No. _____

In The
Supreme Court of the United States

KEVIN L. FAIR,

Petitioner,

v.

CONTINENTAL RESOURCES,
et al.,

Respondents.

On Petition for Writ of Certiorari to the
Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Kevin and Terry Fair fell behind on their property taxes after medical problems caused severe financial hardship. When they failed to pay $5,200 in taxes, interest, penalties, and costs by the deadline, Scotts Bluff County extinguished the Fairs' entire interest in their $60,000 home and conveyed it to an investor who paid the tax debt. Unlike other types of debt collection, the Fairs' foreclosed home was not sold after competitive bidding, leaving no opportunity for the Fairs to be paid for their equity from the proceeds remaining after paying the debt. Nebraska is one of only 14 states where government takes valuable real estate and all equity in that property as payment for small tax debts. Half those states, like Nebraska here, convey the windfall taken from such foreclosures to private investors. Courts have split on whether government may constitutionally take more property than necessary to pay a debt. The questions presented are:

(1) Does the government violate the Takings Clause when it confiscates property worth more than the debt owed by the owner?

(2) Does the forfeiture of far more property than needed to satisfy a delinquent tax debt plus interest, penalties, and costs, constitute an excessive fine within the meaning of the Eighth Amendment?

LIST OF ALL PARTIES

Petitioner Kevin L. Fair was the appellant in the Nebraska Supreme Court and defendant and cross-plaintiff in the trial court.

Respondent Continental Resources was the appellee in the Nebraska Supreme Court and plaintiff and cross-defendant in the trial court.

Respondents Scotts Bluff County, Nebraska; Heather Hauschild, Scotts Bluff County Treasurer; and Doug Peterson, Attorney General for the State of Nebraska were appellees in the Nebraska Supreme Court and third-party defendants in the trial court.

STATEMENT OF RELATED PROCEEDINGS

Continental Resources v. Fair, et al., Nebraska Supreme Court No. S-21-074 (Mar. 18, 2022).

Continental Resources v. Fair, et al., District Court for Scotts Bluff County, Nebraska, No. CI 18-699 (Jan. 4, 2021).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kevin L. Fair respectfully petitions for a writ of certiorari to review the judgment of the Nebraska Supreme Court.

OPINIONS BELOW

The decision of the Nebraska Supreme Court (App.1a) is published at *Continental Resources v. Fair*, 311 Neb. 184 (2022). The trial court's order granting respondents' motions for summary judgment and denying petitioner's motion for summary judgment (App. 27a) is unpublished. The Nebraska Supreme Court's order denying rehearing is at App. 33a.

JURISDICTION

The judgment of the Nebraska Supreme Court was entered on March 18, 2022. Fair moved for rehearing, which was denied on April 12, 2022. On May 23, 2022, this Court extended the deadline to file a petition for writ of certiorari to August 10, 2022. On July 29, 2022, the Court further extended the deadline to August 19, 2022. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Eighth Amendment to the U.S. Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides:

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

The pertinent portions of the Nebraska statutes at issue in this case are reproduced in the Appendix at App.37a.

INTRODUCTION

Scotts Bluff County and Continental Resources (Continental) took Kevin L. Fair's $60,000 home, which he owned free and clear, as payment for a $5,200 tax debt, unconstitutionally depriving Mr. Fair of his lifesavings in the home. Unlike standard debt collection procedures, the County and Continental took the property pursuant to a statute that authorizes the extraordinary power to confiscate property worth far more than Mr. Fair owed in taxes,

penalties, interest, and costs: nearly $55,000 more. Nebraska singles out tax debts for this unjust treatment. For other types of debt collection (like executions on judgment and mortgage foreclosures) Nebraska follows the longstanding tradition in English and American law that allows a debt collector to take only as much money or collateral property as is owed plus related costs. Most states offer these protections to tax debtors as well.[1] There, when government seizes property to pay a debt (or sells the right to do so to a private investor), the government or investor must sell the property at a public auction to the highest bidder, after which the debts are paid, and the remainder of the proceeds returned to the former owner. But under Nebraska's tax foreclosure statute, Scotts Bluff County extinguished Mr. Fair's interest in his home by conveying full title to Continental without any ability for Mr. Fair to recover his equity.

Nebraska, although in the minority of states that offer such windfalls to private investors, is not alone. Thirteen other states also take the title and "any equity he or she has accrued in the property, no matter how small the amount of taxes due or how large the amount of equity." *Tallage Lincoln, LLC v. Williams*, 485 Mass. 449, 453 (2020); *see infra* Section III. Some states use that surplus value as general revenue to fund public projects. *See, e.g.,* Minn. Stat. Ann. § 282.08. Others, like Nebraska, routinely convey the windfall to private investors for their personal benefit.

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[1] Jenna Christine Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real. Prop. Tr. & Est. L. J. 93, 99–103 & n.38 (2019).

Lower courts conflict as to whether these foreclosures and windfalls rise to the level of an unconstitutional taking. Some jurisdictions hold that such confiscations violate the constitutional mandate that government pay just compensation when it takes private property for a public use. *See, e.g., Rafaeli LLC v. Oakland Cnty.*, 505 Mich. 429, 437 (2020). Others, like the Nebraska Supreme Court in this case, reject hundreds of years of common law protections for debtors, holding instead that the government has no constraints as to the value of what it takes as payment for a debt. Governments lacking those constraints inevitably begin to view residents' property opportunistically as a source of revenue to be tapped. Eric Boehm, *A Michigan Man Underpaid His Property Taxes By $8.41. The County Seized His Property, Sold It—and Kept the Profits*, Reason (Nov. 6, 2019) (Michigan counties used these funds for "pet projects;" one county treasurer expressed that she was "tickled pink" to foreclose on lakefront property).[2]

