet the County took Tyler's former home and extinguished her equity interest, even though she only owed $15,000. The County used the $25,000 windfall it realized from that taking for the public. This violated the Takings Clause, which 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." *Id.* at 49; *Hall v. Meisner*, 51 F.4th 185, 194 (6th Cir. 2022).

A. Home Equity Is Private Property

The Takings Clause protects "every sort of interest the citizen may possess" in a "physical thing." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945); *Jago v. Van Curen*, 454 U.S. 14, 17 (1981) ("'[P]roperty' denotes a broad range of interests that are secured by 'existing rules or understandings.'") (citation omitted). State law is a common but *not* exclusive source of constitutionally recognized property interests. *See Phillips*, 524 U.S. at 164. Here, the property interest at issue is Tyler's home equity.[6]

[6] The Sixth Circuit used "equity" synonymously with "equitable title" in *Hall*, 51 F.4th at 187. But "equity" is the better understood term in modern America. *See id.* By contrast, "equitable title" is broadly used today to refer to property

Equity is an owner's financial interest in the property after deducting encumbering liens. *Crane v. Commissioner*, 331 U.S. 1, 7 (1947); Black's Law Dictionary (11th ed. 2019) ("equity" is "[a]n ownership interest in property" and "[t]he amount by which the value of or an interest in property exceeds secured claims or liens"). Equity bears all the hallmarks of a property interest. Individuals may possess, use, or transfer it. *See, e.g.*, 12 U.S.C. § 1715z-20 (regarding home equity conversion mortgages for elderly homeowners); *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 618 (Tex. 2007) (every state permits loans using home equity as collateral); National Council on Aging, *Get the Facts on Home Equity and Seniors* (Mar. 1, 2021)[7] (equity is a "useful financial tool"); Joint Center for Housing Studies of Harvard Univ., *Housing America's Older Adults* at 3, 7 (2018) (means of savings);[8] 11 U.S.C. § 522(d) (law exempts certain amount of home equity from a bankruptcy estate). Thus, under this Court's definition of property, equity is "private property" within the meaning of the Takings Clause. *Cf. Koontz v. St. Johns River Water Mgmt. 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").

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interests of any owner whose name is not on the legal title. *See, e.g., Cook v. United States*, 37 Fed.Cl. 435, 442 (1997) (using equitable title to describe the owner of the property interest even though the owner is not on the title).

[7] https://www.ncoa.org/article/get-the-facts-on-home-equity-and-seniors.

[8]https://www.jchs.harvard.edu/sites/default/files/media/imp/Harvard_JCHS_Housing_Americas_Older_Adults_2018.pdf.

1. This Court's decisions support the recognition of home equity as a property interest protected by the Taking Clause

This Court has repeatedly recognized that the Takings Clause protects financial property interests, including money, interest, liens, and mortgages that require the holder to be paid some share of proceeds from the sale of that property. *See, e.g.*, *Koontz*, 570 U.S. at 613 (money); *Webb's*, 449 U.S. at 164; *Phillips*, 524 U.S. at 167 (interest); *Armstrong*, 364 U.S. at 48 (liens); *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). Equity falls within the same class as these other protected financial interests. It doesn't matter that home equity represents only a partial interest in the home; the law routinely recognizes partial interests in property. *See, e.g.*, Minn. Stat. § 558.01 (allowing certain joint owners of property to seek partition "according to the[ir] respective rights and interests"); *Bogart v. United States*, 169 F.2d 210, 213 (10th Cir. 1948) (owners of separate interests in property may distribute a just compensation award amongst themselves); *United States v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st Cir. 1999) (just compensation fund to be distributed to heirs both known and unknown).

Although this Court has not directly said that equity in real estate is a discrete property interest, it consistently treats it as such. For example, *United States v. Rodgers* held that the Internal Revenue Service could forcibly sell a widow's home to collect her late husband's debts. 461 U.S. 677, 680 (1983).

However, the government was *not* entitled to take proceeds from the widow's share of the estate. *Id.* ("We also hold that, if the home *is* sold, the non-delinquent spouse is entitled . . . to so much of the proceeds as represents complete compensation for the loss of the homestead estate."). The statute avoided causing a taking "by requiring that the court distribute the proceeds of the sale 'according to . . . the interests of the parties.'" *Id.* at 697–98.

Similarly, debtors have obtained relief where an auctioneer failed to solicit competitive bidding or sold more than needed to satisfy a debt, based on an implicit understanding that debtors have a property interest in the equity value of their property. *See, e.g.*, *Slater v. Maxwell*, 73 U.S. 268, 276 (1867) ("It is essential to the validity of tax sales . . . that they should be conducted with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be in all such cases strictly exacted."); *Stead's Ex'rs v. Course*, 8 U.S. 403, 414 (1808) ("[I]f a whole tract of land was sold when a small part of it would have been sufficient for the taxes . . . the collector unquestionably exceeded his authority."). These cases make sense only if equity is a protected property interest.

This Court construed federal property tax statutes imposed during the Civil War to avoid a forfeiture of equity that might otherwise present a constitutional problem. In *Bennett v. Hunter*, 76 U.S. 326, 335, 337 (1869), a statute provided "that the title of, in, and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States." *Id.* at 335. Because such a forfeiture

strayed from the common law, and it is "proper" to avoid such a "highly penal" provision where milder construction is possible, the Court interpreted "forfeit" to mean that the title of property and not the land itself was transferred to the government to allow for public sale. *Id.* at 335–36. The Court then held the tax sale in that case was invalid because the government should have accepted the owner's attempt to redeem the "forfeited" property prior to the sale. *Id.* at 338.

Subsequently interpreting the same act as in *Bennett*, the Court held that the law required the government to adopt the traditional duty of refunding the surplus proceeds after selling forfeited property. *United States v. Taylor*, 104 U.S. 216, 219 (1881). In *Taylor*, the federal government sold a property owner's land at a tax sale for $3,000 to collect $70.50 in property taxes. *Id.* at 217. Relying on *Bennett*, the Court noted that the tax law "was not a confiscation act," and therefore the former owner was entitled to the surplus proceeds from the sale of the property. *Id.* at 221. Moreover, the owner's recovery of the surplus could not be barred by the statute of limitations because a "good faith" construction of the statute required 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 again interpreted the same statutes in *United States v. Lawton*, 110 U.S. 146, 150 (1884), and held 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." The Court later said in *Nelson v. City of New York*, 352 U.S. 103, 110 (1956), that *Lawton*

did not answer the question presented here because the statute rather than the Constitution was interpreted to require a return of the surplus. Nevertheless, taken together, *Bennett*, *Taylor*, and *Lawton* show this Court's unwillingness to allow government to confiscate equity (or surplus proceeds) because it is private property that rightfully belongs to the debtor.

