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 Supreme Court Of Ohio

BRIEF OF AMICUS CURIAE THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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?

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INTERESTS OF THE AMICUS CURIAE

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. The Buckeye Institute is a leading advocate of protecting private property.

The requirement that "just compensation" must accompany any taking of private property predates the

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[1] Pursuant to Rule 37.2(a), The Buckeye Institute states that it has obtained written consent to file this amicus brief from all parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission. The parties were timely notified.

United States Constitution and has pedigree stretching back nearly a millennium. Indeed, this safeguard against governmental abuse, enshrined in the Fifth Amendment, as well as the Ohio constitution, is one of the oldest and most firmly rooted principles in the Anglo-American legal tradition. The Buckeye Institute has a particular interest in this case because the Ohio statute at issue flies in the face of this well-established protection and robs Ohioans like the Petitioner of the fundamental liberties bequeathed to them by the Founders.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Takings Clause's Just Compensation requirement is categorical and unconditional. Its simple and unadorned language provides, "Nor shall private property be taken for public use, without just compensation." U.S. CONST. AMEND. V. Those words carry the same meaning today that they carried when they were written with quill and ink. This Court should therefore look to the legal and historical context that surrounded its drafting and ratification and how this safeguard against government overreach—already well-established in Anglo-American law when it was ratified—was understood by the citizens of the day.

That original understanding, rooted in Magna Carta and applied consistently to the present day, is that when the government takes an interest in

property for some public use, its duty to compensate the former owner is "categorical." *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002), *citing United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951). The government must make just compensation regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. *Id.*

This is particularly true in a "classic taking," where a government entity extinguishes an owner's property rights by taking title to land. *See id.* (noting that a "classic" taking is one where the government "directly appropriates private property for its own use," (internal citations omitted); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426–435 (1982) (a physical appropriation of real property is a *per se* taking that requires just compensation).

The Ohio statute that Feltner challenges effects a physical taking that robs landowners of equity that they have built up in their property. Ohio law provides county governments two avenues when foreclosing on tax delinquent properties. The first, which requires the County to conduct a public sale of the property and refund to its owner any profits realized in excess of the tax debt, honors the Fifth Amendment and commonsense notions of fairness. OHIO REV. CODE §§ 323.73, 5721.20. The second avenue, at issue here, permits the County to confiscate the land and transfer title to the county land bank, thus taking without compensation the equity that the owner had built up through years

of payments, improvements, and appreciation. OHIO REV. CODE §§ 323.78(B), 5721.20.

This type of uncompensated appropriation of private property rights is precisely what the Founders sought to prohibit. In drafting what became the Takings Clause, Madison restated familiar and uncontroversial precepts of English law that had taken root in colonial statutes and common law. William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 684, at 694 (1985). Indeed, colonial statutes, nascent State constitutions, and the Northwest Ordinance of 1787 all premised the sovereign's right to take property for the public good on just and contemporaneous compensation to the landowner.

Importantly, the Founders' generation, and the men and women who settled Ohio, understood the protection of private property as the key to securing other freedoms and promoting the republican virtues that they believed necessary for self-government.

And while debate continues over the extent the drafters intended the Takings Clause to encompass regulatory takings and what constitutes "public use," the principle that the government owes compensation is not in doubt. Feltner presents this Court with the opportunity to reaffirm the categorical nature of the Just Compensation requirement and clarify its prior holdings establishing that a sovereign's right to take private property exists *only* where there is payment of just compensation. *See Webb's Fabulous Pharmacies,*

Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

The Court should grant the petition to reaffirm that this fundamental principle—originally imposed on King John at the meadow of Runnymede—applies with equal force to a county government on the banks of the Cuyahoga.

ARGUMENT

On July 22, 1796, Moses Cleaveland[2]—lawyer, Revolutionary War veteran, and General Agent for the Connecticut Land Company—arrived with his surveying party at the mouth of the Cuyahoga River to lay out the plat map for the property where, 213 years later, Elliot Feltner would open his auto body repair business. *See* Harvey Rice, *An Account of the Lineage of General Moses Cleaveland, of Canterbury (Wyndham County), Conn. The Founder of the City of Cleveland, Ohio (with Portrait)*, 1885; *see* Pet. App C-13. While General Cleaveland could not have foreseen how Feltner would use his real property, he would have understood that land is an asset whose value typically appreciates over time and that when a property's value

[2] So spelled—in 1831, the "Cleveland Advertiser," a newspaper in the city that Cleaveland founded, dropped the "a" from Cleaveland's name to save space on the paper's masthead. The shortened spelling stuck. Henry E. Bourne, *"The Story of Cleveland", New England Magazine*, 14 (6): 744 (1896).

exceeds the debts attached to it, a land owner retains his ownership in the difference.

