No. 22-160

In the Supreme Court of the United States

KEVIN L. FAIR,

Petitioner,

v.

CONTINENTAL RESOURCES, et al.,

Respondents.

On Petition for Writ of Certiorari to the Nebraska Supreme Court

NEBRASKA ATTORNEY GENERAL'S AND CONTINENTAL RESOURCES' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Tax revenue is crucial for government operations. When Nebraska landowners fail to pay their taxes, third parties intercede and satisfy the debt. If the landowners do not resume payment within three years, despite receiving notice that the property will be lost, Nebraska counties issue tax deeds transferring the properties to those third parties upon application.

In this tax-deed context, Nebraska law has never recognized a property interest in the former owners to acquire the "surplus value" of the property—a term referring to the property's value minus the delinquent taxes and fees owed. Nor have Nebraska's counties, which sell tax-delinquent properties for the amount of back taxes and fees, ever generated surplus proceeds from these property transfers. This longstanding procedure is consistent with the practice of other States at common law.

The question presented is:

> Whether a State violates the Takings Clause when a third party pays property taxes for a delinquent landowner for more than three years, the landowner receives notice of the impending loss of his property, and the State transfers the property to the third party without generating surplus proceeds or paying surplus value to the former landowner.

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INTRODUCTION

Property taxes provide vital revenues essential to the government. In Nebraska, when landowners fall into tax delinquency, third parties intercede to pay the taxes. If the landowners do not resume payments within three years, the third parties notify the owners that the property will be lost in 90 days unless the owners act. This notice enables landowners who want to retain the property's surplus value—the property's value minus the taxes and fees owed—to sell the property, satisfy the delinquent taxes, and keep the surplus proceeds. Petitioner Kevin L. Fair did not do that here. Rather, he argues that the Takings Clause of the United States Constitution forces the State to do it for him.

The threshold question in takings cases is whether the plaintiff has a right to the property at issue. This case involves a former landowner who admits that the county could "seize private property for the public purpose of recovering delinquent taxes," Pet. 10, and yet insists that the county must generate and pay him the surplus proceeds. In the court below, he argued that Nebraska law—its statutes, constitution, and common law—recognizes a former landowner's interest in the surplus value after the tax deed transfers the property to another. But the Nebraska Supreme Court found no such right.

In his petition to this Court, Fair changes his tactic, contending that generic common-law principles outside Nebraska force the State to recognize such a property right. This reliance on the general common law to override the State's own determina-

tion of property rights within its borders is problematic, particularly for federalism. Because Fair did not invoke the general common law below, Nebraska's high court did not have the chance to consider these concerns.

Assuming it is legitimate for generic common-law principles to usurp Nebraska law, Fair argues that he has a deeply rooted right to recover the surplus value of his former property. But throughout early American history, there was substantial variation in the tax deed and forfeiture laws among the States. Some States like Nebraska transferred the property for only the delinquent taxes and fees, and therefore they did not produce surplus proceeds. Meanwhile, other States took the land for themselves and kept all the proceeds when they eventually sold it. Given this history, it can hardly be said that Fair's asserted right to surplus value was deeply rooted in the common law. Again, Fair did not raise this argument below, so the lower court did not have occasion to engage in this historical analysis.

Because Fair does not have a property right in the property's surplus value—be it under Nebraska law or the general common law—his takings claim fails. As this Court held in *Nelson* v. *City of New York*, 352 U.S. 103, 110 (1956), "nothing in the Federal Constitution prevents" a government from "retain[ing] the property or the entire proceeds of its sale" when "adequate steps were taken to notify the owners of the charges due and the [impending] foreclosure." Fair now accepts that he received constitutionally adequate notice informing him that he would lose the property, yet he took no steps to retain the surplus by

selling the property himself. These uncontroverted facts bar Fair's takings claim.

Fair tries to concoct a need for this Court's review by alleging a broad split of authority on the federal takings issue decided below. But this purported split is illusory. Nearly half of the cases Fair cites reviewed state (not federal) claims, and many others are unpublished decisions of federal district courts. The closest Fair comes to establishing a true split is *Hall* v. *Meisner*, 51 F.4th 185, 189–96 (6th Cir. 2022), a recent Sixth Circuit case decided just weeks ago. The court there held that generic common-law principles override States' decisions about property rights, but the court below did not consider any such argument because it was not presented. Because these rulings addressed different arguments, they do not conflict.

Nor is Fair's claim under the Eighth Amendment's Excessive Fines Clause worthy of review. He does not argue a split or direct conflict with this Court's precedents. Rather, he contends merely that the claim presents an important federal question. But no important question exists because Fair's excessive-fine claim is meritless. The Excessive Fines Clause simply does not apply here because Nebraska tax deeds are purely remedial and not punitive in nature.

At bottom, Fair has provided no good reason to grant the petition. Laws throughout the States afford delinquent landowners pre-deprivation opportunities to take action that will allow them to acquire the surplus value of their properties. When they fail to act, neither the Takings Clause nor the Excessive Fines Clause saves them.

STATEMENT

Relevant Nebraska Law. "The right to levy and collect taxes has always been recognized as one of the supreme powers of the state, essential to its maintenance[.]" *Leigh* v. *Green*, 193 U.S. 79, 87 (1904). Exercising this "sovereign power to raise revenues essential to carry on the affairs of state," *id.* at 89, Nebraska law provides that "[a]ll property taxes levied" in the State "shall be due and payable on December 31" each year. Neb. Rev. Stat. §77-203. If property owners neglect to pay their taxes by the December 31 deadline, state law automatically gives the county "a first lien on the property," *ibid.*, which "take[s] priority over all other encumbrances and liens," Neb. Rev. Stat. §77-208.