2. History and tradition confirm that equity in real estate is private property

This nation's history and tradition confirm that Tyler's equity is "private property" within the meaning of the Takings Clause. *See Horne*, 576 U.S. at 358–60 (looking to history and tradition to decide personal property is protected by Takings Clause). Magna Carta "recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess." *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429, 463 (2020); *see also Hall*, 51 F.4th at 193; William Sharp McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 322–23 (2d ed. 1914). At common law, the government could not take more than it was owed. *See, e.g.*, *Martin v. Snowden*, 59 Va. 100, 136–38 (1868) (discussing protection for debtors in English history, including specific laws). Sir William Blackstone wrote that when officials seized property for delinquent taxes, "they 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 (citation omitted).

Consistent with its English roots, the United States respected debtors' property rights by selling tax-indebted property in a public sale and refunding the surplus over the debt to the former owner. *Rafaeli*, 505 Mich. at 462–67 (tracing the long and consistent history of this protection); *Douglas v. Roper*, No. 1200503, 2022 WL 2286417, at *11–12 (Ala. June 24, 2022) (citing *McDuffee v. Collins*, 23 So. 45, 46 (Ala. 1898)) (law that a property owner was entitled to excess funds resulting from a tax sale was "merely declaratory of the law as it *already existed*"); *Martin,* 59 Va. at 138–41; *Hall*, 51 F.4th at 193 (American courts' traditionally have protected equity in mortgage foreclosures despite contractual agreements, and tax-debtors enjoy even greater protection than mortgagors "given the absence of any agreement by the landowner (as with a mortgage) to forfeit the land upon default.").

Shortly after the adoption of the Fourteenth Amendment, Thomas Cooley wrote that he was unaware of *any* jurisdiction that failed to protect debtors' equity by either refunding the surplus or taking only as much property as required by the taxes owed. Thomas M. Cooley, *A Treatise on the Law of Taxation* 343 (1876). Similarly, Henry Black noted that

> where the land is sold for what it will bring, and the amount of the bid exceeds the aggregate of charges against it, the owner of the estate is clearly entitled to the surplus. For the government is satisfied upon receiving its dues, with the penalties, and the expenses incurred in and about the sale.

Henry Black, *Treatise on Tax Titles* (1888) § 157. *Id.* §§ 71–72 (also noting that Louisiana engaged in a forfeiture of equity, a practice he described as of questionable constitutionality). The reason for this limitation on debt collectors is obvious: a tax collector's power to take property is "exhausted the moment the tax [is] collected." Cooley, *A Treatise on the Law of Taxation* 343–44. Indeed, "[a]n indebted thing cannot be condemned beyond its indebtedness." Rufus Waples, *A Treatise on Proceedings In Rem* § 232 (1882).

The common law imposes a fiduciary duty on government to sell the property fairly and hold the surplus proceeds for the benefit of the former owner. *See, e.g.*, *Bogie v. Town of Barnet*, 129 Vt. 46, 52 (1970) ("For the privilege of so proceeding [with a tax sale to collect a tax], the town must suffer the restraints of fiduciary duty."); *Cahoon v. Coe*, 57 N.H. 556, 597–98 (1876); *Slater*, 73 U.S. at 276 (tax sales must be "conducted with entire fairness" free "from all influences likely to prevent competition in the sale" to protect debtor's interest in the property). Tax collectors who fail to properly sell seized property and refund the surplus profits have long been held liable under the common law to pay the former owner or found in violation of the Constitution. *See, e.g.*, *Cone v. Forest*, 126 Mass. 97, 101 (1879) (liable for conversion); *Seekins v. Goodale*, 61 Me. 400, 400 (1873) (tax collector who seized and sold more cloth than necessary to pay debt was liable for trespass for the excess and had to pay fair market value for extra cloths that he sold); *Griffin v. Mixon*, 38 Miss. 424, 436–37 (1860) (uncompensated taking); *Martin*, 59 Va. at 142–43 (violates due process of law to confiscate

more than owed); *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").

The history and tradition of Minnesota itself, like the rest of the states, reflects the principle that property-tax debtors are entitled to be paid for their equity in property seized to pay a public debt. When the legislature passed a statute in 1862 providing that property 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).

Minnesota's high court again affirmed that government cannot take more than it is owed in *Farnham*, 32 Minn. at 11. There, the state seized and sold a debtor's 320 acres to collect property taxes. When the debtor then harvested timber off the land, the buyer sued for trespass. The Minnesota Supreme Court held the tax sale invalid because it sold more property than necessary to collect the tax. Moreover, it held that any surplus proceeds from a subsequent sale must be returned to the former owner. *Id.* It was

"immaterial" that the statute provided no guidance on the subject. "[T]he right to the surplus exists *independently* of such statutory provision." *Id.* at 12 (emphasis added).

Similarly, in *Burnquist v. Flach*, 6 N.W.2d 805, 809 (Minn. 1942), the State of Minnesota took title to a debtor's property for failure to pay property taxes. *Id.* at 807. Several months later, the state highway commission brought condemnation proceedings against the property for a road. *Id.* at 806. The debtor tried to redeem the property and claim the condemnation proceeds. *Id.* at 807. The county treasurer denied her attempt because the redemption period expired upon "sale" of the land and the state had "purchased" it via condemnation. *Id.* at 807–08. The Minnesota Supreme Court disagreed, construing the state's tax statute to preserve the tax-delinquent owner's right to recover the proceeds, noting "[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 807 (internal quote omitted). The court protected the debtor's equity interest: "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. Thus, the court required the proceeds to be paid to the debtor (presumably offset by the tax due), commenting that any "unprejudiced mind" would recognize "justice" demanded that result. *Id.*