As an 18th century lawyer and land speculator, Cleaveland would have been well-acquainted with the Northwest Ordinance, which a decade earlier had opened the Connecticut Western Reserve to settlement and stated in plain terms the well-established principle that the government's right to take property was conditioned on just compensation to its owner and served as a model for Madison's Takings Clause. *See* Treanor, *supra* at 708. More importantly, Cleaveland would have understood—like the citizens who ratified the Fifth Amendment, the Congress that enacted the Northwest Ordinance, and the Drafters of state constitutional compensation requirements—that the sovereign's right to take private property for public use is conditioned on payment of just compensation.

I. The Categorical Right to Just Compensation for the Taking of Property was Well-Established in Anglo-American Jurisprudence Before the Fifth Amendment's Ratification.

A. Magna Carta and Just Compensation in Colonial America.

1. This Court has identified that the roots of the Just Compensation Clause extending "back at least 800 years to Magna, which specifically protected agricultural crops from uncompensated takings." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). Specifically,

Clause 28 of Magna Carta forbade any "constable or other bailiff" from taking "corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." *Id*. (internal citations omitted). Chapter 31 of Magna Carta placed an outright prohibition on "the king or his officers taking timber" from land without the owner's consent. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 564 (1972). Lord Coke interpreted this limitation to imply that while the king could take certain "inheritances" from land, he could not take the land itself. *Id.* Blackstone later asserted Magna Carta's protections of property meant that "only the legislature could condemn land." *Id*. As Professor Stoebuck explains, "eminent domain"—the physical taking of land—"arose in Anglo-American jurisprudence as a function of Parliament," rather than as a prerogative of the Crown. *Id.* This distinction was significant in English law, however in America the distinction gradually blurred, and following ratification of the Constitution, disappeared entirely.

These principles of Magna Carta sailed with the early colonists to the New World and established themselves firmly in American soil. For example, in 1641 Massachusetts adopted a provision in its Body of Liberties, prohibiting "mans Cattel or goods of what kinde soever" from being "pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the

Countrie do afford." Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes too Far*," 49 Am. U. L. REV. 181, 209 (1999).

2. Consistent with Blackstone's distinction between the powers of the king and the powers of Parliament, most colonial legislatures did not recognize a blanket governmental obligation to compensate a property owner for the public taking of his property. Treanor, *supra* at 694. Rather, the duty to provide just compensation flowed from the specific statute authorizing the taking. Under these "purveyance statutes" legislatures often included payment as a matter of simple justice. Thus, "compensation became a feature [] through the American colonial period." Stoebuck, *supra* at 556. According to Stoebuck, "purveyance statutes" were "in themselves examples of the principle that government must pay for what it takes." *Id.*

And while eminent domain was primarily a statutory matter, colonial courts still looked to Magna Carta as a component of English common law. *See*, *e.g.*, *Bowman v. Middleton*, 1 Bay 252 (S.C. Ct. Common Pleas 1792) (declaring that it would be "against common right, as well as against magna charta, to take away the freehold of one man, and vest it in another without any compensation.") Early state courts, drawing upon the common law of their predecessors "were justified in their claim that compensation was a principle of the common law—of immemorable usage in our land and in the land of our land." Stoebuck, *supra* at 583.

Simply put, "compensation," based on the ideas of Magna Carta, "was the regular practice in England and America, . . . during the whole colonial period." *Id.* And while it is impossible to say that it was "invariably practiced," legal authorities such as Callis, commenting at the beginning of the colonial period and Blackstone, writing near the end, both "regarded compensation as an accepted principle." *Id.*

3. But while pre-revolutionary colonists were largely content to trust their legislatures to provide compensation when fair, the experience of the Revolutionary War impressed on them the need for a broader more consistent protection of property rights. *See* Treanor, *supra* at 700-701. The Revolutionary War brought with it the seizures of property from both the British and the Continental Army. St. George Tucker, the author of the first published treatise on the U.S. Constitution and editor of the 1803 edition of Blackstone's Commentaries posited that the new nation's shift to the inclusion of compensation requirements in state constitutions, as well as the Northwest Ordinance, and the Takings Clause was due to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever." 1 Blackstone's Commentaries, Editor's App. 305–306 (1803).