"One-half of the taxes due . . . become delinquent on May 1 and the second half on September 1." Neb. Rev. Stat. §77-204. Every year, the county "deliver[s] a statement of the amount of taxes due . . . to the last-known address of the person . . . against whom such taxes . . . are assessed." Neb. Rev. Stat. §77-1701(1). "Such statement shall clearly indicate . . . the amount of taxes due." *Ibid.* "[W]hen taxes on real property are delinquent for a prior year, the county treasurer shall indicate this information on the current year tax statement in bold letters." *Ibid.* "The language shall read 'Back Taxes and Interest Due For,' followed by numbers to indicate each year for which back taxes and interest are due." *Ibid.*

All real estate with unpaid taxes "on or before the first Monday of March, after they become delinquent, shall be subject to" a tax-certificate sale. Neb. Rev.

Stat. §77-1801. Before the sale, "[t]he county treasurer shall cause the list of real property subject to sale and accompanying notice to be published once a week for three consecutive weeks." Neb. Rev. Stat. §77-1804(1). And the State Property Tax Administrator "publish[es]" each county's list of tax-delinquent properties "on the web site of the Department of Revenue." Neb. Rev. Stat. §77-1804(2).

In Nebraska, the purchaser at the tax sale has never paid more than the amount of delinquent taxes and fees due on the property. Neb. Rev. Stat. §77-1807(1)(b) & (2)(c) (tax-certificate purchaser pays "the amount of taxes" due); Neb. Comp. Stat. ch. 77, §110 (1881) (purchaser pays no more than "the amount of taxes due"). That purchaser receives a tax certificate, which affords its holder a tax "lien . . . on the real property." Neb. Rev. Stat. §77-1818. If tax-certificate holders pay future taxes levied on the property, they acquire "the same lien" for those taxes and "add them to the amount paid . . . in the purchase." *Ibid.*

The landowner may extinguish the tax-certificate holder's lien—and thereby fully "redeem" the property—"by paying the county treasurer" the amount listed in the certificate, "all other taxes subsequently paid," and an interest payment. Neb. Rev. Stat. §77-1824. The redemption period lasts at least three years. Neb. Rev. Stat. §77-1837(1).

When the redemption period ends, the tax-certificate holder may apply "to the county treasurer for a tax deed" to the property. Neb. Rev. Stat. §77-1837(1). "[A]t least three months before applying for the tax deed," the tax-certificate holder must "serve[] or cause[] to be served a [detailed] notice" informing the

owner that "UNLESS YOU ACT YOU WILL LOSE THIS PROPERTY." Neb. Rev. Stat. §77-1831. The recording of that tax deed "vest[s] in the grantee . . . the title of the property." Neb. Rev. Stat. §77-1838; *accord* Neb. Comp. Stat. ch. 77, §127 (1881).

Pursuing a tax deed is risky because tax-certificate holders will not acquire the property if they fail to "strict[ly] compl[y] with" all the statutory requirements. *King* v. *Boettcher*, 147 N.W. 836, 843 (Neb. 1914). If tax-certificate holders want to forego that risk, they "may, instead of demanding a deed," commence judicial foreclosure proceedings. Neb. Rev. Stat. §77-1902. The judicial foreclosure option is not "comparable" to the tax-deed approach, especially its "notice procedures." *SID No. 424* v. *Tristar Mgmt., LLC*, 850 N.W.2d 745, 753 (Neb. 2014).

Factual Background. The property at issue here is in Scotts Bluff County, Nebraska. Pet. App. 5a. It is a small 7,000 square-foot lot,[1] which equates to roughly 0.16 acre, and on the property, as Fair alleged below, is a two-bedroom and one-bathroom house. Fair Aff. ¶5 (filed with state district court on Aug. 5, 2020).

Fair did not pay his property taxes "for the 2013 and 2014 tax years" even though "a tax statement was sent" to him for those years by the Scotts Bluff County Treasurer. Hauschild Aff. ¶4 (filed with state district court on Aug. 5, 2020). As noted, Nebraska law required those statements to indicate that "taxes . . . are delinquent . . . in bold letters" declaring "Back

[1] Nebraska Assessors Online, https://nebraskaassessorsonline.us/propdetail.aspx?e5N5A85p3Dx%2fWsXbE2NarWY9lATzabs7ErLDKksGQbaL4ZgXKcgz%2fQ=%3d (visited Nov. 29, 2022) (click on "View Data Sheet" link to see the lot size).

Taxes and Interest Due." Neb. Rev. Stat. §77-1701(1). Fair does not deny receiving these tax statements. Nor does he deny that his tax delinquency subjected the property to a tax-certificate sale. Neb. Rev. Stat. §77-1801.

In February 2015, the county published the statutorily required notice of the tax-certificate sale. Pet. App. 5a. And on March 11, 2015, the treasurer sold a tax certificate to Continental Resources. *Ibid.*

For the next few years, Fair remained delinquent in his property taxes. Pet. App. 5a. During that time, the county still sent the tax statements to Fair notifying him of his ongoing delinquency. Neb. Rev. Stat. §77-1701(1). Because Fair did not make subsequent tax payments, Continental continued to pay the taxes on the property. Pet. App. 5a.

On April 10, 2018, Continental sent Fair the mandatory notice stating in large font: "UNLESS YOU ACT YOU WILL LOSE THIS PROPERTY." Pet. App. 5a–6a; Neb. Rev. Stat. §77-1831. The notice informed Fair that he had three months to "redeem the property and that redemption would cost $5,268—the total value of the unpaid taxes, fees, and interest." Pet. App. 5a–6a. Three days later, Fair signed for the delivery confirming his receipt of the notice. Walocha Aff. Ex. G (filed with state district court on Aug. 5, 2020).

Fair "did not make any payment to the county treasurer after receiving the notice." Pet. App. 6a. While he alleges that he unsuccessfully "applied for loans to redeem the[] property," Pet. 7, Fair never says that he tried to sell the property, which would

have enabled him to pay off the tax lien and keep the surplus proceeds he might have acquired.

