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 Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

As payment for approximately $2,300 in property taxes and $12,700 in penalties, interest, and fees, Respondents Hennepin County and its treasurer (collectively "County") took nonagenarian Geraldine Tyler's Minneapolis condo, sold it for $40,000, and kept every penny. The County relies on tortuous readings of the case below and decisions by state high courts and lower federal courts to deny the deep and mature conflict that exists on the takings question presented. And while it does not deny that its forfeiture scheme took tens of thousands of dollars in excess property from Tyler, it disclaims the forfeiture as punishment, walking away from the "deterrent" aspect of the scheme it acknowledged in earlier proceedings. *See, e.g.*, App.48a.

The County's opposition misses the mark. Tyler's case is emblematic of what happens to thousands of property owners every year,[1] in part due to persistent confusion arising from dicta in *Nelson v. City of New York*, 352 U.S. 103, 110 (1956). This case is an excellent vehicle to end that confusion by deciding whether the County violated the Takings Clause by taking Tyler's equity without just compensation or imposed a fine within the meaning of the Excessive Fines Clause.

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[1] An analysis covering only half the population of nine states with laws like Minnesota's found that 7,900 *homes* were taken between 2014–2021. The report "severely understates the prevalence" of tax forfeiture because it did not consider vacant, farm, industrial, or commercial land. Angela C. Erickson, Thousands Lose Their Wealth to Home Equity Theft (Nov. 29, 2022), homeequitytheft.org/size-and-scope.

CORRECTED STATEMENT OF FACT

The County asserts for the first time and without support in the record that Tyler "abandoned" her former Minneapolis home when the County took title to it. Respondents' Response to the Petition for Writ of Certiorari ("BIO") 4. She did not. She moved into an apartment in a senior community after having a scare in her Minneapolis condo and did not timely pay subsequent property taxes. App.2a; Pet. 4–5. Moving and failing to pay property taxes is not "abandonment" of property. *See Bd. of Trustees of First Congregational Church of Austin v. Cream City Mut. Ins. Co. of Milwaukee*, 255 Minn. 347, 350 (1959) (abandonment requires "an actual relinquishment of possession accompanied by an intent to part permanently with the property in the goods").

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION DEEPENS A SPLIT AMONG THE COURTS ABOUT WHETHER GOVERNMENT EFFECTS A TAKING WHEN IT CONFISCATES MORE THAN IT IS OWED TO SATISFY A DEBT

A. The Eighth Circuit decision here directly conflicts with the Sixth Circuit

The County's opposition relies entirely on the premise that *only* state law creates property rights, and it appears to believe that the only law that matters is the modern tax-forfeiture statute at issue in this case. BIO 8 ("This principle—that it is state law that creates property rights—undoes Petitioner's claim that a circuit split exists."). The County's argument is unavailing.

It is true that the "Constitution protects rather than creates property interests," which are "determined by reference to existing rules or understandings that stem from an independent source *such as* state law." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) (emphasis added and internal quote omitted). But as the Sixth Circuit explained in *Hall v. Meisner*, 51 F.4th 185, 190 (Oct. 13, 2022), in direct conflict with the Eighth Circuit in this case, "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." *Hall* held that taking absolute title to a home worth more than the debt giving rise to the forfeiture effected a taking of the equity, also known as equitable title. *Id.* at 187. "Under Michigan law—and the law of virtually every state for the past 200 years—a creditor can divest a debtor of real property only after a public foreclosure sale, after which any surplus proceeds in excess of debt are refunded to the debtor." *Id.* Returning the "surplus compensates the debtor" for her equity. *Id.* Michigan's legislature created a "self-dealing" "exception to this rule for just a single creditor: namely, the State itself (or a county thereof) to collect property taxes." *Id.* 187–88. Taking the property owner's equitable title without compensation violated "some 300 years of decisions by English and American courts" and the federal Takings Clause. *Id.* at 188.