Alternatively, such extreme forfeitures are a form of punishment, since they seize property worth far more than the taxes, penalties, interest, and costs. In this case, the County and Continental took assets worth $60,000 for a $5,200 tax debt—more than eleven times the amount owed. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (punitive damage awards of more than four times the amount of compensatory damages are "close to the line of constitutional impropriety" under the due process clause). The forfeited equity also vastly

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[2] https://reason.com/2019/11/06/a-michigan-man-underpaid-his-property-taxes-by-8-41-the-county-seized-his-property-sold-it-and-kept-the-profits/.

exceeds the statutory penalty for delinquent tax payment which, in Nebraska, takes the form of 14% interest. Neb. Rev. Stat. §§ 45-104.01, 77-1823. Yet the Nebraska Supreme Court and some other jurisdictions hold that the Excessive Fines Clause provides no protection in such cases, narrowly interpreting that clause to apply only where there is underlying criminal activity and a legislatively expressed goal of punishment. App.23a.

Under either theory, only this Court can ensure that Mr. Fair and other property owners obtain a constitutional remedy for the confiscation of their home equity.

This Court should grant the petition.

STATEMENT OF THE CASE

A. Scotts Bluff County takes and conveys Kevin Fair's $60,000 home to Continental Resources as a payment for $5,200 in property taxes

Kevin Fair, now 67 years old, owned and lived at 2109 Avenue D in Scottsbluff, Nebraska, with his wife Terry. App.5a. It is a modest 912 square foot house: three bedrooms and one bathroom with a partially finished basement. Mr. Fair was gifted the property by his mother in 1995, and he, Terry, and his stepson made it their home. App.53a. In 2013, Terry developed multiple sclerosis. *Id.* As a result, she lost her job at Walmart and soon required a caretaker. *Id.* Kevin had to quit his job to care for her. *Id.* Between increased medical expenses and their income reduced to social security, they lacked the funds to pay their 2014 property taxes. App.54a.

The County promptly began proceedings to take the house. In February 2015, the county treasurer thrice published a notice of tax delinquency with legal descriptions of 685 tax-delinquent properties in the county—including the Fairs' home. App.5a. *See* Neb. Rev. Stat. § 77-1804. At the time, the Fairs' tax debt totaled $588.21. App.5a.

The next month, without any other notice to the Fairs, the county sold a tax certificate—a lien—for the property's unpaid 2014 taxes to Continental Resources for the total debt owed, $588.21. *Id.* Still, without any notice to the Fairs, Continental paid their property taxes in 2015 and 2016 and quietly added those amounts, plus interest and costs, to the "redemption cost" that eventually confronted the Fairs as their last chance to avoid foreclosure. *Id.* Once Continental began paying the property's taxes, the County communicated exclusively with Continental even though the Fairs still held title to their home. During this time, the Fairs were *never* notified that their debt was growing, with 14% interest and other costs. App.5a, 51a. Meanwhile, as of January 1, 2017, the county assessed the Fairs' property at $59,759, free of any encumbrances.[3] *See* App.5a. Neither the County nor Continental informed the Fairs that the clock was ticking on their ability to pay the accrued taxes, interest, and fees, and that they would lose their home's entire value if they did not pay the accumulated debt in full. *Id.*

After three years of silence from both the County and Continental, on April 13, 2018, Continental served the Fairs a "Notice of Expiration of Right of

[3] Zillow estimates the current value as over $98,000. Zillow, *2019 Avenue D, Scottsbluff, NE 69361* (visited Aug. 12, 2022).

Redemption." App.5a. *See* Neb. Rev. Stat. 77-1831. The notice told the Fairs they had 3 months to redeem the property by paying $5,268—the total accumulated unpaid taxes, fees, and interest. Until this notice, the Fairs had no idea their $588 tax debt had ballooned nearly tenfold. App.5a, 54a. The notice said that if the Fairs did not pay $5,268 to Continental, the County would give full title to the Fair's home to Continental in the form of a tax deed. App.6a.

Stricken by illness and job loss, living solely on social security, the Fairs did not have $5,268 to pay the back taxes, costs, and interest, plus additional interest of $1.60 per day, to save their home. App.54a–55a. They applied for loans to redeem their property, but no lender approved them. App.55a. When the three months expired, the County treasurer issued a deed conveying title to the Fairs' home to Continental. App.6a. The deed extinguished the Fairs' title and their equity interest in the property, giving both to Continental. Neb. Rev. Stat. § 77-1837. The County recorded Continental's deed on August 13, 2018. App.45a. The Fairs were left with nothing.

B. Procedural Background

Continental filed a quiet title action against the Fairs on October 31, 2018. App.6a. Obtaining pro bono legal counsel from Legal Aid of Nebraska, the Fairs filed an answer, counterclaim, and third-party complaint, which added Scotts Bluff County and the County treasurer in her official capacity as third-party defendants. *Id*. The Fairs alleged that by taking their home, which was worth approximately $55,000 more than their cumulative debt, the County and Continental violated their state and federal constitutional rights. Pertinent here, the lawsuit

alleged violations of the Takings Clause and Excessive Fines Clause and 42 U.S.C. § 1983. App.7a, 30a.

The Nebraska Attorney General exercised his right "to be heard" regarding the Fairs' constitutional claims, becoming a party to this case aligned with the County and Continental. App.6a. *See* Neb. Rev. Stat. § 25-21, 25-159.

While litigation continued in the district court, Terry Fair succumbed to her illness and passed away. App.7a. On January 4, 2021, the trial court granted summary judgment against the Fairs, holding their constitutional rights were not violated and quieting title in Continental's favor. *Id*. Mr. Fair appealed to the Nebraska Court of Appeals, but the Nebraska Supreme Court transferred the case to its own docket. App.7a.