After three months passed, in July 2018, Continental applied for, and the county issued, a tax deed. Pet. App. 6a. At that time, the property had an assessed value of $59,759. *Ibid.*

State-Court Proceedings. Continental then filed a quiet-title action in state court. Pet. App. 6a. In response, Fair filed an amended answer, counterclaim, and third-party complaint. *Id.* at 44a–74a. The third-party complaint added the County of Scotts Bluff, its treasurer, and the Attorney General as third-party defendants. *Id.* at 49a.

That complaint asserted federal constitutional claims, including a procedural-due-process claim, an excessive-fine claim, and two takings claims. Pet. App. 56a–66a. The due-process claim alleged that the notice Fair received was constitutionally deficient. *Id.* at 61a–63a. The excessive-fine claim insisted that transferring Fair's property to pay for his delinquent taxes "is in essence a punishment" that is "disproportional to the gravity of the[] tax delinquency." *Id.* at 65a–66a. The first takings claim asserted that the county had "no public purpose" for selling the property because the house was worth more than "the tax liens, interest, and other statutory costs at issue." *Id.* at 58a. And the other takings claim argued that the county must pay Fair "just compensation" equaling the surplus value. *Id.* at 59a–60a.

After Continental moved for summary judgment, the trial court rejected all Fair's constitutional claims and quieted title in Continental. Pet. App. 29a–35a.

Decision Below. The unanimous Nebraska Supreme Court agreed that Fair's federal constitutional claims lack merit. Pet. App. 10a–27a. Starting with due process, the court held that the Constitution requires no more than the notice Fair received 90 days before the county issued the tax deed. *Id.* at 10a–15a. By choosing not to raise that due-process claim to this Court, Fair now accepts that he received constitutionally adequate notice.

The Nebraska Supreme Court next addressed the takings claims. Rejecting Fair's first theory, the court readily determined that the county acted for a public purpose. Pet. App. 16a–18a. Fair's first theory, the court explained, "depends upon his contention that the State's power to impose and collect taxes is subject to the Takings Clause." *Id.* at 16a. Relying on this Court's caselaw, the court below explained that "[t]axes . . . are not takings," *id.* at 17a (quoting *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013)), and neither are "efforts to collect that tax, whether through the sale of a lien on the property or sale of the property itself," *ibid.* (citing *Jones* v. *Flowers*, 547 U.S. 220, 234 (2006) ("People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property.")).

The court then considered Fair's alternative takings theory seeking just compensation for the surplus value. "[T]he existence of a property interest," the court recognized, "is determined by reference to existing rules or understandings that stem from an independent source such as state law." Pet. App. 20a–21a (quoting *Phillips* v. *Wash. Legal Found.*, 524 U.S.

156, 164 (1998)). Fair argued below that "Nebraska law recognizes . . . a property right" to "the value of the property in excess of the tax debt." Pet. App. 21a. To support this argument, he cited "Nebraska statutes," "a provision in the state constitution," and "Nebraska common law." *Id.* at 21a–23a. The court considered all those sources and found nothing in Nebraska law recognizing a right in "the original property owner" to "receive compensation if the value of the property transferred to a tax certificate holder exceeded the tax debt." *Id.* at 23a.

The court next rejected Fair's excessive-fine claim because "the transfer of [the property's] title . . . lacks essential attributes of a 'fine[.]'" Pet. App. 25a. Binding caselaw from this Court distinguishes "between a penalty or forfeiture that is purely 'remedial,'" which is not a fine, and a penalty "that 'can only be explained as serving in part to punish,'" which is a fine. *Id.* at 25a (quoting *Austin* v. *United States*, 509 U.S. 602, 610 (1993)). A tax deed is not a fine for three reasons, the court explained. First, the "discrepancy between the value of the property forfeited and the government's loss" does not mean that the forfeiture is "punitive." *Ibid.* Second, the property at issue here is not "involved in criminal offenses" or "connect[ed] to criminal proceedings." *Id.* at 26a. Third, affording Fair an "extended opportunity"—at least three years—"to avoid forfeiture suggests that the purpose of the tax deed is to collect taxes, rather than to punish delinquent taxpayers." *Ibid.* (quotation marks omitted). The court then observed that the Excessive Fines Clause did not apply for another reason: because the alleged fine—the lost surplus value—is not "directly . . . payable to[] the government." *Id.* at

27a (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989)).

After losing before Nebraska's courts, Fair retained new counsel before filing his petition for a writ of certiorari here. Unlike his arguments below, Fair's takings claim no longer focuses exclusively on Nebraska law. He now argues—for the first time in this litigation—that general common-law sources beyond Nebraska law afford him a "deeply rooted . . . right[]" in the surplus value of his former property. Pet. 12–17.

REASONS FOR DENYING THE PETITION

The Court should not grant certiorari on the takings issue because (1) there is no split of authority on the federal takings question decided below, (2) the Nebraska Supreme Court's decision does not conflict with this Court's precedents, (3) the decision below was correct in rejecting Fair's takings claim, (4) accepting Fair's arguments would have many adverse consequences, and (5) this case is not a good vehicle to resolve the takings question. Likewise, the excessive-fine issue, which admittedly is not subject to a split, does not warrant review because Fair's arguments are utterly without merit.

I. The Court should decline to review the takings question.

Fair raises multiple reasons why this Court should review his takings claim. Pet. 10–24. But he is wrong about all of them. Most notably, appellate courts are not split on the federal takings question decided below, and the Nebraska Supreme Court's decision does not conflict with this Court's caselaw. For these

and the other reasons discussed below, this Court should not review Fair's takings claim.

