No. _____

In The
Supreme Court of the United States

OHIO EX REL. ELLIOT FELTNER,

Petitioner,

v.

CUYAHOGA COUNTY BOARD OF REVISION, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Cuyahoga County confiscated Elliot Feltner's land worth $144,500 for an unpaid tax debt of $65,189. The County bypassed the usual sale and refund of surplus proceeds to former owners and instead gifted the property to the County's land bank. The County provided no process by which Feltner could recover the surplus equity in his property. In *Nelson v. New York*, 352 U.S. 103, 109 (1956), this Court declined to decide whether a property owner suffers a taking by government's "retention of [tax-delinquent] property . . . far exceeding in value the amounts due" because, in that case, the state provided a procedure by which the former owner could recover the "surplus proceeds of a judicial sale." The Court reserved for a future day the question of whether the same action would have been constitutional where state law "absolutely precludes an owner from obtaining the surplus proceeds." *Id.* at 110. This case squarely presents that question. In Ohio and a dozen other states, local governments can extinguish a property owner's title and all equity to collect overdue tax and utility bills, with no opportunity for the owner to recover the surplus value above the amount owed plus lawfully charged penalties, interest, and costs.

The Question Presented is:

When confiscating property to satisfy a delinquent debt, does it violate the Takings Clause for government to take property worth far more than what is owed, keeping the surplus value of that property as a windfall for the public?

LIST OF ALL PARTIES

Petitioner is Elliot G. Feltner, who was the plaintiff/relator in the Ohio Supreme Court.

Respondents, who were also respondents in the Ohio Supreme Court, are Cuyahoga County Board of Revision, Cuyahoga County, Cuyahoga County Treasurer W. Christopher Murray II, Executive of Cuyahoga County Armond Budish, Cuyahoga County Council Member Michael Gallagher, and Fiscal Officer of Cuyahoga County Michael W. Chambers.

The Ohio Attorney General and Cuyahoga County Land Revitalization Corporation were dismissed as respondents below, and the dismissal of these parties is not challenged here.

RULE 14.1(b)(iii) STATEMENT

The proceeding in the Supreme Court of Ohio was directly related to the above captioned case and was known as *State ex rel. Feltner v. Cuyahoga County Board of Revision*, No. 2018-1307.

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The March 20, 2019, decision of the Ohio Supreme Court denying the just compensation claim petitioned here is available at *State ex. rel. Feltner v. Cuyahoga County Board of Revision*, 119 N.E.3d 431 (Ohio 2019) and attached as Appendix A. The court's March 20, 2019, corrected entry of the decision is attached as Appendix B. The May 28, 2020, decision of the Ohio Supreme Court, which disposed of all other claims (not at issue in this petition) is reported at *State ex. rel. Feltner v. Cuyahoga County Board of Revision*, __N.E.3d__, 2020 WL 2758696 (Ohio 2020), and is attached as Appendix C. This case was filed directly in the Ohio Supreme Court and therefore there are no trial or appellate decisions.

JURISDICTION

The order denying Feltner's takings claims issued on March 20, 2019. Pet. App. A-1. The Ohio Supreme Court issued a final decision disposing of the remainder of the case on May 28, 2020. Pet. App. C-1. Under this Court's March 19, 2020 order adjusting deadlines because of the coronavirus, this Petition is timely. This Court has jurisdiction under 28 U.S.C. § 1257. *See Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (final-judgment rule satisfied when nothing "further remains to be determined by a State court").

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

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

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 . . . ." U.S. Const. amend XIV.

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 Ohio statutes at issue in this case are reproduced in Appendix E.

RULE 29.4(c) STATEMENT

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

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the application of the Takings Clause to foreclosure actions in which local governments confiscate excess private property in the course of debt collection. The issue splits state and federal courts, many of which have decided the question in conflict with this Court's precedent.

In more than a dozen states, statutes allow local governments to satisfy delinquent property taxes or utility bills by confiscating all title and "any equity [the owner] has accrued in the [subject] property, no matter how small the amount of taxes due or how large the amount of equity." *Tallage Lincoln, LLC v. Williams*, No. SJC-12847, 2020 WL 4811678 (Mass. Aug. 19, 2020). *See Crane v. C.I.R.*, 331 U.S. 1, 7 (1947) (The term "equity" in this context means the value of the property that exceeds all encumbering debts.). In these states, equity is frequently taken without just compensation or any procedure for the former owner to recover the surplus value of the property.

The result is often shocking, depriving vulnerable owners of homes, land, and farms of their entire interest in the property over debts as small as $8. *See, e.g.*, *Rafaeli, LLC v. Oakland County*, __N.W.2d__, 2020 WL 4037642, at *5 (Mich. 2020) (county confiscated a suburban home as payment for an $8 property tax debt). Individually, the loss for struggling property owners can be devastating; collectively, they lose hundreds of millions of dollars in equity every year. *See, e.g.*, Ralph Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L.