On March 18, 2022, the court below rejected all Mr. Fair's claims, holding that the government and Continental did not violate any statutory or constitutional rights and paving the way for Mr. Fair's eviction. App. 1a, 3a. Mr. Fair seeks review of the Nebraska Supreme Court's takings and excessive fines decisions. First, the court held that although the county transferred full title to Mr. Fair's home and equity windfall to Continental, this was categorically not a taking for private use because the transfer occurred pursuant to "the county's tax collection efforts." App.18a. Second, the court held that the federal Takings Clause is not implicated because the difference between the home's value and the amount of the debt was not a discrete property interest under state law. App.24a (Mr. Fair "has not demonstrated that at the time the tax deed was issued, he had an absolute right to the difference between the assessed

value of his property and his tax debt. Without such a right, his claims under the Takings Clauses cannot succeed."). The court said there is "no basis to conclude that Nebraska common law recognizes the property interest" of debtors like Mr. Fair. App.23a.

The court also denied Mr. Fair's Excessive Fines claim, holding that the Eighth Amendment does not apply for two reasons. First, the court determined that the windfall of home equity transferred to Continental "lacks essential attributes of a 'fine'" because it does not punish a crime and the statute's purpose is remedial—to collect taxes. App. 25a-26a.[4] Second, the court held that the windfall is not a fine within the meaning of the Excessive Fines Clause because the government does not keep it for its own purposes. App. 27a.

Mr. Fair's motion for reconsideration was denied on April 12, 2022. App.36a. He then moved to stay the mandate because he is indigent, elderly, and likely homeless when Continental evicts him from his home and pockets the entire worth of his only significant asset. *See* App.42a. The court denied the motion as untimely, but acknowledging the case presents federal questions, the court on its own motion stayed the mandate in the interest of the administration of justice pending consideration by this Court. App. 42a–43a.

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[4] The court's analysis relies in part on *Tyler v. Hennepin County*, 505 F.Supp.3d 879 (D. Minn. 2020), *aff'd* 26 F.4th 789 (8th Cir. 2022), *petition for writ of certiorari pending*, docket no. 22-____ (filed Aug. 19, 2022). *See* App.25a–26a.

REASONS FOR GRANTING THE PETITION

I

COURTS CONFLICT ON WHETHER GOVERNMENT VIOLATES THE JUST COMPENSATION CLAUSE WHEN IT CONFISCATES MORE PROPERTY THAN NECESSARY TO SATISFY A PUBLIC DEBT

The Fifth Amendment requires the government to pay just compensation when it takes private property for a public use. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071 (2021). The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Government may seize private property for the public purpose of recovering delinquent taxes, but when it takes *more than it is owed*, it must pay just compensation. *See, e.g.*, *Bogie v. Town of Barnet*, 270 A.2d 898, 900, 903 (Vt. 1970). *See Citizen's Sav. & Loan Ass'n v. Topeka*, 87 U.S. 655, 664 (1874); *United States v. Lawton*, 110 U.S. 146, 150 (1884); Thomas M. Cooley, *A Treatise on the Law of Taxation* 343 (1876) (tax collector's power to seize and sell is "exhausted the moment the tax was collected").

Here the County took the Fair's $60,000 home as payment for a $5,268 debt and gave it to Continental. Under the Nebraska Supreme Court's reasoning, even the smallest debt entitles government to seize real estate and confiscate its entire value, including the debtor's equity. This violates traditional rights historically protected in this nation, the fairness and

justice embodied by the Just Compensation Clause, and takings principles established by this Court.

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

Despite this Court's decisions recognizing that debtors retain ownership of the surplus value of property taken in debt collection, federal and state courts conflict about whether government may confiscate more than it is owed when collecting a debt. The split arises primarily from this Court's dicta in *Nelson v. City of New York*, 352 U.S. 103 (1956). Confusion about *Nelson* will persist and individuals in some jurisdictions will have no recourse to vindicate their constitutional rights unless this Court grants the petition and settles the issue.

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

A debtor's property right in the surplus value—i.e., equity—of property seized to pay a debt is deeply rooted in this nation's history and tradition. *See, e.g.*, William Sharp McKechnie, *Magna Carta, A Commentary on the Great Charter of King John*, 322-23 (2d ed. 1914) (Magna Carta limited how much property could be taken to satisfy a debt). While government may seize property to collect a tax, *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 281 (1855), it exceeds its legitimate authority when it takes more than what is owed. *E.g.*, *Tiernan v. Wilson*, 6 John 411, 414 (N.Y. 1822); Cooley, *supra* at 343; Henry Black, *Treatise on Tax Titles* § 157 (1888).

Consequently, under the common law, debtors are entitled to recover the equity value of property seized to pay their debt. "Equity" is the value of property that exceeds encumbering liens. *Crane v. Comm'r*, 331 U.S. 1, 7 (1947). Because equity transforms from an intangible property interest to cash when property is sold, "[a]ny surplus remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner." 72 Am. Jur. 2d *State and Local Taxation* § 911 (1974). This is consistent with English law, as Blackstone explained: officials that seize property for delinquent taxes "are bound, by an implied contract in law" to return it if the debt is paid before sale, or to sell it and "render back the overplus." 2 William Blackstone, *Commentaries on The Laws of England* *452.