3. Current Minnesota law treats equity as private property in other contexts

Minnesota, like all states and the federal government, ordinarily recognizes that equity in real estate is a property interest. For example, Minnesota courts treat equity as property to be divided in a marital dissolution. *See, e.g.*, *Batsell v. Batsell*, 410 N.W.2d 14, 15 (Minn. Ct. App. 1987); *Nelson v. Nelson*, 384 N.W.2d 468, 473 (Minn. 1986) (marital homestead purchased with "partial transfer of equity" from wife's premarital home is non-marital property). Home equity is a factor used to calculate the amount of child support. *Byrd v. O'Neill*, 309 Minn. 415, 416 (1976). The "equity value of real property" may be a "liquid asset" for purposes of determining whether a criminal defendant is sufficiently indigent to warrant appointment of counsel. *In re Stuart*, 646 N.W.2d 520, 526 (Minn. 2002). Property owners who own their home free and clear can borrow against their equity. Minn. Stat. § 47.58 (authorizing "reverse mortgage loans" on "residential property owned solely by the borrower").[9]

In other debt collection contexts, Minnesota law consistently recognizes that debtors have a property interest in the value of the property that exceeds

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[9] Reverse mortgages are also known as "Home Equity Conversion Mortgages" and "are not an uncommon way for older people to reap the benefits of the equity they have in their homes." *Taft v. Wells Fargo Bank, N.A.*, 828 F.Supp.2d 1031, 1032 (D. Minn. 2011); *see also Greer v. Professional Fiduciary, Inc.*, 792 N.W.2d 120, 124 (Minn. App. 2011) ("reverse mortgage" home equity conversion loan paid for long-term care of elderly homeowner); *In re Estate of Rutt*, 824 N.W.2d 641, 644 (Minn. App. 2012) (noting establishment of line of credit based on home equity).

encumbering debts. For example, property seized as part of an execution on judgment or collateral repossessed must be sold fairly and surplus profits must be returned to the debtor after the debts are paid. *Id.* § 550.20 ("No more shall be sold than is sufficient to satisfy the execution"); *id.* § 550.08 (creditor only entitled to "so much thereof as will satisfy the execution);" *id.* § 336.9-608(a), -615(d) (following Uniform Commercial Code (U.C.C.) by returning surplus to former owner); U.C.C. § 9-615. *See also* 28 U.S.C. § 3203(g), (h)(1) (Federal Debt Collection Procedures Act protects a debtor's equity by requiring a "commercially reasonable" sale and refunding any surplus proceeds to the former owner). This protection for debtors is mandatory and cannot be waived by agreement. *See, e.g.*, Minn. Stat. § 336.9-602(5), (8), (9) (following U.C.C. § 9-602).[10]

In mortgage foreclosures, Minnesota, like all states, secures equity as a property interest, requiring the excess proceeds from the sale of foreclosed property to be returned to the former owner. Minn. Stat. § 580.10; *see also Hall*, 51 F.4th at 195 (noting the same rule across the country).[11] They require the

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[10] A comment to U.C.C. Section 9-602 notes that "in the context of rights and duties after default, our legal system traditionally has looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties. . . . The context of default offers great opportunity for overreaching. The suspicious attitudes of the courts have been grounded in common sense."

[11] Even Connecticut and Vermont, which are sometimes identified as the only states using strict foreclosure, *see, e.g.*, *In re Canney*, 284 F.3d 362, 369 (2d Cir. 2002), protect debtors' equity interest where the property is worth substantially more than the debt. Vt. Stat. Ann. tit. 12, § 4941 (strict foreclosure only

property to be sold publicly to the highest bidder. Restatement (Third) of Property (Mortgages) § 7.4. "[T]he proceeds of [that] sale are substituted for the land itself, and become subject to outstanding liens and claims to the same extent and in the same order as the land itself was subject thereto." 5 Tiffany Real Prop. § 1529 (3d ed. 2022). *See, e.g.*, *Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 873, 877 (Minn. 2002); *Brown v. Crookston Agric. Ass'n*, 34 Minn. 545, 546 (1886) ("the land is converted into money"). After paying the debts, the surplus is refunded to the former owner because it "represents the owner's equity in the real estate." *Grand Teton Mountain Invs., LLC v. Beach Props., LLC*, 385 S.W.3d 499, 502 (Mo. Ct. App. 2012) (all the liens and ownership interests that previously "attached to the land" now attach to the proceeds from the sale). "The rights of the parties, as they before existed, are not transposed by the sale, and the court will apply the fund in accordance with their rights as they existed in respect to the land."

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allowed where "no substantial value in the property in excess of the mortgage debt"); *Voluntown v. Rytman*, 27 Conn.App. 549, 555, 607 (1992) ("when the value of the property substantially exceeds the value of the lien being foreclosed, the trial court abuses its discretion when it refuses to order a foreclosure by sale"); *Toro Credit Co. v. Zeytoonjian*, 341 Conn. 316, 330 (2021) ("It may be that the majority of foreclosure judgments are by strict foreclosure, but, if anything, that would indicate only that the majority of foreclosures arise in situations in which *the value of the property is less than the debt owed*. That hardly makes strict foreclosure the general rule.") (emphasis added).

Shaw Acquisition Co., 639 N.W.2d at 877 (citations omitted).[12]

Moreover, when collecting other delinquent taxes in Minnesota—like income taxes—the state protects equity in real estate by seizing and selling property at public auction and refunding the surplus to the former owner after satisfying the tax debt. Minn. Stat. §§ 270C.7101, 270C.7108; 270C.40 (refunds for overpayment are paid with interest).[13] When personal property taxes are delinquent, the County protects the owner's interest in the property's surplus value by selling it and refunding the surplus. *Id.* § 277.21(1)–(3), (13); *id.* § 270C.7108(2) ("Any surplus proceeds remaining . . . shall . . . be credited or refunded . . . to the person or persons legally entitled thereto.").

Minnesota's self-dealing property forfeiture scheme stands in sharp contrast to the state's usual treatment of equity. It fails to recognize the property status of equity in only one context: when the state itself is the creditor. There is nothing about property taxes, utility bills, or code enforcement fines that justifies this unusual treatment. *See* JA.53 (district

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[12] A similar rule generally applies in bankruptcy proceedings. *See, e.g.*, *Burton Coal Co. v. Franklin Coal Co.*, 67 F.2d 796, 801 (8th Cir. 1933) ("any surplus remaining in the custody of the trustee should go to the bankrupt without the necessity of a statutory provision to that effect"); *Matter of First Colonial Corp. of Am.*, 693 F.2d 447, 451 (5th Cir. 1982) ("In the absence of an express provision for the orderly devolution of surplus monies or other assets after payment of all debts and administrative costs, the courts have relied upon equitable principles in returning such surplus to the debtor.").

