No. 22-166

In The
Supreme Court of the United States

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

Petitioner,

vs.

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

RESPONDENTS' RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Takings Clause require local government to pay a former property owner for any "surplus equity" in real estate that might have existed before the property forfeited for the nonpayment of *in rem* property taxes, even when the property owner had many opportunities to protect their own property interest during the collection procedure but chose not to do so?

Is Minnesota's property tax collection scheme, in which property forfeits as an enforcement mechanism of last resort, subject to the Excessive Fines Clause?

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INTRODUCTION

This case concerns Petitioner's complaint that, after she failed to pay her property taxes for so many years that she forfeited "absolute title" to the state, Respondent Hennepin County resold the property and did not disburse any of the proceeds to her. Minnesota, like many other states, provides ample opportunity for property owners to protect their interests before a parcel of real estate forfeits—the enforcement measure of last resort. Upon forfeiture, the state takes "absolute title" and all liens are extinguished. Minnesota has raised revenue through the taxation of real estate—and enforced the same through sale of the land—since it was a territory. Nonetheless, Petitioner says that although the state simply sold its own land, she alone is entitled to all of the surplus proceeds from the sale, notwithstanding the years of notices she received and the many opportunities she had to protect her property interest before final forfeiture.

The U.S. Court of Appeals for the Eighth Circuit determined that Petitioner's Takings and Excessive Fines Clause challenges fail as a matter of law. This decision is in accord with Minnesota property law—which governs the question of whether Petitioner had a property interest—and with this Court's holding in *Nelson v. City of New York*, 352 U.S. 103 (1956). No circuit split exists because the property rights that exist following the forfeiture of real estate are inherently questions of state law. No significant issue exists that needs to be addressed by this Court at this time because states are constantly tweaking their collection

procedures in alignment with policy preferences. And, finally, the multitude of state-specific approaches taken to property tax collection around the country caution against interference and refute Petitioner's assertion that the approach she prefers is mandated by the U.S. Constitution. This Court should deny the petition for certiorari.

STATEMENT OF THE CASE

A. Property tax forfeiture under Minnesota law

In Minnesota, property taxes attach to real estate every year by operation of law, but the collection and enforcement of each annual liability spans approximately five years. Property taxes in Minnesota are *in rem*; the county cannot collect any deficiency as a personal liability of the owner.

Property taxes first become a liability on January 2 of the "Assessment Year," when they attach as a "perpetual lien" to the land. Minn. Stat. §§ 273.01, 272.31. Those taxes are paid in two installments the following year, called the "Payable Year." Minn. Stat. § 279.01, subd. 1. The same taxes do not become delinquent until the January following the "Payable Year," when interest begins to accrue. Minn. Stat. § 279.03, subd. 1. The county auditor must commence a civil action by the following February 15 to obtain a judgment against the property. Minn. Stat. § 279.05. That judgment, if not satisfied, is sold to the state by operation of law in May

of that year. Minn. Stat. § 280.01. This constitutes the first sale. At this time, no money changes hands and the taxpayer remains the record owner of the property.

The first sale begins the redemption period, in which taxpayers may redeem their property by paying their unpaid taxes plus interest as well as all penalties and fees. Minn. Stat. § 281.41. Most redemption periods are three years. Minn. Stat. § 281.17. After the redemption period expires, "absolute title" vests in the state, Minn. Stat. § 281.23, subd. 9, although an owner may apply to repurchase the property, Minn. Stat. § 282.241. This statutory procedure ensures that Minnesota owners are given abundant notice and time to protect their property interests.

After the state takes absolute title, counties are tasked with returning forfeited properties to productive use. The county has the discretion to sell the property and return it to private ownership. Minn. Stat. § 282.01, subd. 1(a). When a forfeited property is sold, no proceeds are distributed to the former owner. Instead, they are distributed pursuant to a statutory waterfall. Minn. Stat. § 282.08.

B. Petitioner abandoned her property and forfeited "absolute title" to the State of Minnesota

In this case, Petitioner Geraldine Tyler abandoned her Minneapolis condominium in 2010. (Pet. 4-5.)[1] The condo was sold to the state by operation of law in 2012 for failure to pay the taxes. Minn. Stat. § 280.001. Final forfeiture occurred in 2015, after a three-year redemption period during which Petitioner chose not to redeem the property. Minn. Stat. § 281.23, subd. 9. Petitioner also chose not to repurchase the property.

Hennepin County sold the condo in 2016 and did not send a check to Petitioner. (App. 4a.) Instead, the County followed the applicable statute in distributing the proceeds. Petitioner now seeks the "surplus" from the government's resale of the already-forfeited property.

C. Petitioner sues to recover "surplus equity"

Petitioner filed the operative complaint in 2019. (Pet. 7.) She claimed that the County violated the federal and Minnesota Constitutions by effecting a taking without just compensation, imposing an excessive fine, depriving her of substantive due process, and unjustly enriching itself. (*Id.*) As a remedy, Petitioner sought the difference between the property's value and the tax debt. Notably, Petitioner did not allege that she was unable to pay her property taxes, that she tried to pay

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[1] For purposes of citation in this brief, "Pet." refers to the Petition for Writ of Certiorari.

them, or that she lacked adequate time or notice. Petitioner also did not allege that the consequences of forfeiture were unknown to her.

After the County removed the case to federal court, it moved to dismiss the entirety of the Complaint. (*Id.*) The district court granted the County's motion on all grounds. (App. 11a-449a.)

