

No. 20-567

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In the  
**Supreme Court of the United States**

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OHIO, *ex rel.* ELLIOT FELTNER, *et al.*,  
*Petitioner,*

v.

CUYAHOGA COUNTY BOARD OF REVISION,  
*Respondent.*

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On Petition for Writ of Certiorari  
to the Ohio Supreme Court

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**BRIEF AMICUS CURIAE OF  
GERALDINE TYLER  
IN SUPPORT OF PETITIONER**

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## **QUESTION PRESENTED**

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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## INTEREST OF AMICUS CURIAE

Geraldine Tyler respectfully submits this brief amicus curiae in support of the Petitioner Ohio, ex rel. Elliott Feltner.<sup>1</sup>

Ms. Tyler is a 93 year old widow living in Minneapolis, MN who recently suffered the uncompensated forfeiture of her home when she failed to pay a relatively small amount of real estate taxes to Hennepin County, MN.

After taking Ms. Tyler's home, Hennepin County sold it for approximately \$25,000 more than the tax liability. Minnesota law provides no avenue for people in Ms. Tyler's position to recover that surplus, and no funds have been or ever will be paid to her.

Ms. Tyler's position -- and there are thousands, if not tens of thousands, of people across the United States in a similar position -- is essentially the same as Petitioner Feltner's. Despite having committed no crime or civil infraction, her ownership of real property, in her case her home, was extinguished in its entirety by the government, with no recourse to recover the surplus, simply because she owed money for back taxes.

Although she has no connection to Mr. Feltner, Ms. Tyler believes her perspective as a property owner whose home was taken by Hennepin County,

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<sup>1</sup> Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or her counsel made a monetary contribution to its preparation or submission.



Minnesota, will aid this Court in weighing the importance of this issue and understanding why it merits review.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Court has received excellent and compelling analyses of the relevant law from Petitioner and two other amici. Ms. Tyler will not re-plow that ground but instead present additional perspectives on the issue at hand.

In support of our request that the Court review this case, we invite a thought experiment. Or it could be a real experiment.

The question presented here is an important one. If you own a home free and clear, with no mortgage, and owe a small amount of real estate taxes which you fail to pay, does the constitution permit the government to seize your house, evict you, sell your house, and keep all the proceeds, giving you nothing, even if the proceeds are far in excess of your unpaid taxes? Most Americans would be shocked to hear that some state systems allow this. Americans (unlike political leaders) reject the idea that government would be permitted to take your house, or your parents' house, and sell it and keep all the proceeds, including the equity in the house, simply because of a small unpaid tax obligation.

The likely answers to this question illustrates that the practice under challenge is, quite simply, unfair and unjust and is perceived as such by ordinary citizens. They call the practice “cruel,” “bizarre” and “seriously wrong”. See [https://www.google.com/amp/s/amp.reddit.com/r/notttheonion/comments/e784vi/unpaid\\_841\\_property\\_tax\\_bill\\_cost\\_michigan\\_man/](https://www.google.com/amp/s/amp.reddit.com/r/notttheonion/comments/e784vi/unpaid_841_property_tax_bill_cost_michigan_man/)

“Theft” is the colorful word Judge Kethledge of the Sixth Circuit used to describe Michigan’s practice of using small tax debts owed to the counties as a reason to pay owners nothing for property the government takes from them. *Wayside Church v Van Buren*, 847 F. 3d 812, 824 (6<sup>th</sup> Cir. 2017), *cert. denied*, 138 S. Ct. 380 (2017) (dissenting). In *Rafaeli, LLC v. Wayne Cty.*, Judge Berg called the practice “a manifest injustice.” *Rafaeli, LLC v. Wayne Cty.*, No. 14-13958, 2015 WL 3522546, at \*3 (E.D. Mich. June 4, 2015). And in *Freed v. Thomas*, Judge Friedman stated it was “unconscionable.” *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 1964669 (E.D. Mich. Apr. 26, 2018), *vacated*, No. 17-CV-13519, 2018 WL 5831013 at \*2 (E.D. Mich. Nov. 7, 2018). *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 5831013, at \*2 (E.D. Mich. Nov. 7, 2018), *rev’d and remanded*, 976 F.3d 729 (6<sup>th</sup> Cir. 2020).