In *Horne*, this court made similar observations, noting John Jay's complaints to the New York Legislature about military impressment by the Continental Army of "Horses, Teems, and Carriages," and voiced

his fear that such action by the "little Officers" of the Quartermasters Department might extend to "Blankets, Shoes, and many other articles." *Horne*, 576 U.S. at 359, *quoting*, A Hint to the Legislature of the State of New York (1778), in *John Jay, The Making of a Revolutionary* 461–463 (R. Morris ed. 1975). Similarly, during the war, many of the newly independent states enacted legislation allowing the confiscation of loyalist property. Some Founders, including Madison, were concerned that this confiscation threatened the long-term safety of property rights in general. *See* James W. Ely, Jr., *Property Rights in American History*, 4 (1997); *see also* Treanor, *supra* at 709 (noting Madison's opposition to the seizure of loyalist property). In short, Americans were "not as secure in their property rights between 1776 and 1787 as they had been during the Colonial period." Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 154 (1985).

II. Following the Revolutionary War through the Early Federal Period, the Founders and Succeeding Generations Held the Just Compensation Requirement to be Categorical and Fundamental.

A. The Post-war Period and The Northwest Ordinance of 1787

1. In the aftermath of the Revolutionary War, Madison wrote to Jefferson about his concern over the erosion of property rights, noting that "[t]he necessity of . . . guarding the rights of property was for obvious

reasons unattended to in the commencement of the Revolution" and citing the need for positive steps to secure those rights in the new country. Treanor, *supra* at 710.

While the colonial right to compensation for a taking of property often relied on a patchwork of purveyance statutes and general reliance on the common law, the Congress of the Confederation of the United States provided what was to be the first national statement on the matter when it enacted the Northwest Ordinance of 1787. In essence, the Northwest Ordinance provided the first national "pre-constitutional codification of the eminent domain power." Joseph J. Lazzarotti, *Pub. Use Or Pub. Abuse*, 68 UMKC L. REV. 49, 54 (1999).[3]

In language that prefigured the Fifth Amendment, the Northwest Ordinance provided that:

> No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and *should the public exigencies make it necessary, for the common preservation, to take any person's property*, or to demand his particular services, *full compensation shall be made for the same*.

An Ordinance for the government of the Territory of the United States northwest of the River Ohio, art. 2.

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[3] While the Northwest Ordinance provided the first "national" statement of the Just Compensation requirement, the Vermont Constitution of 1777 and the Massachusetts Constitution of 1780 included similar categorical requirements. Trainor, *supra* at 701.

U.S.C.A., Northwest Ordinance art. 2 (1787) (emphasis added).

2. Like the Just Compensation requirement in the Takings Clause, the Northwest Ordinance's guaranty is as clear and understandable today as it was in 1787. Yet to the drafters, steeped in the republican philosophy of their time, the Ordinance's protections of property were much more than a mere commercial guarantee or a pro forma restatement of the common law. To them, the property protections were closely tied to the protection of other rights and the development of civic virtue. Indeed, the historical record reveals "a strong regard in the founding era with protection of property as one of the key requirements for encouraging a virtuous, self-sufficient citizenry." Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 434 (2013).

This connection between property as both a guarantor of other liberties and an incubator of civic virtue was well-established in the ideology of the early republic, particularly among the Jeffersonian Democratic-Republicans who would settle Ohio. The republican theory was that citizens who were self-sufficient and secure in their own property were a backstop against tyranny as well as a solid middle class which could "prosper so that they in turn could give back to the common good as political participants and guarantors of the collective social order and security." *Id*., at 427; *see also* Maxwell M. Garnaat, *The Republic of Virtue: The Republican Ideal in British and American Property Law*, 51 CORNELL INT.'L L.J. 731, at 741-742

(discussing the importance of available land as a means of promoting republican virtue).

There is a more cynical view, however, that also highlights the regard in which the drafters held real property. Congressman Manasseh Cutler, who was a crucial figure in securing passage of the bill, was also a lobbyist for the Ohio Company. Treanor, *supra* at 707, n. 73. As a land speculator, he wanted to make sure the government could not take his investment without compensation. But whether one looks at the Northwest Ordinance's protection of private property as a necessary ingredient for republican virtue or as a self-serving hedge against changing political winds, the principle that land held value which could not be taken without compensation is evident.