Petitioner appealed to the Eighth Circuit, which affirmed. The court began by noting that to have a takings claim, Petitioner must identify something in Minnesota state law that gave her a "property interest in surplus equity." (App. 6a.) The court concluded that any common law right to surplus equity in Minnesota—whether recognized in *Farnham v. Jones*, 19 N.W. 83 (Minn. 1884) or not—had been abrogated by Minnesota's legislature. (App. 7a-8a.) The court thus held that Petitioner had no interest in the surplus equity "under Minnesota law today." (*Id.*) The court also found Minnesota's statutes constitutional under *Nelson v. City of New York*, 352 U.S. 103 (1956), which the Eighth Circuit said was controlling "despite a modest factual difference" because the property owners in both cases "received adequate notice of the impending forfeiture action and enjoyed multiple chances to avoid forfeiture of the surplus." (App. 8a-9a.)

The Eighth Circuit also adopted the district court's "well-reasoned" dismissal of Petitioner's excessive fines claim. (App. 9a-10a.) The district court had held that the County's retention of surplus was not an excessive fine, because it found that Minnesota's tax

forfeiture statutes are not punitive and thus do not impose an improper "fine" under the Excessive Fines Clause. (App. 41a-44a.)

REASONS FOR DENYING THE PETITION

I. There is no relevant split between courts.

A. There is no true conflict between the Eighth Circuit's decision and other state and federal courts.

Petitioner asserts that this Court should grant certiorari to resolve a conflict it alleges exists between various state and federal courts "over whether government must pay just compensation when it takes property to collect a debt and keeps a windfall." (Pet. 18-21.) But there is no true split among courts to resolve. Most importantly, although Petitioner points to cases that arrived at different outcomes, those differences are not based on contradictory understandings of the Takings Clause, but rather on differences between the *state property laws* at issue in the cases. Moreover, no two courts have come to different holdings about whether Minnesota state property law—which must form the basis of Petitioner's takings claim—creates a constitutionally-protected interest in surplus equity. Since there is no real conflict between the Eighth Circuit's decision and the decisions of other courts, this Court should deny certiorari.

As an initial matter, to plead a takings claim, a plaintiff must show that the government "took"

property that belonged to her. *E.g.*, U.S. Const. amend. V (providing that "nor shall private property be taken for public use, without just compensation"); *United States v. Dow*, 357 U.S. 17, 20 (1958) (noting that a plaintiff could "prevail only if the 'taking' occurred while he was the owner"). A party without a cognizable interest in property cannot claim to have had that property "taken" from her. So, first, a takings plaintiff must identify the specific property right she claims was violated and the source of law giving rise to that property right. *E.g.*, *id.*; *see also Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

"Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Indeed, as this Court recently recognized, "the property rights protected by the Takings Clause are *creatures of state law*." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021) (emphasis added, cleaned up); *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."). Accordingly, when addressing takings claims, courts must look to state law to determine whether a citizen

possessed a property interest that was then "taken" from her.

This principle—that it is state law that creates property rights—undoes Petitioner's claim that a circuit split exists. This is because most of the cases Petitioner cites as evidencing a circuit split are not cases disagreeing as to the meaning of the federal Takings Clause but are, in fact, cases simply determining whether an individual state's law created a property right to what Petitioner calls "surplus equity."

Some courts have held that a state's underlying law created a property right to the surplus. For example, in *Rafaeli, LLC v. Oakland County*, the Michigan Supreme Court expressly based its decision solely on Michigan's Constitution. 952 N.W.2d 434, 458 n.65, 477 & n.116. In the pair of *Coleman* cases, the court considered whether District of Columbia law recognized an interest in equity. *Coleman through Bunn v. District of Columbia*, 70 F. Supp. 3d 58, 80 (D.D.C. 2014); *Coleman through Bunn v. District of Columbia*, No. 13-1456, 2016 WL 10721865, at *2–3 (D.D.C. June 11, 2016). Similarly, the court in *Thomas Tool Servs., Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) looked only to the New Hampshire Constitution. *Accord Polonsky v. Town of Bedford*, 238 A.3d 1102, 1112 (N.H. 2020) (ruling under New Hampshire's Constitution); *Bogie v. Town of Barnet*, 129 Vt. 46, 55 (Vt. 1970) (ruling under Vermont's Constitution).

Other courts, including the court below, concluded that the relevant state's law did not create a property

interest in surplus equity. (App. 8a ("Thus, even assuming 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.")); *Automatic Art, LLC v. Maricopa Cnty.*, No. CV 08-1484-PHX-SRB, 2010 WL 11515708, at *5–6 (D. Ariz. Mar. 18, 2010) (holding that since Arizona law did not provide for distribution of equity to a former owner, plaintiff's interest "terminated completely with the issuance of the treasurer's deed, and no deprivation of constitutional rights occurred"); *Reinmiller v. Marion Cnty., Oregon*, No. CV-05-1926-PK, 2006 WL 2987707, at *3 (D. Or. 2006) (dismissing takings claim because Oregon's statutes directed that surplus be distributed to government and did not expressly grant former owners rights to any of the surplus); *Continental Resources v. Fair*, 311 Neb. 184, 201 (Neb. 2022) (holding plaintiff did not have a right under Nebraska state law to the difference between the property's assessed value and the tax debt); *Ritter v. Ross*, 558 N.W.2d 909, 912-13 (Wis. Ct. App. 1996) (holding there was no taking because Wisconsin state statutes did not articulate an express right to the surplus). *Accord U.S. Bank v. Walworth County*, No. 21-CV-00451-SCD, 2022 WL 317728, at *5 (D. Wis. Jan. 6, 2022), *appeal pending*, 7th Cir. No. 22-1168; *City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Me. 1974).[2]

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[2] Similarly, some courts have relied on an individual state's law to hold that taxpayers had a statutory right to a surplus, and so did not reach the question of whether government's retention of surplus equity was a taking. *E.g.*, *Lake County Auditor v. Burks*,

Still other courts cited by Petitioner did not meaningfully address whether government's retention of surplus equity constituted a taking, instead focusing on matters not at issue here. For example, *Griffin v. Mixon*, 38 Miss. 424 (1860) concerned the need for taxpayers to receive sufficient notice of forfeiture. *See Riverboat Corp. of Mississippi v. Harrison Cnty. Bd. of Sup'rs*, 198 So. 3d 289 (Miss. 2016) (stating that *Griffin* addressed "whether the Legislature may enact a statute that divested a citizen of his/her property without notice for unpaid taxes"). And *Baker v. Kelley*, 11 Minn. 480 (Minn. 1866)—which Petitioner cites as a case "recogniz[ing] a takings claim when government forecloses on property to collect delinquent taxes or related debts and keeps more than it is owed" (Pet. 20)—in fact related to whether the taxpayer had sufficient opportunity to challenge the validity of a tax sale. *Baker* at 496. ("[T]he principal error complained of in this case is, that the plaintiff was denied the right to disprove any legal tax sale. That the premises in question were taken under the power of eminent domain is not pretended.").