Even in the United Kingdom, the practice elicits a visceral reaction. *Michigan man, 83, who 'mistakenly' underpaid property taxes by \$8.41 has his house SEIZED by local government, which sold it and kept \$24,500 profit*; Nov. 8, 2019; <https://www.dailymail.co.uk/news/article-7665171/Michigan-man-83-underpaid-property-taxes-8-41-house-SEIZED.html>

However, as arbitrary and unfair as it seems on its face, state and local governments persist in misusing their power -- not by confiscating real property on which taxes are owed, which is not in issue -- but in failing to *compensate* property owners whose property has been confiscated.

In the absence of meaningful protection from this Court, state and local governments across the country will continue their practice of augmenting tax revenue by shifting to hapless individuals such as Mr. Feltner and Ms. Tyler a disproportionate share of the tax burden that should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40 (1960).

## ARGUMENT

### I

#### **Uncompensated Home Forfeitures Result in a Serious and Unconscionable Impact on Americans, Meriting Review by this Court**

The issue presented by this petition for a writ of certiorari has received substantial attention in the press and otherwise in recent years. It is a worthy subject for this Court's attention. See Christie, Les, *The other foreclosure crisis: Losing a home over \$400 in back taxes*, CNN Money (July 11, 2012), available at [http://money.cnn.com/2012/07/10/realestate/tax-liens/index/ht\\_index.htm](http://money.cnn.com/2012/07/10/realestate/tax-liens/index/ht_index.htm); Emily L. Mahoney and Charles T. Clark, *Arizona owners can lose homes over as little as \$50 in back taxes*, ARIZ. REPUBLIC (June 12, 2017), available at <http://www.azcentral.com/story/money/realestate/2017/06/12/tax-lien-foreclosures-arizonamaricopa-county/366328001/>; Michael Sallah, *et al.*, *Left With Nothing*, WASH. POST (Sept. 8, 2013), available at [http://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/?utm\\_term=.3b0d3c3cc326](http://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/?utm_term=.3b0d3c3cc326).

Significantly, searching for support for uncompensated government confiscations of people's homes yields essentially nothing. No one besides local county treasurers will go on record as saying this is a "good" idea.

**A. Uncompensated Home Forfeitures  
Target an Especially Vulnerable Subset  
of Older Americans Who Own Their  
Homes Free and Clear**

Petitioner describes how the impact of uncompensated forfeitures of homes and other real property is felt by people “suffer[ing] from cognitive problems, illness, simple poverty, or [who] do not understand the consequences of allowing a property to be foreclosed for delinquent taxes.” Petition for Writ of Cert. at 15, State ex rel. Feltner v. Cuyahoga County Board of Revision, No. 20-567

Petitioner is correct. For example, in an interview with Cook County, Illinois Treasurer Maria Pappas, she said:

she considers those who get into this situation to be the most vulnerable. She said homeowners often make their way to her office downtown with a stack of bills that they struggle to pay for utilities and other expenses.

“For a lot of people who come to this counter and lay out their receipts, \$1,000 is \$1 million to them, ... And they stand at the counter and they cry and they weep because their home is sacred to them.”

Virtually all the properties whose taxes are listed for sale are mortgage-free, according to the treasurer's office. That's because lenders, to retain their security

position on the properties, will pay what's owed in taxes and then collect the amount from the homeowners.

As a result, those who find themselves in trouble are often full owners of the homes they live in. Many are senior citizens, living on fixed incomes, which may not have kept up with rising property taxes over the years.

“They're embarrassed, they're ashamed, they don't tell their family,” said Lindsey, of the Legal Assistance Foundation...

“If you're caught up in it, you can lose an incredible asset, an incredible amount of your wealth, your ownership, over a relatively small amount of debt,” he [Lindsey] said. “I do think that it should not [sic] be the case that somebody can lose their home for a small fraction of its value.”<sup>2</sup>

The upshot? The group which suffers most from uncompensated Feltner-type tax forfeitures consists of people who are old and thrifty enough to have paid off a home purchased in young adulthood, have in all likelihood lost some or all of their

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<sup>2</sup> Odette Yousef, *Cook County Makes Millions By Selling Property Tax Debt — But At What Cost?*, NPR, at <https://www.npr.org/local/309/2019/05/03/719971654/cook-county-makes-millions-by-selling-property-tax-debt-but-at-what-cost> (May 3, 2019).

“executive” functioning capability to age or illness, and are isolated, out of contact with friends or relatives to help them with finances. This is a group that has earned better treatment and should be *more* rather than *less* deserving of protection by the law. Certainly, it is not a group that should be singled out for mistreatment.

