No. 22-160

IN THE

Supreme Court of the United States

KEVIN L. FAIR,

Petitioner,

v.

CONTINENTAL RESOURCES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Nebraska Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND *AMICUS CURIAE* BRIEF OF PIONEERLEGAL, LLC IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE

Pursuant to Rule 37.2(b), PioneerLegal, LLC respectfully moves for leave to file the accompanying brief in support of Petitioner as *amicus curiae*.

Petitioner gave blanket consent to the filing of amicus briefs on September 8, 2022, as noted on the docket.

On September 9, 2022, pursuant to Rule 37.2(a), PioneerLegal timely informed the parties of its intent to file a brief as *amicus curiae*. Respondents the State of Nebraska and Scotts Bluff County—the governmental entities whose laws are at issue—responded with their consent. Respondent Continental Resources—a private entity that has profited from the challenged law—has withheld its consent.

PioneerLegal is a non-profit, non-partisan legal research and litigation entity that defends and promotes accountable government, economic opportunity, and educational opportunities across the country. Through legal action and public education, PioneerLegal works to preserve and enhance constitutional and civil liberties.

The Nebraska Supreme Court held that a State may, as payment for a tax debt, take or authorize others to take private property worth (far) more than the debt. PioneerLegal's mission to promote government accountability and economic opportunity distinctively positions it to highlight in the accompanying brief the injustice of the tax foreclosure scheme at issue here. The scheme conflicts with fundamental principles of the laws governing debtor-creditor relationships. PioneerLegal's perspective will show the Court that Nebraska's tax foreclosure scheme is an outlier among the commercial laws of our country, which otherwise prize equal treatment among creditors, commercial reasonableness, and a "fresh start" for overburdened debtors.

Accordingly, PioneerLegal respectfully seeks leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

The questions presented are:

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus respectfully asks this Court to grant certiorari and reverse the erroneous decision of the Nebraska Supreme Court.

PioneerLegal is a non-profit, non-partisan, legal research and litigation entity that defends and promotes accountable government, economic opportunity, and educational opportunities across the country. Through legal action and public education, PioneerLegal works to preserve and enhance constitutional and civil liberties.

The Nebraska Supreme Court's holding that a State may, as payment for a tax debt, take or authorize others to take private property worth *more* than the liquidated debt owed by the taxpayer goes to the core of PioneerLegal's mission to promote government accountability and economic opportunity. PioneerLegal is distinctively situated to highlight, as it does in this brief, the ways in which the tax foreclosure scheme at issue in this case conflicts with fundamental principles of the laws governing debtor-creditor relationships.

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[1] Pursuant to Rule 37.6, counsel for *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and that no person other than *amicus* and its counsel made such a monetary contribution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner asks this Court to review Nebraska's tax-foreclosure scheme, which resulted in the taking of a $60,000 freely-owned residential real estate asset to satisfy a $5,200 tax debt, producing a windfall of $54,800 to the private debt collector to which the claim and lien had been transferred. Petitioner rightly explains in the petition how that scheme is fundamentally unfair to him and violates his rights under the Fifth, Eighth, and Fourteenth Amendments. *Amicus* concurs with Petitioner's arguments but neither repeats nor belabors them here. *Amicus* writes separately to highlight how the tax-foreclosure scheme challenged by Petitioner also unfairly interferes with the rights and interests of other *creditors* and upends basic principles of commercial law. By expressly sanctioning the taking of a $60,000 asset to satisfy a $5,200 debt, Nebraska vastly preferred one of the Petitioner's creditors at the expense of all others with claims to his assets, including the equity in the home in excess of the *de minimis* state tax claim. This result is contrary to fundamental principles upon which parties rely in extending debt in commercial transactions.

First, certain commercial transactions are impermissible and must be unwound because they fail to provide "reasonably equivalent value" to a debtor for a transfer of property or other interests. Both federal and state law relating to these "constructive fraudulent transfers" require, as a bedrock principle, that a debtor receive "reasonably equivalent value" in exchange for any property transferred to another.[2] This requirement ensures that assets are not unfairly removed from the pool of a debtor's assets that would otherwise be available to pay other creditors. Nebraska's tax-foreclosure scheme offers nothing of the sort and, instead, cedes all surplus value to the foreclosing entity.