[13] The federal government likewise returns surplus proceeds when seizing property to collect unpaid income taxes. *See, e.g.*, 26 U.S.C. §§ 6342, 7403.

court noting that all other creditors "get[] left holding the bag except the government[]"). Indeed, most states protect equity when collecting property taxes.[14] *See* 72 Am.Jur.2d State and Local Taxation § 911 (1974).

B. The County Violated the Takings Clause When It Confiscated Tyler's Equity

Because equity is private property that belongs to the debtor, the government violates the Takings Clause when it takes equity without compensation. *Hall*, 51 F.4th at 195; *Bogie*, 129 Vt. at 49, 55; *Polonsky v. Town of Bedford*, 173 N.H. 226, 239 (2020) ("[W]hen a municipality acquires property by tax deed and the equity in the property exceeds the amount owed, a taking has occurred, regardless of whether the former owner took steps to correct the consequences of the tax delinquency."). Certainly, the government can seize property to collect a debt. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277–78 (1855). But when it seizes more than it is owed, it

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[14] *See* Alaska Stat. §§ 29.45.480, 29.45.470; Ark. Code § 26-37-205; Conn. Gen. Stat. § 12-157(h); Del. Code tit. 9, §§ 8751, 8779; Fla. Stat. §§ 197.522, 197.582; Ga. Code Ann. §§ 48-4-5, -81; Idaho Code § 31-808(2)(b); Ind. Code § 6-1.1-24-7(c); Iowa Code Ann. § 446.16; Kan. Stat. § 79-2803; Ky. Rev. Stat. §§ 91.517, 426.500; La. Stat. Ann. § 47:2153(5); Md. Code Ann., Tax-Prop. § 14-818(a)(4); Mich. Comp. Laws § 211.78g(2); Miss. Code Ann. § 27-41-77; Mo. Rev. Stat. § 140.340; Nev. Rev. Stat. § 361.610(4), (6); N.C. Gen. Stat. § 105-374(k), (q)(6); N.H. Rev. Stat. Ann. §§ 80:88, 80:89; N.M. Stat. § 7-38-71(A)(4); N.D. Cent. Code § 57-28-20(1)(a); Okla. Stat. tit. 68, §§ 3131(C), 3125; 72 Pa. Cons. Stat. §§ 5860.205, 5860.601, 5860.610, 5860.613; S.C. Code §§ 12-51-60, -130; 44 R.I. Gen. Laws §§ 44-9-24, -8.1, Tenn. Code § 67-5-2702; Tex. Tax Code § 34.04(a); Utah Code Ann. §§ 59-2-1351.1(7), 67-4a-903(1); Va. Code Ann. § 58.1-3967; Wash. Rev. Code § 84.64.080; W. Va. Code § 11A-3-65; Wis. Stat. § 75.36(2m); Wyo. Stat. § 39-13-108(d)(4).

must protect the debtor's interest either by paying for the equity or by taking the property subject to the traditional duty to sell the property in a commercially reasonable manner and refund the surplus proceeds. *See supra* at 16. The County's uncompensated confiscation of Tyler's equity in this case violates the Takings Clause.

The government here had a $15,000 lien on Tyler's property. Prior to its forfeiture, Tyler had equity in her home that substantially exceeded the amount of the lien. In 2015, the County extinguished Tyler's total interest and converted its lien into fee simple absolute title for the benefit of the government. This conveyance transformed Tyler's equity interest (worth at least the $25,000 yielded by the subsequent sales auction) into public property without compensation.

1. The state may not use legislation or its lien to extinguish equity without just compensation

The Eighth Circuit rejected Tyler's takings claim by holding that the Minnesota Legislature "abrogated" any property interest Tyler had in her property. Pet.App.7a. But "the Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Hall*, 51 F.4th at 190. *See also* Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 Mich. L. Rev. 1892, 1894 (1992) ("The compensation requirement makes sense as a constitutional right only if it was intended as a limit on the legislature's judgment about the need for compensation and a check on the legislature's authority over private property.").

Indeed, government cannot by "*ipse dixit*" legislatively "transform private property into public property without compensation." *Webb's*, 449 U.S. at 158–59, 164. *Webb's* held that government violated the Takings Clause by designating the interest earned on private funds deposited with a court as "public funds" and keeping the money. The Takings Clause cannot be avoided by statutorily redefining private property as public property: "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.

Nor may the government carve out exceptions to what qualifies as private property to avoid the Takings Clause. In *Phillips*, 524 U.S. 156, the plaintiffs challenged a Texas State Bar Rule that required them to give interest on client trust accounts to fund legal aid nonprofits of the state's choice. *Id.* at 159. Relying on *Webb's*, the plaintiffs argued that the forced transfer of interest to fund the charities took clients' property (money) without just compensation. *Id.* In opposition, Texas claimed that the state's property laws exempted the bar's program from the general rule that interest follows principal. *Id.* at 167. Relying on history and the common law, however, this Court held that the program was not exempt from the "firmly embedded" rule that interest belongs to whomever owns the principal. *Id.* at 159, 165. By mandating the diversion of interest for a public use, the program effected a taking and that "*at least as to confiscatory regulations* . . . a State may not sidestep the Takings Clause by disavowing traditional property interests." *Id.* at 167 (emphasis added);

accord Canel v. Topinka, 212 Ill.2d 311, 332 (2004) (rejecting state's "bare assertion of authority" to redesignate private property as public property); *Muskin v. State Dep't of Assessments and Taxation*, 422 Md. 544, 565 (2011) ("Allowing the 'mere will of the Legislature' to shift drastically the fee simple ownership of land or cancel contractual obligations will shake further the confidence of citizens in their constitutional protections from government interference.").

This case is like *Webb's* and *Phillips*, insofar as history, the common law, and Minnesota law in all other contexts, support Tyler's takings claim. *See Phillips*, 524 U.S. at 165 & n.5. The County provided no compensation for its confiscation of Tyler's home equity, violating the established rule that "the owner shall be put in as good position pecuniarily as [s]he would have been if h[er] property had not been taken." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 356 (1923). Prior to confiscation, Tyler owned a home worth at least $40,000 and owed $15,000. After confiscation, she owned and owed nothing. No other type of debt collector, nor the state itself when recovering any other type of debt, could keep such a windfall. *See supra* at 19–22.