A. The asserted split is illusory.

Fair claims that the decision below conflicts with 15 cases in which the government allegedly "foreclose[d] on property . . . and [kept] more than it [was] owed." Pet. 21–22 (collecting cases). But the county here did not keep any more than the amount of delinquent taxes and fees owed, and thus it did not receive any extra financial benefit. It appears that only one case has addressed a federal takings claim in this context—where the government transfers land to a third party for the amount of delinquent taxes—and the court there, in a ruling summarily affirmed by this Court, found no constitutional violation. See *Balthazar* v. *Mari Ltd.*, 301 F. Supp. 103, 105–06 & n.6 (N.D. Ill.), *aff'd*, 396 U.S. 114 (1969).

Fair struggles to characterize the 15 cases he cites as creating a split with the federal takings analysis below. Relevant splits involve "important federal question[s]." Sup. Ct. R. 10(b). But six of Fair's 15 cases do not address a *federal* takings claim, and some of those do not consider a takings claim at all. See *Rafaeli, LLC* v. *Oakland Cnty.*, 952 N.W.2d 434, 462 (Mich. 2020) ("our holding speaks to Michigan's Takings Clause, which . . . offer[s] broader protection" than its federal counterpart); *Polonsky* v. *Town of Bedford*, 238 A.3d 1102, 1110 (N.H. 2020) (statute terminating a "municipality's duty to provide excess proceeds" to a former property owner "conflicts with the takings clause of the New Hampshire Constitution"); *Thomas Tool Servs., Inc.* v. *Town of Croydon*, 761 A.2d 439, 441–42 (N.H. 2000) (addressing a claim

under the New Hampshire Takings Clause while referencing cases that analyzed similar federal claims and found "no taking"); *Bogie* v. *Town of Barnet*, 270 A.2d 898, 903 (Vt. 1970) (town's retention of surplus proceeds is "an unlawful taking" under the Vermont Constitution); *Baker* v. *Kelley*, 11 Minn. 480, 496–97 (1866) (statute of limitations preventing former owner from contesting tax deed violated due-process (not takings) principles of the Minnesota Constitution); *Griffin* v. *Mixon*, 38 Miss. 424, 436–37 (Miss. Err. & App. 1860) (concluding under the Due Process Clause of the Mississippi Constitution that the State could not take land "without notice" from a delinquent taxpayer").

Nor do any of the cited cases that address federal takings claims establish a split. This Court looks for splits involving "decision[s] of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b). Yet six of the remaining cases are federal district court decisions, four of which are unpublished. Pet. 22. Even the two published decisions do not advance Fair's position. In *Coleman through Bunn* v. *District of Columbia*, 70 F. Supp. 3d 58, 81 (D.D.C. 2014), the government there, unlike the State here, "failed to respond" to the plaintiff's claim that "he [had] a protected property interest . . . based on principles of D.C. law," so the court "assume[d]" without deciding that he did. And in *Dorce* v. *City of New York*, No. 19-CV-2216 (JGK), --- F. Supp. 3d ----, 2022 WL 2286381, at *12 (S.D.N.Y. June 24, 2022), the government there—again, unlike here—did not deny that state law afforded the plaintiffs a right to the surplus proceeds; rather, the parties disputed

whether the "opportunity to obtain [that] surplus" was real or illusory.

That leaves only three of Fair's original 15 cases; none of which help him. In *Proctor* v. *Saginaw County Board of Commissioners*, No. 349557, 2022 WL 67248, at *11 (Mich. Ct. App. Jan. 6, 2022), a Michigan appellate court addressed an issue of municipal liability under *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658 (1978), holding that the plaintiffs' takings claim "satisfied the requirements for bringing a . . . claim as specified in *Monell*." The next case—*Martin* v. *Snowden*, 59 Va. 100 (1868)—offers only dicta on the federal Takings Clause because the court there held that the statute did not require it to reach that constitutional issue. See *id.* at 144–45 (emphasizing that the court was not "compelled to place that [potentially unconstitutional] construction upon the act"). And in the final case—*King* v. *Hatfield*, 130 F. 564 (C.C.D. W. Va. 1900)—the State violated due-process principles by transferring land to a third party "without . . . notice . . . of any kind" to the prior owner and without a sale of any kind. *Id.* at 580–81. The process was so wanting, the court observed, that the legal issue was not even "a matter of taxation." *Id.* at 580. That, of course, is nothing like this case.

Those 15 cases aside, Fair's circuit split argument suffers from an additional, more fundamental defect: it fails to focus on the question actually "decided" by the court below. See Sup. Ct. R. 10(b). Fair argued below that "Nebraska law"—including its statutes and common law—"recognizes . . . a property right" to "the value of the property in excess of the tax debt."

Pet. App. 21a–23a. The court disagreed, finding nothing in Nebraska law recognizing a right in "the original property owner" to "receive compensation if the value of the property transferred to a tax certificate holder exceeded the tax debt." *Id.* at 23a. This Court "will not second-guess the Nebraska Supreme Court's . . . interpretation of state law." *Hopkins* v. *Reeves*, 524 U.S. 88, 101 (1998).

Fair now presents a very different argument to this Court, contending that common-law principles outside Nebraska force the State to recognize his asserted property interest in surplus value. Pet. 12–17. It appears that only one court has adopted that approach when identifying property rights for takings claims arising out of delinquent property taxes—the recent Sixth Circuit decision in *Hall*, 51 F.4th at 189–96. Yet that case does not create a split with this one because the Nebraska Supreme Court, unlike the Sixth Circuit, did not consider common law outside Nebraska since that argument was not presented to it. Pet. App. 21a–23a.

