No. 22-166

In The
Supreme Court of the United States

GERALDINE TYLER, on behalf of herself and all others similarly situated,

Petitioner,

v.

HENNEPIN COUNTY, and MARK V. CHAPIN, Auditor-Treasurer, in his official capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF THE WISCONSIN REALTORS ASSOCIATION IN SUPPORT OF PETITIONER

THOMAS D. LARSON
Counsel of Record
WISCONSIN REALTORS® ASSOCIATION
4801 Forest Run Road, Suite 201
Madison, WI 53704
Telephone: (608) 241-2047
E-mail: tlarson@wra.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Takings Clause?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY WHETHER THE GOVERNMENT'S RETENTION OF SURPLUS PROCEEDS IN A TAX FORECLOSURE SALE VIOLATES THE TAKINGS CLAUSE 5

A. The Government's Retention Of Surplus Proceeds In A Tax Foreclosure Sale Is A *Per Se* Taking 6

B. State Laws Cannot Override Protections For Private Property Rights Provided By The Takings Clause 11

II. THIS COURT SHOULD GRANT CERTIORARI TO PREVENT THE CONTINUED LOSS OF HOME EQUITY AND THE RESULTING DISPROPORTIONATE IMPACT ON ELDERLY AND MINORITY HOMEOWNERS 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. United States, 364 U.S. 40 (1960).....9

Berman v. Parker, 348 U.S. 26 (1954).....14

Cedar Point Nursery v. Hassid, ___ U.S. ___, 141 S.Ct. 2063 (2021).....8, 13, 14

Dolan v. City of Tigard, 512 U.S. 374 (1994).....9

Horne v. Department of Agriculture, 576 U.S. 350 (2015).....8

Jackson v. Housel, 17 Johns 281 (N.Y. Sup. Ct. 1820).....6

Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).....9, 10

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).....4, 7, 8

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).....9

Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992).....7

Matter of Kansas CVS Pharmacy, LLC, 497 P.3d 574 (Kan. Ct. App. 2021).....12

Nelson v. City of New York, 352 U.S. 103 (1956).....4, 10, 11, 12

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).....7, 9

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998).....9, 15

TABLE OF AUTHORITIES – Continued

Page

Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).....13

Ritter v. Ross, 558 N.W.2d 909 (Wis. Ct. App. 1996).....2, 3

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).....8

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).....6, 18

Tyler v. Hennepin County, 505 F.4th 789 (2020)....*passim*

United States v. Causby, 328 U.S. 256 (1946).....8

United States v. Craft, 535 U.S. 274 (2002).....7, 13

United States v. Cress, 243 U.S. 316 (1917).....13

United States v. General Motors Corp., 323 U.S. 373 (1945).....13

United States v. Lawton, 110 U.S. 146 (1884).....4, 10

United States v. Lynah, 188 U.S. 445 (1903).....13

United States v. Taylor, 104 U.S. 216 (1881).....4, 10

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).....4, 14, 15

CONSTITUTIONS

U.S. Const. amend. V .....*passim*

U.S. Const. amend. XIV 6

TABLE OF AUTHORITIES – Continued

Page

ACTS

2021 Wis. Act 216.....3

OTHER AUTHORITIES

Emily Badget and Quoctung Bui, *The Extraordinary Wealth Created by the Pandemic Housing Market*, The New York Times (May 1, 2022), https://www.nytimes.com/2022/05/01/upshot/pandemic-housing-market-wealth.html.....17

Black's Law Dictionary (11th ed. 2019).....6, 12

Kathleen Coxwell, *How Do You Compare? Average Cash, Savings, Home Equity and Other Balances* (October 1, 2020), https://www.newretirement.com/retirement/average-household-savings-home-equity-and-other-balances/ 17

Christopher L. Foote, Kristopher Gerardi, and Paul S. Willen, *Negative Equity and Foreclosure: Theory and Evidence,* Federal Reserve Bank of Boston (June 5, 2008).....16

Michael A. Heller, *The Boundaries of Private Property*, 108 Yale L.J. 1163 (1999) 7

G. Thomas Kingsley, Robin Smith and David Price, *The Impacts of Foreclosures on Families and Communities,* The Urban Institute (May 2009) 16, 18

1 John Lewis, *A Treatise on the Law of Eminent Domain in the United States* (3d ed. 1909) 6

TABLE OF AUTHORITIES – Continued

Page

Alanna McCargo and Jung Hyun Choi, *Closing the Gaps: Building Black Wealth Through Homeownership*, Urban Institute (Dec. 2020).....17

Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885 (2000).....7

Laryssa Mykyta, *Housing Crisis and Family Well-being: Examining the Effects of Foreclosure on Families*, U.S. Census Bureau (April 30, 2015) 16

John Rau, *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat'l Consumer Law Ctr. (July 2012).....16

Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap, Brookings (December 9, 2020), https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/ 17

Wealth Accumulation and Homeownership: Evidence for Low-Income Households, U.S. Dep't of Hous. and Urb. Dev. (Dec. 2004) 2

Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics, Pew Research Center (July 26, 2011) 16

INTERESTS OF *AMICUS CURIAE*[1]

The Wisconsin REALTORS® Association ("WRA") is a non-profit, professional trade association of member REALTORS® and affiliate members in the State of Wisconsin. The WRA membership consists of approximately 18,500 real estate agents, brokers, developers, and other real estate professionals throughout Wisconsin. The WRA represents its members before the Wisconsin Legislature, state regulatory agencies, and federal, state and local courts on a wide range of issues to promote the interests of the real estate industry and property owners throughout Wisconsin, including questions pertaining to the authority of governmental entities to follow fair and just property tax foreclosure practices. As the State's largest real estate association, the WRA has a direct and active interest in protecting the constitutional rights of property owners, including the Fifth Amendment rights of property owners like Petitioner.

In this brief, the WRA offers an additional viewpoint on the error committed by the Eighth Circuit United States Court of Appeals in *Tyler v. Hennepin County*, 505 F.4th 789 (2020). The Eighth Circuit

---

[1] No counsel for a party authorized this brief in whole or in part, and no such counsel of party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to this preparation or submission.

Counsel of record for all parties received timely notice of *amicus curiae*'s intention to file this brief pursuant to Supreme Court Rule 37.2(a). The parties have consented to the filing of this brief.

wrongly concluded that homeowners are not entitled to just compensation, as provided under the Takings Clause of the Fifth Amendment to the United States Constitution, when local governments keep the net proceeds in a property tax foreclosure sale.

The WRA and its members have an active interest in protecting the equity that people have in their homes. The home is often the biggest investment in one's life. Homeownership is commonly regarded as the most common way families can build generational wealth, especially for lower-income families and minorities. *See Wealth Accumulation and Homeownership: Evidence for Low-Income Households*, U.S. Dep't of Hous. and Urb. Dev. at 5 (Dec. 2004). Foreclosures resulting from the non-payment of debt generally result from a major life tragedy such as loss of a job, severe illness, or death of a family member. The loss of equity in a home after a foreclosure magnifies the financial hardship of the homeowner and can have a multi-generational impact on the financial wellbeing of affected families.

While *Tyler v. Hennepin County* arises out of Minnesota, Wisconsin homeowners are subject to a similar court ruling in *Ritter v. Ross*, 558 N.W.2d 909 (Wis. Ct. App. 1996). In *Ritter*, the property owners lost property with a fair market value of $37,835.57 because they owed $84.43 in back taxes. *Id.* at 909. The county seized the property, sold it at auction for $17,345 and kept all the profits – a $17,260.07 windfall for the county. *Id.* at 912. In rejecting the property owners' takings claim and upholding the county's retention of

the sales proceeds, the Wisconsin court declared that "when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements." *Id.* at. 912-13.

Although the recent enactment of 2021 Wis. Act 216 has stopped the ability of municipalities to keep any surplus proceeds after a foreclosure, Wisconsin property owners remain subject to the determination by Wisconsin courts and lower federal courts that such action by municipalities is not an unconstitutional taking. The WRA respectfully submits its views on this issue and asks the Court to clarify whether such unjust foreclosure practices violate the Takings Clause.

SUMMARY OF ARGUMENT

In this case, the Eighth Circuit United States Court of Appeals held that property owners are not entitled to just compensation, as provided under the Takings Clause of Fifth Amendment to the United States Constitution, when local governments keep the surplus proceeds in a property tax foreclosure sale. *Tyler v. Hennepin County*, 26 F.4th 789 (2022). In making this determination, the Eighth Circuit concluded that property owners in Minnesota do not have a property interest in the surplus equity after the foreclosure sale because the Minnesota statutory foreclosure scheme does not expressly provide property owners with such

an interest. *Id.* at 792. Moreover, the Court, citing *Nelson v. City of New York*, 352 U.S. 103 (1956), declared that after title to property passes to the government after a foreclosure sale, the government does not violate the Takings Clause by keeping the surplus proceeds so long as the property owner was provided with adequate notice and an opportunity to retrieve the surplus proceeds. *See id*. at 794.