The taking of Tyler's equity interest in her property also resembles the injustice condemned in *Armstrong*, 364 U.S. 40. There, 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 its contractual and common law rights. *Id.* at 41. The United States, however, 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 "vanish" 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 and "destroyed" the liens, the suppliers had "compensable property" 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.

Like *Armstrong*, here "the government for its own advantage destroy[ed] the value" of Tyler's compensable property, her equity. And like the destruction of liens in *Armstrong*, the taking of Tyler's equity requires payment of just compensation. *See id.* at 48; *accord Hall*, 51 F.4th at 187–88; *Griffin*, 38 Miss. at 436–37 (uncompensated taking); *Rafaeli*, 505 Mich. at 468 (taking under Michigan Constitution); *Bogie*, 129 Vt. at 55 (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*, 173 N.H. at 227–28, 239.

2. The taking of equity violates the purpose of the Takings Clause

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*, 364 U.S. at 49. The government's actions here were

neither fair nor just, heaping a disproportionate share of the public's tax burden onto Tyler by confiscating her equity to fund local government operations and school districts. *Cf. Staats v. Miller*, 150 Tex. 581, 584–85 (1951) (citation omitted) (A cause of action for taxes or other monies improperly taken is "less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff."). Courts have a duty to justly apply foreclosure law even in cases involving the government's "insatiable, relentless pursuit of its tax collection." *United States v. Boyd*, 246 F.2d 477, 481 (5th Cir. 1957). Indeed, Judge Kethledge aptly analogized the confiscation of "property worth vastly more than the debts" to "theft." *See Hall*, 51 F.4th at 196 (citing *Wayside Church v. Van Buren County*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting)).

Shocking cases are common. In Michigan, a county foreclosed on an octogenarian's home to collect $8 in taxes, plus penalties, interest, and costs, and kept all $24,500 from its sale. *See Rafaeli*, 505 Mich. at 437. In Massachusetts, a similar law took an indigent senior's $240,000 home over a $9,626 tax debt. *Foss v. City of New Bedford*, No. CV 22-10761-JGD, 2022 WL 3225154, at *2 (D. Mass. Aug. 10, 2022). Washington, D.C., took the $200,000 home of a veteran suffering with dementia to recover a $133 tax debt. *Coleman through Bunn v. D.C.*, 70 F.Supp.3d 58, 62 (D.D.C. 2014). Nebraska took a widow's million-dollar farm because she missed an $8,276 tax bill after she was moved into a retirement home. *Wisner v.*

Vandelay Invs., L.L.C., No. A-16-451, 2017 WL 2399492, at *1–2 (Neb. Ct. App. May 30, 2017), *rev'd*, 300 Neb. 825 (2018). Such confiscations "produce severe unfairness" and violate the Takings Clause. *Lake Cnty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004). "Taxing authorities are not (nor should they be) in the business of buying and selling real estate *for profit*." *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191–92 (Tex. 1995) (emphasis added), *as amended* (June 22, 1995)); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981). Tyler's takings claim "rests on the venerable proposition" that taking private property and giving it to the government without compensation "'is against all reason and justice.'" *Harrison v. Montgomery Cnty., Ohio*, 997 F.3d 643, 652 (6th Cir. 2021) (quoting *Calder v. Bull*, 3 U.S. 386, 388 (1798)) (analyzing similar forfeiture statute that gave property to government-run land bank).

3. *Nelson v. City of New York* does not apply here and its comments about the Takings Clause are dicta

The Eighth Circuit rejected Tyler's takings claim based mainly on a misreading of *Nelson*, 352 U.S. at 110. In that case, the City of New York foreclosed on two properties to satisfy delinquent utility bills, taking property that was worth more than the debt. The former owners pressed procedural due process and equal protection claims in the state courts and in their petition for writ of certiorari. *See Nelson*, 352 U.S. at 107; *City of New York v. Nelson*, 309 N.Y. 801, 801 (1955); *see also* Brief for Appellants, *Nelson*, No. 30, 1956 WL 89027, *3 (Sept. 14, 1956). But in the reply brief on the merits before this Court, they

argued—for the first time—that the failure to return the surplus value of the property violated the Takings Clause. *See Nelson*, 352 U.S. at 107. This Court rejected that eleventh-hour argument, noting that the New York City law gave the owners an opportunity to claim the surplus proceeds from a judicial sale of the property, which the owners failed to request in time. *Id.* at 110 (takings claim fails "in the absence of timely action to . . . recover[ ] any surplus"). The Court implied that state law could effect a taking if it "precludes an owner from obtaining the surplus proceeds of a judicial sale." *Id*. Unlike New York City's law, Minnesota does not provide *any* opportunity for debtors to collect surplus proceeds from the sale of their tax foreclosed property, therefore *Nelson* is inapplicable here. *See, e.g.*, *Rafaeli*, 505 Mich. at 460 (distinguishing successful challenge to Michigan's similar forfeiture statute on that ground); *Hall*, 51 F.4th at 196.

More importantly, *Nelson*'s takings discussion is nonbinding and unpersuasive dicta. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (court's "rebuttal to a counterargument" that went outside the issue before the court was dicta). Claims "not brought forward" in the lower court "cannot be made" in the Supreme Court. *Magruder v. Drury*, 235 U.S. 106, 113 (1914); *United States v. Williams*, 504 U.S. 36, 41 (1992). The property owners in *Nelson* did not argue a takings claim in the lower courts, and therefore could not raise it in this Court. Because *Nelson*'s discussion of the takings issue was unnecessary to the Court's resolution of the case, it was dicta. *Kirtsaeng*, 568 U.S. at 548; *Williams v. United States*, 289 U.S. 553, 568 (1933) (dicta should

not "control the judgment in a subsequent suit, when the very point is presented for decision") (citation omitted).

Nelson's dicta also conflict with this Court's takings decisions. *Nelson* suggests that an owner must seek compensation for a taking in a state court proceeding *before the taking* occurs. *See Nelson*, 352 U.S. at 110 (owner should have requested relief in the *in rem* foreclosure action, which would have allowed the owner "to recover the surplus" proceeds from a subsequent sale). In other words, the lower court's interpretation of *Nelson* transforms the government's burden to pay just compensation into a burden on the owner to seek compensation before she has lost anything. A property owner who experiences a taking cannot be required to seek compensation by filing a claim in state court before the taking has even occurred. "[T]he act of taking" is the "event which gives rise to the claim for compensation." *United States v. Dow*, 357 U.S. 17, 22 (1958). "Compensation under the Takings Clause is a remedy for the constitutional violation that the landowner has *already suffered* at the time of the uncompensated taking." *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2172 (2019) (emphasis added and internal quotes omitted).