Even if it were true that *Hall* conflicts with the decision below, it is as nascent as a split can be. The Sixth Circuit decided that case just weeks ago—after Fair filed his petition in this case. No percolation has occurred. Further development in the lower courts is crucial because, as discussed below, reliance on the general common law to override state law raises difficult federalism implications and historical analysis that no other court has considered. In addition, *Hall* is a highly suspect outlier because other courts to address federal takings claims in these tax delinquency contexts have asked whether the State's law,

not the general common law, creates a property interest in the surplus. *E.g.*, *Tyler* v. *Hennepin Cty.*, 26 F.4th 789, 792 (8th Cir. 2022) ("look[ing] to Minnesota law to determine whether [the plaintiff had] a property interest in surplus"); *Ritter* v. *Ross*, 558 N.W.2d 909, 912 (Wis. Ct. App. 1996) (asking whether the "the state constitution or tax statutes" give the former owner "a recognizable interest in the excess proceeds from [a tax] sale"); *Automatic Art, L.L.C.* v. *Maricopa Cty.*, No. CV 08-1484-PHX-SRB, 2010 WL 11515708, at *6 (D. Ariz. Mar. 18, 2010) (similar); *Reinmiller* v. *Marion Cty., Or.*, No. 05-1926-PK, 2006 WL 2987707, at *3 (D. Or. Oct. 16, 2006) (similar). *Hall* thus provides no basis to grant review in this case.

B. The decision below does not conflict with this Court's precedents.

The Nebraska Supreme Court's decision is squarely supported by this Court's caselaw. Most notable is *Nelson*. There, a city took property because of unpaid water bills, sold it to a private party, and kept the surplus proceeds. *Nelson*, 352 U.S. at 105–06. The former property owner had a right to request the surplus under state law but had not exercised it. *Id.* at 110. Rejecting a takings claim to acquire the surplus, this Court held that "nothing in the Federal Constitution prevents" the city from "retain[ing] the property or the entire proceeds of its sale" when "the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings." *Ibid.*

According to *Nelson*, then, the Takings Clause does not require the government to give surplus to the

former owner so long as the owner was notified of the debt and the impending property loss. See *Tyler*, 26 F.4th at 794 ("*Nelson* provides that once title passes to the State under a process in which the owner first receives adequate notice and opportunity to take action . . . , the governmental unit does not offend the Takings Clause by retaining surplus equity from a sale."); *Miner* v. *Clinton Cty., N.Y.*, 541 F.3d 464, 475 (2d Cir. 2008) (citing *Nelson* to conclude that "[t]he retention of any surplus from a tax auction is constitutional because there was no violation of plaintiffs' right to due process related to the notices of foreclosure"); *City of Auburn* v. *Mandarelli*, 320 A.2d 22, 31 (Me. 1974) (interpreting *Nelson* as holding that "the retention of the surplus by the taxing authority was not violative of constitutional rights, where the city had taken adequate steps to notify the landowner and the latter failed to act seasonably").

Applying that standard, Fair's takings claim fails because the county sent him statements informing him of his tax debt and Continental subsequently sent him three months' notice stating that he would lose the property unless he acted. Any time before the county issued the tax deed, Fair could have sold the property, paid off his tax lien, and retained the surplus funds. While Fair previously challenged the sufficiency of the notice he received, he has abandoned that claim and thus accepts that the notice was constitutionally sufficient.

Fair tries to limit *Nelson* to cases where the former property owner had an "*opportunity to recover surplus proceeds*" and neglected to do so. Pet. 24. But again, Fair had an opportunity to retain the surplus value

by selling the property before the county issued the tax deed. That Nebraska law required Fair "to do the work of arranging a sale in order to retain the surplus"—rather than forcing the county to do it for him—"is not constitutionally significant." *Tyler*, 26 F.4th at 794; see also *Balthazar* v. *Mari Ltd.*, 396 U.S. 114 (1969) (summarily affirming *Balthazar*, 301 F. Supp. at 105–06 & n.6, which denied a takings claim brought by a former landowner who had no formal right to recover the surplus value).

Moving beyond *Nelson*, Fair argues that the decision below conflicts with three of this Court's cases that arose outside of the tax-deed or tax-forfeiture context. His reliance on those cases is misplaced because all of them are distinguishable from the facts here.

In *Armstrong* v. *United States*, 364 U.S. 40 (1960), shipbuilding suppliers had a lien on materials that the federal government took. In analyzing the suppliers' takings claim, the Court concluded that their lien was an undeniable property interest under state law. *Id.* at 46 ("petitioners had valid liens under Maine law"). Here, however, the Nebraska Supreme Court held that state law does not give former landowners a property interest in the surplus value after tax deeds are issued.

The next case—*Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164–65 (1980)—announced a very "narrow" holding. The Court there concluded that a county may not take "the interest earned on [an] interpleader fund" when "the deposit in the court's registry is required by state statute . . . for the depositor to avail itself of statutory protection from

claims or creditors." *Ibid. Webb's* is entirely unlike this case for three reasons. First, the company that filed the interpleader action complied with state law by depositing the interpleader fund with the court, whereas Fair violated state law by failing to pay his taxes for years. Second, the company in *Webb's* had no way to acquire the interest income on the interpleader fund. But Fair received actual notice that he would lose his property, and he could have sold it, paid off his tax lien, and kept the surplus if he acted. Third, the State in *Webb's* offered "[n]o police power justification . . . for the deprivation." *Id.* at 164. Yet here, the county acted to "collect taxes"—an undeniably "essential" state purpose. *Leigh*, 193 U.S. at 87.

The final case—*Phillips* v. *Washington Legal Foundation*, 524 U.S. 156 (1998)—is distinguishable for similar reasons. In *Phillips*, the Court held that the "interest earned on client funds held in IOLTA accounts is 'private property'" of the client "for purposes of the Takings Clause." *Id.* at 160. Like the plaintiff in *Webb's*, the plaintiffs in *Phillips* had clean hands. In contrast, Fair ignored his obligations under state tax laws for well over three years. Additionally, the plaintiffs in *Phillips* did not have a chance to obtain the IOLTA interest, yet Fair could have acted to retain any available surplus value.

In short, Fair's trilogy of cases—*Armstrong*, *Webb's*, and *Phillips*, none of which involve delinquent taxes—do not conflict with the decision below.