Rev. 274 (2018) (localities in Massachusetts alone took $56 million in equity from property owners in just one year); Ashton Nichols, *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), https://eyeonohio.com/taxpayers-lose-out-on-at-least-11-25-million-homeowners-and-banks-lose-up-to-80-million-in-little-known-foreclosure-process-that-skips-sheriffs-sales/.

In Feltner's case, the Cuyahoga County Board of Revision, Cuyahoga County, and the named county officials (collectively County) took title to his land and autobody shop worth $144,500, taking from him approximately $80,000 more than he owed in back taxes, interest, penalties and costs. Pet. App. C-13. The County then gave it to the county-sponsored land bank, which requested the property for purported economic development. Ordinarily, Ohio law requires a public sale of tax-delinquent property and a refund of surplus profits. Ohio Rev. Code §§ 323.73, 5721.20. But because the land bank wanted Feltner's property, the County confiscated it without a public sale and without payment to Feltner for his surplus equity. Pet. App. D-9; Ohio Rev. Code §§ 323.78(B), 5721.20 (permitting direct confiscation to benefit the land bank without payment). This predatory process deprived Feltner of the equity in his property without compensation. *See* Pet. App. D-10.

The Takings Clause can and should provide just compensation for this taking of Feltner's equity interest. The law has long recognized equity as a discrete interest in property, imposing a duty on foreclosing parties to sell the property and refund to

the former owner the surplus proceeds of property confiscated to satisfy a debt. *Martin v. Snowden*, 59 Va. 100, 137 (1868), *aff'd sub nom. Bennett v. Hunter*, 76 U.S. 326 (1869) (describing the practice in England, the colonies, and early America). Failure to abide by that duty violates a deeply rooted property right, requiring compensation under this Court's takings precedents.

Two Ohio Supreme Court justices thought this argument deserved serious consideration in Feltner's case. Pet. App. C-14. This Court also recognized, but did not resolve, the takings question at issue in this case in *Nelson v. City of New York*, 352 U.S. 103, 110 (1956). In *Nelson*, the City of New York foreclosed on two properties to satisfy delinquent debts, taking property that was worth far more than the debt owed. *Id.* at 106. The former owners argued that the city was not entitled to the windfall and sought just compensation for the surplus equity in their properties. The Court rejected their claims, however, because the owners failed to use a procedure available under state law to receive the surplus proceeds from a judicial sale of the property. *Id.* (rejecting takings claim "in the absence of timely action to . . . recover[ ] any surplus"). This Court declined to answer whether the city's retention of the windfall would be a taking where state law "precludes an owner from obtaining the surplus proceeds of a judicial sale." *Id.* This is the question presented by Feltner's case. Since *Nelson*, state and federal courts have split on the answer to that question.

This Court should grant the petition to settle the important question of whether the government unconstitutionally takes private property when it

forecloses on property worth more than a government lien and keeps the excess equity as a windfall.

STATEMENT OF THE CASE

A. Cuyahoga County Board of Revision Takes Feltner's $144,500 Property as Payment for $65,189 in Taxes, Penalties, and Interest

In 2009, Elliot G. Feltner's wife, Linda, inherited a small Cleveland auto body shop from her father. Soon after, she was diagnosed with cancer that eventually took her life. After his wife passed, Feltner discovered that the autobody shop he inherited was encumbered by a large past due tax bill that he could not afford to pay. The property was worth substantially more than the debt, however, and so he began a process to sell it and use the proceeds to clear the debt. His efforts were delayed when he was struck with spinal problems in 2015 while traveling to Kentucky, requiring two surgeries and an extended absence from Ohio until early 2017. Agreed Statement of Facts, No. 2018-1307, Exh. 1 at 217 (Apr. 9, 2019) (affidavit of Elliot Feltner for motion to vacate foreclosure). Consequently, the Board's summons and other notices sent to Feltner's Ohio home warning him of an impending administrative foreclosure of the tax-delinquent property failed to reach him while he was out of state. *See* Pet. App. D-10.

Under Ohio law, property that is foreclosed for delinquent property taxes will ordinarily be sold to the highest bidder in a public auction. Ohio Rev. Code §§ 323.25, 323.73. The proceeds pay the delinquent taxes, interest, penalties, and collection costs. Ohio Rev. Code § 323.73. And consistent with the duty to pay just compensation for excess property taken, any

remainder is returned to the former owner. Ohio Rev. Code § 5721.20. But different rules apply when Cuyahoga County's land bank wants to acquire tax-delinquent property. The relevant statutes allow the County to skip the auction, shorten the time period for Feltner to save his property to 28 days from the foreclosure decision, *see* Ohio Rev. Code § 323.65, and allow the land bank to keep the surplus value of the property. Ohio Rev. Code § 323.78(B) (also applies when county, town or school district wants property).