Minnesota law, like Michigan's, treats equity or equitable title as private property in every other context, including other types of debt collection, divorce, and bankruptcy. Pet. 17. *See also* Br. of *Amicus Curiae* The Cato Institute at 7–8; *Amicus Curiae* Br. of PioneerLegal, LLC at 9–10 (Uniform

Commercial Code, Article 9, adopted by all states, only allows creditor to take as much as it is owed); *id.* at 10–12 (Bankruptcy Code "prevent[s] senior creditors from taking a windfall" at the expense of "more junior creditors" and reserves surplus to the debtor). The County does not dispute this. But the Eighth Circuit nonetheless ruled in direct conflict with the Sixth Circuit that whether Tyler had a property right depended *only* on Minnesota's tax statutes. App.6a, 8a. Tyler argued below many of the same points that persuaded the Sixth Circuit, but the Eighth Circuit rejected them and dismissed the case for failure to state a claim. App.8a.

In support of its conclusion, *Tyler* read *Nelson* to hold that a property owner only has a property interest in equity cognizable under the Takings Clause if *state tax law* so provides. App.6a–8a (holding that under *Nelson* any common law property rights were "abrogated" by the Minnesota legislature). By contrast, the Sixth Circuit held that *Nelson* did *not* "disavow[] more than two centuries of Anglo-American property law; the case was about process, not substantive property rights." *Hall*, 51 F.4th at 195. The Sixth Circuit also properly acknowledged this Court's precedent that whether a taking occurred could not be "answered solely" by a state statute. *Id.* at 189–90 (citing *Phillips*, 524 U.S. at 164, 167, and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162–65 (1980)).

This Court should grant the Petition to resolve a direct conflict between the Eighth Circuit and Sixth Circuit involving laws that deprive thousands of homeowners of their equity each year.

B. State courts and federal district courts also split on the question

The County claims that no split between *Tyler* and state high courts or lower federal courts exists because the differing outcomes are "not based on contradictory understandings of the Takings Clause, but rather on differences between the *state property laws* at issue in the cases." BIO 6. But cases cited by Petitioner, *see* Pet. 19–20, contradict this premise. *See, e.g., Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429, 458 n.65 (2020) ("look[ing] for guidance in the decisions of the United States Supreme Court regarding surplus proceeds and the federal Takings Clause" and considering Anglo-American common law to find forfeiture statute violated state constitution); *Griffin v. Mixon*, 38 Miss. 424, 449, 452 (Miss. Err. & App. 1860) (forfeiture caused taking without just compensation because legislature lacked power to "to appropriate to itself the property of the citizen for non-payment of tax"); *Bogie v. Town of Barnet*, 129 Vt. 46, 49, 55 (1970) (after noting it would violate the federal Takings Clause, court found a taking under state Constitution). *See also* Brief of *Amici Curiae* The Buckeye Institute and The Competitive Enterprise Institute 15–19 (citing Anglo-American authorities supporting takings claim).

Indeed, even Minnesota's supreme court—while not directly answering the takings question pressed here—has noted that government lacks the power to forfeit absolute title for delinquent taxes. *See Baker v. Kelley*, 11 Minn. 480, 488, 499 (1866) (state has no power to "forfeit[] to the State" debtor's absolute title when collecting taxes); *Farnham v. Jones*, 32 Minn. 7,

12 (1884) ("the right to the surplus exists independently of such statutory provision.").

To be sure, some courts have held the Takings Clause does not protect debtors' equity if a state tax statute does not recognize it. *See* BIO 9 (citing Tyler's case, Maine and New York high courts, Wisconsin court of appeals, and a few federal district courts). Those courts rely on the same misreading of *Nelson* to reach that conclusion. Pet. 20–21. Other courts reject that interpretation of *Nelson*. *See*, *e.g.*, *Rafaeli*, 505 Mich. at 459–60; *Coleman through Bunn v. Dist. of Columbia*, 70 F.Supp.3d 58, 80 (D.D.C. 2014); *Dorce v. City of New York*, No. 19-cv-2216 (JGK), 2022 WL 2286381, at *12 (S.D.N.Y. June 24, 2022), *motion to certify appeal denied*, No. 19-cv-2216 (JGK), 2022 WL 3133063 (S.D.N.Y. July 18, 2022). The conflicting understandings of *Nelson* and resulting contradictory holdings underscore rather than obviate the need for this Court to grant review.