As noted below (*see infra* § I(C)), the property tax laws of the 50 states vary widely, falling into many more categories than Petitioner's binary classification of "good" and "bad." This variety of state property tax schemes makes discerning any conflict among courts as to the meaning of the Takings Clause difficult.

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802 N.E.2d 896 (Ind. 2004); *City of Anchorage v. Thomas*, 624 P.2d 271, 273–74 (Alaska 1981).

Indeed, were there actually a problematic circuit split, this Court would have granted certiorari in *Ohio, ex rel. Feltner v. Cuyahoga County Board, et al.*, No. 20-567. There, an Ohio landowner asked this Court to review the following question: "When confiscating property to satisfy a delinquent debt, does it violate the Takings Clause for government to take property worth far more than what is owed, keeping the surplus value of that property as a windfall for the public?" Petition for a Writ of Certiorari, *Feltner*, No. 20-567, 2020 WL 6379082, at *i. The former owner cited the district court's opinion in *Tyler* as a case "demonstrat[ing] a conflict on the question presented." Reply in Support of Petition for a Writ of Certiorari, *Feltner*, No. 20-567, 2021 WL 680531, at *11. This Court declined to review that case—despite the former owner's reference to *Tyler* as part of a judicial split—and the Court should do so here as well. March 29, 2021 Order List, *available at* https://www.supremecourt.gov/orders/courtorders/032921zor_nmip.pdf (last visited Dec. 2, 2022).

B. There is no relevant conflict between the Eighth and Sixth Circuits.

Amici contend—wrongly—that the Sixth Circuit's recent decision in *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), created a circuit split with the Eighth Circuit's decision below. Brief for the Cato Institute as *Amicus Curiae* at 8. In *Hall*, the court invalidated Michigan's statutes that provided that a former owner had "no right to any of the proceeds" after a tax foreclosure. 51 F.4th at 188. In so doing, the Sixth Circuit looked at Michigan law recognizing "equitable title in every

context but this one," a principle the court said accorded with various "Anglo-American" legal authorities going back to the 12th century. *Id.* at 194-95. *Tyler*, by contrast, looked only to "*Minnesota law* to determine whether Tyler has a property interest in surplus equity." (App. 6a (emphasis added).) Since Minnesota law created no property interest in the surplus, the Eighth Circuit held, Petitioner had failed to identify a property interest that was taken from her. "Where state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking." (App. 8a.)

Indeed, *Hall* makes no mention of *Tyler*, even though the case came up at oral argument. There, one of the members of the panel observed that *Tyler*'s holding was premised on Minnesota law. Oral Argument at 41:57, *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), *available at* https://tinyurl.com/2s46dndm (last visited Dec. 2, 2022). Certainly, if *Hall* intended to contradict *Tyler*, the *Hall* opinion would have at least discussed the Eighth Circuit's holding.

C. Even if there is a split between *Tyler* and *Hall*, the split warrants percolation.

The Eighth Circuit decided *Tyler* on February 16 of this year; the Sixth Circuit decided *Hall* approximately six weeks ago, on October 13.[3] That only two

[3] Moreover, on November 10, the government defendant in *Hall* moved for rehearing or rehearing en banc of the panel's

federal circuits have ever addressed this issue, both of which have done so within the last year, further militates against this Court's review.

In cases with new or shallow splits among courts, this Court usually denies certiorari to allow courts to "percolate" on the issue presented. *See Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). There is no reason for the Court to depart from that practice here.

Moreover, denying review allows percolation among state legislatures, who in some cases have recently modified their state laws regarding the distribution of surplus equity to former owners. *See*, *e.g.*, Mich. Public Act 256 of 2020 (amending Michigan's General Property Tax Act by creating mechanism for former owners to recover surplus equity); Wis. Stat. § 75.36(2m) (amended Mar. 31, 2022) (requiring counties to send proceeds of post-judgment sale to a former owner). Indeed, Minnesota's own legislature recently considered, but did not adopt, a bill creating exactly

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opinion. (Pet. for Rehearing or Rehearing En Banc, *Hall v. Meisner, et al.*, No. 21-1700, ECF. No 84-1 (6th Cir. Nov. 10, 2022)). The Sixth Circuit could grant that motion, rehear the case, and come to a different conclusion than the original panel. The fact that the Sixth Circuit's opinion is not yet final also merits denying certiorari.

the property interest that Petitioner claims already exists. H.F. 1552, 92nd Leg. (Minn. 2021) (proposing that any balance of equity in a tax-forfeited property "must be returned to the person or entity that owned the property prior to its forfeiture"). Allowing the states to decide anew what property rights they want to grant to former owners honors our federalist system, in which the states are meant to be "laboratories of democracy." *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("My vote to deny certiorari in these cases does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue. . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

In sum, despite Petitioner's claims to the contrary, there is no relevant split in this case, and *Hall* does not conflict with the decision below. And even if *Hall* did conflict with *Tyler*, this Court should deny review so that lower courts and state legislatures can more fully consider these issues.