C. The decision below is correct.

The threshold issue when evaluating a takings claim is to determine whether the plaintiff has an interest in the property at issue. As this Court

recently affirmed, "the property rights protected by the Takings Clause are creatures of state law." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2076 (2021); see also *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Env't Prot.*, 560 U.S. 702, 732 (2010) ("The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established.").

Fair now concedes—as this Court's caselaw dictates he must—that the county "may seize private property for the public purpose of recovering delinquent taxes." Pet. 10; see also *Jones*, 547 U.S. at 234 ("People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property."). Thus, Fair must establish that he had a property interest in the surplus value after the county lawfully took the property to satisfy his delinquent taxes. Focusing on that question, the court below held that Nebraska law does "not recognize a property interest in the surplus . . . value of property after . . . a tax deed is requested and issued." Pet. App. 21a–23a.

Fair implies that the Nebraska Supreme Court was wrong about its own law and that this Court should correct it. Pet. 15–16. But "[t]his Court . . . repeatedly has held that state courts are the ultimate expositors of state law and that we are bound by their constructions . . . ." *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975) (citations omitted). Asking this Court to supersede the Nebraska Supreme Court's pronouncements on its own law is thus unavailing.

In any event, the court below was right about Nebraska law. In questioning that, Fair cites cases that involve the right to receive surplus in a judicial foreclosure proceeding rather than following the issuance of a tax deed. Pet. 15–16 (citing *Delatour* v. *Wendt*, 139 N.W. 1023, 1024 (Neb. 1913); *Gillian* v. *McDowell*, 92 N.W. 991, 992 (Neb. 1902); *Lancaster Cnty*. v. *Trimble*, 52 N.W. 711, 712 (Neb. 1892)). But Nebraska courts have repeatedly held that those contexts are not "comparable." *Neun* v. *Ewing*, 863 N.W.2d 187, 194 (Neb. 2015); *SID No. 424*, 850 N.W.2d at 753. Tax deeds are unlike foreclosures because they have never generated surplus proceeds in Nebraska, contrary to what Fair implies. See Neb. Rev. Stat. §77-1807(1)(b) & (2)(c) (tax-certificate purchaser pays "the amount of taxes" due); Neb. Comp. Stat. ch. 77, §110 (1881) (purchaser pays no more than "the amount of taxes due"). And tax deeds are different because they follow the receipt of specific notices telling the owners that they will "lose th[e] property." Neb. Rev. Stat. §77-1831 (capitalization omitted). Given this, delinquent landowners whose properties are transferred via tax deeds do not have a reasonable expectation of retaining any property interest in the surplus value or receiving any surplus proceeds.

Even if there were old Nebraska caselaw suggesting a common-law right to surplus value in the tax-deed context—which there is not—any such law has clearly been abrogated. See *Silver* v. *Silver*, 280 U.S. 117, 122 (1929) (permitting States to abolish "old" rights "recognized by the common law"). Since at least the late 1800s, Nebraska statutes have directed that a tax deed "vest[s] in the grantee . . . the title of the

property," making no provision for the former owner. Neb. Comp. Stat. ch. 77, §127 (1881); Neb. Rev. Stat. §77-1838. That longstanding statute is incompatible with any suggestion that former landowners retain rights under state law to the surplus value of property transferred via tax deed.

Because it would be futile to second-guess the Nebraska Supreme Court's assessment of its own law, Fair focuses most of his current argument on general common-law principles outside Nebraska, insisting that they establish his right to surplus value. Pet. 12–15. His reliance on this new argument—which, again, was not raised below—falls short. To begin, this Court's precedents strongly suggest that the Takings Clause does not recognize a deeply rooted common-law right to recover surplus value in all circumstances. If such a right existed, *Nelson* and *Balthazar*—cases where delinquent landowners brought takings claims to recover surplus proceeds or surplus value—would have come out differently.

To escape this problem, Fair compiles a cherry-picked set of common law references. Pet. 10–15. As a threshold matter, this generalized appeal to the common law, rather than the property rights established by the forum State, presents serious concerns, which are addressed in the following section. But even if this inquiry is valid, Fair's discussion of the common law is incomplete and unpersuasive.

Fair cites a treatise by Henry Black. Pet. 12. But the referenced section of that treatise undermines Fair's position. In addressing the issue of "surplus," Black acknowledged—without any disapproval—that some States historically provided *no* surplus to the

former landowner. Henry Black, A Treatise on the Law of Tax Titles p.199, §157 (1888). One group of States mirrored Nebraska's approach by selling the property for only "the amount of taxes and costs," and "no question as to the division of the purchase money" arose because the money received did not "exceed the sum which belong[ed] to the State and its officers." *Ibid.* Meanwhile, other States "declar[ed] a forfeiture of the estate for non-payment of the taxes," and there was "no question as to a division of the purchase money [subsequently] received for the land" because "whatever the amount may be, it clearly belong[ed] to the State alone." *Ibid.* Black could have never said such things if Fair's tilted view of the common law were correct.

Fair's reliance on Cooley's treatise suffers from similar flaws. Pet. 10, 13. As Cooley observed, "[i]t is provided by law in some states, that if the taxes assessed against lands shall not be paid by a certain time, and, after some prescribed notice, the land shall be forfeited to the state." Thomas M. Cooley, A Treatise on the Law of Taxation 315–16 (1876). While some States decided to institute "a public sale of property, rather than [] a forfeiture of it," Cooley was "not aware of any constitutional principle" that mandates the sale. *Id.* at 318. Even when States chose tax sales, their legislatures retain "very ample discretion" to establish a process based on their "own view of public policy," which need not be "for the advantage of a negligent or defaulting citizen." *Ibid.* Nebraska law does not fall outside these common-law traditions.