The Eighth Circuit's decision is inconsistent with the Court's longstanding takings jurisprudence recognizing a categorical or *per se* taking when the government takes physical possession of land, money, or other forms of property without providing just compensation. *See*, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982) ("[t]he historical rule that a permanent physical occupation of another's property is a taking has more than tradition to comment it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests.") In cases involving the sale of property to satisfy a tax debt, the Court has determined the former owner of the property to be entitled to the surplus proceeds. *See*, *e.g*., *United States v. Taylor*, 104 U.S. 216 (1881); *United States v. Lawton*, 110 U.S. 146 (1884).

Moreover, state foreclosure laws cannot override fundamental, fee simple interests in property protected by the Takings Clause. When state law does authorize government to keep the property of private individuals, the Court has determined such laws to be conflict with the Takings Clause. *See*, *e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)

(States cannot confiscate private property by "sidestep[ping] the Takings Clause.").

Finally, homeowners with equity in their homes don't intentionally lose their homes through foreclosure. Allowing local governments to keep the equity in people's homes has significant, long-term impacts to generational wealth, the health and wellbeing of children, the financial security of families across the country. Moreover, minority homeowners and older homeowners are generally most impacted by such foreclosure practices because home equity makes up a larger percentage of their net worth.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY WHETHER THE GOVERNMENT'S RETENTION OF SURPLUS PROCEEDS IN A TAX FORECLOSURE SALE VIOLATES THE TAKINGS CLAUSE.

The Eighth Circuit Federal Court of Appeals asserts that a property owner has no constitutional right to the surplus equity in a tax foreclosure sale, as provided by the Takings Clause. *Tyler*, 26 F.4th at 793-94. Specifically, the court maintains that "once title passes to the State under a process in which the owner first receives adequate notice and opportunity to take action to recover the surplus, the governmental unit does not offend the Takings Clause by retaining surplus equity from a sale." *Id.* at 794.

The Eight Circuit's ruling is inconsistent with the long history of United States Supreme Court cases recognizing a categorical or *per se* taking when the government takes physical possession of property.

A. The Government's Retention Of Surplus Proceeds In A Tax Foreclosure Sale Is A *Per Se* Taking.

The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." The plain language of the Takings Clause "requires the payment of compensation whenever the government acquires private property for a public purpose." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002).

"Property" is defined broadly as "[t]hat which is peculiar or proper to any person; that which belongs exclusively to one." Black's Law Dictionary (11th ed. 2019). More specifically, property has been regarded as "the highest right a man can have to anything; being used for that right which one ha[s] to lands or tenements, goods or chattels, which no way depends on another man's courtesy." *Jackson v. Housel*, 17 Johns 281, 283 (N.Y. Sup. Ct. 1820). Early legal scholars defined property as "certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition." 1 John Lewis, *A Treatise*

on the Law of Eminent Domain in the United States 52 (3d ed. 1909) (footnote omitted).

The rights associated with the ownership of property are often likened to a "bundle of sticks." *See United States v. Craft*, 535 U.S. 274, 278 (2002); *see also* Michael A. Heller, *The Boundaries of Private Property*, 108 Yale L.J. 1163, 1191 n. 146 (1999) (tracing the use of the "bundle of rights" theory to the late 1800s); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 899 (2000) (explaining that property is often conceived to be a "bundle of rights"). Each of the sticks in the bundle is associated with a different right of ownership, and individual sticks in the bundle have been considered "property" for purposes of the Takings Clause. *See*, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) (holding that abrogation of the right to exclude others from the roof of an apartment building was a taking).

In cases where the government physically acquires an interest in private property for a public purpose, this Court has recognized such government action to constitute a categorical or *per se* taking requiring the payment of just compensation without consideration given to other facts. *See Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1015 (1992); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (declaring a state-imposed easement across private property to be a 'permanent physical occupation' requiring compensation). The government's physical possession of private property is a *per se*

taking because "'[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests,' depriving the owner of . . . 'the rights to possess, use and dispose of' the property [and] [t]hat reasoning . . . is equally applicable to a physical appropriation of personal property." *Horne v. Department of Agriculture*, 576 U.S. 350, 360 (2015) (citing *Loretto*, 458 U.S. at 435).