II. Petitioner's first Question Presented was not actually decided by the Eighth Circuit.

Petitioner describes her first Question Presented as whether "just compensation is due when government takes property to collect a debt to itself and keeps more than it is owed." (Pet. 9.) But that is not the question the Eighth Circuit answered. Rather, the court

below held only that there was no right to surplus equity under Minnesota law, and so Petitioner had not been subject to a taking. (App. 5a-10a.) Since this Court is "a court of final review and not first view," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), it should decline certiorari because the Eighth Circuit did not answer the question Petitioner presents here.

III. This case raises no "pressing national problem."

American federalism empowers state and local governments to serve as "laboratories for devising solutions to difficult legal problems." *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quotation omitted). Petitioner wishes to convince this Court to nationalize property tax collection regulation by asserting the existence of a "pressing national problem" (Pet. 29, 33), but in doing so oversimplifies a topic that presents "difficult legal problems" more appropriately left to the states.

Specifically, Petitioner claims that Minnesota is among fourteen states that "allow government or private investors to seize a windfall when collecting delinquent property taxes." (*Id*. at 29.) It's true that Minnesota does not offer a post-forfeiture opportunity for a taxpayer to collect a surplus, while other states do. Yet this black-or-white framing of state tax forfeiture statutes does not appropriately convey the opportunity taxpayers have to protect their interests, nor

does it accurately reflect the diversity of state laws related to redemption and recovery of a surplus.

In Petitioner's framing, "good" states provide a post-forfeiture right to surplus funds. Meanwhile, "bad" states, including Minnesota, provide only pre-forfeiture opportunities to preserve one's property interest.[4] Petitioner insists that it is unconstitutional that the states in the latter camp "take[] more than what [they are] owed." (*Id.* at 9, 11, 18, 19.) Petitioner asserts that only Minnesota and thirteen other states "seize a windfall when collecting delinquent property taxes."[5] (*Id.* at 29.)

Yet by this definition, many other state tax schemes are unconstitutional because they, too, can "seize a windfall," just via a different mechanism. These states provide only a limited post-forfeiture opportunity to claim a surplus, because they keep the

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[4] For example, Minnesota taxpayers not only may pay the tax during the year in which it is payable, but once it becomes delinquent, they generally have at least three years in which they can (1) redeem the property by paying outstanding taxes and fees, (2) enter into an installment contract to pay off the outstanding debt, or (3) sell their delinquent property on the open market and thereby recoup any surplus equity. *See*, *e.g.*, Minn. Stat. §§ 281.02, 279.37, subd. 2. In addition, those who fail to take advantage of these options still may apply to repurchase their property for six months after absolute title forfeits to the state. Minn. Stat. § 282.241.

[5] This number in and of itself is wrong, as Louisiana also lacks a post-forfeiture right to any surplus. La. Rev. Stat. Ann. § 47:2211 ("[A]ny amount in excess of the costs, statutory impositions, and governmental liens shall be paid to the selling political subdivision.").

surplus if the taxpayer fails to claim it by a certain deadline.[6] For example, Connecticut keeps a surplus if a delinquent taxpayer fails to file a post-forfeiture application for the surplus within 90 days of the tax sale. Conn. Gen. Stat. § 12-157(i)(2). By putting Connecticut in the "good" category and Minnesota in the "bad," Petitioner suggests that delinquent taxpayers in Connecticut are better situated than those in Minnesota. But both must take action to preserve their property, either before the forfeiture or in a limited period following the forfeiture. Petitioner articulates no reason why Connecticut's limited post-forfeiture ability to claim a surplus is constitutional, but not Minnesota's extensive pre-forfeiture opportunities to preserve one's equity.

Petitioner's preference for Connecticut's statutory scheme confounds further when comparing the total amount of time taxpayers have to recoup their equity in Minnesota and Connecticut. Once again, Minnesotans have more than three years to protect their

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[6] *See*, *e.g.*, Alaska Stat. § 29.45.480(b) (providing six months to claim surplus); Ark. Code Ann. § 26-37-205(b)(3)(C) (two years); Conn. Gen. Stat. § 12-157(i)(2) (ninety days); Haw. Cnty. Code § 19-45 (two years); Ind. Code § 6-1.1-24-6.4(d) (three years); Mich. Comp. Laws Ann. § 211.78t (two years); Miss. Code Ann. § 27-41-77 (two years); Mo. Rev. Stat. § 140.230 (ninety days); Nev. Rev. Stat. § 361.610 (one year); Okla. Stat. Ann. tit. 68, § 3131 (one year); S.C. Code Ann. § 12-51-130 (five years); S.D. Codified Laws § 10-22-27 (one year); Tex. Tax Code Ann. § 34.03 (two years); Va. Code Ann. § 58.1-3967 (two years); Wash. Rev. Code Ann. § 84.64.080(10) (three years); W. Va. Code Ann. § 11A-3-65 (two years); Wis. Stat. 75.36(2m) (five years); Wyo. Stat. Ann. § 39-13-108(d)(4) (two years).

equity; this is the redemption period that spans from the initial sale to the government until the final forfeiture. Minn. Stat. § 281.17. In Connecticut, after the initial sale of their property, delinquent taxpayers face a six-month redemption period until final forfeiture, Conn. Gen. Stat. § 12-157(f), then are granted a ninety-day window after the redemption period has closed, during which they may file an application in court for the surplus proceeds, *id.* § 12-157(i)(2). Again, Petitioner provides no principle that would render Connecticut's system constitutional, but not Minnesota's.[7]

The examples above show that Petitioner is asserting a policy preference in the guise of a constitutional claim, given how many other states are capable of "seizing a windfall" through a time-limited post-forfeiture claim period. Yet those examples represent a small portion of the many ways other states limit a former owner's ability to claim a surplus, none of which

[7] Connecticut is not alone in setting such deadlines. Other examples of states that provide the same or less time to recoup equity than Minnesota—yet escape Petitioner's scorn—include Alaska, Missouri, and Nevada. Alaska requires a redemption period of "at least one year," Alaska Stat. § 29.45.400, and a surplus claim period of six months. *Id*. § 29.45.480(b). Missouri provides for a one-year redemption period that begins upon the delinquent taxpayer's payment of the sale costs, Mo. Rev. Stat. § 140.340, and a surplus claim period that lasts either (1) three years from the date of sale (if no redemption period is triggered) or (2) ninety days following the expiration of the redemption period, whichever period is shorter. *Id*. § 140.230. In Nevada, delinquent taxpayers generally receive a two-year redemption period, Nev. Rev. Stat. § 361.570, and have one year in which to claim surplus funds. *Id*. § 361.610(4).

