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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Kevin Fair asks this Court to decide two questions of exceptional importance and to settle an acknowledged conflict among lower courts. Respondents Scotts Bluff County and Continental Resources took Fair's $60,000 home to satisfy a debt of $5,200 in property taxes, interest, and fees. The County gave the remaining equity—approximately $54,800 more than he owed—as a windfall to Continental Resources. Fair asks this Court to decide whether the confiscation of the excess value of his home effects an unconstitutional taking or an excessive fine.

Respondents grudgingly acknowledge the conflict recently highlighted by *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022). Nebraska Attorney General's and Continental Resources' Joint Brief in Opposition (BIO) 15. As related by both the Petition and *Hall*, the takings question presented is one of exceptional national importance. A recent report compiled from public records in nine states found that tax forfeiture laws like Nebraska's confiscated more than 7,900 homes and $777 million in equity between 2014 and 2021. Angela C. Erickson, et. al., *End Home Equity Theft* (Nov. 29, 2022).[1]

CORRECTED STATEMENT OF FACT

Respondents claim that after Continental Resources acquired the tax lien on Fair's property, "the county still sent the tax statements to Fair notifying him of his ongoing delinquency." BIO 7 (without citation to the record). The county did not. "Once Continental began paying the property's taxes,

[1] https://homeequitytheft.org/size-and-scope.

the County did not send any further communications or tax bills to the Fairs." App.5a. Nor did Continental notify Fair for three years. App.54a.

ARGUMENT

I. THERE IS A DEEP AND GROWING CONFLICT AMONG THE LOWER COURTS

A. This case directly conflicts with the Sixth Circuit's opinion in *Hall v. Meisner*

Hall v. Meisner, 51 F.4th at 188, held that government violates the Takings Clause when it confiscates all title and interest in property to satisfy a debt of lesser value. *Hall* involved a Michigan statute that, like the law at issue here, allowed the state and counties "alone among all creditors" to "take a landowner's equitable title without paying for it, when it collects a tax debt." *Id.* at 187–88. The Sixth Circuit held that the law was "an aberration from some 300 years of decisions by English and American courts" and "[t]he government may not decline to recognize long-established interests in property as a device to take them." *Id.* at 188. Like Michigan, Nebraska protects equitable title in other debt collection contexts, only excepting certain government debts from that rule. *See* Pet. 18. Neb. Stat. § 25-1540 (surplus returned on property sold on execution of judgment); 2 Res. Mort. Lend. State Reg. Man. § 2:19 (Neb. Stat. § 25-1540 applies to judicial mortgage foreclosures); Neb. Stat. § 76-1011 (mortgage sale by trustee returns surplus to former owners).

The Sixth Circuit reviewed centuries of property law to determine that the landowners had "a vested property right in what is ordinarily called the equity

in one's home—meaning the property's value beyond any liens or other encumbrances upon it." *Id.* at 189–94. It refuted the assumption that property is defined "solely by reference to [state] law." *Id.* at 189–90 ("the Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take"). The court traced the unwillingness of English and American courts to permit "strict foreclosure," by which a mortgagee could transform a security interest into fee simple ownership, thus rejecting creditors' attempts to take more than owed. *Id.* at 192. It linked that history with traditional protections for debtors in the tax context to show that equity—i.e., equitable title—is a well-established property interest protected by the Takings Clause. *Id.* at 190–94. Michigan's statute, like Nebraska's, allowed this "unconscionable" and "draconian" strict foreclosure, "disavowing traditional property interests long recognized under state law." *Id.* at 194–95 (noting state's recognition of the right in every context other than modern collection of tax debts) (citation omitted).

Finally, the Sixth Circuit explicitly defined the nature of a landowner's interest in home equity: "The owner's right to [] surplus [proceeds] after a foreclosure sale [] follows directly from her possession of equitable title before the sale. The surplus is merely the embodiment in money of the value of that equitable title." *Id.* at 195. *See also* Pet. 10–16. When Nebraska confiscated Fair's home, it took what was owed *and, additionally,* all equitable title—for which Respondents are liable under the Taking Clause.