B. Madison and the Fifth Amendment

1. Madison believed it necessary "to erect strong safeguards for rights in general and for property rights in particular." Treanor, *supra* at 694. His just compensation clause—although intended to have relatively narrow legal consequences—was such a safeguard. Madison viewed the Fifth Amendment as a restatement of what was already accepted law. In arguing for acceptance of the Fifth Amendment, he stated that the codification of these pre-existing guarantees into the Bill of Rights was, at least in part, a hortatory exercise:

> Paper barriers have a tendency to impress some degree of respect for them, to establish

> the public opinion in their favor, and rouse the attention of the whole community.

Id., at 710. As written, of course, it applied only to the federal government and only, at least in Treanor's view, to physical takings. *Id.*, at 708. Still, Madison held that broad protections for property—both real and intangible—was the proper end of government. James Madison, *Property* (1792), compiled in 1 *The Founders' Constitution*, Chap. 16, Doc. 23 (The University of Chicago Press, 1977) https://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html.

Following ratification, Madison's broader vision took hold in American jurisprudence. Professor Treanor explains that "[i]n addition to limiting the national government's freedom of action, the just compensation clause served an educative role: It inculcated the belief that an uncompensated taking was a violation of a fundamental right. . . . the Fifth Amendment was a national declaration of respect for property rights." Treanor, *supra* at 714. By the 1820's, the principle of just compensation had won general acceptance. *Id.*

In the landmark case of *Gardner v. Village of Newburgh*, 2 Johns Ch. 162, 1 N.Y. Ch. Ann 332, 1816 WL 1306 (1816), Chancellor Kent articulated the broad Madisonian view that had begun at Runnymede, crossed the ocean, survived a war, and firmly established its place as the fundamental law of the new nation:

> I may go further, and show that this inviolability of private property, even as it respects the acts and the wants of the state, *unless a just indemnity be afforded*, has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government. Such an article is to be seen in the bill of rights annexed to the constitutions of the states of *Pennsylvania, Delaware*, and *Ohio;* and it has been incorporated in some of the written constitutions adopted in *Europe*, (Constitutional charter of *Lewis* XVIII., and the ephemeral, but very elaborately drawn, constitution *de la Republique Française* of 1795.) But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the *United States*, "that private property shall not be taken for public use, without just compensation." I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property.

Id. (emphasis in original).

Fifty-seven years after Moses Cleaveland reached the mouth of the Cuyahoga, the Ohio Supreme Court issued a similarly rousing declaration on the primacy of private property in a free society, its role in

protecting and securing other rights, and the government's duty to protect it:

> The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are *derivative*—mere *incidents* to the political institutions of the country, conferred with a view to the public welfare, and therefore *trusts* of civil power, to be exercised for the public benefit. * * *
>
> Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection—the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property.
>
> The right of private property being, therefore, an *original right*, which it was one of the primary and most sacred objects of government to secure and protect, is widely and essentially distinguished in its nature, from those exclusive political rights and special privileges * * * which are created by law and conferred upon a few * * * The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, * * * were evidently designed to protect the right of private property as one of the primary and original objects of civil society * * *. (Emphasis sic.)

Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 632 (1853).

Granting Feltner's petition will allow this Court to address an injustice that degrades a core constitutional guarantee, and that if left unchecked, will continue to deprive Ohioans, and citizens of states with similar statutes, of their property rights. Further, it will allow this Court to clarify that the validity of a public taking rests on whether the government provides just compensation to the property owner and not the time or manner in which the owner seeks the compensation that is constitutionally due to him.

III. The Concept of Equity As an Enforceable Property Right Predates and Informs the Term "Property" in the Fifth Amendment.

"Property interests, of course, are not created by the Constitution." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Instead, as this Court has explained, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Here, the original understanding of the Takings Clause plainly encompasses a property right to recover the surplus from a tax sale—the right to equity in the property—that Feltner seeks to vindicate.

The Michigan Supreme Court recently addressed the constitutionality of a similar Michigan statute in

Rafaeli, LLC v. Oakland Cty., 2020 WL 4037642 (July 17, 2020). There, the Michigan Supreme Court citing famed jurist Thomas Cooley's 1871 *Treatise on Constitutional Limits*, noted that the government is never justified in taking more than it needs—and by implication—more than it is owed:

> The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though compensation be made therefor. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain.