Petitioner challenges. For example, in Michigan and New Hampshire, the states only remit the surplus if the delinquent taxpayer involves themselves in a post-forfeiture legal proceeding. *See* Mich. Comp. Laws Ann. § 211.78t; N.H. Rev. Stat. Ann. § 80:88. New Hampshire's statute even explicitly states that "the municipality shall be deemed to have a continuing interest in said funds, and in default of valid claims made by other parties, such funds shall be decreed to be the property of the municipality." N.H. Rev. Stat. Ann. § 80:88(II)(d).

In another case, although New Mexico offers a period for former owners to collect a surplus, *see* N.M. Code R. § 3.6.7.80(B)(1), it provides no right of redemption after a property is sold for delinquent taxes. *See Cochrell v. Mitchell*, 75 P.3d 396, 400 (N.M. App. Ct. 2003) (stating that 1973 amendments to the property tax laws "eliminated the right of redemption"). Presumably some delinquent taxpayers might take issue with a policy that only allows them to make a claim for the surplus without any opportunity to redeem the real estate itself.

The list of idiosyncrasies continues. In certain Delaware counties, tax-forfeited land that is sold remains beholden to any mortgage or other lien that existed at the time of forfeiture, a law that undoubtedly influences the property's price in a tax sale and thus, whether a surplus even exists. Del. Code Ann. tit. 9, § 8704. In North Carolina, a court has discretion over whether to pay surplus funds to the former owner. *See* N.C. Gen. Stat. Ann. § 105-374(q)(6); *id*. § 1-339.71. In Texas, the state can opt to hold delinquent taxpayers

personally liable for their unpaid property taxes. Tex. Tax Code Ann. § 32.07. Minnesota, by comparison, extinguishes all liens when absolute title passes to the state, Minn. Stat. § 281.23, subd. 9, and does not hold former owners personally liable for unpaid property taxes, Minn. Stat. § 282.07.

Each of these examples illustrates why this Court should not wade into the complicated and quirky waters of tax forfeiture. As noted above, this Court has long recognized that "[p]roperty interests . . . are not created by the Constitution," but rather are creatures of state law. *E.g.*, *Roth*, 408 U.S. at 577. This Court should resist Petitioner's invitation to rewrite state laws defining property interests. Moreover, "[t]he federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 564 U.S. 211, 221 (2011) (citation omitted). No "pressing national problem" exists here that would require this Court to depart from these important principles of federalism.

IV. The Court of Appeals correctly held that Petitioner had no state law right to surplus equity.

Petitioner presents a "self-created conundrum" on which the "meaning of the Constitution should not turn." *Jones v. Flowers*, 547 U.S. 220, 248 (2006)

(Thomas, J., dissenting). "People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property." *Id.* at 234. This is not a case, as Petitioner suggests, about whether the government can take more than it is owed. This is a case about whether a taxpayer can force a local government to go beyond its role as tax collector and manage the taxpayer's affairs.

The Eighth Circuit correctly rejected Petitioner's takings claim because Minnesota state law provides no right to a post-forfeiture surplus and properly applied this Court's holding in *Nelson*. In addition, Petitioner's attempt to establish a historical right to a surplus is unavailing. This Court should deny certiorari.

A. After Petitioner failed to protect her property interest for five years, and "absolute title" forfeited to the state, Petitioner had no remaining property interest to take.

Petitioner claims that the County unconstitutionally took the difference between the tax debt and the value of the property. This claim fails because she relinquished her property interest when she failed to redeem during the three-year redemption period following the property's sale to the state. Minn. Stat. §§ 280.01, 281.17. When the redemption period expired, the state's title to the property became "absolute," so Petitioner had no interest left to take. Minn. Stat. § 281.23, subd. 9. Petitioner identifies nothing in either federal or Minnesota law that gave her an

absolute right to any surplus equity after final forfeiture. And even if such an interest ever existed, it was abrogated when the Minnesota legislature struck a different balance long ago. The sale of the property thus could not violate the Takings Clause since, under Minnesota law, Petitioner held no interest in the property after absolute title vested in the state.

As noted above, to plead a takings claim, a plaintiff must show that the government "took" property that belonged to her. *E.g.*, *Dow*, 357 U.S. at 20 (1958). As *Cedar Point Nursery* and other cases recognize, it is state law that defines the existence of a property interest. *Cedar Point Nursery*, 141 S. Ct. at 2076; *Stop the Beach Renourishment, Inc.*, 560 U.S. at 732; *Phillips*, 524 U.S. at 164; *Roth*, 408 U.S. at 577. To maintain her takings claim, Petitioner must identify something in *Minnesota's* state law that created a right to surplus equity.

No Minnesota statute creates the property interest Petitioner seeks. Absent a relevant statute, Petitioner looks for analogs in other areas of Minnesota's law, and notes that equity is treated as property in mortgage foreclosure, the execution of judgment liens, and marital dissolution actions. (Pet. 17.) This does not move the needle, though, because equity is not a distinct stick in the bundle, but merely a measure of a stick. Following the expiration of the redemption period in Minnesota, nobody but the government has an interest in the property.