Moreover, the government's physical possession of an interest in property results in a *per se* taking regardless of whether the property is real property or personal property. *See Horne*, 576 U.S. at 357 (citations omitted). As the Court noted in *Horne*, "[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Id.* at 358. In fact, the Court has recognized a categorical duty to compensate property owners for a wide variety of property and property interests. For example, in *Loretto*, 458 U.S. at 435, the Court found a *per se* taking when the government appropriates part of a rooftop to provide cable TV access for apartment tenants. *See also United States v. Causby*, 328 U.S. 256 (1946) (finding a *per se* taking when government planes use private airspace to approach a government airport); *Cedar Point Nursery v. Hassid*, ___ U.S. ___, 141 S.Ct. 2063, 2074-75 (2021) (finding that a California regulation giving labor organizers a right to enter onto agricultural land to solicit union support from agricultural workers to be a *per se* taking); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-03 (1984) (extending

the definition of property for purposes of the Fifth Amendment to trade secrets).

Financial interests in property in the form of liens, mortgages, and interest have been determined to be property protected by the Takings Clause. *See Armstrong v. United States*, 364 U.S. 40, 48 (1960) (finding that the taking of mechanic's liens on materials by the federal government was a violation of the Takings Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935) (finding that the rights of owners in property secured by a mortgage is protected by the Takings Clause); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) (the interest earned in Interest on Lawyer Trust Accounts (IOLTA) is the private property of the owner of the principal).

Furthermore, in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013), the Court recognized that government exactions involving money are afforded the same takings protections as exactions involving land. *Id.* at 612. In *Koontz*, the Court reviewed a Florida Supreme Court decision, which concluded that the *Nollan/Dolan* exaction rule did not apply "because the subject of the exaction issue was money rather than a more tangible interest in real property." *Id.*; *see Dolan v. City of Tigard*, 512 U.S. 374 (1994). In reviewing the Florida court's decision, this Court explained that, "if we accepted this argument it would be easy for land-use permitting officials to evade the limitation of *Nollan* and *Dolan*" by "simply giv[ing] the owner a choice of either surrendering an easement or making a payment equal to the easement's value."

Id. As a result, the Court held that the government's demand for property from a permit applicant must satisfy the same takings standards regardless of whether the exaction was for land or money. *Id.* at 619.

In cases involving the sale of property to satisfy a tax debt, the Court has determined the former owner of the property to be entitled to the surplus proceeds. For example, in *United States v. Taylor*, 104 U.S. 216 (1881), the Court examined a federal law that permitted the federal government to sell property to collect delinquent federal tax debts. Although the law did not expressly provide for the former owner to receive the surplus, the Court concluded that the former owner of the proceeds was entitled to receive the surplus proceeds and claims for such proceeds were not barred by the statute of limitations. *Id.* at 221-22.

In *United States v. Lawton*, 110 U.S. 146 (1884), the Court, in reviewing the same federal law at issue in *Taylor*, concluded that a debtor was entitled to the surplus proceeds in the sale of the debtor's property by the federal government to satisfy a tax delinquency. *Id.* at 149-50. In doing so, the Court held "[t]o withhold the surplus from the owner would be to violate the fifth amendment of the constitution, and . . . take his property for public use without compensation." *Id.* at 150.

In this case, the Eighth Circuit Court relied on *Nelson v. City of New York*, 352 U.S. 103 (1956), in rejecting Tyler's claim that the Takings Clause protects her ownership in the surplus proceeds. *Tyler*, 26 F.4th at 793-94. However, the takings claim in *Nelson* was

addressed by the Court in dicta after denying the property owner's principal arguments related to due process and equal protection claims. *Nelson*, 352 U.S. at 109-10. The Court reasoned that the takings argument failed because the city's ordinance provided the property owner with sufficient opportunity to claim title to the surplus proceeds. *Id*.

In relying on the dicta in *Nelson* without addressing the extensive body of the Court's takings jurisprudence relating to the physical confiscation of private property, the Eighth Circuit's holding will create additional confusion as to whether surplus proceeds in a tax foreclosure case is property of the former owner protected by the Takings Clause.