C. The Eighth Circuit's decision departs from this Court's takings precedent

The County disputes the relevance of decisions of this Court that found a taking of similar kinds of property interests because they occurred "outside the context of tax collection and involve established property rights." BIO 27 (citing *Phillips*, 524 U.S. at 172; *Webb's*, 449 U.S. 155; *Armstrong v. United States*, 364 U.S. 40 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935)). But that begs the question of whether the government took an established property interest from Tyler, the predicate question on which Tyler seeks certiorari.

Rather than engage Tyler's application of those cases, the County instead argues that *Jones v. Flowers*, 547 U.S. 220, 239 (2006), and *King v. Mullins*, 171 U.S. 404, 422 (1898), "considered and approved" of forfeiture that involves taking a windfall from debtors like Tyler. BIO 29. The County is wrong. Both cases raised—and their rulings were limited to—procedural due process claims, not takings claims. *Jones*, 547 U.S. at 223; *King*, 171 U.S. at 422–23 ("[O]ur duty is not to go beyond what is necessary to the decision of the particular case before us."). Moreover, the laws at issue in both cases required public auctions and a distribution of any surplus proceeds to the former owner. *See* Ark. Code Ann. § 26-37-205(b)(2)(A); Ark. Atty. Gen. Op. No. 97-239, 1997 WL 628853 at *1 (Sept. 23, 1997); *Mullins*, 171 U.S. at 418. The "forfeiture" at issue in both cases was solely of legal *title*, not of equity without compensation. *Cf. Bennett v. Hunter*, 76 U.S. 326, 335–37 (1869) (interpreting "forfeited" as meaning only loss of title upon public sale, not loss of equity).

II. THE COUNTY'S FORFEITURE SCHEME IMPOSES A FINE: AN ECONOMIC SANCTION THAT CANNOT FAIRLY BE SAID TO SERVE A SOLELY REMEDIAL PURPOSE

The County does not dispute that its forfeiture of Tyler's home delivered to it a windfall far beyond what she owed. BIO 33. An economic "sanction [imposed by government] that cannot fairly be said *solely* to serve a remedial purpose" is a punishment subject to review under the Excessive Fines Clause. *Austin v. United States*, 509 U.S. 602, 621 (1993) (internal quote omitted); *see also Timbs v. Indiana*, 139 S.Ct. 682, 690

(2019) (Clause applies to civil sanctions that are "at least partially punitive").

Nonetheless, the County says its forfeiture is not punitive because some older cases allowed other types of disproportionate *in rem* forfeitures and because Minnesota law gives owners an opportunity to avoid forfeiture. It also suggests that sales of forfeited properties sometimes yield "less than the amount of taxes owed," which the County offers as evidence of a nonpunitive purpose. The confusion represented by these arguments highlights the need for this Court to clarify the role of the Eighth Amendment in policing draconian forfeitures. *See also* Br. of National Taxpayers Union Foundation as *Amicus Curiae* at 8 (noting disagreement among circuit courts on what constitutes a fine under the Eighth Amendment).

A. None of the older *in rem* cases noted in *Bajakajian* answer the question presented here

The County asserts "this Court has ruled that penalties that are facially disproportionate can still be remedial." BIO 33. It leans on a brief discussion in *Bajakajian* of old *in rem* forfeitures, such as forfeiture of goods imported in violation of custom laws that (as Justice Kennedy's dissent noted) were not always limited to only reimbursing the government for unpaid duties. *See United States v. Bajakajian*, 524 U.S. 321, 331 (1998); *id.* at 345 (Kennedy, J., dissenting).

Tyler noted and distinguished those categories of historical cases. Pet. at 26–27. But they are ultimately irrelevant because the formalism of the era in which those cases were decided led courts to treat *in rem*

seizures as categorically different from punishment-of-persons cases. That approach is gone today and the two types of cases are now subject to the same analysis: A "modern statutory forfeiture [including an *in rem* forfeiture] is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part." *Bajakajian*, 524 U.S. at 331, n.6.