From the founding through adoption of the Fourteenth Amendment, which extended the Takings Clause protections against the states,[5] government broadly understood that the taxing power justified taking only as much as was owed. *Rafaeli*, 505 Mich. at 462-67 (tracing the long consistent history of this protection). To protect a debtor-owner's equity interest, states either sold tax-delinquent property to the highest offer and refunded the surplus to the former owner, or took only as much property as needed to satisfy the debt. *Id.*; *Douglas v. Roper*, No. 1200503, __ So. 3d __, 2022 WL 2286417, at *12 (Ala. June 24, 2022); *Martin v. Snowden* 59 Va. 100, 136 (1868) (tracing history of tax collection from England, through the founding, and up to that time); *Tiernan*, 6 John at 414 ("The proposition is not to be disputed, that a Sheriff ought not to sell, at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand . . . "); *Stead's Ex'rs v. Course*, 8 U.S. 403, 414 (1808) ("if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority"); *Cooley*, *supra*, at 343 (1876) (all jurisdictions protected debtors' interests in one of these manners).

When tax collectors seized more than necessary or kept a windfall from the sale of the property, debtors could bring actions in trespass or conversion or otherwise seek to void the sale. For example, in

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[5] *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (just compensation was the first right in the Bill of Rights "incorporated" against states under the Fourteenth Amendment).

Seekins v. Goodale, 61 Me. 400, 400 (1873), a tax collector who seized and sold more cloth than necessary to pay a debt was liable for trespass and had to pay fair market value to the debtor for the extra cloth that he sold. *See also Cone v. Forest*, 126 Mass. 97, 101 (1879) (tax collector liable for conversion); *Stover v. Boswell's Heirs*, 33 Ky. 232, 235 (1835) ("statutes authorizing the sale of land under execution, which are in derogation of the common law, do not authorize the officer to sell more land than is sufficient to satisfy the execution"). State courts historically rejected attempts to forfeit more property than necessary or to take a windfall at the expense of a debtor, finding such confiscations to be unconstitutional as uncompensated takings or violations of due process. *Martin*, 59 Va. at 142–43 *aff'd on other grounds sub nom. Bennett v. Hunter*, 76 U.S. 326 (1869) (government's confiscation of land worth more than a tax debt violates traditional notions of due process of law); *Baker v. Kelley*, 11 Minn. 480, 499 (1866) (statute authorizing forfeiture of land for delinquent taxes would "overstep[]" constitutional limits).

Mississippi's high court vociferously rejected "the power to appropriate a man's whole estate for default in the payment of a few dollars tax by a simple act of legislation." *See Griffin v. Mixon*, 38 Miss. 424, 436–37 (1860), relying on *Wilkinson v. Leland*, 27 U.S. 627 (1829). *Griffin* held that the state compounded the constitutional injury by transferring the confiscated property to a private individual, a power that "[e]ven Hobbes, the most ingenious of all the advocates of despotic power, does not claim." *Id.* at 438. *See also King v. Hatfield*, 130 F. 564, 579 (C.C.D.W. Va. 1900) (because statute lacked "provision for a sale thereof

and the return of the proceeds" was unconstitutional taking for a private use). The state's power to collect taxes cannot override a property owner's interest in his property that exceeds the amount of a tax debt. As this Court declared in *Loan Ass'n v. Topeka*, 87 U.S. at 664:

> To lay with one hand the power of the government on the property of the citizens and with the other to bestow it upon favored individuals . . . is none the less robbery because done under the forms of law and called "taxation." This is not legislation. It is a decree under legislative forms. Nor is it taxation.

Nebraska, too, followed this common law tradition, protecting debtors' property interest in their equity when government seizes property for delinquent taxes. *See, e.g.*, *Lancaster Cnty. v. Trimble*, 34 Neb. 752, 756 (1892) ("the land may be sold as upon foreclosure of a mortgage, the surplus in excess of taxes due going to [the landowner]"); *Delatour v. Wendt*, 139 N.W. 1023, 1024 (Neb. 1913) (former owner had the right to claim $90.48 in surplus proceeds from tax sale). The court below was dismissive of the notion that Fair has a right "to receive compensation if the value of the property transferred to a tax certificate holder exceeded the tax debt." App.21a. But Nebraska's early laws—including the 1879 statute relied upon by the Nebraska Supreme Court to argue that the law has not meaningfully changed since its founding—required competitive sales of property for either the highest price or smallest piece of the whole. *See, e.g.,* Ann. Stat. Neb. Ch. 105, § 121 (1881) (party offering to

purchase "smallest portion" of "any parcel of land" for the amount of taxes due is entitled to a tax certificate); *Gillian v. McDowell*, 66 Neb. 814, 92 N.W. 991, 992 (1902) (tax foreclosure also did not extinguish other lienholders' interest in the surplus proceeds). Nebraska's courts—like this Court—voided tax sales where the treasurer failed to solicit competitive bidding to protect debtors' property rights. *See, e.g., State ex rel. Snow v. Farney*, 36 Neb. 537, 544–45 (1893); *Bd. of Comm'rs of Richardson Cnty. v. Miles*, 7 Neb. 118, 123 (1878) ("The object of the law is to raise revenue, and at the same time protect, as far as possible, the rights of the owner of the land by inviting competition at the sale."); *Slater v. Maxwell*, 73 U.S. 268, 276 (1867) (sale of delinquent property marked with "unfairness" should be "set aside, or the purchaser be required to hold the title in trust for the owner" to protect the debtor's interest in receiving fair payment for the property).

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

Then in *United States v. Taylor*, 104 U.S. 216, 219 (1881), the Court further interpreted the same congressional act to require the government to follow the traditional duty of refunding surplus proceeds when land was taken to pay tax debts. Relying on *Bennett*, the Court noted that the law "was not a confiscation act," and therefore the former owner was entitled to the surplus proceeds. *Id.* at 220–21. Moreover, the statute of limitations did not bar the claim because a "good faith" construction of the statute requires the government to act as trustee in selling and holding the funds for the former owner indefinitely. *Id*. at 221-22.