B. State Laws Cannot Override Protections For Private Property Rights Provided By The Takings Clause.

The Eighth Circuit, again relying on *Nelson v. City of New York*, rejected Tyler's taking claim on the basis that Minnesota's statutory property tax foreclosure scheme does not provide the property owner a right to the surplus proceeds after the foreclosure sale. *Tyler*, 26 F.4th at 793-94. In *Nelson*, the Court rejected the takings claim on the basis that the City of New York's code authorized the City to retain the surplus proceeds after the foreclosure sale. 352 U.S. at 109-10. In doing so, the Court explained, "[w]hat the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely

action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale." *Id*. at 110. The Court held that "nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings." *Id.*

Similarly, the Eighth Circuit observed that the Minnesota statutes expressly provide for how the net proceeds are to be distributed and identifies only the various local governments within the jurisdiction of the affected property to be recipients of the proceeds. *Tyler*, 26 F.4th at 793. The court further explained that even if "Tyler had a property interest in surplus equity under Minnesota common law as of 1884, she has no such property interest under Minnesota law today." *Id.* at 793

Fee simple ownership of land is defined as "[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs." Black's Law Dictionary (11th ed. 2019). A person "may own land in fee simple even if the land is 'encumbered' by a mortgage, a restrictive covenant, or lease, for example." *Matter of Kansas CVS Pharmacy, LLC*, 497 P.3d 574 (Kan. Ct. App. 2021). Unpaid property taxes are an encumbrance against the property, but they don't create an ownership interest. *See* Black's Law Dictionary (11th ed. 2019) (defining "encumbrance" to include accrued and unpaid property taxes).

Since the earliest days of American jurisprudence, the Court has treated property owned in fee simple as the ultimate form of property deserving protection from the Fifth Amendment's Taking Clause. *See*, *e.g.*, *Pumpelly v. Green Bay Co*., 80 U.S. 166 (1871) (finding a taking after a state dam flooded a parcel of land); *United States v. Lynah*, 188 U.S. 445 (1903) (finding a taking after a river flooded a cotton field); *United States v. Cress*, 243 U.S. 316 (1917) (finding a taking after a dam and lock system flooded a parcel of land). Fee simple is the most complete form of ownership because the owner possesses all rights in the land. *See United States v. General Motors Corp*., 323 U.S. 373, 378 (1945). "When [the government] takes the property, that is, the fee, . . . whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken. . . ." *Id*. at 382.

While courts often look to state law in determining the scope of property and property rights protected by the Takings Clause, state law cannot disregard the protections afforded to property rights under the Constitution. *See Cedar Point Nursery*, ___ U.S. ___, 141 S.Ct. 2063 at 2076; *see*, *e.g.*, *Craft*, 535 U.S. at 288 (a tax lien is considered property under Michigan law). As the Court observed in *Cedar Point Nursery*:

> [T]he government can commit a physical taking either by appropriating property through a condemnation proceeding or simply by 'enter[ing] into physical possession of property without authority of a court order.' In the latter situation, the government's intrusion does

> not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. Yet we recognize a physical taking all the same. Any other result would allow the government to appropriate private property without just compensation so long as it avoids formal condemnation. We have never tolerated that outcome.

141 S.Ct. at 2076 (citations omitted). When the government takes the fee simple interest in property by eminent domain, tax foreclosure sale, or other lawful means established by federal law, state law, or local ordinance for a public purpose, the Takings Clause requires the payment of just compensation. *See*, *e.g.*, *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

In cases where state law has authorized government to keep money of private individuals, the Court has determined the laws to conflict with the Takings Clause. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Court held that a Florida statute allowing the circuit court to keep the interest earned on private funds deposited with the court violated the Takings Clause. *Id.* at 164. The Court reasoned that the funds were private property when deposited into the account, and thus any interest on those funds was also private property. *Id.* at 162-63. "A State, by *ipse dixit*, may not transform private property into public property without compensation" by passing legislation that transfers ownership of private property to the government. *Id.* at 164. States cannot

confiscate private property by "sidestep[ping] the Takings Clause." *Id*. at 163-64.

In *Phillips*, this Court reviewed a Texas law requiring interest generated from client funds deposited by attorneys into IOLTA trust accounts to be used to finance legal services for low-income populations. 524 U.S. 156 (1998). The Court, citing *Webb's*, emphasized that state law does not override the protections afforded to property interests under the Takings Clause. *See id*. at 167. The Court concluded that the interest generated by the funds deposited in the IOLTA accounts "is 'private property' of the owner of the principal." *Id*. at 172.