If one cynically desired a largely “off-the-radar” and “legal” system of relieving vulnerable people of large sums of money, Feltner-type forfeitures would fit the bill. Local governments’ actions in effecting uncompensated confiscations of people’s homes for unpaid taxes are an almost diabolical way to target a segment of the population which is uniquely vulnerable yet also has money in the form of home equity.

### **B. Loss of a Home is a Particularly Devastating Financial and Psychological Blow**

The importance of one’s home in our society can hardly be overstated. Home ownership is central to “the American dream”. In song, literature and memory, few things compare. Home is where the heart is. A person’s home is their castle.

For decades, home ownership was encouraged, subsidized by the mortgage deduction under the federal income tax code and the so-called SALT deduction. Purchasing a home is the single largest financial decision most people will make in their lifetime. “Pride of ownership” is frequently used in listing homes for sale.

Loss of one's home, especially under such ignominious circumstances as failing to pay relatively miniscule amounts of real estate taxes, is not just an embarrassing but indeed a devastating blow. "Losing your home, or worrying about losing it, is enough to make you sick." See Aimee Thibodeaux, *Losing Your Home Could Be Bad For Your Health*, BANGOR DAILY NEWS, at <https://bangordailynews.com/2011/10/05/health/losing-your-home-could-be-bad-for-your-health/> (Oct. 5, 2011).

No less an authority than Nobel Laureate Robert Schiller has written:

[I]t is important to consider the psychological trauma of foreclosure... Homeownership is fundamental part of a sense of belonging to a country... People instinctively understand that homeownership conveys good feelings about belonging in our society, and that such feelings matter enormously, not only to our economic success but also to the pleasure we can take it.

Robert Schiller, *The Scars of Losing a Home*, N.Y. TIMES, at <https://www.nytimes.com/2008/05/18/business/18view.html> (May 18, 2008).

Although this case does not involve loss of a home so much as *compensating* those who lose their homes, the two are intimately related. If governments



must pay for homes they seize, fewer homes will be lost.

### **C. Seizing Homes for Back Taxes and Failing to Compensate the Owners Has a Disproportionate Impact on Minority Populations**

Unfortunately, but not surprisingly, Black and other minority home owners are at greater risk of losing their home in an uncompensated foreclosure than whites.

In Chicago, for example, “homes ... that [are]... on the list [of homes to be sold for taxes] are disproportionately concentrated in low-income communities on the city's South and West sides. These communities are also predominantly African American or Latino.” *See* Yousef, *supra* note 2.

Data assembled by researchers confirms the correlation between real estate tax defaults and ensuing home forfeitures and the owner's race. People of color lose their homes for back taxes at a significantly higher rate than white people. *Id.*

Professor Andrew Kahrl at the University of Virginia observes:

Almost from the moment African Americans ceased to be taxable property and began having their property taxed, they became subject to discriminatory administrative practices and the victim of

structural inequities in its levying and enforcement, both of which allowed local governments to subtly shift the tax burden onto the backs of racial minorities...

Andrew Kahrl, *Unconscionable: Tax Delinquency Sales As A Form Of Dignity Taking*, 92 CHI.-KENT L. REV. 905 (2018), <https://scholarship.kentlaw.iit.edu/cklawreview/vol92/iss3/11/>.

Until relatively recently, practices such as redlining, imposition of private restrictive covenants and discrimination discouraged people of color from buying a home. But the fact remains that there are millions of minority homeowners who face a higher rates of uncompensated home forfeiture.

**D. The Constitutional Issue *Feltner* Raises Affects A Large Segment of the Economy; It Is Not Confined to One Ohio Land Bank**

Under what circumstances and with what consequences local taxing authorities may sell or retain tax forfeited properties worth more than the delinquent taxes is a question affecting vast amounts of money and an enormous number of citizens all across the United States.