Feltner learned of the County's foreclosure action on his property in 2017 during a title search performed for a prospective buyer. Pet. App. D-10. Feltner did not understand the process, however, and did not attend a final administrative hearing on the matter on June 21, 2017. *Id*. At the hearing, a County official testified the fair market value of the property at $144,500. Pet. App. C-13, D-10. Feltner owed $65,189.94 in property taxes, penalties, interests, and costs. *Id*. More than $25,000 of that debt was penalties and interest. The Board of Revision ordered a foreclosure without an auction, which became final a month later when it transferred title to the Cuyahoga County land bank. Pet. App. D-11. Accordingly, Feltner's attempt to sell the property failed, and he lost his property, including his surplus equity, to the County. Less than a month after receiving title, the County's land bank transferred the property to a private third party (an adjacent automotive repair shop) for the significantly discounted sum of $15,000. Agreed Statement of Facts, Exh. 13, Affidavit of Gus Frangos ¶ 20, No. 2018-1307 (Apr. 9, 2019). Neither the Board nor the land bank compensated Feltner for his lost equity of $79,310.06. Pet. App. C-13. Moreover, because the Board foreclosed without a

judicial sale, the County did not receive one penny of the taxes, interest, or penalties owed.

B. Feltner Files Takings Claim Seeking Just Compensation for His Equity

On September 17, 2018, Feltner filed a complaint in the Supreme Court of Ohio seeking, in part, a writ of mandamus to require the County to hold proceedings to provide just compensation for his roughly $80,000 in lost equity. *See State ex. rel. Duncan v. Mentor City Council*, 826 N.E.2d 832, 834 (Ohio 2005) ("Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged."); *State ex rel. Pressley v. Indus. Comm'n*, 228 N.E.2d 631, 642 (Ohio 1967) (mandamus actions seeking just compensation may be filed directly in the Ohio Supreme Court). Feltner challenged the foreclosure and subsequent transfer of property without just compensation for his surplus equity as a violation of the takings clauses of the United States and Ohio Constitutions. Pet. App. D-16–18.

The County made two primary arguments against the takings claims. First, it urged dismissal on the grounds that a writ of mandamus was the wrong procedure, arguing that Feltner should have raised his claims in an appeal of the administrative foreclosure within 14 days of the Board's June 26, 2017, Adjudication of Foreclosure. *See* County Mot. to Dismiss at 5, 24–25 (Oct. 11, 2018); Ohio Rev. Code § 323.79. According to the County, the 14-day appeal deadline operates as a limitation period for takings claims. If true, however, it would mean that Feltner's takings claims expired weeks before the taking

actually occurred, since the County did not take title and extinguish his interest until July 28, 2017.

Second, the County argued that Feltner could not state a claim for a taking since he was deprived of the surplus equity through tax foreclosure proceedings rather than an eminent domain proceeding. Thus, the County argued, no takings claim could arise from the foreclosure or subsequent transfer to a private third party. *Id.* at 27.

The Supreme Court of Ohio issued a perfunctory order granting the motions to dismiss both the federal and state takings claims on March 20, 2019, while allowing two non-takings claims to proceed (alleging that the Board's judicial function violated separation of powers required by state law). Pet. App. A-1, B-1. The court provided no explanation or reasoning in support of its dismissal but was clear that it was a dismissal on the merits. *See* Pet. App. A-1 ("On the Merits"); Ohio Civ. R. 41(B)(3) (unless otherwise specified, a dismissal is on the merits). Justice Fischer dissented from the dismissal of the takings claims. *Id.* On May 28, 2020, the court denied Feltner's remaining non-takings claims, holding that the Board acted with presumptively valid statutory authority when it foreclosed on the property. Pet. App. C-7.

Justice Fischer, joined by Chief Justice O'Connor, concurred in that final judgment but wrote a separate opinion expressing their view that the dismissal of Feltner's takings claims was inappropriate. They opined that Feltner's takings claims might have merit if the government received "a windfall at Feltner's expense." Pet App. C-8, 13–14. Justice Fischer considered "disconcerting" the allegations that the Board foreclosed on Feltner's entire property worth

approximately $80,000 more than Feltner owed. Pet. App. C-13. The concurrence particularly noted the transfer of the property to the land bank without sale and "without remitting the remaining value of the property to Feltner." *Id.* Justice Fischer said the court should have heard the takings claims noting, "[t]he whole scheme is unsettling and just seems wrong." Pet. App. C-13–14.

