No. 20-567

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 Ohio Supreme Court

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right to ownership and use of private property. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmnt. Dist.*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

SUMMARY OF ARGUMENT

Respondents confiscated Feltner's property. The deed to Feltner's property was transferred to the local government by means of a nonjudicial, administrative process. There is no question that this was a taking by physical appropriation. The only issue is whether there was adequate compensation. Here, the property was confiscated to pay for back taxes – but the property was worth more than twice the amount of the tax debt. By any measure, this was not "just compensation."

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

REASONS FOR GRANTING THE WRIT

I. The Property Owner's Rights to the Surplus after a Tax Sale Date Back to the Magna Carta

The importance of individual rights in property predated the Declaration of Independence and the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman … which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND Bk. 1, Ch. 1 at 135 (Univ. of Chicago Press 1979) (1765). As this Court noted in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), the colonists brought these principles with them, drawing on the Magna Carta. *Id* at 358. In *Horne*, the Court noted that the Magna Carta protected personal property the same as real property. For purposes of this case, it is important to note that the Magna Carta also protected the surplus realized from the sale of property to satisfy a tax lien. *See* Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 St. Mary's L.J. 1, 47 (2015), *citing* McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN (Glasgow: James Maclehose & Sons, 2d ed., 1914), p. 322.

Clause 26 of the Magna Carta allowed for the sale of a decedent's property to satisfy debts owed to the crown, but once the debt was satisfied "the residue is to be relinquished to the executors to carry out the testament of deceased." MAGNA CARTA, Clause 26 (1215). Blackstone explained that in the context of bailments,

whenever the government seized property for delinquent taxes, it did so subject to "an implied contract in law" to either return the property if the tax debt was paid or "to render back the overplus" if the property was sold to satisfy the delinquent taxes. 2 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, p. 452.

This principle was incorporated into the laws in many states. Justice Cooley noted that states adopted various methods for paying surplus proceeds to the owner from the sale of land for back taxes. Thomas Cooley, TREATISE ON THE LAW OF TAXATION (3d ed. 1909), 952. Some states deposited the surplus proceeds into the local treasury for the benefit of the landowner. *Id.*; *see United States v. Lawton*, 110 U.S. 146, 150-51 (1884). Excessive tax levies were "beyond the jurisdiction of the officers" charged with collecting taxes and that even *de minimis* amounts in excess of the taxes owed were impermissible. Cooley, *supra*, at 590-591 ("If the line which the legislature has established be once passed, we know of no boundary to the discretion of the assessors.") (quotation marks and citation omitted). In some cases, a sale of property for unpaid taxes that was in excess of the taxes owed was rendered voidable at the option of the landowner. *Id.* at 953 ("A sale of the whole when less would pay the tax would be such a fraud on the law as to render the sale voidable at the option of the landowner ....").

II. Background Principles of State Property Law Recognize a Property Right in the Equity/Surplus After a Lien Sale

Most states recognize the principle that the government is only entitled to collect as much as it is owed by guaranteeing the surplus proceeds from the

sale of tax-indebted property to the former owner. *See, e.g.*, Ala. Code § 40-10-28; 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; Me. Rev. Stat. tit. 36 § 949; Mo. Rev. Stat. § 140.340; Nev. Rev. Stat. § 361.610.5; 72 Pa. Cons. Stat. Ann. § 1301.19; 72 Pa. Cons. Stat. Ann. § 1301.2; S.C. Code Ann. § 12-51-130; S.D. Code § 10-22-27; Tenn. Code Ann. § 67-5-2702; Va. Code Ann. § 58.1-3967; Wash. Rev. Code Ann. § 84.64.080; W. Va. Code § 11A-3-65; Wis. Stat. § 75-36(4) (homesteads); Wyo. Stat. § 39-13-108(d)(4).

These provisions accord with the idea that equity in property is a protected property right. "Equity" is, by definition, the fair market cash value of the property after deduction of all encumbering debts (like tax debts). *Crane v. Commissioner*, 331 U.S. 1, 7 (1947) ("'[E]quity' is defined as 'the value of a property above the total of the liens.'"); *see also Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 392 (6th Cir. 1986); *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984).

Equity has long been recognized as a discrete interest in property which imposes a duty on foreclosing parties to sell the property and refund the surplus proceeds of the property confiscated to satisfy the debt to the owner. *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). In other common debt-collection contexts, the law has consistently recognized equity as a discrete and valuable interest in property 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 equitable interest in surplus proceeds).