The Court should grant the petition to clarify that, while state law has broad latitude in defining property interests, state law cannot override fundamental, fee simple rights in property protected by the Takings Clause.

II. THIS COURT SHOULD GRANT CERTIORARI TO PREVENT THE CONTINUED LOSS OF HOME EQUITY AND THE RESULTING DISPROPORTIONATE IMPACT ON ELDERLY AND MINORITY HOMEOWNERS.

Homeowners with equity in their homes do not intentionally lose their homes through foreclosure. It makes no economic sense to do so. If a homeowner has equity in their home, "they will always prefer to sell their homes rather than default . . . so they can pay off

their outstanding [debts] with the proceeds [from] the sales." *See* Christopher L. Foote, Kristopher Gerardi, and Paul S. Willen, *Negative Equity and Foreclosure: Theory and Evidence*, Federal Reserve Bank of Boston, at 3 (June 5, 2008).

Home foreclosure is a devastating experience for individuals and families. Foreclosures generally occur due to a significant, and unexpected tragedy in life such as illness, job loss, divorce, or an accident that results in a major change to a family's financial situation. G. Thomas Kingsley, Robin Smith and David Price, *The Impacts of Foreclosures on Families and Communities*, The Urban Institute, at 6 (May 2009). Older homeowners can be even more vulnerable to foreclosure due to a diminished capacity to make financial decisions of pay bills on time. *See* John Rau, *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat'l Consumer Law Ctr. at 5 (July 2012). Home foreclosures result in substantial financial loss and economic hardship, cause emotional distress and harm, displace families, and create disruptions in school for children. Laryssa Mykyta, *Housing Crisis and Family Well-being: Examining the Effects of Foreclosure on Families*, U.S. Census Bureau, at 1-4 (April 30, 2015).

The home is often the largest financial asset for most families in the United States. *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, Pew Research Center 15 (July 26, 2011). Housing represents approximately 50 to 70 percent of the total

wealth held by most Americans.[2] Due to the rapid increase in home values over the last several years, home equity has grown by over $6 trillion since 2020.[3]

While the loss of home equity can have a significant impact on the overall net worth for any affected homeowner, the financial impact tends to be bigger for elderly homeowners and minority homeowners. For older homeowners, home equity makes up the majority of their net worth.[4] For black and Hispanic homeowners, the equity that accrues through homeownership makes up roughly 60 percent and 58 percent respectively of the owners' overall net worth, compared to 43 percent for white homeowners. *See* Alanna McCargo and Jung Hyun Choi, *Closing the Gaps: Building Black Wealth Through Homeownership*, Urban Institute, at 2-3 (Dec. 2020).

In addition to decreasing the overall net wealth of homeowners, the loss of home equity through a

---

[2] *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap*, Brookings *(December 9, 2020)*, https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/.

[3] Emily Badget and Quoctung Bui, *The Extraordinary Wealth Created by the Pandemic Housing Market*, The New York Times (May 1, 2022), https://www.nytimes.com/2022/05/01/upshot/pandemic-housing-market-wealth.html.

[4] Kathleen Coxwell, *How Do You Compare? Average Cash, Savings, Home Equity and Other Balances* (October 1, 2020) (totaling 72 percent of the overall net worth those aged 70 to 74 and 75 percent for those 75 and older), https://www.newretirement.retirement/average-household-savings-home-equity-and-other-balances/.

foreclosure can make finding new housing opportunities more challenging. Homeowners who go through foreclosure often experience significant damage to their credit rating, making it difficult to qualify for financing to purchase a new home or find a landlord willing to rent to them. *The Impacts of Foreclosures*, at 9. The loss of home equity exacerbates the problem of finding new housing because most affected homeowners will not have the financial means to make down payments or security deposits. In some cases, the loss of home equity prevents the owner from making a financial recovery and from becoming a homeowner again.

The Court should grant the petition to restore the concepts of 'fairness and justice' to the foreclosure process which serve as the foundation of the Takings Clause by prohibiting local governments from keeping the net proceeds in a property tax foreclosure sale. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 344.

CONCLUSION

For the reasons stated above, and those described by the Petitioner, we respectfully request that this Court grant the petition.

DATED: September 21, 2022

Respectfully submitted,

THOMAS D. LARSON
Counsel of Record
WISCONSIN REALTORS® ASSOCIATION
4801 Forest Run Road, Suite 201
Madison, WI 53704
Telephone: (608) 241-2047
E-mail: tlarson@wra.org