Second, Article 9 of the Uniform Commercial Code, which has been adopted by all 50 states and the District of Columbia, requires that any foreclosures be conducted in a "commercially reasonable" manner. Once senior claims are satisfied from the proceeds, any surplus must flow down to junior creditors (and then, ultimately if funds remain, to the debtor). Nebraska's tax-foreclosure scheme abandons this concept of commercial reasonableness to the detriment of both debtors and creditors.

Finally, federal law, specifically the U.S. Bankruptcy Code, dictates a fair and equitable manner of distributing assets to creditors based on the type and relative status of claim each holds. Under the Bankruptcy Code's priority scheme, each creditor receives and retains only that amount to which it is entitled, while the balance is made available to junior creditors and, ultimately, to equity. That priority scheme forbids one creditor from confiscating assets worth more than its claim to obtain a windfall to the detriment of

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[2] The laws of constructive fraudulent transfer generally require, in order for a transaction to be avoidable, that the debtor be insolvent at the time of (or rendered insolvent by) the transaction.

other creditors and interest holders; yet that is precisely the result enabled (and encouraged) by Nebraska's tax-foreclosure scheme.

ARGUMENT

As explained below, underpinning federal and state commercial law are the principles of commercial reasonableness, equality of distribution, and equity and fairness among creditors. Nebraska, and the 13 other states that have similar tax-foreclosure laws, defile these principles. The current tax foreclosure regime in Nebraska threatens the free and fair deployment of capital as well as the taxpayer's right to a fresh start. The windfall afforded a single creditor holding a *de minimis* claim by Nebraska's tax-foreclosure scheme is irreconcilable with those foundational commercial principles, and the scheme thus merits the Court's review.

To be clear, *amicus* acknowledges and has no quarrel with taxpayers' responsibility for the payment of taxes or taxing authorities' (or, as here, their assignees') right to collect on tax debts in full. *Amicus* writes instead to highlight for the Court the extent to which the practices of a minority of states—Nebraska among them—operate in a manner at odds with established law and expectations concerning the debtor-creditor relationship.

I. Nebraska's tax-foreclosure scheme authorizes commercial transactions for an exchange of less than reasonably equivalent value

The Bankruptcy Code and most states' debtor-creditor laws make transactions in which an insolvent debtor did not receive "reasonably equivalent value" voidable. See 11 U.S.C. § 548(a)(1)(B); Uniform Voidable Transactions Act § 4(a)(2).[3] These "constructive fraudulent transfers" are voidable regardless of the motives of the parties involved. Instead, "reasonably equivalent value" turns on whether the transaction is fair, financially, to all of the debtor's creditors.

The Bankruptcy Act of 1898 and the Uniform Fraudulent Conveyance Act (model Act adopted in 1918) deemed voidable transfers of a debtor's property for which the debtor did not receive "fair consideration." Bankruptcy Act of 1898 § 67(d)(2); Md. Code Ann., Com. Law § 15-206.[4] Under these frameworks, "fair consideration" turned on both the value the debtor received and whether she made the transaction in good faith. See Md. Code Ann., Com. Law § 15-203.

As fraudulent transfer law evolved, "reasonably equivalent value" replaced "fair consideration" in both the current Bankruptcy Code and the relevant model Act, the Uniform Voidable Transactions Act. A key difference between the two concepts is that, unlike

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[3] Nebraska has adopted the Uniform Voidable Transactions Act. See Neb. Rev. Stat. Ann. § 36-801 *et seq*.

[4] Maryland is the only state that applies the Uniform Fraudulent Conveyance Act.

"fair consideration," the modern concept of "reasonably equivalent value" focuses exclusively on the value exchanged, without regard to the motives of the parties involved. See 5 COLLIER ON BANKRUPTCY ¶ 548.05[2][a] n.9 (Richard Levin & Henry J. Sommer eds., 16th ed. 2022) (noting this difference). This simplification is consistent with the general principle animating bankruptcy and related laws: equality of distribution among creditors. See, *e.g.*, *Begier* v. *I.R.S.*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code."). Whether a transaction was undertaken in good faith has little to do with the assets that a particular transaction makes available to creditors, and so the question of good faith has been eliminated from the standard by which a transaction's avoidability is determined.