Moreover, a property owner may sue for just compensation in federal court notwithstanding the existence of "a state law procedure that will eventually result in just compensation." *Id.* at 2171; *see also Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). This is the opposite of *Nelson*'s dicta, which disparaged a federal

takings claim on the grounds that plaintiffs should have instead pursued a state court procedure to recover the surplus value of their confiscated property. 352 U.S. at 109. The Takings Clause does not allow the government to substitute just compensation with a state court procedure that might result in compensation. *Knick*, 139 S.Ct. at 2175.

Rather than recognize that *Nelson*'s gratuitous takings analysis was disproven by *Knick*, the lower court expanded its reach, holding that the ability to avoid a foreclosure by selling or redeeming the property is essentially the same as a right to claim surplus proceeds from the sale of the property. Pet.App.9a ("That Minnesota law required Tyler to do the work of arranging a sale in order to retain the surplus is not constitutionally significant."). The opportunity to avoid a foreclosure by redeeming the property is a procedural protection, not just compensation for property actually taken. *Polonsky*, 173 N.H. at 239 ("when a municipality acquires property by tax deed and the equity in the property exceeds the amount owed, a taking has occurred, regardless of whether the former owner took steps" to redeem). Tyler does not challenge the procedures involved in foreclosing on her property as a matter of due process; she challenges the County's taking of her equity without compensation. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (due process and the Takings Clause both protect property owners, offering different remedies for different types of constitutional violations).

Indeed, a window to avoid a taking by paying a debt does not satisfy the Takings Clause. In *Horne*, this Court held that requiring the owners to donate a

portion of their raisin crop to the government was a taking and that it was irrelevant that the owners had an opportunity to avoid the taking by selling the grapes for juice. 576 U.S. at 365. "[P]roperty rights cannot be so easily manipulated." *Id.* (internal quote omitted).[15]

Tyler's failure to pay her debt does not entitle the government to take property worth more than what she owed without paying just compensation for the difference. This Court should reverse the dismissal of Tyler's takings claim.

II. The Excessive Fines Clause Limits the Forfeiture of Tyler's Equity

Because the County did not pay just compensation for Tyler's equity, its forfeiture operated as a fine subject to the limitations of the Excessive Fines Clause.[16] This is true under a straightforward

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[15] Like selling raisins in *Horne*, the equity in one's home is "not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." *Id.* at 366. *See also* JA.49 (district court describing Minnesota's scheme: "what the state sort of does is when they take a $100,000 condo because, I don't know, $5,000 in taxes are owed, is they're basically like holding the condo hostage, saying pay us our 5,000 or we're taking your 100,000"). Preventing this sort of ransom is the premise that underlies the unconstitutional conditions doctrine in the takings context, which "refuse[s] to attach significance to the distinction between conditions precedent and conditions subsequent." *Koontz*, 570 U.S. at 607 (citations omitted).

[16] Tyler acknowledges that likely only one remedy will be necessary, because paying her just compensation should eliminate the challenged fine. But the question at this stage is only whether she has stated viable claims. "Certain wrongs affect

application of this Court's existing precedents. Further, the history and original meaning of the Clause support its application here.

The County took Tyler's entire home, worth far more than the $15,000 she owed. The $15,000 liability included her unpaid tax, plus penalties, interest, and collection costs added by the County to compensate for all its expenses in pursuing the debt. Pet.App.3a. The forfeiture of Tyler's substantial excess property "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes []." *Austin*, 509 U.S. at 610–11 (quotation omitted). The County itself admits that "[f]orfeiture also deters non-payment of property taxes; this deterrence is not to prevent crime, but rather a civil deterrence that encourages the positive behavior of paying one's property taxes." JA.42; *see also id.* ("[T]he ultimate possibility of loss of property serves as a deterrent to those taxpayers considering tax delinquency."). A civil sanction that is "at least partially punitive" is subject to scrutiny under the Excessive Fines Clause. *Timbs v. Indiana*, 139 S.Ct. 682, 690 (2019). As this Court explained in *Kokesh v. S.E.C.*, 137 S.Ct. 1635, 1643–44 (2017), "[s]anctions imposed for the purpose of

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more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). Here, as in *Soldal*, the seizure of property implicates two constitutional commands. *See id.* Where multiple constitutional violations are alleged, "[t]he proper question is not which Amendment controls but whether either Amendment is violated." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 50 (1993); *Soldal*, 506 U.S. at 70 (court does not identify which claim is "dominant," but rather examines each "provision in turn").

deterring infractions of public laws are inherently punitive."

The historical genesis of the Clause and the public understanding of its terms at the time of ratification buttress the conclusion that the forfeiture at issue here is a fine within the meaning of the Eighth Amendment. The prohibition of excessive fines traces its lineage to English law where it served, among other purposes, as protection against the sovereign "raising revenue in unfair ways." *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257, 272 (1989). Moreover, the terms "fine" and "forfeiture" were used interchangeably when referencing both civil and criminal economic sanctions in early American history, suggesting an original public meaning of the Clause consistent with its application to the forfeiture at hand. *See Austin*, 509 U.S. at 623 (Scalia, J., concurring in part) ("'Forfeiture' and 'fine' each appeared as one of many definitions of the other in various 18th-century dictionaries."); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 302 (2014).

A. The County's Forfeiture Is a Fine Under This Court's Existing Precedents

This Court has recognized that the "[p]rotection against excessive punitive economic sanctions secured by the [Excessive Fines] Clause is . . . both fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition." *Timbs*, 139 S.Ct. at 689 (citation and quotation omitted). In determining whether an economic sanction falls within its protection, the Court considers "whether it is punishment," not whether it

is criminal or civil. *Austin*, 509 U.S. at 610. Most recently, the Court reaffirmed that the Clause applies to forfeitures that are "at least partially punitive." *Timbs*, 139 S.Ct. at 690; *see also United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998) (the Clause "limits the government's power to extract payments, whether in cash or in kind [like forfeiture of an interest in real property] as punishment for some offense"). A forfeiture or fine has the hallmark of punishment when it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving retributive or deterrent purposes." *Austin*, 509 U.S. at 610–11.