Unless this Court grants his petition, Feltner will be unable to vindicate his federal constitutional right to just compensation. He is barred by principles of res judicata from seeking relief for the uncompensated taking in federal district court. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019) (claim preclusion prohibits re-litigation of takings claim after loss in state court); *see also State Ex Rel. Superamerica Group v. Licking County Board of Elections*, 685 N.E.2d 507, 510 (Ohio 1997).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW RAISES THE IMPORTANT QUESTION OF WHETHER THE TAKINGS CLAUSE DEMANDS COMPENSATION WHEN GOVERNMENT TAKES PROPERTY TO COLLECT A DEBT AND KEEPS AN EQUITY WINDFALL

By allowing the County to extinguish Feltner's equity without payment, the Supreme Court of Ohio violated well-settled property rights and stands against principles embodied by this Court's takings decisions. Ohio is not alone in this practice: local governments in a dozen other states also take a windfall of equity when collecting delinquent taxes.

The Court should grant the petition to settle the important federal question of whether equity is protected by the Takings Clause under these circumstances.

A. The Decision Below Ignores Deeply Rooted Property Rights in Equity

When government confiscates property worth more than an outstanding debt and fails to compensate the owner for the surplus value, it invades and unconstitutionally takes an equity interest. That is true even where a statute, such as the tax foreclosure statute in Ohio, does not expressly recognize the right to surplus equity. The property right in equity is protected by other sources. The law has long recognized equity as a discrete and valuable interest in property in other common debt-collection contexts, and mandated the return of surplus value in a foreclosed property to the former owner. *See, e.g., Grand Teton Mountain Invs., LLC v. Beach Props., LLC*, 385 S.W.3d 499, 502 (Mo. Ct. App. 2012) ("[A] foreclosure sale surplus 'retains the character of real estate for purposes of determining who is entitled to receive it . . . . Such surplus represents the owner's equity in the real estate."); Restatement (Third) of Property (Mortgages) § 7.4 (1997) ("The surplus stands in the place of the foreclosed real estate, and the liens and interests that previously attached to the real estate now attach to the surplus."); 72 Am. Jur. 2d State and Local Taxation § 911 (1974) ("Any surplus remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner."); *Villas at East Pointe Condo. Ass'n v. Strawser*, 142 N.E.3d 1200, 1205 (Ohio Ct.

App. 2019) (acknowledging lien-holder's equitable interest in surplus proceeds).[1]

Consistent with that principle, tax collectors traditionally have been required to refund any surplus proceeds after the sale of tax-delinquent property to the former owner. *Rafaeli*, 2020 WL 4037642 at *16–17 (tracing the history of this protection to Magna Carta); *see, e.g., McDuffee v. Collins*, 23 So. 45, 46 (Ala. 1898) (tax collector must follow "well-known general rule of law" by paying surplus proceeds in order of priority). 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 (internal citation omitted). Officials who took more property than necessary or who failed to sell and refund the surplus profits were liable in trespass or trover, or for a taking. *See, e.g., Cone v. Forest*, 126 Mass. 97, 101 (1879); *see also Knick*, 139 S. Ct. at 2176 ("Until the 1870s," takings claims were typically brought as "common law trespass action[s] against the responsible corporation or government official."); *Griffin v. Mixon*, 38 Miss. 424, 436–37 (Miss. Err. & App. 1860) (raising takings claim).

For over 100 years after the founding, the states and courts were in apparent accord in protecting the

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[1] This understanding of property equity in the context of mortgages arose to protect debtors from harsh agreements that would have forfeited valuable property over much smaller debts. *Rafaeli*, 2020 WL 4037642, at *34–36 (Viviano, J., concurring) (discussing the history of mortgage foreclosures and the right to property equity).

equity interest of property-tax debtors. *See, e.g., Martin v. Snowden*, 59 Va. at 137, *aff'd sub nom. Bennett*, 76 U.S. 326 (discussing common law, English land tax statute, and early colonial laws); Thomas M. Cooley, A Treatise on the Law of Taxation 343 (1876) (noting the belief that a tax debt only authorized the government to take as much property as the taxes owed and author was unaware of any jurisdiction that failed that duty). So secure was that right, that when Congress passed a statute partly aimed at "suppressing rebellion" in Confederate states and that appeared to forfeit title and all equity in tax-delinquent property, this Court twice chose a less natural statutory interpretation to avoid that outcome. *Bennett*, 76 U.S. at 335, 337 (avoiding the takings question by interpreting "forfeit" as meaning the owner was merely in danger of a tax sale and could still redeem the property until sale, because it is "proper" to avoid such a "highly penal" provision where milder construction is possible); *United States v. Taylor*, 104 U.S. 216, 219, 221–22 (1881) (relying on *Bennett* and noting the purpose was tax collection, not "confiscation" in construing the same statute to hold former owner entitled to $2,929.50 in surplus proceeds from the sale of his tax delinquent property).