Respondents seek to diminish *Hall*'s obvious conflict by arguing that the Nebraska Supreme Court

"did not consider" whether these common law principles could support Fair's federal takings claim. BIO 15. The record refutes this. *See* Br. of Appellant at 34–37, 40, *Continental Resources v. Fair*, No. S-21-0074 (May 19, 2021) (citing decisions by this Court, other states' supreme courts, and Nebraska law, to argue that home equity is private property protected by the Takings Clause). Courts need not address every argument presented. *Common Cause v. Lewis*, 956 F.3d 246, 257 (4th Cir. 2020). The conflict exists because the Nebraska Supreme Court rejected Fair's federal takings claim—a claim that would have succeeded in the Sixth Circuit.

B. The split also includes many other courts

Respondents urge this Court to ignore decisions by the Michigan, Vermont, New Hampshire, and Mississippi supreme courts because those decisions found takings under their respective state constitutions. But Michigan and Vermont analyzed state *and federal* sources to determine whether owners have a protected property right in their property's equity, a key consideration in this Petition. *See Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429, 459, n.65 (2020) ("Although we decide this case based on our state Constitution, we can look for guidance in the decisions of the United States Supreme Court regarding surplus proceeds and the federal Takings Clause."); *Bogie v. Town of Barnet*, 270 A.2d 898, 900, 903 (Vt. 1970) (interpreting federal Constitution as requiring a refund of the surplus proceeds, and concluding it violated the "corresponding rights under the Vermont Constitution"). New Hampshire's high court rejected the federal takings claim because of *Nelson v. City of New York*, 352 U.S. 103 (1956). *See*

Thomas Tool Servs., Inc. v. Town of Croydon, 145 N.H. 218, 219, 221 (2000).

Regarding *Griffon v. Mixon*, 38 Miss. 424, 436–37 (1860), Mississippi's high court could not have invoked the federal Takings Clause because the case pre-dates incorporation of that protection to the states. Nevertheless, the court cited English common law and this Court's decisions to reject "the power to appropriate a man's whole estate for default in the payment of a few dollars tax by a simple act of legislation." *Id.* at 436–37. The government's action was void because it violated due process and took property "without 'just compensation first made.'" *Id.* at 452.

Respondents erroneously dismiss *Martin v. Snowden*, 59 Va. 100, 145 (1868), as "offer[ing] only dicta on the federal Takings Clause." BIO 14. But the lengthy analysis of why a forfeiture would be unconstitutional supported its decision to construe a statute to avoid that result. *See id.* at 131–45; *Martin v. S. Salem Land Co.*, 97 Va. 349, 353 (1899) (ambiguous statutes construed to avoid constitutional problems).

Respondents dismiss the relevance of federal district court decisions cited by Fair. Yet those cases demonstrate the conflict in the lower courts in applying this Court's holding in *Nelson*. *See, e.g.*, *Coleman through Bunn v. District of Columbia,* 70 F.Supp.3d 58, 68, 79 (D.D.C. 2014); *Dorce v. City of New York*, No. 19-cv-2216 (JGK), __ F.Supp.3d __, 2022 WL 2286381 at *12 (S.D.N.Y. July 24, 2022).

Hall and other cases cited in the Petition conflict with the decision below, while cases cited by the

Respondents, including from the Eighth Circuit, the high courts in Maine and New York, the Wisconsin Court of Appeals, and some federal district courts are in accord with Nebraska's decision in this case. *See* Pet. 23; BIO 15–16. The split of authority is clear and only this Court can resolve it.

C. The decision below conflicts with this Court's takings decisions

Respondents justify the government's theft of Fair's property because he failed to pay his property taxes or sell his home prior to forfeiture. BIO 18–19. Certainly, everyone should pay their property taxes in full and on time. But failing to do so cannot justify the confiscation of a home's entire equity, any more than it would justify the government seizing $60,000 in cash as payment for a $5,200 debt.[2] Respondents' argument that Fair deserves to be punished for his failures supports the merits of Fair's second question presented: the action here was a thinly disguised fine within the ambit of the Excessive Fines Clause.