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

B. Confiscating a $60,000 house as payment for a $5,200 debt conflicts with this Court's takings decisions

The court below refuses to recognize home equity as an established property interest. App.22a–23a. Yet, conceptually, it is no different than money, liens, mortgages, and interest on money, none of which may

be taken without just compensation. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 601–02 (1935) (Takings Clause protects "substantive rights in specific property," including the right to collect on a debt in a timely manner by seizing and selling that property); *Koontz v. St. Johns River Water 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"); *Phillips*, 524 U.S. at 168 (accrued interest); *Armstrong*, 364 U.S. at 48 (liens). *Cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54 (1993) ("exploitable economic value of Good's home" is a "significant" property interest protected by due process).

Nebraska law commonly recognizes home equity as private property. For example, Neb. Rev. Stat. § 40-101 provides a homestead exemption of up to $60,000 in real property, an amount determined based on the claimant's equity interest above the mortgages and other valid liens. *See, e.g.*, *Hoy v. Anderson*, 39 Neb. 386, 388 (1894); *Mundt v. Hagedorn*, 49 Neb. 409, 412 (1896). *See also* Neb. Stat. § 25-1540 (on execution of judgment, surplus returned); *Millatmal v. Millatmal*, 272 Neb. 452, 460-61 (2006) (equity value of marital home weighed when determining the value of the marital estate). Moreover, when a tax lienholder pursues a judicial foreclosure instead of an administrative foreclosure (like that at issue in this case), the property is sold to the highest bidder and the surplus paid over to the former owner. App.26a–27a; Neb. Stat. § 77-1916.

Equity stands in for, and is equivalent to, the real property itself. *See Timm v. Dewsnup*, 86 P.3d 699, 703 (Utah 2003) (equity stands in place of the

foreclosed property, subject to the same liens and interests that were attached to the land); *Grand Teton Mountain Invs., LLC v. Beach Props., LLC*, 385 S.W.3d 499, 502–503 (Mo. Ct. App. 2012) (same); *Brown v. Crookston Agr. Ass'n*, 34 Minn. 545, 546 (Minn. 1886) ("the land is converted into money, and this fund being treated as a substitute for the mortgaged estate"). Thus, laws that purport to confiscate equity in tax-indebted properties via tax foreclosure violate the Takings Clause in the same way as if the real property itself is confiscated. *See Morris v. Glaser*, 106 N.J. Eq. 585, 151 A. 766, 771 (N.J. Ch. 1930), *aff'd mem.*, 110 N.J. Eq. 661, 160 A. 578 (N.J. Err. & App. 1932) (Surplus "usually arises because more land is sold . . . than is necessary to satisfy the mortgage debt . . . . [T]he money stands for the land and the rights therein are determined as though the court were dealing with the land itself."). The Takings Clause will not permit such a state-authored transformation of a traditional private interest to public property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

The taking of Mr. Fair's equity interest in his home resembles the injustice condemned by this Court in *Armstrong*, 364 U.S. 40. In that case, a shipbuilder contracted by the United States defaulted on its obligation to build ships. The United States took title to the unfinished boats and materials, pursuant to contractual and common law rights, and refused to compensate the suppliers. *Id.* This refusal effected a taking because property rights in liens do not simply "vanish[ ] into thin air" when the government takes title to the subject property pursuant to a "paramount lien." *Id.* at 44–45, 48. Before the government took the

property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id.* The government could only take the underlying property subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id.* at 49. Like the liens in *Armstrong*, equity is a discrete and valuable financial interest in property worthy of compensation when taken.

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

In *Phillips*, 524 U.S. at 167, the Court rejected Texas's attempt to abrogate the common law property interest that depositors had in accrued interest. Like Mr. Fair here, the Court relied on the common law in England, early America, and at least eighteen other states, which recognized that the depositors held a traditionally protected property right in accrued interest. *Id.* at 165 and n.5. The Court concluded that

"at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests."

Despite *Armstrong*, *Webb's*, and *Phillips*, Nebraska and several other states extinguish the owner's equity and all private liens when foreclosing on tax-delinquent property. This Court should grant the petition to settle the deep and growing split among the lower courts about whether the Takings Clause prevents government from taking more than it is owed in taxes, penalties, interest, and costs.

C. Federal and state courts conflict about whether government must pay just compensation when it confiscates a windfall while collecting a tax debt

Consistent with tradition and this Court's takings decisions, the high courts of Michigan, Minnesota, Mississippi, New Hampshire, Vermont, and Virginia, and federal district courts in Michigan, New York, Ohio, West Virginia, and the District of Columbia recognize a takings claim when government forecloses on property to collect delinquent taxes or related debts and keeps more than it is owed. *Griffin*, 38 Miss. at 436–37 (uncompensated taking); *Martin*, 59 Va. at 142–43 (violates due process of law by taking more than owed); *Rafaeli*, 505 Mich. 468 (violates Michigan's Takings Clause); *Proctor v. Saginaw Cnty. Bd. of Comm'rs*, No. 349557, 2022 WL 67248, at *13 (Mich. Ct. App. Jan. 6, 2022) (federal takings claim properly raised); *Bogie*, 270 A.2d at 900, 903 (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation"); *Thomas Tool Servs., Inc. v. Town of Croydon*, 145 N.H. 218, 220 (2000) (violates state

constitution's Takings Clause); *Polonsky v. Bedford*, 173 N.H. 226, 227–28, 230–31 (2020) (taking of the equity in the property); *Baker*, 11 Minn. at 480; *King*, 130 F. at 579 (violates constitutional mandate that taking of private property must be for a public use); *Dorce v. City of New York*, No. 19-cv-2216, __ F.Supp.3d ___, 2022 WL 2286381, at *12 (S.D.N.Y. June 24, 2022); *Tarrify Properties, LLC v. Cuyahoga Cnty.*, No. 1:19-CV-2293, 2021 WL 164217, at *3 (N.D. Ohio Jan. 19, 2021); *Pung v. Pickens*, No. 18-CV-1334 (W.D. Mich. Sept. 29, 2020); *Freed v. Thomas*, No. 17-CV-13519, 2021 WL 942077, at *4 (E.D. Mich. Feb. 26, 2021) (taking where government retained surplus proceeds from sale of tax-foreclosure); *Coleman through Bunn v. D.C.*, 70 F.Supp.3d 58, 80 (D.D.C. 2014) (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman through Bunn v. D.C.*, No. 13-1456, 2016 WL 10721865 *2–3 (D.D.C. June 11, 2016) (D.C. law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits).