Today, most states still protect equity by requiring surplus proceeds of a foreclosure sale to be paid to the former owner.[2] Even Ohio law ordinarily

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[2] *See, e.g.*, Ark. Code § 26-37-209; Conn. Gen. Stat. § 12-157(h); Del. Code tit. 9 § 879; Fla. Stat §§ 197.522, 197.582; Ga. Code Ann. § 48-4-5; Idaho Code § 31-608(2)(b); Kan. Stat. § 79-2803; Ky. Rev. Stat. § 426.500; Mo. Rev. Stat. § 140.340; Nev. Rev. Stat. § 361.610.5; Ohio Rev. Code § 5723.11; 72 Pa. Cons. Stat. Ann. § 1301.19; 72 Pa. Cons. Stat. Ann. § 1301.2; S.C. Code Ann. § 12-51-130; S.D. Code § 10-22-27; Tenn. Code Ann. § 67-5-2702;

allows debt collectors to take only as much as they are owed, requiring the property to be sold and the remainder returned to the former owner. *See, e.g.*, Ohio Rev. Code §§ 5721.20, 2329.44, 1309.615, 1311.49. But Ohio changed the rules when it wanted the property for itself. Ohio Rev. Code §§ 323.78(B), 5721.20. Here, because the County's land bank wanted Feltner's property, the County extinguished Feltner's $80,000 in equity without just compensation or any right or process to recover it. By straying from the traditional protection for equity, the County took without compensation a private property right that preexists the tax statute. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426–27 (2015) (Takings Clause protects property interests recognized by Magna Carta and Founders); *Farnham v. Jones*, 19 N.W. 83, 85 (Minn. 1884) (Regardless of what state tax laws say, "the right to the surplus exists independently of such statutory provision."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 629–30 (2001) (property rights arise from a variety of sources, including common law).

The traditional recognition that government may only collect as much as it is owed flows from a basic understanding that though owners should pay their taxes, failure to do so is not a criminal[3] (or moral)

Va. Code Ann. § 58.1-3967; Wash. Rev. Code Ann. § 84.64.080; Wyo. Stat. § 39-13-108(d)(4).

[3] Consequently, the County's arguments raised below that *Bennis v. Michigan*, 516 U.S. 442, 455 (1996), justifies its action must fail. Unlike *Bennis* and this Court's related civil forfeiture precedent, the property here was not an instrumentality of crime. *See Rafaeli*, 2020 WL 4037642, at *10; *Martin*, 59 Va. at 142-143 (1868), *aff'd sub nom. Bennett*, 76 U.S. at 326 ("[T]he land of a delinquent tax-payer . . . is neither the instrument nor the fruit of any offence.").

failing that somehow justifies government taking more than what is owed.[4] *See Slater v. Maxwell*, 73 U.S. 268, 276 (1867) (tax sales and foreclosure proceedings "should be closely scrutinized" and set aside or treated as being held in trust for the owner "whenever . . . characterized by fraud or unfairness"). Owners are "generally ignorant of [tax sales] until [it is] too late to prevent it." *Id. See, e.g.*, *In re Application of the County Collector for Judgment v. Lowe*, 867 N.E.2d 941, 951 (Ill. 2007) (hospitalized woman lost home over $110); *In re Petition of Cass County Treasurer for Foreclosure v. Lands Described*, No. 324519, 2016 WL 901700, at *2 (Mich. App. 2016) (wealthy owner ignorant of a $14,743 delinquent tax debt on his $3.5 million vacation property that had just finished construction).

Sometimes owners suffer from cognitive problems, illness, simple poverty, or do not understand the consequences of allowing a property to be foreclosed for delinquent taxes, which are dramatically worse than other types of liens. *Tallage Lincoln*, 2020 WL 4811678 at *1 (delinquent property owners typically cannot afford counsel and the law is difficult even for "experienced attorneys" to understand, leading to "catastrophic" results for property owners). Elderly property owners are especially susceptible to losing their property in this way because they move into senior living or medical

[4] Any government loss or legitimate interest in motivating people to pay their taxes is more than satisfied by the substantial penalties and interest and by selling the property paying the debt out of the proceeds. Tax debts typically grow at 12-18% interest, and often with added penalties and costs. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 755–56, 760, 767–77 (2000).

facilities, children's homes, or are otherwise displaced and consequently often miss notices. *See* Jennifer C.H. Francis, Comment, *Redeeming What is Lost: The Need to Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 Geo. Mason U. Civ. Rts. L.J. 85 (2014). In *Coleman*, an elderly veteran with dementia lost his $200,000 home over a $133 deficiency, plus approximately $5,200 in penalties, interest, fees, and costs. *Coleman through Bunn v. District of Columbia*, 70 F. Supp. 3d 58, 62, 64 (D.D.C. 2014) (*Coleman I*). Similarly, Feltner was displaced by debilitating back problems, followed by out-of-state back surgeries and rehabilitation. Exh. 1 at 217 to Agreed Statement of Facts, No. 2018-1307 (Apr. 9, 2019) (affidavit to motion to vacate foreclosure). Although he found a buyer, the sale failed to close in time. *See id.*; Pet. App. D-10.