Respondents assert that dicta in *Nelson*, and the summary affirmance in *Balthazar v. Mari Ltd.*, 396 U.S. 114 (1969), support the decision below. They are wrong. A three-month window for Fair to sell his home (while caring for his dying wife) to avoid losing his equity, *see* BIO 17−18, is not equivalent to the opportunity in *Nelson* "to claim the surplus proceeds" from an auction. *Nelson*, 352 U.S. at 111. In *Horne v. Dep't of Agric.*, this Court rejected similar arguments that the government's raisin confiscation program did not effect a taking because the farmers could avoid the confiscation by "sell[ing] their raisin-variety grapes as

[2] *Cf.* Neb. Stat. § 77-2793 (refunds of overpaid income taxes).

table grapes or for use in juice or wine." 576 U.S. 350, 365 (2015). "[P]roperty rights cannot be so easily manipulated." *Id.* (internal quote omitted). Like selling raisins, the equity in one's home is "not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." *Id.* at 366.

Balthazar summarily affirmed a due process decision that only mentioned the takings claim in a footnote. 301 F.Supp. 103, 105 n.6 (N.D. Ill. 1969). Summary affirmance is "a 'rather slender reed' on which to rest future decisions," *Morse v. Republican Party of Virginia*, 517 U.S. 186, 203 n.21 (1996). Without an opinion, it is impossible to know the grounds for the decision. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance endorses only the result, not the reasoning).

II. THE PARTIES' DISAGREEMENT ON THE MERITS HIGHLIGHTS THE CONFLICT AND IMPORTANCE OF THE QUESTIONS PRESENTED

Respondents contend (and the court below agrees) that a debtor like Fair only has property rights in his home equity if state law says so. That contention goes straight to the heart of the takings question presented.

Respondents claim that 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." BIO 20. This is incorrect. Fair need only establish that he had a right to be paid just compensation for the amount that exceeded his debt—his equity—*when* the government took his home and

land. *See Hall*, 51 F.4th at 196; *Knick v. Township of Scott*, 139 S.Ct. 2162, 2170 (2019).

Respondents contend that early American law supports their confiscation because "some States historically provided *no* surplus to the former landowner." BIO 22–23 (citing Henry Black, *A Treatise on the Law of Tax Titles* 199, § 157 (1888)). But those largely agrarian states prohibited taking more property than necessary to pay the debt, placing an affirmative duty on the state to take only "so much of the land as may be necessary." *See id.* Moreover, although Black said some jurisdictions allow forfeiture, he identified only Louisiana as forfeiting property over taxes, and considered the constitutionality of such a forfeiture to be "open to serious doubt." *See* Black, *supra,* at §§ 71–72. Indeed, Thomas Cooley was unaware of any jurisdiction that failed to protect equity by either refunding surplus proceeds or selling the smallest amount of property necessary. Thomas Cooley, A Treatise on the Law of Taxation 343 (1876) (it is unimaginable that a state would fail to include "some equivalent provision for the owner's benefit"). Nebraska once followed that same principle. Pet. 15. *See also United States v. Rodgers*, 461 U.S. 677, 695 (1983) ("simple justice" requires proportionate refund of forced tax sale proceeds to innocent third-party co-owners).

Fair seeks vindication of a property right with ancient roots. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992) (noting importance of "common-law" and "background" principles in regulatory takings context); Pet. 12–17 (citing English and American law). Whether characterized as equity, land, a home, or money, Fair

plainly lost an asset of significant value. The state can claim no entitlement to the windfall it received at Fair's expense, except by *ipse dixit*. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("*ipse dixit*[] may not transform private property into public property"). In any context other than tax sales, Nebraska law would treat Fair's equity as private property. *See, e.g.,* Pet. 18; *Hall*, 51 F.4th at 194; *Hansen v. Hansen*, 199 Neb. 462, 464 (1977) (home equity affects alimony calculation).