A straightforward application of these principles indicates that government must be limited by the Excessive Fines Clause when it responds to the public offense of failing to timely pay property taxes, and seeks to deter future offenses, by confiscating property of substantially greater value than the debt owed. The courts below disagreed, holding that Minnesota's home-forfeiture scheme fell outside the protection of the Excessive Fines Clause because "its primary purpose is to compensate the government for lost revenues due to the non-payment of taxes." Pet.App.44a (district court); Pet.App.9a (adopting district court analysis). But this cannot account for the fact that in Tyler's circumstance and most other tax-forfeiture actions by the County in recent years, far more property is taken than needed to compensate for lost revenues and costs.[17] "When an individual is

[17] Annual property taxes in Minnesota typically represent approximately 1.05% of a home's value. JA.11. Moreover, an investigation of public records between 2014 and 2021 indicates

made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Kokesh*, 137 S.Ct. at 1644 (citation omitted).

The analysis provided by this Court in *Austin* is apt. It perceived that forfeitures under the statute at issue in that case looked like punishment because they were neither fixed in amount nor linked to the public harm caused by the property owner's actions. *Austin*, 509 U.S. at 621. They "var[ied] 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. The same is true of Minnesota's home-forfeiture scheme. Tyler lost her property, worth at least $40,000, to satisfy $2,300 in taxes, plus $12,700 in penalties, interest, and costs. The County kept the difference, which was worth at least $25,000 over and above the statutory penalties and compensatory sums. Had her property been worth twice as much with the same debt, the penalty would have been capriciously greater. As in *Austin*, the relationship between the debt owed and the sanction imposed is coincidental. Deterrence or punishment for the offense of not making timely tax payments is the only plausible rationale for taking the whole property when its value goes beyond compensation for the government's loss.

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that Hennepin County foreclosed on at least 326 homes worth approximately $60 million to recover $6.8 million in delinquent taxes, interest, and fees. *See* Angela C. Erickson, "Minnesota," *End Home Equity Theft*, Pacific Legal Foundation (last visited Feb. 29, 2023), https://homeequitytheft.org/minnesota.

Moreover, the County presumes that those who fail to make timely tax payments or redeem their property are culpable for their loss and merit no further protection. *See* JA.47 (blaming owners' "inaction"); Brief in Opposition to Pet. 26–27 (same). But property owners often miss the opportunity to avoid forfeiture due to mistakes of law or circumstances of extreme poverty, ill-health, 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).[18] "Being poor is not a crime." *United States v. Mitchell*, 172 F.3d 1104, 1107 (9th Cir. 1999).

Thus, the scheme here at least partially serves to punish or deter property owners who do not make timely tax payments. *See Bennett*, 76 U.S. at 336 (forfeiture of title and all value in tax-delinquent property would be "highly penal"). The County admits that the statute serves as a deterrent. App.50a ("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)). "Deterrence . . . has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329. Accordingly, if compensation for a taking is not paid, a straightforward application of this Court's existing precedents should bring the forfeiture of Tyler's equity "within the purview of the Excessive Fines Clause." *Id.* at 331 n.6.

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[18] https://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales.pdf.

B. The History and Original Meaning of the Excessive Fines Clause Support Its Application Here

This Court's most extended discussion of the history of the Excessive Fines Clause occurred in *Browning-Ferris*, where it observed that "[t]he Eighth Amendment received little debate in the First Congress and the Excessive Fines Clause received even less attention." 492 U.S. at 264 (citing *Weems v. United States*, 217 U.S. 349, 368 (1910)). In that case, the Court surveyed historical sources to determine whether the Clause was meant to limit punitive damages awarded by juries in cases between private parties. In answering no, the majority noted that damages awards were distinguished from what it perceived to be more historically evident applications of the Clause to government-imposed punishments in the criminal context or government's use of "civil courts to extract large payments or forfeitures for the purpose of raising revenue." *Id.* at 275. Justice O'Connor, writing separately about the history and origins of the Clause, expressed her view that the Clause should apply to punitive damage awards. "A chronological account of the Clause and its antecedents demonstrates that [it] derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct." *Browning-Ferris*, 492 U.S. at 298 (O'Connor, J., concurring in part, dissenting in part).

Under either view, the Court's discussion of history supports the application of the Clause to the forfeiture of Tyler's equity in this case. Here, the County used its "civil courts to extract [a] forfeiture[] for the purpose of raising revenue" and imposed a

monetary penalty to punish and deter misconduct. *See id.* at 275.

The courts below did not take that path, however, adverting to *Bajakajian* and its brief commentary on the history of traditional *in rem* forfeitures (e.g., forfeitures for importing goods in violation of customs laws, in which the government confiscated property or ships worth more than evaded duties). The district court wrongly concluded that this Court "rejected the notion that a penalty or forfeiture must be deemed punitive if the government receives more than is necessary to make it whole." Pet.App.42a. It thereby held that the County's home-forfeiture scheme passed muster as a "debt-collection system whose primary purpose is plainly remedial" despite confiscating property worth more than its indebted owners owed. Pet.App.44a.

Forfeiture in *this* case is easily distinguishable from the forfeitures cited in *Bajakajian*. Tyler's property is not involved in any criminal violation, making it impossible to describe as guilty property "tainted by the offense." *See Austin*, 509 U.S. at 613–14. As the Virginia Supreme Court noted in the tax foreclosure context,

> This forfeiture cannot be sustained as a forfeiture for crime, like the forfeitures which take place under the revenue and navigation laws, or under the act of August 6, 1861. In such cases, the thing forfeited is the instrument by which the offence was committed, or was the fruit of the offence, and is treated as being itself, in some sort, the offender. But the land of a delinquent tax-

> payer cannot be brought within the principle of this class of cases; it is neither the instrument nor the fruit of any offence.