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. *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). This principle has also been applied to other debts. S*ee, Linker v. Linker*, 196 S.E. 329, 331 (N.C. 1938) (stating that an undivided interest in land is "subject to be divested only in the event that the personal assets of the estate be insufficient to pay the debts of the estate, and then only to the extent that it is necessary to use the proceeds of sale of it to pay said debts"); *Kolars v. Brown*, 108 Minn. 60, 61 (1909) (surplus of the proceeds of a sale for payment of debts goes to the person whom the real estate would have gone to

but for the conversion); *Kitchens v. Jones*, 87 Ark. 502 (1908) (same); *State v. Doud*, 269 S.W. 923, 924 (Mo. Ct. App. 1925) (same); *In re Harris' Estate*, 44 A.2d 18, 20 (Del. Super. Ch. 1945) ("surplus over and above the debts" belong to the owner at the time of the sale.

Ohio has recognized that the surplus remaining after sale of a home in order to repay debts must be returned to the owner. *See*, *Kelly v. Duffy*, 31 Ohio St. 437 (1877) (holding that the surplus of the sale of the home should be given to the debtor's wife after payment of the preferred liens); *Jackson v. Reid*, 32 Ohio St. 443 (1877) (stating a debtor may insist upon the surplus of the sale of his home after payment of creditors). Ohio courts have also recognized that surplus is personal property and should be treated as such. *See Floyd v. Clyne*, 108 Ohio App. 16, 9 Ohio Op. 2d 93, 80 Ohio L. Abs. 225, 154 N.E.2d 771 (8th Dist. Cuyahoga County 1958) (holding that surplus is personal property and the administrator of the estate of the former owner of such property has the right, as the real party in interest, to maintain an action to obtain such surplus).

The county in this case seeks to avoid such a result here by confiscating the property and transferring to another government entity rather than selling it for payment of the debt. If there is no sale, can there be a surplus? But Ohio's action is a "taking" by any definition, and the release of the tax debt is not "just compensation."

III. The Court Should Grant Review to Determine Whether Confiscation of Property for Tax Debts that Are Less than the Value of the Property Is a Taking Under the Fifth Amendment Requiring Just Compensation

There was no "surplus" in this case because there was no tax sale. Instead, the county foreclosed on the property in a nonjudicial proceeding and transferred title to another county entity. *State ex rel. Feltner v. Cuyahoga Board of Revision*, Ohio Supreme Court, Petitioner's Appendix at C-2.

By any definition, this was a physical appropriation of the property. *Horne*, 576 U.S. at 363; *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). When government takes physical possession of property it has taken the property for purposes of the Fifth Amendment. *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). This taking triggers a "categorical duty to compensate the former owner." *Tahoe-Sierra*, 535 U.S. at 322; *United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951). Physical appropriation is a categorical taking which "requires courts to apply a clear rule." *Yee v. Escondido*, 503 U.S. 519, 523 (1992).

Even property burdened by a tax lien is still property protected by the Constitution. *See Jones v. Flowers*, 547 U.S. 220, 226 (2006). Nonetheless, there is no question that the government, in the exercise of its police power and complying with the requirements of the Due Process Clause, may seize property and sell it to satisfy a tax debt. But this is not like the case in *Nelson v. City of New York*, 352 U.S. 103, 110 (1956), where the owner had an opportunity to reclaim the

surplus between the value of the property and the debt owed. Here there was no sale and county simply transferred title to itself.

The Fifth Amendment requires payment of "just compensation" in the event of taking. That is, the government must pay "the full monetary equivalent of what was taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973). That generally means the fair market value of the property. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979). Fair market value is defined as what a willing buyer would pay to a willing seller. *United States v. Miller*, 317 U.S. 369, 374 (1943).

The fair market value of the property taken in this case was $144,500. *State ex rel. Feltner*, Ohio Supreme Court, Pet. App. C-14 (Fischer, J., concurring in the judgment). Petitioner, however, did not receive compensation in that amount. Instead, petitioner received satisfaction of a $65,000 tax lien – less than one-half of the fair market value of the land. As noted above, had the property been sold the owner would have been entitled to the surplus proceeds – the amount in excess of what was owed. Here, however, the county decided it wanted ownership of the property rather than the cash owed for the tax lien.

In this situation, the result cannot be different than if the county sold the property at auction. It is only entitled to the amount of its lien. The county is not entitled to simply redefine property rights. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). When the county transfers title to itself, the Takings Clause of the Fifth Amendment requires just compensation. This Court should grant review to

rule that satisfaction of a tax lien of less than the full value of the property is not just compensation.

CONCLUSION

Since the time of the Magna Carta government has understood that the owner of property seized for satisfaction of tax liens is entitled to receive any surplus realized in the sale. Here, the county did not sell the property. Instead, it transferred title to itself. By any definition, this was a categorical taking. This Court should grant review to rule that satisfaction of a tax lien that is less than the fair market value of the property does not constitute just compensation.

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