Respondents seek an exception from the normal rule that equity is property in cases where someone owes the government money. This Court has rejected other carve-outs from protections guaranteed by the Bill of Rights. *See, e.g., Phillips v. Wash. Legal Found.*, 524 U.S. 156, 165 (1998) (refusing to allow states to establish a carve-out from the traditional rule, established in English common law in the 1700s and followed in other contexts, that interest follows principle); *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371–72 (2018) (rejecting separate category of "professional speech" entitled to less First Amendment protection to hold state law unconstitutional); *Application of Gault*, 387 U.S. 1, 49–50 (1967) (rejecting exception to Fifth Amendment's protection against self-incrimination).

Lastly, Respondents complain that paying just compensation for stolen equity would create a "federal common law of property rights" with "deeply unsettling effects." BIO 24. States often make this complaint. "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest."

Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 36–37 (2012). "The sky did not fall" then, and it won't fall if this Court grants review now. *See id.*

The Supremacy Clause requires state property laws to comply with federal constitutional requirements. *Rodgers*, 461 U.S. at 701. Respondents' warning against federal common law is a red herring. The Founders meant something by "private property" when they agreed that "nor shall private property be taken for public use, without just compensation." Some property interests are created by state law, while others pre-exist or transcend state law. *See, e.g.*, *Horne*, 576 U.S. at 359 (not looking to state law to decide raisins are property protected by the Takings Clause); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013) (money is protected by Takings Clause); *United States v. Nat'l Bank of Com.*, 472 U.S. 713, 727 (1985) ("[W]hether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law.").

III. THE EXCESSIVE FINES DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS AND MERITS REVIEW

Respondents claim that *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), which states that the Eighth Amendment applies only to fines payable to the government, precludes Fair's excessive fines claim. BIO 32. But that case was decided in the context of civil damages awarded by juries in disputes between private parties. Home equity taken above and beyond a tax debt is a fine imposed by, and therefore lost to, the government in

response to a public offense, even if the government ultimately transfers the money to a private party.[3]

Moreover, Respondents assert Fair only claims this is an important issue. But he also asserted that the lower court's opinion conflicts with this Court's precedent on excessive fines. Pet. 25. As demonstrated by the lower court's opinion, the Excessive Fines Clause is a topic of much confusion below and this case merits review to bring clarity to the matter. App. 34a; *see also* Amicus Brief of National Taxpayers Union at 3 (noting importance of issue and confusion of lower courts).

IV. THIS IS A STRONG VEHICLE TO DECIDE THE QUESTIONS PRESENTED

Fair's case presents this Court with an exceptional opportunity to settle the growing split among the lower courts on the Takings question and clarify the application of the Excessive Fines Clause.[4] Further, the same questions presented are raised in *Tyler v. Hennepin County*, No. 22-166, also pending on

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[3] Although *Browning-Ferris* is distinguishable, recent scholarship provides a more complete historical analysis of the original meaning of the Excessive Fines Clause. It "weighs heavily in favor of the notion that a 'fine'—regardless of recipient—is a deprivation of anything of economic value in response to a public offense." Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 343 (2014); *see also* Brief Amici Curiae of Eighth Amendment Scholars in Support of Neither Party, *Timbs v. State of Indiana*, No. 17-1091, 2018 WL 4522295, at *32 (Sept. 10, 2018).

[4] Fair's Petition properly presents the constitutional questions. *See* BIO 28 (acknowledging new arguments "do[] not present a waiver problem"); *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S.Ct. 941, 948 (2022) (answering "subsidiary question[] fairly included").

a petition for writ of certiorari. In that case, Minnesota's law allows governmental agencies to deprive property owners of all title and interest in homes worth far more than their debt. But in Minnesota, the equity is kept by the government rather than transferred to private tax-deed investors. Between the two cases, this Court is presented with the opportunity to comprehensively determine whether the Takings Clause or Excessive Fines Clause protects property owners when the government confiscates property worth far more than the debt it is owed.

CONCLUSION

The Court should grant the Petition.

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Respectfully submitted,

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