Martin, 59 Va. at 142. Neither is the forfeiture of Tyler's whole property "justified by necessity," as has been said about customs forfeitures where persons responsible for the offense were "frequently located overseas and thus beyond the personal jurisdiction United States courts." *Leonard v. Texas*, 137 S.Ct. 847 (2017) (Thomas, J., statement respecting denial) (citing Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 Mich. L. Rev. 1910, 1918–20 (1998)). Indeed, Tyler is an elderly woman living in the same apartment in Minnesota where she's resided for more than a decade since moving out of the property at issue in this case.[19]

Moreover, *Bajakajian*'s discussion of the historical status of civil *in rem* forfeitures was dicta and is unpersuasive. The question in the case was whether the Excessive Fines Clause properly limited the amount of an *in personam* criminal forfeiture. *Bajakajian*, 524 U.S. at 332. Likely because it was not at issue in the case, *Bajakajian* incorrectly posited that "[t]raditional in rem forfeitures were [] not considered punishment against the individual for an offense," and "because they were viewed as nonpunitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause." *Id.* at 331. In dissent, Justice

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[19] Other debtors who lose homes because of delinquent taxes may remain living in the property when the homes are foreclosed. *See, e.g.*, Br. of Amici Curiae David Wilkes, et al. in Support of Petitioner Geraldine Tyler 17–20; *Fair v. Continental Resources*, No. 22-160, Petition for Writ of Certiorari (filed Aug. 18, 2022).

Kennedy criticized the majority's reading of the history and expressed concern that its conclusions "remove[d] important classes of fines from any excessiveness inquiry at all," treating "many fines as 'remedial' penalties even though they far exceed the harm suffered." *Id.* at 345 (Kennedy, J., dissenting). "In the majority's universe, a fine is not a punishment even if it is much larger than the money owed. This confuses whether a fine is excessive with whether it is a punishment." *Id.*; *see also Toth v. United States*, 143 S.Ct. 552, 553 (2023) (Gorsuch, J., dissenting from denial of certiorari) ("[T]he notion of 'nonpunitive penalties' is a 'contradiction in terms.'") (citing Justice Kennedy's dissent). Five years earlier, in *Austin*, this Court held that those same traditional *in rem* forfeitures were at least partly a form of punishment. 509 U.S. at 614–18 ("[F]orfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."); *id.* at 625 (Scalia, J., concurring in part) ("[I]t seems to me that this taking of lawful property must be considered, in whole or in part, punitive.") (citation omitted).

Consistent with *Austin*'s view, recent scholarship confirms that traditional *in rem* forfeitures were considered punishment during the Founding era. *See* Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449, 1498–99 (2019). In fact, the Founding generation sought to constrain them with proportionality principles embodied by the Excessive Fines Clause. For instance, a study of the effects of the 1790 Remission Act, which authorized the owners of forfeited goods or ships to petition the government for their return where the forfeiture was not justified by

"wilful negligence or any intention of fraud," shows that nearly 91% of petitioners received their property back. *Id*. at 1485, 1487–88. Early cases also explain *in rem* forfeitures as punishment. *See, e.g.*, *Peisch v. Ware*, 8 U.S. 347, 364 (1808) ("[T]he act punishes the owner with a forfeiture of the goods" and therefore cannot be interpreted as applying where customs violation occurs without the owner's "consent or connivance, or with that of some person employed or trusted by him."); *Harmony v. United States*, 43 U.S. 210, 235 (1844) (describing an *in rem* forfeiture statute as "confessedly penal"); *The Gertrude*, 10 F.Cas. 265, 267–68 (C.C.D. Me. 1841) (*in rem* forfeitures "highly penal" and not applicable where unintentional violation of customs law occurred); *see also*, 3 Blackstone, *supra* at *261 (forfeiture statutes are "penal").

Moreover, scholarship after *Austin* and *Bajakajian* demonstrates that the Founding generation had a more expansive understanding of "fines" than this Court's precedents have yet explored. *See generally*, Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. at 310–19. "At a minimum," historical records show "that the concept of nonpunitive penalties cannot fairly be treated as historical truth." *Id*. at 319. The history and meaning of fines support treating the forfeiture of Tyler's equity as a "fine" subject to scrutiny under the Excessive Fines Clause.

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Windfall statutes like Minnesota's can be profitable for the government, but have devastating consequences for homeowners who fall behind on their

taxes. This is especially pernicious for owners who have non-blameworthy reasons, including cognitive decline, physical or mental illness, or simple poverty. *See* Rao, *The Other Foreclosure Crisis* at 5, 9, 33, 38. 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, 86 (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, 848 (2017) (Thomas, J., concurring in denial of certiorari) (citations omitted). The County has acknowledged the disproportionate effect, noting that "it would be a very rare occasion where the county would forfeit a $500,000 parcel . . . as a practical matter that just would be very unusual." JA.49. At bottom, the County's position is that if a property owner is not clever or capable enough to sell encumbered property before the imposed deadline, then the government may ignore constitutional protections and confiscate more than it is owed. But the Constitution does not only protect the clever, deserving, and the diligent; it protects the weak, poor, and the unfortunate alike. *See, e.g.*, *Chambers v. Florida*, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand

against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless [or] weak . . . ."). *See also Cerajeski v. Zoeller*, 735 F.3d 577, 583 (7th Cir. 2013) (chastising state for taking property from "inattentive" or "incapable" property owners "who may be incompetent to safeguard [their] property"). Property owners like Tyler are entitled to the protection of the Excessive Fines Clause.

CONCLUSION

Petitioner Tyler respectfully requests this Court to reverse the judgment below and remand the case for further proceedings on her takings and excessive fines claims.

DATED: February 2023.

Respectfully submitted,

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No. 22-166

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Brief for Petitioner contains 12,103 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 27, 2023.

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No. 22-166

GERALDINE TYLER, on behalf of herself
and all others similarly situated,
Petitioner,
v.
HENNEPIN COUNTY, and
DANIEL P. ROGAN, Auditor-Treasurer,
in his official capacity,
Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 27th day of February, 2023, send out from Omaha, NE 2 package(s) containing * copies of the BRIEF FOR PETITIONER, JOINT APPENDIX and STATEMENT OF COST in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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Subscribed and sworn to before me this 27th day of February, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

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Subject:	Tyler v. Hennepin County (22-166)
Date:	Monday, February 27, 2023 5:44:00 PM
Attachments:	Brief for Petitioner.pdf Tyler Cert of Compliance Merits Brief.pdf Tyler Affidavit of Service.pdf Tyler Joint Appendix.pdf

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On behalf of Christina Martin, counsel of record for Petitioner, please see attached Brief for Petitioner, Certificate of Compliance, Affidavit of Service, and Joint Appendix filed today with the United States Supreme Court.

Sincerely,

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