By extinguishing Feltner's equity interest for the purportedly public purposes of the land bank, the County not only acted unfairly, it took more than was due and violated the Takings Clause's command of just compensation.

B. The Decision Below Conflicts with Decisions of This Court That Require Government To Compensate Owners When It Takes Discrete and Legally Cognizable Interests in Property

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for a public use without paying just compensation. U.S. Const. amend. V. When government seizes protected property, it effects a classic, *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982);

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) ("direct appropriation" of property or the "functional equivalent" is a classical taking). The Constitution protects a wide range of interests. Consequently, this Court has found a violation of the Takings Clause when government takes without payment financial interests including money, interest on money, land, liens, and mortgages. *See, e.g.*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 601–02 (1935) (Takings Clause protects "substantive rights in specific property," including the right to collect on a debt in a timely manner by seizing and selling that property); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 613 (2013) (Takings Clause protects money and "a right to receive money that is secured by a particular piece of property"); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 168 (1998) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens). Similarly, the Court has held that where a statute requires property to be sold to pay debts and the surplus proceeds returned, the Takings Clause protects the former owner's rights to those proceeds. *United States v. Lawton*, 110 U.S. 146, 150 (1884) ("To 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.").

Government may not use legislation to take an established property right without compensation. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 158–59 (1980), this Court held that government violated the Takings Clause by keeping the interest earned on private funds deposited with a court. The Court explained that the Takings Clause cannot be avoided by statutorily redefining private

funds as public funds: "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. Likewise in *Phillips*, 524 U.S. at 167, this Court rejected similar attempts to redefine property by statute, explaining "at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests." *See also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) (states effect a taking when they re-characterize traditionally private property as public property).

State laws that purport to convert surplus equity in tax-indebted properties into public property violate the Takings Clause in the same way. The Takings Clause will not permit such a state-authored transformation of a traditional private interest to public property. *Webb's Fabulous Pharmacies*, 449 U.S. at 164. Government cannot "by ipse dixit . . . transform private property into public property without compensation." *Id.*

The taking of Feltner's equity interest in his property bears analogy to the injustice considered by this Court in *Armstrong*, 364 U.S. 40. In that case, a shipbuilder contracted by the United States defaulted on its obligation to build ships, and the United States took title to the unfinished boats and materials, pursuant to contractual and common law rights. *Id.* Material suppliers claimed the United States had unconstitutionally extinguished their liens on the unfinished boats and supplies and refused to compensate the suppliers. *Id.* This Court agreed,

holding that property rights in liens do not simply disappear when the government takes title to the subject property. *Id.* at 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.

Despite *Armstrong*, a dozen states and Ohio extinguish the entire equity and all private liens when foreclosing on tax-delinquent property.[5] The windfall to the government often comes at the expense of society's most vulnerable members. For example, a Nebraska county took a million-dollar farm from an elderly widow who was living in a nursing home over

[5] Ariz. Rev. Stat. § 42-18205; Col. Rev. Stat. § 39-11-115; Me. Rev. Stat. Ann. tit. 36 § 949; Minn. Stat. Ann. § 280.29; Ore. Rev. Stat. § 312.100; 35 Ill. Comp. Stat. §§ 200/22-40, 200/21-90; Mont. Code Ann. §§ 15-18-211, 15-18-219 (issuing a deed to whoever holds a tax lien, but requiring sale and a return of surplus proceeds only for certain residential properties); Neb. Stat. 77-1837–38; Tex. Tax. Code § 34.051 (allows property to be sold at discount for economic development or affordable housing, even though state law normally protects the surplus, *see* Tex. Tax. Code § 34.03); *Tallage Lincoln*, 2020 WL 4811678 (describing Massachusetts system which sometimes takes a windfall for cities and sometimes for private investors); *Ritter v. Ross*, 558 N.W.2d 909, 910 (Wis. Ct. App. 1996); *Winberry Realty P'ship v. Borough of Rutherford*, No. A-3846-13T4, 2015 WL 10765151, at *2 (N.J. Super. App. Div. May 4, 2016) (walking through New Jersey statutes that allow private investor who purchases tax lien for amount of tax debt to foreclose and take full title without sale); Ala. Op. Atty. Gen. No. 2019-033 (Apr. 24, 2019).