In continued search of a property interest, Petitioner reaches back hundreds of years to the distraint of goods and chattel (referenced in the Magna Carta), to an 1881 "clearing up sale" in Minnesota (in *Farnham*, 19 N.W. 83), and to the collection of a direct tax to fund the Civil War (in cases such as *Martin v. Snowden*, 59 Va. 100, 148-49 (1868), *aff'd sub nom. Bennett v. Hunter*, 76 U.S. 326 (1869)). These authorities do not establish a Fifth Amendment-protected property interest in sale proceeds following the expiration of a redemption period.

Petitioner cites *Farnham* for the proposition that Minnesota recognizes a common law right to surplus equity. At issue in *Farnham* was special legislation creating a "clearing-up" sale of properties in various stages of the collection process. The 1881 "clearing up" law provided no right of redemption and was silent on the right to a surplus. 19 N.W. at 85. *Farnham* held that a single sale certificate containing too many parcels of land was invalid. *Id*. at 86. But the court opined—in *dicta*—that the "clearing up" law should be interpreted to entitle the owner to any surplus from the special sale. *Id.* at 85; *see also Taxes in Hennepin Cnty. v. Baldwin*, 65 N.W. 80, 82 (Minn. 1895) (noting that "the state waived any rights under prior sales or forfeitures, and recognized existing equities in the owners of the lands" in *Farnham's* "general clearing-up tax sale").[8]

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[8] Indeed, a subsequent "clearing-up" sale provided a redemption period instead of a right to a surplus, supporting the conclusion that an opportunity to protect one's interest is all that has been historically required. 1893 Minn. Laws, ch. 150, § 5.

Next, Petitioner cites *Baker v. Kelley* for the proposition "that any attempt to take more than the debt owed would be unconstitutional." (Pet. 13.) In fact, *Baker* had nothing to do with a surplus. At issue was a statute that created a time limit to challenge the validity of the January 1863 tax sale. 11 Minn. 480, 493-94 (Minn. 1866) (explaining that statute cannot apply to ejectment actions because the cause of action might not even accrue until after the statute has run).[9]

Petitioner relies on several cases interpreting an 1861 act of Congress to levy a direct tax to pay for the Civil War. (Pet. 14-15.) These cases turn on statutory construction and do not have the constitutional import Petitioner gives them. *See Bennett v. Hunter*, 76 U.S. 326, 330 (1869) ("The case, as this court considered it, required the consideration and determination of one point only, namely, whether the commissioners under the act could make a valid sale for taxes, notwithstanding the previous tender . . . "); *see also King v. Mullins*, 171 U.S. 404, 416 (1898) ("This court did not deem it necessary in [*Bennett*] to decide whether the United States could constitutionally take to itself the absolute title to lands merely because of the nonpayment of taxes thereon within a prescribed time, and without some proceeding equivalent to office found."). Likewise, Petitioner's reliance upon *United States v. Taylor*, 104 U.S. 216 (1881) is inapposite, since it too was

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[9] *Baker* not only is irrelevant to this case, but so is its supposed successor, *Burnquist v. Flach*, 6 N.W.2d 805, 808-09 (Minn. 1942) (interpreting statute allowing former owner to repurchase following final forfeiture).

performing statutory interpretation. 104 U.S. at 221. The same is true for *United States v. Lawton*, 110 U.S. 146 (1884), which relied upon *Taylor*. Indeed, this Court's later opinion in *Nelson* rejected the contention that *Taylor* or *Lawton* had any "constitutional overtones." 352 U.S. at 109-10.

Petitioner makes much of the fact that the County sold her condo for a sum that exceeded the tax debt. But she ignores the fact that the sale proceeds she claims arise from the *resale* of the condo, after the redemption period had expired and the County was left to do something with the property. After state law had extinguished any interest Petitioner once had, the County was tasked with returning the property to productive use and chose to sell it. Accordingly, the court below was correct to find that Petitioner's takings claim fails.

B. *Nelson* rejected a nearly identical takings claim.

Minnesota's retention of all proceeds from a sale that occurs after the redemption period expires is constitutional under *Nelson*, 352 U.S. 103 (1956). There, this Court held that government may acquire all interest in a property through an *in rem* collection proceeding, so long as the owner has the opportunity to protect her interest. In *Nelson*, the city foreclosed upon liens for unpaid water charges. *Id.* at 105-06. The owners failed to redeem or appear in the foreclosure proceeding, so judgment was entered by default. *Id.* After

obtaining title, the city resold one of the properties and retained the entirety of the sale proceeds. *Id.* at 106.

This Court held that retention of the surplus did not constitute a taking in language that was not, as Petitioner suggests, mere *dicta*. *Id.* at 110 ("We *hold* that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.") (emphasis added).

In addition, Petitioner is wrong to claim that *Nelson* does not control here because the New York law at issue provided a post-forfeiture opportunity to claim a surplus. (Pet. 8.) The Eighth Circuit correctly found the differences between Minnesota and New York's laws "immaterial," stating:

> *Nelson*'s reasoning on the Takings Clause controls this case despite a modest factual difference. It is true that New York foreclosure law allowed the plaintiffs in *Nelson* to file an action to redeem the property or to recover the surplus, while Tyler had options only to redeem the property, confess judgment, or apply to repurchase the property. But that distinction is immaterial. Like the property owners in *Nelson*, Tyler received adequate notice of the impending forfeiture action and enjoyed multiple chances to avoid forfeiture of the surplus.

(App. 8a-9a.) The Eighth Circuit properly applied *Nelson* because Petitioner's interest was relinquished

through her own inaction, with ample procedural protections.

This Court's other takings cases on which Petitioner relies take place outside of the context of tax collection and involve established property rights. *See*, *e.g.*, *Phillips*, 524 U.S. at 172 ("[I]nterest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest belongs to owner of principal, so its seizure is a taking); *Armstrong v. United States*, 364 U.S. 40 (1960) (finding that lienholders had a state-created property interest that attached before the United States took title to its contractor's ships); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (law eliminating vested rights of mortgagee is a taking). It was unnecessary for the Eighth Circuit to address these takings cases because they do not resolve the question presented.