Further illustrating Fair's haphazard use of the treatises, consider his reference to Cooley's section on

"excessive sale[s]," which criticized "a sale of the remainder [of property] after the tax had been satisfied by the sale of a part" of the property. Cooley, *supra*, at 343–44; see Pet. 10. That has nothing to do with this case, for Fair has never argued—nor could he—that the county could have sold a portion of his .16 acre lot to satisfy his roughly $5,000 debt. Thus, the prohibition against selling all the property when only part would do is simply not implicated here. Fair similarly invokes the Magna Carta and Blackstone's Commentaries. Pet. 12. But both of those sources discussed movable goods instead of real property. Because the history and common law concerning goods are vastly different from those involving real property, Fair's reliance on the Magna Carta and Blackstone are irrelevant.

D. Adopting Fair's takings arguments would have deeply unsettling effects.

Fair primarily argues that federal courts may invoke general common-law principles—on topics like taxation over which States have historically had vast discretion—to override individual States' sovereign choices when defining property rights. This position raises significant concerns.

Foremost is federalism. Fair's position would essentially create a federal common law of property rights that displaces States' property-right determinations on vital matters of local concern like state taxation. Such federalizing of common-law property rights would risk, in the words of James Madison, "overwhelm[ing] the residuary sovereignty of the States." Report on the Virginia Resolutions, House of Delegates, Session of 1799–1800, Concerning Alien

and Sedition Laws, in 6 Writings of James Madison 381 (G. Hunt ed. 1906). Gone would be the days when States could abrogate common-law property interests. See *Munn* v. *Illinois*, 94 U.S. 113, 134 (1876) ("A person has no property, no vested interest, in any rule of the common law," so the common law "may be changed by statute"). That, in turn, would impede State' vital role as "laborator[ies]" of democracy. *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And the effect would go beyond preventing States from abrogating the common law; as this case demonstrates, States would be forced to recognize property rights that they have never granted.

The Sixth Circuit's recent decision in *Hall* illustrates the federalism problems. A few years before *Hall*, the Michigan Supreme Court in *Rafaeli* held that under that State's common law, delinquent property owners have a property interest in "the surplus proceeds." 952 N.W.2d at 466. Overriding that holding, the Sixth Circuit in *Hall* said that property rights are not defined "solely by reference to Michigan law," 51 F.3d at 189, and that delinquent landowners have a broader "equitable title" under historical common-law sources, *id.* at 194. Especially in an area where commentators like Black and Cooley have recognized ample room for state discretion, this exudes a federal superiority on traditional state issues like property rights that should find no home in this Court's jurisprudence.

Fair's vague appeal to general notions of the common law also raises difficult line-drawing questions. Some pertain to timing. What year is relevant

when analyzing the common law? The Constitution's ratification in 1789, the Fourteenth Amendment's adoption in 1868, or some other time period? Other questions pertain to prevalence and consistency. See Report on the Virginia Resolutions at 373 ("[t]he common law was not the same in any two of the Colonies"). How many States must have recognized a right to surplus value before it qualifies as "deeply rooted"? What if the States were so divided in their practices that no clear consensus emerged?

Fair's approach threatens to metastasize takings litigation. The common law among the States has always had substantial variation, see Report on the Virginia Resolutions at 373, so litigants will often be able to construct an argument by picking and choosing aspects of various States' common law. Expecting courts to wade through that history without adequate standards to guide them is a recipe for confusion.

Additional difficulties would befall States like Nebraska that do not already produce surplus proceeds. It would likely force Nebraska to eliminate the tax-deed process that has existed in the State since the 1800s. And any requirement that the State unwind this or other tax-deed transfers would violate the vested property rights of countless tax-deed recipients like Continental—stripping them of property they acquired by stringently following state law. That problem would be exacerbated if courts were to give Fair's novel theory retroactive effect.

States without surplus proceeds would face other problems, too. Valuation issues would no doubt arise. If, for instance, a delinquent landowner thinks that a county received a low value in a sale generating

surplus proceeds, that person presumably would bring a claim against the county for failing to maximize the property's value. Those kinds of disputes would not be isolated because the poor condition of many properties lost to tax delinquencies guarantees that the disparity between the value on paper and the value obtained in a sale will often be stark. By relying on the supposed surplus value, Fair seeks to transform the county treasurer into a real estate agent for delinquent landowners. Allowing that would be particularly egregious in Nebraska since those property owners receive notice and have an opportunity to sell their properties before losing them. They should not be allowed to pass that work off to the government.

Fair concludes by arguing that the tax-deed statutes in Nebraska and other States disadvantage property owners who are facing real difficulties. Pet. 28–33. But again, he ignores that, like most of the other individuals who have lost their properties, he received actual notice and had the opportunity to sell the property, pay off the tax liens, and keep the surplus. So it is not as if those individuals were without recourse; rather, they failed to take reasonable steps to avail themselves of it.

Fair's one-sided narrative also fails to account for ways in which state legislatures have attempted to balance competing interests. For example, Nebraska law eliminates or reduces property taxes for homesteads owned by certain low-income or disabled individuals. *E.g.*, Neb. Rev. Stat. §77-3507 (low income); Neb. Rev. Stat. §77-3508 (disability). In addition, Nebraska has extended the redemption period for

"persons with an intellectual disability or a mental disorder." Neb. Rev. Stat. §77-1827.

More broadly, state legislatures are continually evolving their practices on tax deeds and forfeitures. Just recently, Wisconsin amended its laws to permit delinquent property owners a longer time to recover surplus proceeds. See Wis. Stat. §75.36(2m) (as amended by 2021 Wis. Act 216). This ongoing development of the law is consistent with this Court's admonition in *Nelson* that "relief from [any] hardship imposed by [these] statute is the responsibility of the state legislature[s] and not of the courts." *Nelson*, 352 U.S. at 111. Legislatures throughout the country are actively considering these matters.