$50,000 in property taxes, interest, and costs.[6] The county gave the full windfall to a private investor without any payment for the widow's equity. In Wisconsin, officials took title to farmland worth $38,000 as payment for an $84 property tax debt.[7] In Massachusetts, a homeowner recently lost title to a $120,000 home as payment for approximately $10,000 in taxes and $5,000 in interest. *See Tallage Lincoln, LLC v. Gardzina*, No. 17 TL 001084, Judgment in Tax Lien Case (Mass. Land Ct. Nov. 7, 2019). The state law extinguished both the owner's equity interest and a substantial lien held by a small nonprofit. *See id*.

In such cases, "the government for its own advantage destroy[s] the value of [any] liens" and the owner's equity, which should require just compensation. *See Armstrong*, 364 U.S. at 48. Even though the government has only a limited interest in the property, it takes everything. This transformation of private property for public use is a taking. The government thus has the "constitutional obligation to pay just compensation" or to return the excess property it takes. *See id.* at 49. This Court should grant the petition to clarify that the same Takings Clause protections that apply to liens and interest on money also apply to a debtor's equity.

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[6] *Wisner v. Vandelay Investments, L.L.C.*, 916 N.W.2d 698, 708 (Neb. 2018); Response Brief, Wisner, No. S-16-000451, 2018 WL 659770, at *30 (Jan. 4, 2018).

[7] *Ritter*, 558 N.W.2d at 910.

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

Five state courts of last resort and two federal district courts hold that when tax-delinquent property is foreclosed to pay the debt, the government must pay just compensation. Federal and state courts in six other states have held that no taking occurs, usually interpreting *Nelson* too broadly to hold that the right to compensation exists only if required by statute. And several courts have avoided the constitutional question by reading their state's statutes to require the return of surplus proceeds of tax sales to the former owner. This Court's review would bring clarity to the matter and harmony to the lower courts.

The high courts of Michigan, New Hampshire, Vermont, Mississippi, and Virginia, and some federal district courts recognize that a property owner's equity in property is a discrete and legally cognizable interest, and hold that government effects a taking without just compensation when it takes more than it is owed. *Griffin*, 38 Miss. at 436–37; *Martin*, 59 Va. at 142–43 (violates due process by taking more than owed); *Rafaeli*, 2020 WL 4037642 at *5; *Bogie v. Town of Barnet*, 270 A.2d 898, 900, 903 (Vt. 1970) (citing *Lawton*, 110 U.S. 146, and holding retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation"); *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) (statute granting government surplus proceeds from tax sales

violates state constitution's Takings Clause); *King v. Hatfield*, 130 F. 564, 579 (C.C.D.W. Va. 1900); *Pung v. Kopke*, No. 1:18-cv-01334-RJJ-PJG, Opinion and Order (W.D. Mich. Sept. 29, 2020) (ECF No. 119, Page ID.1357–58); *see also Coleman I*, 70 F. Supp. 3d at 80 (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman through Bunn II*, No. 13-1456, 2016 WL 10721865 *2–3 (D.D.C. June 11, 2016) (recognizing district law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits).

Acknowledging the disagreement among courts on whether the federal Takings Clause protects equity in tax-delinquent property, the state supreme courts of Michigan and New Hampshire chose to protect it under their state constitutions, declining to answer the federal question. *See Rafaeli*, 2020 WL 4037642 at *14 n.65, *22 (noting disagreement in other jurisdictions and "look[ing] for guidance in the decisions of the United States Supreme Court regarding surplus proceeds and the federal Takings Clause" in interpreting the Michigan takings Clause); *Thomas Tool*, 761 A.2d at 441–442. Nevertheless, by holding that state property law protects a delinquent owner's equity interest from an uncompensated taking, these states make clear that equity is a discrete property interest under state law, triggering federal takings protection as well. *Pung*, No. 1:18-cv01334-RJJ-PJG (ECF No. 119, Page ID.1357–58). *See, Lawton*, 110 U.S. at 150 (a taking where applicable law requires a return of the surplus); *Phillips*, 524 U.S. at 164 (Constitution protects property rights property interests recognized by state law).

The state supreme courts of Indiana, North Dakota, Texas, and Alaska have also criticized the idea that government could legitimately extinguish equity or liens on tax-delinquent properties and have interpreted tax sale statutes to avoid that result. *Lake Cty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004) (noting it would "produce severe unfairness" and likely violate the Takings Clause); *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); *Shattuck v. Smith*, 69 N.W. 5, 12 (1896) (noting statute would likely be unconstitutional "if [it] contained no provision that the surplus should go to the landowner").