The state supreme courts of Indiana, North Dakota, Texas, and Alaska also criticize the idea that government could wholly extinguish equity or liens on tax-delinquent properties and have interpreted tax statutes to avoid the constitutional question. *Lake Cnty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004) (total confiscation would "produce severe unfairness" and likely violate the Takings Clause); *Shattuck v. Smith*, 69 N.W. 5, 12 (N.D. 1896) (statute would likely be unconstitutional "if [it] contained no provision that the surplus should go to the landowner"); *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191–92 (Tex. 1995), as amended (June 22, 1995) ("Taxing authorities are not (nor should they be) in the

business of buying and selling real estate for profit."); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981) (refusing to interpret the law as confiscating the surplus). Similarly, the Sixth Circuit did not reach the merits in *Harrison v. Montgomery Cnty., Ohio*, 997 F.3d 643, 652 (6th Cir. 2021), but noted that when government takes excess property to satisfy a tax debt, the confiscation "implicates debates going back to the founding." Such takings claims "rest[] on the venerable proposition that 'a law that takes property from A. and gives it to B. . . . is against all reason and justice.'" *Id.*, citing *Calder v. Bull*, 3 U.S. 386, 388 (1798).

The Eighth Circuit and courts in Arizona, Illinois, Maine, Nebraska, Ohio, Oregon, New York, and Wisconsin hold that the government may take homes—no matter how valuable—as payment for even small property taxes or other municipal debts like water bills. *See, e.g.,* App.24a; *Tyler v. Hennepin Cnty.*, 26 F.4th 789 (8th Cir. 2022); *City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Me. 1974); *Ritter*, 207 Wis. 2d at 485; *Sheehan v. Suffolk Cnty.*, 67 N.Y.2d 52, 60 (1986); *Balthazar v. Mari Ltd.*, 301 F.Supp. 103, 105 n.6 (N.D. Ill.), *summarily aff'd* 396 U.S. 114 (1969); *Automatic Art, LLC v Maricopa Cnty.*, No. CV 08-1484-PHX-SRB, 2010 WL 11515708, at *5–6 (D. Ariz. Mar. 18, 2010); *Reinmiller v. Marion Cnty., Oregon*, No. CV-05-1926-PK, 2006 WL 2987707, at *3 (D. Or. 2006); *U.S. Bank Tr. Nat'l Ass'n v. Walworth Cnty.*, No. 21-CV-451-SCD, 2022 WL 317728 (E.D. Wis. Jan. 6, 2022) (appeal pending 7th Cir. No. 22-1168).

These conflicts arise primarily from dicta in *Nelson*, 352 U.S. at 110. In *Nelson*, the City of New

York foreclosed on two properties to satisfy delinquent water bills. The City kept one property and sold the other and kept the windfall. *Id.* at 106. The former owners alleged procedural due process and equal protection violations. In their reply brief, the owners suggested for the first time that the City took property without just compensation. *Id.* at 109–110. The Court rejected the due process and equal protection claims and then in dicta asserted that the takings argument also failed because City law gave the owners an opportunity to request a sale and claim the surplus proceeds, which the owners failed to request. *Id.* at 110 (no takings claim because of "the absence of timely action to . . . recover[] any surplus"). Subsequent court decisions rely on the dicta to reject takings claims *even when there is no opportunity to recover surplus proceeds*, as in Nebraska. *See, e.g., Mandarelli*, 320 A.2d at 32; *Tyler*, 26 F.4th at 793. This Court should grant the petition to resolve the conflicts arising from *Nelson* and to decide whether equity is private property protected by the Takings Clause.

II. THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER FORFEITURE OF MORE THAN IS OWED IN TAXES, PENALTIES, INTEREST, AND COSTS, IS A FINE WITHIN THE MEANING OF THE EIGHTH AMENDMENT

The Nebraska Supreme Court rejected Mr. Fair's Excessive Fines claim on the ground that confiscation of equity when seizing property to collect a debt cannot be considered a fine. App.25a. That decision conflicts with this Court's excessive fines decisions. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind,

'as punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609–10 (1993)).

In *Austin*, this Court held that civil forfeiture of a mobile home and auto body shop used in an illicit drug sale was "punishment," and therefore a "fine" subject to the Eighth Amendment. The government had argued that the forfeiture was not a punishment because it served only remedial purposes by removing instrumentalities of crime from society. The Court observed, however, that "a civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 509 U.S. at 610–11 (emphasis added) (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)). It does not matter whether, in some applications, the sanction could be remedial rather than punitive, i.e., not enough or just enough to cover the government's cost or the social cost of the property owner's offense. *Austin*, 509 at 610–11. In short, the Eighth Amendment applies when a civil sanction is "at least partially punitive." *Timbs v. Indiana*, 139 S.Ct. 682, 690 (2019).