E. This case is a poor vehicle to address the takings issue.

This case is a bad vehicle for resolving the taking arguments that Fair raises in his petition. As mentioned above, Fair's central argument to this Court—that generalized notions of the common law outside Nebraska establish his right to surplus value—was not raised below, and thus the Nebraska Supreme Court did not address it. While this does not present a waiver problem because "parties are not limited to the precise arguments they made below," *Yee* v. *City of Escondido, Cal.*, 503 U.S. 519, 534 (1992), it does force this Court to serve as a court "of first view" rather than "a court of review," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

This means that the Court will not have any lower-court analysis on two critical issues inherent in Fair's new argument. First is whether, and if so when, general notions of the common law create a property

interest under the Takings Clause that overrides the State's own law. And the second question, which assumes the relevance of the generic common law in establishing a property interest, is whether historical common-law principles establish as deeply rooted the right to surplus value that Fair asserts here. With no guidance on either of these issues by the lower courts, this case is a decidedly poor vehicle for resolving the central takings argument that Fair wants to raise.

Compounding these vehicle problems is Fair's astoundingly broad rendition of the takings question. He asks whether the Takings Clause forbids the State from "confiscat[ing] property worth more than the debt owed by the owner." Pet. i. That question implies that the State cannot take and sell the property if it is worth more than the tax debt owed. While that position is consistent with Fair's more extreme takings argument below, he has moved away from that on appeal and now concedes that the county "may seize private property for the public purpose of recovering delinquent taxes." Pet. 10. Particularly in light of that concession, the Court should decline to grant review on the sweeping takings question that Fair's petition presents.

II. The Court should decline to review the excessive-fine question.

Most telling about Fair's position on his Eighth Amendment excessive-fine claim is what he does not say. He argues neither that the decision below creates a split with another appellate court nor that it conflicts with decisions of this Court. Sup. Ct. R. 10(b)–(c). Fair is thus left to argue only that his excessive-fine claim raises an "important question" of

federal law. Pet. 24; Sup. Ct. R. 10(c). It is not an important question, however, because Fair's Eighth Amendment claim, as explained below, is entirely without merit.

The Eight Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Excessive Fines Clause restricts the "power of those entrusted with the criminal-law function of government" by "limit[ing] the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Timbs* v. *Indiana*, 139 S. Ct. 682, 687 (2019) (quotation marks omitted). Its protection applies only when the challenged statutes can "be explained as serving in part to punish." *Austin*, 509 U.S. at 610. But if those statutes further purely remedial purposes, the Excessive Fines Clause has no role.

The Eighth Amendment does not apply here because Nebraska's tax-deed statutes are purely remedial and not punitive. Their "overall objective," as the Nebraska Supreme Court has said, "is the recovery of unpaid taxes on real property." *Neun*, 863 N.W.2d at 194. Even the transfer of the property via tax deed is not intended to punish the former owner. Rather, its purpose is to restore the property to an owner that has shown a willingness and ability to pay the taxes—an undoubtedly remedial objective. It is telling that Fair, despite his petition's heavy focus on treatises, has not cited anything from the common law suggesting that tax deeds are, or have ever been, punitive in purpose.

Fair relies heavily on *Austin* to support his Eighth Amendment claim. Pet. 25–27. But that case does not help him. In *Austin*, this Court concluded that a statute permitting the forfeiture of property used in drug-trafficking crimes was punitive because (1) the statute tied forfeiture to the commission of a crime, (2) the statute's innocent-owner defenses linked forfeiture to the owner's culpability, and (3) the legislative history indicated that Congress enacted the law to create a "powerful deterrent" against drug crimes. 509 U.S. at 619–20. None of these factors are present here: issuance of a tax deed does not depend on a criminal conviction; the tax-deed statutes do not create a defense based on innocence; and no legislative history suggests that the legislature intended to punish property owners. *Austin* thus does not support Fair's claim.

Fair's contrary take on *Austin* is unpersuasive. He argues that "the redemption provision in Nebraska's statute resembles the affirmative defense exempting innocent owners from forfeiture in *Austin*." Pet. 27. Not so. Redemption relieves the property owner from forfeiture because the owner's payment of delinquent taxes obviates the need to remedy the government's tax loss. Redemption has nothing to do with "atonement" for the owner's "presumed negligence." *Ibid.*

Fair also relies on *Austin* to argue that tax deeds necessarily serve "retributive or deterrent purposes" because they permit "the confiscation of homes worth substantially more than what is owed." Pet. 26. This occasional disparity does not establish a punitive purpose, particularly when all other indicators demonstrate the State's remedial goals. *Austin* certainly

does not say that a disparity in value—by itself—renders the forfeiture a form of punishment. 509 U.S. at 621. Rather, *Austin* relied on the confluence of many factors that are missing here—the connection to a crime, the availability of innocent-owner defenses, and the legislative history's affirmation of deterrent purposes. See *id.* at 619–20. Fair overreads *Austin* in his quest to declare disproportionate valuation the sole determinant of punishment.

Moreover, as the court below explained, see Pet. App. 27a, the Excessive Fines Clause does not apply for another reason. That "Clause was intended to limit only those fines directly . . . payable to[] the government." *Browning-Ferris Indus.*, 492 U.S. at 268. But the county here did not receive the purported fine that Fair considers objectionable. The only money that the county receives when it issued a tax deed is the delinquent taxes and fees, which are paid by the tax-certificate purchaser. Fair does not suggest that the delinquent taxes and fees are an excessive fine. Instead, he argues that the lost surplus value is. But the county does not receive any surplus value or proceeds when it issues tax deeds. Because none of the surplus passes to the county, the tax deed does not qualify as an excessive fine under the Eighth Amendment.

Fair does not deny that *Browning-Ferris Industries* established that the fine must be payable to the government. Instead, he argues that a hundred-year-old case that did not even discuss the Eighth Amendment—*Missouri Pacific Railway Co.* v. *Tucker*, 230 U.S. 340, 351 (1913)—somehow preemptively overturned *Browning-Ferris Industries* on this point. Pet.

at 28. Because it plainly did not, Fair's attempt to fit this case within the parameters of the Excessive Fines Clause misses the mark.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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