And like the two justices below in the instant Ohio case, federal judges who did not reach the merits for jurisdictional reasons have noted the extreme injustice and the potential takings problem raised by such laws. *See, e.g.*, *Wayside Church v. Van Buren County*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting), *reopened under Rule 60*, No. 14-cv-01274, ECF No. 64 (identifying potential takings concerns and noting, "[i]n some legal precincts that sort of behavior is called theft"); *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546 (E.D. Mich. 2015) (raising concerns about the injustice and potential constitutional problems caused by the taking of a valuable home as payment for a delinquent $8 property tax underpayment); *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 5831013 at *2 (E.D. Mich. 2018) *rev'd* __F.3d__, 2020 WL 5814503 (Sept. 30,

2020) (calling the uncompensated taking of surplus equity "unconscionable").

On the other side of the split, courts in Arizona, Illinois, Maine, Oregon, and Wisconsin join Ohio in rejecting takings claims against tax statutes that extinguish surplus equity. *See, e.g., City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Me. 1974); *Ritter*, 558 N.W.2d at 912 n.7; *Balthazar v. Mari Ltd.*, 301 F. Supp. 103, 105 n.6 (N.D. Ill., 1969) ("Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue."), *summarily aff'd* 396 U.S. 114 (1969);[8] *Automatic Art, LLC v Maricopa County*, 2010 WL 11515708, at *5–6 (D. Az., Mar. 18, 2010); *Reinmiller v. Marion County, Oregon*, No. CV-05-1926-PK, 2006 WL 2987707, at *3 (D. Or. 2006). These decisions have mostly hinged on a confused analysis of this Court's decision in *Nelson*, reading it broadly to mean "retention of any surplus from a tax auction is constitutional [where] there was no violation of plaintiffs' right to [procedural] due process." *See Miner v. Clinton Cty., N.Y.*, 541 F.3d 464, 475 (2d Cir. 2008).

In *Nelson*, the City of New York took the plaintiffs' property assessed at $6,000 to collect a $65 unpaid water bill, sold it for $7,000, and kept all the proceeds.

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[8] A few courts upholding tax sale statutes against constitutional challenges also rely on this Court's summary affirmance of *Balthazar*, 396 U.S. 114 (1969). But summary affirmance "carrie[s] little more weight than denials of certiorari." *Hohn v. United States*, 524 U.S. 236, 260 (1998) (Scalia, J., dissenting) (summary). That is especially true with *Balthazar*, where there may have been procedural problems with the underlying claims. *See Coleman I*, 70 F. Supp. 3d at 79 (noting the affirmance could have been because the government was not a party to the claim for just compensation).

Id. The city took the plaintiffs' other property assessed at $46,000, to collect an $814 water bill, and retained title to the property. *Id.* at 106. The dispossessed owners brought a due process challenge for lack of notice, and in their reply brief before this Court suggested that failure to vindicate their right to due process would also effect an uncompensated taking. *Id.* at 109. The Court denied their due process claim (because their bookkeeper had actual notice of the foreclosure) and briefly disposed of the takings argument. The New York statute provided the dispossessed owners with the opportunity to recover the surplus proceeds by raising a claim for the surplus during the foreclosure proceedings. *Id.* This Court held there had been no taking because the plaintiffs failed to claim the surplus using that procedure. *Id.* at 110 (The New York statute did not "preclude[] an owner from obtaining the surplus proceeds of a judicial sale.") (internal citation omitted). In so holding, the *Nelson* Court reserved the question raised here: Whether government effects a taking if the statute fails to provide a means to reimburse surplus funds. *See id.*; *Coleman I*, 70 F. Supp. 3d at 79 ("*Nelson* . . . expressly reserved the question whether a tax sale law with no avenue for recovery of the surplus would be constitutional.").

Nelson tells us only that a party who fails to use a state procedure to claim the surplus proceeds cannot bring a takings claim.[9] "*Nelson* do[es] not tell us . . .

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[9] Essentially, *Nelson* held that the state court hearing where the plaintiff could seek and potentially obtain compensation was a suitable substitute for the actual payment of money for a taking. But this Court has recently rejected the notion that that a "taking does not give rise to a federal constitutional right to just compensation at that time, but instead gives a right to a state

what occurs when the statutes governing foreclosure make no mention of, or expressly preclude, a divested property owner's right" to the equity or surplus proceeds from a tax sale, but the owner establishes that right through another "source, such as the common law." *Rafaeli*, 2020 WL 4037642 at *14.

This Court should grant the petition to resolve the discord among the state and federal courts on the question whether the owner of tax-delinquent property is owed just compensation when government takes property worth far more than what is owed and retains the windfall for the public.

CONCLUSION

This Court should grant the petition.

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law procedure that will eventually result in just compensation." *Knick*, 139 S. Ct. at 2171. While certainly government may use limitations periods on the ability to make a takings claim after the taking occurs, it is not reasonable for a court require a plaintiff to stake a takings claim before the taking actually occurs. Nor does a procedural opportunity to request compensation before the taking occurs satisfy the constitutional mandate that government pay just compensation. *See id.* at 268.

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