Austin's analysis hinged on two factors analogous to Nebraska's tax-forfeitures. First, the statutory scheme in *Austin* provided affirmative defenses against forfeiture for innocent owners whose property was misused by others without their consent, knowledge, or willful blindness. 509 U.S. at 619. These exemptions implicate the "culpability of the owner in a way that makes them look more like punishment, not less." *Id.* Second, the forfeitures in *Austin* were neither a fixed sum nor linked to the

harm caused by the property owner's actions. *Id.* at 621. They "vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental," defying description as "remedial." *Id.* at 622 n.14.

The Nebraska Supreme Court concluded that the purpose of the statute is to collect taxes, not to punish debtors, but the confiscation of homes worth substantially more than what is owed can "only be explained as [] serving either retributive or deterrent purposes." *Halper*, 490 U.S. at 448. *See also Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 554 (Minn. 2003) (harsh tax-related penalty was an excessive fine because it could only be explained by and "*must* be calculated to deter"). As in *Austin*, the value of property forfeited under Nebraska's statute "var[ies] so dramatically that any relationship between" the debt owed that "the amount of the sanction is merely coincidental." *Austin*, 509 U.S. at 621. Mr. Fair's home was worth approximately $60,000—more than 11 times his $5,268 debt. In another case, the same statute forfeited a widow's home and ranch worth 20 times the tax debt. *Wisner v. Vandelay Invs., L.L.C.*, 300 Neb. 825, 831 (2018); Response Brief, *Wisner*, No. 2018 WL 659770, at *30. *See also, e.g., Nieveen v. TAX 106*, 311 Neb. 574, 580 (2022), *pet. for writ of cert. to be filed* (home worth more than 16 times debt); Petition for Writ of Certiorari, *HBI, L.L.C. v. Barnette*, No. 20-321, *cert. denied*, 141 S.Ct. 1370 (2021) (property worth 21 times debt). Deterrence or punishment is the only plausible goal of these draconian forfeitures. Indeed, in *Bennett v. Hunter*, when the federal government urged an interpretation of the federal tax statute as imposing a forfeiture of title (including all equity value) for delinquent taxes,

this Court described such an action as "highly penal." 76 U.S. at 336.

Likewise, the redemption provision in Nebraska's statute resembles the affirmative defense exempting innocent owners from forfeiture in *Austin*. Here, a property owner may escape the confiscation of his property for late payments by taking diligent action to redeem the property. The state softens the harshness of the penalty for those who demonstrate atonement for their presumed negligence. One must say "presumed" negligence, however, because in most cases, property owners fall prey to the forfeiture of their entire homes under Nebraska's and other states' similar laws for small debts due to mistakes of law or in circumstances of extreme poverty, health or cognitive disability, and other factors resulting in the failure either to make payments or succeed in a timely redemption. John Rao, *The Other Foreclosure Crisis*, Nat'l Consumer Law Ctr. 5, 9, 33, 38 (July 2012).[6] It is not immoral for people to struggle to pay their property taxes. *See Thiede v. Town of Scandia Valley*, 14 N.W.2d 400, 407 (Minn. 1944) (poverty is not a moral failure and courts should give "[m]ore respect for the common rights of man and less regard for the condition of the public exchequer" in administering laws). Their failure does not warrant the punishment of losing the entirety of their single most valuable asset.

The Nebraska Supreme Court also held that the Excessive Fines Clause could not apply because the government did not benefit from the forfeiture.

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

However, this Court implied that the Clause applies even where a statute designates the payment to go to another party. In *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913), this Court held unconstitutional a statutory damages provision requiring payment of $500 to another private party no matter how small the offense. The court held it violated "due process of law" because it was "grossly out of proportion to the possible actual damages." *Id.* *Tucker* foreshadowed this Court's definition for excessive fines as fines that are "grossly disproportional to the gravity of the . . . offense." *See Bajakajian*, 524 U.S. at 337. *See also Stierle v. Rohmeyer*, 260 N.W. 647, 654 (Wis. 1935) (statute that extinguished mortgage where lender violated statute whether the debt "be $5,000, as here, or 5 cents in another case" would inflict a "penalty").

This Court began developing Excessive Fines Clause jurisprudence only 30 years ago, after two centuries of relative silence. This Court should grant the petition to provide guidance to the lower courts about whether a forfeiture that goes well beyond any remedial costs is a punishment within the meaning of the Excessive Fines Clause.

III. THIS CASE RAISES A PRESSING NATIONAL PROBLEM THAT CAN BE RESOLVED ONLY BY THIS COURT

For most homeowners, their house is their most important and valuable asset. Every year, homeowners lose millions of dollars in equity across the 14 states that allow government or private investors to seize a windfall when collecting delinquent property taxes. *See, e.g.*, Ralph Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L.

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

Six states—Nebraska, Arizona, Colorado, New Jersey, Montana, and Illinois—grant a foreclosed home's entire equity windfall to private investors, to

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

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

devastating effect on homeowners.[9] For example, public records from 19 New Jersey cities reveal that between 2014 and 2020, 683 homes were taken for delinquent taxes—a loss of an estimated $140 million in equity.[10] On average, New Jersey homeowners lost 92% of the value of their home, or $219,000, above the tax debt that was owed, which averaged $16,800. Angela C. Erickson, *The size and scope of home equity theft: Shining a spotlight on New Jersey* (Nov. 15, 2021).[11] Windfall statutes like Nebraska's have devastating consequences for homeowners, many of whom are elderly, low-income, disabled, or suffering physical or mental impairments.[12] Examples include

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[9] Ariz. Rev. Stat. § 42-18205; Colo. Rev. Stat. § 39-11-115; *Winberry Realty P'ship v. Borough of Rutherford*, 247 N.J. 165, 173 (2021) (New Jersey statutes allow private investor who purchases tax lien for amount of tax debt to foreclose and take full title without sale); Mont. Code Ann. §§ 15-18-211, 15-18-219 (issuing a deed to whomever holds a tax lien, but requiring sale and a return of surplus proceeds only for certain residential properties); 35 Ill. Comp. Stat. §§ 200/22-40, 200/21-90.