Some degree of market price-testing is required to ensure that a transaction involves an exchange of "reasonably equivalent value." This Court has held that, when it comes to nonconsensual asset sales like real-estate mortgage foreclosures, market forces are invoked sufficiently "so long as all the requirements of the State's foreclosure law have been complied with." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 545 (1994). Even where "fair market value" is unlikely to be achieved, given the constraints of the foreclosure process, some semblance of market pressure must be applied for the reasonably equivalent value standard to be met. See *id.* at 548 (in foreclosure context, "normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales"). The Court also emphasized that, while state foreclosure law requirements were sufficient in the context of forced real-estate mortgage foreclosure sales, "[t]he considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." *Id.* at 537 n.3.

The Uniform Voidable Transactions Act similarly provides: "a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default *under a mortgage, deed of trust, or security agreement*." Uniform Voidable Transactions Act § 3(b) (emphasis added). Like *BFP*'s clarification, the official comments make clear that this rule "does not apply to a sale foreclosing a nonconsensual lien, such as a tax lien." Uniform Voidable Transactions Act § 3 cmt. 5.

The Uniform Voidable Transactions Act makes this same distinction in the context of transfers that result from the "enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code." Uniform Voidable Transactions Act § 8(e)(2). Such a transfer is not voidable. *Id.* This rule "does not extend to" cases of "strict foreclosure" precisely "because compliance with the rules of Article 9 relating to strict foreclosure *may not sufficiently protect the interests of the debtor's other creditors if the debtor does not act to protect equity the debtor may have in the asset*." Uniform Voidable Transactions Act § 8, cmt. 5 (emphasis added).

The Courts of Appeals have since grappled with whether and how *BFP*'s rule for consensual liens applies when determining whether nonconsensual tax lien foreclosures were transactions for "reasonably equivalent value." The Courts of Appeals have uniformly held that some form of competitive bidding is necessary for such foreclosures to result in "reasonable equivalent value." See *Gunsalus* v. *Cnty. of Ontario*, 37 F.4th 859, 865–66 (CA2 2022) (*BFP* did not apply where New York's law allowing strict foreclosure of tax lien could not have "convey[ed] to the debtor value that is substantially comparable to the worth of the transferred property"); *Hackler* v. *Arianna Holdings Co. (In re Hackler)*, 938 F.3d 473, 479–80 (CA3 2019) (*BFP* did not apply to insulate tax foreclosure in preference action under § 547 of the Bankruptcy Code where, among other things, property was not subjected to public auction); *Tracht Gut, LLC* v. *Los Angeles City Treasurer & Tax Collector (In re Tracht Gut, LLC)*, 836 F.3d 1146, 1155 (CA9 2016) (tax sale that contained procedural safeguards that apply to mortgage foreclosures "conclusively establishes that the price received at the tax sale was for reasonably equivalent value"); *Smith* v. *SIPI, LLC (In re Smith)*, 811 F.3d 228, 238 (CA7 2016) (*BFP* did not apply to interest rate bidding procedure employed in Illinois tax sales where there is "no correlation between the sale price and the value of the property"); *Kojima* v. *Grandote Int'l Ltd. Liab. Co. (In re Grandote Country Club Co.)*, 252 F.3d 1146, 1152 (CA10 2001) (transfer of property through regularly conducted tax sale subject to competitive bidding procedure constituted reasonably equivalent value under Colorado Uniform Fraudulent Transfer Act); *T.F. Stone Co.* v. *Harper (In re T.F. Stone Co.)*, 72 F.3d 466, 472 (CA5 1995) (tax sale transfer of land that was noncollusive and conducted in conformity with state law "satisfied § 549(c)[of the Bankruptcy Code]'s requirement that the sale be 'for present fair equivalent value'").[5]

Thus, it is well established that *even in cases involving forced sales*, where prices are inevitably depressed, *some* market-competitive process must be used to ensure that creditors receive the best value reasonably available from the transaction. The Nebraska tax-foreclosure scheme at issue disregards this principle entirely, allowing a governmental entity or a private debt collector to simply take whatever excess results from a tax foreclosure without consideration of other creditors or the taxpayer. Which is to say, Nebraska's scheme conveys a windfall on the governmental entity or private debt collector at the expense not merely of the homeowner, but of the homeowner's other creditors.

II. Contrary to Nebraska's tax-foreclosure scheme, the Uniform Commercial Code demands "commercially reasonable" disposition of collateral for the benefit of all creditors.