Thomas M. Cooley, *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (1871), p. 1147.

In other words, to the extent that a taking of Feltner's property is needed to make the government whole for its delinquent taxes, the taking can be limited to only what is actually owed. If the government sees a need to appropriate all of Feltner's property without crediting back his equity, it must provide just compensation. Similarly, if one looks at the taking merely as a collection on a tax debt—obviously a

permissible public purpose—the government is still limited to collecting only what is owed. This principle, like the just compensation requirement, finds its roots in Magna Carta. Indeed, historians have noted that before Magna Carta, "[t]he sheriff and bailiffs of the district, where [the] deceased's estates lay, were in the habit of seizing everything to secure the interests of the King" and "sold chattels out of all proportion to the sum actually due" and often refused to disgorge the surplus. Vincent R. Johnson, *The Ancient Magna Carta & the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY'S L.J. 1, 47 (2015).

Specifically, Clause 26 of Magna Carta required that when goods were seized to satisfy a debt, "the value of the goods seized had to approximate the value of the debt." *Id*. English law thus recognized "equity" in a person's real and personal property. Indeed, Blackstone, a name familiar to the Founders, summarized the well-understood limitation on tax seizures, stating that "whenever the government seized property for delinquent taxes, it did so subject to an 'implied contract in law to . . . render back the overplus' " if the property was sold to satisfy the delinquency. *See Rafaeli*, 2020 WL 4037642 at * 16, *quoting* 2 Blackstone, *Commentaries on the Laws of England*, p. 452.

Like other English liberties, the colonists brought this common-sense limitation on the Crown with them to the New World. Justice Cooley, in his treatise on the *Law of Taxation*, summarized the common law of the early Republic regarding tax sales thus:

> It is not for a moment to be supposed that any statute would be adopted without [payment of surplus equity] or some equivalent provision for the owner's benefit. And such a provision must be strictly obeyed. A sale of the whole when less would pay the tax is void, and a sale of the remainder after the tax had been satisfied by the sale of a part would also be void, for the very plain reason that the power to sell would be exhausted the moment the tax was collected.

Thomas M. Cooley, *A Treatise on the Law of Taxation including the Law of Local Assessments* (1876), Ch. XV, p. 344 (collecting cases). Cooley's conclusion that the power to sell is exhausted when the tax was collected is consistent with the concomitant principle that a taking is only constitutional when there is just compensation.

The limitation on the power of the state to seize and convert property for debts, whether in Magna Carta, Blackstone, or Cooley, is predicated upon an understanding of an enforceable property right in equity—and specifically an enforceable property right in "surplus" equity. This understanding of equity pervaded English and American common law at the time of the founding, would have been well-understood by the Founders, and infuses the concept of property and the protections for property found in the Fifth Amendment.

Finally, this Court has recognized an owner's right to surplus funds from a tax sale. In *United States v.*

Lawton, 110 U.S. 146, 147–50 (1884) this Court recognized that when the United States purchased property that the United States itself sold due to a tax lien and took real property to satisfy a tax debt, "the surplus of that sum, beyond the [] tax, penalty, interest, and costs, must be regarded as being in the treasury of the United States, for the use of the owner, in like manner as if it were the surplus of purchase money received by the United States from a third person on a sale of the land to such person for the non-payment of the tax." *Id.* at 150. The Court concluded that "[t]o withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation." *Id*.

And in a similar case, this Court held that crediting the surplus back to the landowner rested on fundamental fairness, and should not be overcome by procedural wrangling:

> A construction consistent with good faith on the part of the United States should be given to these statutes. It would certainly not be fair dealing for the government to say to the owner that the surplus proceeds should be held in the treasury for an indefinite period for his use or that of his legal representatives, and then, upon suit brought to recover them, to plead in bar that the demand therefor had not been made within six years.

United States v. Taylor, 104 U.S. 216, 221–22 (1881).

Taken together, the original understanding of the Fifth Amendment and American common law—the understanding that Moses Cleaveland would have brought with him to the Connecticut Western Reserve and the property that he surveyed there—was that equity in land was a form of property. And as such, no government can take that property without just compensation.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and this amicus curiae brief, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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