C. Petitioner is wrong to assert that a general, federal common law property right to surplus equity exists.

With no post-forfeiture property right to a surplus under Minnesota law and no claim under *Nelson*, Petitioner next attempts to establish a "deeply rooted right" to a surplus that, if acknowledged by this Court, would create a federal common law property right. Petitioner's efforts fail; the Court should deny the Petition since (1) Petitioner mischaracterizes the "historical tradition" concerning *in rem* tax forfeiture; and

(2) overextends this Court's precedent in trying to establish this federal common law property right.

1. Forfeiture of land is a longstanding practice in the United States.

Petitioner focuses much of her analysis trying to establish a right to post-forfeiture equity under what would become a general federal common law.

First, Petitioner makes much of the Magna Carta and its protections against abusive tax collectors, but disregards that these protections addressed a different form of debt collection not analogous to the *in rem* forfeiture at issue here. The specific provision cited by Petitioner discusses the seizure of a decedent's personal property to pay the Crown for any outstanding debts. William Sharp McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 322–23 (2d ed. 1914); *see also Martin*, 59 Va. at 136 ("The forfeiture of land to the Crown does not appear to have been a means recognized and employed in England, at any period of its history, for enforcing the payment of taxes or other debts to the Crown. If it had been, we should have found such forfeitures treated of in the English law books; but we no where find them mentioned."). In addition, although Petitioner asserts that the "Magna Carta limited how much property could be taken to satisfy a debt" (Pet. 11), the provisions cited by Petitioner merely imposed a procedure for the seizure of these goods to guard against abuses. McKechnie, *supra* at 34.

Moreover, this Court "hesitate[s] to place great emphasis" on the Magna Carta and the "particulars of 13th-century English practice, particularly when the interpretation we are urged to adopt appears to conflict with the lessons of more recent history." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989).

Petitioner also relies heavily upon historical treatises, such as those by Thomas Cooley, to establish a historical right to a surplus. Yet even Cooley points to no definitive right to a surplus, explaining only that the states adopted "[v]arious methods . . . to save, if possible, something to the owner when his land is sold," not that this right originated from the common law or is absolute. Thomas M. Cooley, A Treatise on the Law of Taxation, at 343 (1876).

In contrast to Petitioner's claims, the practice of tax forfeiture in American law is longstanding and has been considered and approved by this Court, when accompanied with sufficient due process. *King v. Mullins*, 171 U.S. 404, 428 (1898) (analyzing whether "the system of taxation established by the state was, in its essential features, consistent with due process of law"); *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (when mailed notice of tax sale was returned, state must do more to satisfy due process); *see also Nelson*, 352 U.S. at 110.

2. Petitioner mischaracterizes this Court's precedent to manufacture a federal property law.

Petitioner's reliance on *Webb's* and *Phillips*—cases that do not involve tax collection—is misplaced. Neither case establishes a constitutional right to a post-forfeiture surplus.

Webb's involved a statute under which a county took as its own the interest accruing on an interpleader fund deposited in the county court. *Webb's*, 449 U.S. at 155. And in *Phillips*, the issue was also whether the interest belonged to the owner of the principal. 524 U.S. at 172.

Petitioner would like this Court to draw a generalized rule from *Webb's* and *Phillips* that traditional property rights cannot be abrogated, but the Court does not appear to have applied Petitioner's rule other than in cases involving interest. *See Webb's*, 449 U.S. at 164–65 ("We hold that under the *narrow circumstances* of this case . . . Seminole County's taking unto itself . . . the interest earned on the interpleader fund . . . was a taking. . . .") (emphasis added). Moreover, the statutes at issue in *Webb's* and *Phillips* were significantly different from Minnesota's tax forfeiture statutes. Specifically, this Court found that the statute in *Webb's* took private money with "no reasonable basis" and suggested the case might have a different result if any "police power justification" for the statute had been offered. *Id.* at 163. Here, the tax forfeiture was effected for an important reason: the collection of delinquent

taxes. Finally, these cases applied to a widely-recognized property law rule, unlike a right to a surplus, as explained above.

V. The Eighth Circuit properly rejected the Excessive Fines claim.

Petitioner and amici argue that the forfeiture in this case violates the Excessive Fines Clause. The Eighth Circuit adopted the reasoning of the district court in affirming the dismissal of Petitioner's Excessive Fines claim. (App. 9a-10a.) The district court held that Minnesota's tax forfeiture statutes do not impose a fine under the Excessive Fines Clause. In doing so, the court appropriately applied the standard established in *Austin v. United States*, 509 U.S. 602 (1993). (App. 41a.) As such, this Court need not grant review of the Excessive Fines question.

The Excessive Fines Clause applies only to "limit[] the government's power to extract payments, whether in cash or in kind, as '*punishment* for some offense.'" *Austin*, 509 U.S. at 609-10 (quotation omitted) (emphasis in original). Therefore, courts must determine whether a challenged penalty "can only be explained as serving in part to punish." *Id.* at 610. Punitive penalties are subject to the Excessive Fines Clause, while remedial penalties are not. *United States v. Bajakajian*, 524 U.S. 321, 331-32 (1998) (distinguishing that case's crime-adjacent forfeiture from other remedial *in rem* forfeitures).

In determining whether a statute is punitive or remedial, a court should consider the statute's text,

purpose, and history, as the district court recognized. (*See* App. 41a n.18 (describing the process used in *Bajakajian* and *Austin* for analyzing whether a statute was punitive).) This Court has also described this step as a "categorical approach." *United States v. Ursery*, 518 U.S. 267, 281 (1996). Many times, remedial statutes compensate the government for a loss or promote public safety. *See Bajakajian*, 524 U.S. at 329; *Austin*, 509 U.S. at 621. By contrast, punitive penalties often feature statutory language directly tied to the commission of criminal offenses. *Austin*, 509 U.S. at 619-20; *Bajakajian*, 524 U.S. at 328.