Every state and the District of Columbia has adopted Article 9 of the Uniform Commercial Code (with, in some cases, non-uniform amendments not relevant here). Article 9 provides that "[e]very aspect

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[5] See also *Lowry* v. *Southfield Neighborhood Revitalization Initiative (In re Lowry)*, 2021 WL 6112972, at *4 (CA6 2021) (unpublished) (*BFP* did not apply to tax foreclosure where local government was permitted to purchase property without an auction for the amount of outstanding taxes due).

of a disposition of collateral … must be commercially reasonable." UCC § 9-610(b). One critical element of a "commercially reasonable" disposition is to ensure that the price paid for the collateral is tested by the marketplace. If the price paid in a commercially reasonable disposition exceeds the amount of the secured obligations, any surplus is returned to the debtor. See UCC § 9-615(d). This is for the benefit of the debtor *and her other creditors*. As the First Circuit has explained: "the lender normally is entitled to the value of the collateral up to the amount of the outstanding debt. *The balance belongs to the borrower or, if the borrower is then bankrupt, to the bankruptcy trustee on behalf of the other creditors*." *Bezanson* v. *Fleet Bank*, 29 F.3d 16, 20 (CA1 1994) (emphasis added).

Nebraska's tax-foreclosure scheme ignores any element of commercial reasonableness—and any surplus that would result from a commercially reasonable disposition—to the detriment of the taxpayer and creditors. When taxing authorities keep for themselves (or, in the case of a private party, essentially gift to its investors) the surplus funds from tax foreclosures, they receive a windfall at the expense of other creditors' interests. This result is at odds with the policies undergirding the Uniform Commercial Code.

III. The Nebraska tax-foreclosure scheme's provision of a windfall to one creditor at the expense of all others cannot be reconciled with the Bankruptcy Code's priority rules for payment of creditors.

The Bankruptcy Code's priority rules, see, *e.g.*, 11 U.S.C. §§506, 507, 726, prevent senior creditors from taking a windfall while more junior creditors remain unpaid. These rules dictate the order in which different types of claims against a debtor's estate are paid. Often thought of as a ladder, the priority rules require claims at the highest rung be paid first, then claims at the next rung, then the next, until either all claims are paid or the estate's assets are insufficient to pay the next rung of claims in full. Generally, each creditor that holds a claim that cannot be paid in full receives a pro rata share of the debtor's remaining assets.

The Court has declared the priority system to be the Bankruptcy Code's "most important and famous rule" and that it is "a basic underpinning of business bankruptcy law." *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, ___, 137 S. Ct. 973, 983–84 (2017). Fairness and equity are at the center of the priority rules, which provide creditors with predictability to know where in line their claims stand following a liquidation or restructuring event. The rules ensure that a debtor's assets are distributed "in an orderly manner … in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor." *Id.* at 984. Inherent in the priority rules is the idea that privileged creditors may not "use the reorganization process to gain an unfair advantage." *Id.* at 987 (citing *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999)). Instead, the priority rules promote consistency, fairness, equity, and integrity.

Nebraska's tax-foreclosure scheme does the opposite: it gives one creditor—the tax lien holder—the right to payment in full *plus* all the equity in the home, regardless of the interests and claims of other creditors. Other creditors are left holding the bag, while the tax-lien holder receives more than its due.

In addition, under the Bankruptcy Code's priority framework, any surplus remaining after all creditors have been paid reverts to the debtor (chapter 7), 11 U.S.C. § 726(a)(6), or holder of equity interests (chapter 11), 11 U.S.C. § 1129(b)(2)(C). Indeed, even "[i]n the absence of any express statutory authority governing the disposition of surplus funds, bankruptcy courts have commonly recognized the debtor's right to recover surplus bankruptcy funds under general equitable principles." *Georgian Villa, Inc.* v. *United States (In re Georgian Villa, Inc.)*, 55 F.3d 1561, 1563 (CA11 1995). The debtor/taxpayer's right to the excess proceeds is fundamental to the oft-cited bedrock principle that the debtor may use those assets to aid in the debtor's fresh start. Nebraska's tax-foreclosure scheme contravenes these rights of junior creditors and equity, well-established under federal law, and instead traps all value in the hands of a single secured creditor.

CONCLUSION

For the forgoing reasons, *amicus* requests that this Court grant the petition for certiorari and reverse the judgment of the Nebraska Supreme Court.

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