Real estate taxes comprise a significant segment of the U.S. economy. Nearly \$600 billion, or approximately the same amount as is spent on the nation's defense, is collected each year in property

taxes.<sup>3</sup> Every year, millions of homeowners pay property taxes, which are a major source of income for local and state governments.<sup>4</sup>

Tax buying – investors buying the right to collect delinquent taxes plus interest, often with a right at the “back end” to obtain title to the property - is a large industry. Approximately \$20 to \$25 billion dollars in local property taxes go unpaid each year, and the 29 states that currently sell delinquent taxes sell between \$5 billion and \$6 billion dollars' worth to the private sector each year.<sup>5</sup>

In 2019, it was reported that in Cook County, Illinois alone (which includes Chicago) more than 42,000 properties owed more than \$130 million in delinquent taxes for Tax Year 2018 (due in 2019).<sup>6</sup>

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<sup>3</sup> See Erin Duffin, U.S. State And Local Property Tax Revenue 1977-2018, *available at* <https://www-statista.com/statistics/249133/us-state-and-local-property-tax-revenue/#:~:text=U.S.%20state%20and%20local%20property%20tax%20revenue%201977%2D2018&text=In%202018%2C%20state%20and%20local,U.S.%20dollars%20by%20property%20tax> (Sept. 23, 2020).

<sup>4</sup> Chris Seabury, *How Property Taxes Are Calculated*, at <https://www.investopedia.com/articles/tax/09/calculate-property-tax.asp> (Sept. 20, 2020).

<sup>5</sup> Francys Vallecillo, *U.S. Tax Lien Industry Worth Billions*, *WORLD PROP. J.* (Mar. 31, 2014), at <https://www.worldpropertyjournal.com/north-america-residential-news/us-national-tax-lien-association-ntla-tax-lien-auctions-unpaid-property-taxes-brad-westover-tax-foreclosures-tax-lien-sales-8142.php>.

<sup>6</sup> CISION PR Newswire, *Pappas: Taxpayers now have more time to pay delinquent Cook County property taxes* (June 10, 2020), at <https://www.prnewswire.com/news-releases/pappas-taxpayers->

Similarly, 10,000 owners faced tax foreclosure in Wayne County, Michigan (Detroit) in 2016.<sup>7</sup>

Local governments' failure to compensate owners of forfeited properties does not directly implicate all the taxpayers and sums described above -- most states foreclose without engaging in what has been termed "theft" of equity, *Wayside Church v. v Van Buren County*, 847 F. 3d 812, 824 (6<sup>th</sup> Cir. 2017), *cert. denied*, 138 S. Ct. 380 (2017) (dissenting) -- but uncompensated, involuntary transfers of real property occur in enough states to make the issue worthy of the Court's review, not to mention the potential for other states to adopt the practice.

### **E. Seizing Homes Without Compensating Homeowners Fuels a Predatory Tax Buying Industry**

A number of states have real property tax systems involving the auction or sale of tax liens or certificates. Under these systems, generally speaking, investors pay the government the overdue taxes on a property in exchange for a certificate or lien giving the buyer the government-sanctioned right to collect the overdue taxes from the delinquent owners, plus high

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now-have-more-time-to-pay-delinquent-cook-county-property-taxes-301073262.html.

<sup>7</sup>Christine MacDonald, *Wayne Co. foreclosures, Detroit evictions halted amid outbreak*, DETROIT NEWS (March 16, 2020), available at <https://www.detroitnews.com/story/news/local/detroit-city/2020/03/16/wayne-co-wont-foreclose-this-year-due-to-coronavirus/5060012002/>

rates of interest. These investors, or “tax buyers,” may also, if the overdue taxes are never paid, obtain clear title to the property in question, often for a small fraction of its value.

The government’s practice of taking title to properties without compensating the owners, and transferring it to tax buyers, thus creates/fosters/encourages an industry of tax buyers. The tax buying industry is described as predatory. See, e.g., Andrew W. Kahrl, *Investing in Distress: Tax Delinquency and Predatory Tax Buying in Urban America*, Vol. 43:2 CRITICAL SOCIOLOGY, 199 (Aug. 22, 2015), available at <https://journals.sagepub.com/doi/10.1177/0896920515598565>.

Predatory tax buying has flourished in states that allowed buyers to charge the highest rates of interest and *offered delinquent taxpayers the fewest rights and protections*. *Id.* From the outset, the tax buying industry’s growth has been inversely proportional to the economic conditions and fiscal health of the cities and counties where it has done business.