The district court correctly ruled that Minnesota's tax forfeiture statutes are "a debt-collection system whose primary purpose is plainly remedial: assisting the government in collecting past-due property taxes and compensating the government for the losses caused by the non-payment of property taxes." (App. 44a.) The Court also noted that the statutes are not punitive in purpose because they can confer a windfall on either the taxpayer or the government. (App. 42a.) Finally, the district court correctly observed that the multiple opportunities to avoid forfeiture provided by statute were evidence that their purpose was not punitive. (App. 42a.) In addition to this rationale for why the statutes are remedial, the district court also distinguished Minnesota's tax forfeiture statutes from the statutes in *Austin* and *Bajakajian*, in which the challenged forfeitures were closely connected to criminal proceedings. (App. 43a-44a.)

Petitioner takes issue with the district court's approach. The crux of Petitioner's argument is that the government's receipt of a windfall is evidence that the tax forfeiture statutes are punitive and therefore fines. (Pet. 23 ("[T]he confiscation of substantial excess property above the debt owed can only be [punitive]."") (quotation omitted), *id.* at 29 ("Minnesota's scheme strips property owners of more than needed to satisfy their debts . . . and accordingly has the effect of punishing property owners for violating a public law."). This approach, however, would improperly collapse this Court's two-step test into one step. *See Ursery*, 518 U.S. at 287 ("Because the second stage of inquiry under the Excessive Fines Clause asks whether the particular sanction in question is so large as to be 'excessive,' a preliminary-stage inquiry that focused on the disproportionality of a particular sanction would be duplicative. . . ."") (citation omitted). In fact, this Court has ruled that penalties that are facially disproportionate can still be remedial. *See*, *e.g.*, *Bajakajian*, 524 U.S. at 331 (stating that traditional *in rem* forfeitures were not considered punishment even if the value of the forfeiture exceeded the money owed); *Stockwell v. United States*, 80 U.S. 531, 546-47 (1871) (finding remedial a customs statute that called for forfeiture of goods, plus a penalty of double their value). As such, the fact that Minnesota's tax forfeiture statutes can result in "the confiscation of substantial excess property" does not render it a fine.

Petitioner also asserts that "[t]he holding in *Austin* hinged on two factors": (1) that the forfeiture statute at issue included an innocent owner defense; and (2) that the forfeitures permitted under the statute were not fixed in amount. (Pet. 23.) This analysis not only mischaracterizes *Austin*, but these assertions weigh in favor of finding Minnesota's tax forfeiture statutes remedial. While this Court considered the innocent owner defense and the lack of a fixed value in *Austin*, it also focused on several other factors distinguishable from this case. *Austin*, 509 U.S. at 621-22 ("In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose.").

Furthermore, these two factors in fact support the conclusion that Minnesota's tax forfeiture statutes are remedial. Petitioner wrongly claims that the innocent owner defense in *Austin* is analogous to Minnesota's right of redemption. First, nobody is accusing delinquent taxpayers of any crime. Moreover, unlike the innocent owner defense, which permits innocent third parties to retain their property, redemption allows property owners themselves to avoid forfeiture by undoing the civil "offense" of non-payment. By contrast, the statute in *Austin* did not and could not provide several years of opportunities to undo the crime committed. The district court correctly noted that taxpayers'

multiple opportunities to avoid forfeiture was "evidence that the purpose of the scheme is to collect taxes, rather than to punish delinquent taxpayers." (App. 42a.)

Petitioner also claims that because the value of forfeited property can vary dramatically, the statute must be punitive. However, *Austin* considered a forfeiture statute tied to commission of a criminal offense, so every application resulted in a net loss to the property owner. This is not the case with Minnesota's tax forfeiture law. The statute is equally capable of granting a windfall to delinquent taxpayers when the property value is less than the amount of taxes owed (and other liens that are exclusively liabilities of the land, for that matter).

Finally, Petitioner, for the first time, asserts that the Court's ruling conflicts with *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1639 (2017). But there are significant differences between disgorgement, the court-ordered equitable remedy found punitive in *Kokesh*, and Minnesota's tax forfeiture statutes. Tax forfeiture is Minnesota's tax collection method of last resort. In contrast, disgorgement is a penalty that the government actively pursues to "deprive the defendants of their profits" after having committed wrongdoing. *Kokesh*, 137 S.Ct. at 1643. Disgorgement is more like the forfeitures in *Austin* and *Bajakajian*, which were tied to the commission of a crime. Accordingly, *Kokesh*

provides no new basis for reevaluating the district court's ruling.[10]

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[10] Amicus Curiae National Taxpayers Union Foundation ("NTUF") presents two unique arguments about the Excessive Fines clause that this court should disregard. First, Amicus argues that "lower courts are struggling to apply the grossly disproportional standard, resulting in a circuit split." (NTUF Br. 5.) This goes beyond the scope of the district court's opinion, which held that Minnesota's tax forfeiture states do not impose a "fine" and which did not even address excessiveness or the "grossly disproportionate" standard. (App. 41a-44a.) Second, Amicus argues this Court should resolve a circuit split that exists between courts that "have limited the Excessive Fines Clause to solely apply to cases connected to criminal activity" and others that hold that "civil penalties are subject to the Excessive Fines Clause." (NTUF Br. 8.) This argument is meritless. The district court did not rule that the Excessive Fines Clause solely applies to cases connected to criminal activity, but instead distinguished the statutes here from those in *Austin* and *Bajakajian* partially because those statutes were "closely connected to criminal proceedings." (App. 44a.)

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

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Respectfully submitted,

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