[10] These records do not include commercial properties lost under the same statutory scheme. *See, e.g., Johnson v. City of East Orange*, N.J. Super. No. LCV20212798775 (Complaint filed Dec. 1, 2021, alleging taking when city took $80,000 surplus equity in commercial property after a tax foreclosure).

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

[12] In states with confiscatory tax collection procedures, investment firms quickly adopted a business model to prey on financially distressed property owners and take the windfall of surplus equity. *See, e.g.*, Steven A. Waters, *Gering, Nebraska Delinquent Tax Sale Property*, Tax Lien University https://taxlienuniversity.com/tax-sales/gering-nebraska-tax-lien-certificates-and-tax-deeds.php (visited July 26, 2022) ("[T]here are generally two outcomes with the purchase of a tax lien certificate; the purchaser will either receive what was paid

a well-maintained home taken for an $8 property tax delinquency;[13] a family farm that over the generations increased to a million dollar value taken from a nursing home patient for a $50,000 debt;[14] farmland worth $38,000 taken as payment for an $84 debt.[15]

Five states retain the windfall for its own use. Minnesota, Maine, and Oregon's municipalities routinely seize a windfall for the government's benefit when foreclosing tax delinquent properties.[16] Ohio and California ordinarily protect debtors' property rights in their equity by requiring government to sell property and refund the surplus proceeds to the former owner, but they confiscate the entire property when municipalities desire indebted property for a public use or economic revitalization. *See State ex rel. Feltner v. Cuyahoga Cnty. Bd. of Revision*, 160 Ohio St. 3d 359, 366 (2020) (Fischer, J., concurring), cert. denied, 141 S.Ct. 1734 (2021); Coupal, Jon, and Polk, Joshua, *Stop home equity theft by the state of California*, The Orange County Register (Mar. 27, 2022).[17] These statutes create an incentive for government to foreclose on owners. Indeed, until a

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to satisfy the delinquent property taxes PLUS up to 14% per annum, or Scotts Bluff County Nebraska has the legal right to transfer them the property—often with no mortgage! Once they own the property they can do whatever they like; sell it, rent it for monthly cash-flow, even move in (often with no mortgage payment).").

[13] *Rafaeli*, 505 Mich. at 437.

[14] *Wisner*, 300 Neb. at 831; Response Brief, *Wisner*, No. S-16-000451, 2018 WL 659770, at *30.

[15] *Ritter v. Ross*, 207 Wis.2d 476, 478 (Ct. App. 1996).

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

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

recent Michigan Supreme Court decision found that taking a windfall from owners like Mr. Fair effected a taking, some counties planned on such windfalls to balance their budgets. *See, e.g.*, Joel Kurth, et al., *Sorry we foreclosed your home. But thanks for fixing our budget*, Bridge Magazine (June 6, 2017).[18]

In Alabama,[19] Massachusetts, and New York, municipalities have discretion to take a windfall, give it to investors, or protect the debtors.[20] Massachusetts' foreclosure process strips owners of roughly $56,000,000 in equity per year. Clifford, *supra* at 274. Some municipalities sell the properties and take a windfall for the public. But most of the equity benefits investors via a tax lien process (called a "tax taking title") that is similar to Nebraska's. Between 2014 and 2020, a single investment company pocketed $15,000,000 by foreclosing and selling 154 tax-delinquent homes. Angela Erickson, et al., *Violating the Spirit of America: Home Equity Theft in Massachusetts.*[21]

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[18] https://www.bridgemi.com/detroit-journalism-cooperative/sorry-we-foreclosed-your-homethanks-fixing-our-budget.

[19] Ala. Code §§ 40-10-28(a)(1); 40-10-198. But Alabama's courts may be poised to strike down this law, after the Alabama Supreme Court recently held that surplus proceeds from the auction of tax-delinquent property were protected at common law and in Alabama. *See Douglas*, 2022 WL 2286417, at *12.

[20] *Tallage Lincoln*, 485 Mass. at 451–53 (describing Massachusetts system which sometimes takes a windfall for cities and sometimes for private investors); *Dorce*, 2022 WL 2286381, at *12 (describing city's ordinance that sometimes protects debtors and sometimes benefits private parties).

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

Ultimately, these laws overwhelmingly harm society's most vulnerable members like the elderly, sick, and poor. *See* Rao, *supra*, at 5, 9, 33, 38. As Justice Thomas wrote about other types of forfeitures, "These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture." *Leonard v. Texas*, 137 S.Ct. 847 (2017) (Thomas, J., concurring in denial of certiorari) (citations omitted). Unless this Court grants review, then any debt—no matter how small—may ultimately be used to strip everything from people like Mr. Fair. Such laws violate the purpose for which governments are formed: to protect individual liberty. *See Cedar Point Nursery*, 141 S.Ct. at 2071 ("protection of property rights is necessary to preserve freedom") (internal quote omitted).

This case is an ideal vehicle for this Court to address the questions presented and resolve the split among the lower courts. Mr. Fair pressed his takings and excessive fines claims at all stages of his case and they were decided by both the trial court and on appeal. The Nebraska Supreme Court acknowledged that this case presents federal questions, staying the mandate pending this Court's consideration of the petition.[22]

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[22] The Court may wish to consolidate this case with *Tyler v. Hennepin County*, on a petition for writ of certiorari filed concurrently with this case raising the same questions, but arising from a tax statute that authorizes the government to take valuable property as payment for a tax debt, sell it, and keep the windfall of surplus proceeds for itself.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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