The predatory nature of the tax buying system is highlighted by the fact that one reason taxes go delinquent is that the taxes are discriminatorily high to begin with. Urban minority neighborhoods have historically been over-assessed relative to white neighborhoods. *Id.*

The predatory practices of the home mortgage industry during the 1990s and 2000s (that gave rise

to the “housing bubble” that burst in 2008), in particular, the peddling of subprime loans and reverse mortgages in urban black and brown neighborhoods, also made this class of homeowners more vulnerable to tax delinquency and, ultimately, to uncompensated forfeitures of real property. *Id.*

## II

### **This Court Should Grant the Petition to Resolve Problems Left by this Court’s Decision in *Nelson***

#### **A. Granting *Certiorari* Will Do Double- Duty, Enabling the Court to Address a Pressing Unanswered Takings Question *and* Resolve a Conflict in Supreme Court Precedent**

In *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that citizens bringing takings claims in federal court were required to exhaust state remedies before suing. *Id.* at 186-87. This rule gave rise to unexpected problems and prevented victims of government takings from obtaining redress.

In 2019, this Court decided *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), which overruled *Williamson* and held that that when there is an uncompensated taking, the aggrieved property owner can proceed directly to federal court; the owner does not need to “do” anything as a prerequisite to filing suit. The owner need not exhaust remedies,

navigate procedural hoops, or engage in legal proceedings.

*Knick*, however, is inconsistent with *this Court's* holding some 65 years ago in *Nelson v. City of New York*, 352 U. S. 103 (1956), which is the only case decided by this Court that touches on the pressing question now squarely posed by Elliot Feltner, and even *Nelson* leaves Feltner's question unanswered.

In *Nelson*, a property owner suffered a forfeiture of his property to the government because he had overlooked and failed to pay a water bill. Certiorari was granted to decide whether the forfeiture had been attended by due process.

In the petitioner's reply brief, however, the property owner claimed for the first time that he had *also* suffered an uncompensated taking in light of the fact that the value of his property was far in excess of amount of the overdue water bill.

This Court held *Nelson* had not experienced an uncompensated taking because the New York statute in question gave *Nelson* the ability – which he had for some reason not pursued – to recover post-taking the amount by which the property value exceeded the unpaid water bill. The Court in effect thus held that there is no violation of the Constitution if there is a post-taking avenue available to obtain compensation for what would otherwise be an uncompensated taking. *Nelson*, however, did not decide the question presented here: what if there is no avenue to recover the surplus.

This case presents the Court with the opportunity to answer this important and long-unanswered question.

In addition, it allows the Court to clarify another question about the meaning on *Knick*, namely, whether *Knick* has overruled the part of *Nelson* that says an aggrieved party whose property has been taken cannot go into court unless that party has exhausted whatever avenue exists for obtaining the surplus. That is, *Nelson* says in effect the aggrieved party has to exhaust, and *Knick* abolishes the exhaustion requirement.

If this Court accepts this case, it can clarify the law and state either that: 1) *Nelson* is overruled to the extent it requires an owner to wait to sue until he or she unsuccessfully availed him or herself of a procedure for claiming any surplus, or 2) *Knick* does not mean what it says about the courthouse being open to anyone who suffers a taking that is not immediately compensated.

**B. The Important Takings Question Presented by this Case Deserves More Thoughtful Treatment Than is Found in *Nelson v. City of New York*, Decided 65 Years Ago**

In *Nelson*, the question of whether there had been a taking was not even raised until the petitioner's reply brief, and there only glancingly.

This Court's ruling on the taking question was, not surprisingly, similarly glancing:



What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recovery [*sic*] any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.

352 U.S. at 110.

Other takings questions, arguably involving less weighty property interests than that of an owner in their home, have received far more detailed exposition in recent years.

In *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), the Court addressed whether a temporary, non-final deprivation of an individual's possessory interest in property may nonetheless constitute a taking for constitutional purposes. *See also, e.g., Horne v. Dep't of Agric.*, 576 U.S. 350, 357, 135 S. Ct. 2419, 2426, (2015) (personal 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); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (mortgages).

The Court has repeatedly addressed what constitutes the public purpose needed to support a

taking. See *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 125 S.Ct. 2655 (2005) (broadly defines the “public-use standard”); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98 (1954) (taking to consolidate land for private urban development); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321 (1984) (taking of fee interest of leased property to convey it to lessee).

The Court has often addressed how far land use regulations can go before they become “regulatory takings.” *E.g.*, *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The important question presented by this case has received, at most, only cursory treatment in *Nelson* – indeed Petitioner Feltner maintains the issue was left open -- and yet it is at least as important, and arguably more important, than issues to which the Court has devoted far more attention.

## CONCLUSION

This Court should issue a writ of certiorari to the Ohio Supreme Court for review of this case.

DATED: December 30, 2020

Respectfully submitted,

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