The County cannot (and does not) assert that the forfeiture of Tyler's $40,000 home is solely remedial compensation for her overdue property taxes of $2,300 (approximately $15,000 when supplemented by interest, penalties, and collection costs). The County has in this very case defended its forfeiture scheme as "a deterrent to those taxpayers considering tax delinquency." App. 48a. "Deterrence . . . has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329.

B. A forfeiture that goes beyond compensating the government for loss is punishment despite opportunities to avoid it

The County argues that confiscating a property owner's entire interest to satisfy a much smaller debt is not a punishment because Minnesota "allows property owners themselves to avoid forfeiture by undoing the civil 'offense' of non-payment" by paying the total debt within a redemption period. BIO 34.

Of course, it is rational and best for a homeowner to resolve their debt through redemption. But this ignores the reason why so many homeowners with substantial equity fail to redeem and lose everything. Many people with tax deficiencies are simply too poor to come up with a lump sum large enough to pay not

just the back taxes but all penalties, interest, and costs due, or do not possess the luck or savvy to complete a sale of the home in time to avoid the ultimate penalty. *See, e.g.*, Petition for Writ of Certiorari, *Fair v. Continental Resources*, No. 22-160 (filed Aug. 18, 2022). Moreover, "[h]omeowners most at risk are those who have fallen into default because they are incapable of handling their financial affairs, such as individuals suffering from Alzheimer's, dementia, or other cognitive disorders." John Rao, *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat'l Consumer Law Ctr. at 5 (July 2012), https://www.nclc.org/resources/the-other-foreclosure-crisis-property-tax-lien-sales/. *Accord* Br. *Amicus Curiae* of AARP and AARP Foundation at 18 ("Older homeowners are at increased risk [due to] higher incidence of disability and associated incapacity"); *Amicus Curiae* Br. of Wisconsin Realtors Association at 16 ("foreclosures generally occur due to a significant, and unexpected tragedy in life . . . that results in a major change to a family's financial situation").

C. The County's scheme is punitive even if it does not yield a windfall for the government in every case

Finally, the County asserts that its "statute is equally capable of granting a windfall to delinquent taxpayers when property value is less than the amount of taxes owed" as evidence that retaining the equity is not punishment. BIO 33. Nothing in the record indicates that both circumstances are "equally" likely, and certainly that is *not* true in Tyler's case. Moreover, given that taxes are typically a miniscule fraction of a home's value, and forfeiture extinguishes

all other liens on a property, the County's assertion is facially implausible. *See* Minn. Stat. § 280.41. Indeed, the actual data suggest the County profits substantially from forfeitures.[2] Regardless, "when an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Kokesh v. S.E.C.*, 137 S.Ct. 1635, 1644 (2017). That is exactly how the County's forfeiture regime operated here on Tyler.

CONCLUSION

The issues here are of great national importance, affecting thousands of property owners and hundreds of millions of dollars in at least 14 states. Pet. 29–33.[3] These confiscatory statutes overwhelmingly rob the poor, sick, and elderly. Br. of *Amici Curiae* David C. Wilkes, Legal Services of the Hudson Valley, and Legal Aid Society of Mid-New York 16–22 (sharing firsthand experience of legal aid organizations in New York). *See also Amicus Curiae* Br. of Howard Jarvis

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[2] Public records indicate that between 2014 and 2021, Hennepin County foreclosed on at least 326 homes worth approximately $60 million to recover $6.8 million in delinquent taxes, interest, and fees. The transactions resulted in tax-delinquent homeowners losing an average of $191,000 in equity per home. *See* Angela C. Erickson, "Minnesota," End Home Equity Theft (Nov. 29, 2022), https://homeequitytheft.org/minnesota.

[3] In addition to the 14 states identified in the Petition, a recent report found that South Dakota and Washington D.C. also permit equity forfeiture. Angela C. Erickson, Home Equity Theft: Tax Foreclosure Laws in 50 States and the District of Columbia (2022), homeequitytheft.org/loophole-states. Moreover, Alaska, Idaho, Nevada, and Rhode Island have statutes that apparently authorize government to confiscate tax delinquent property (including equity) for particular public uses, but it is unclear whether those statutes are ever used in those states. *See id.*

Taxpayers Ass'n at 4 (questions presented are even more important with aging population). This problem has festered long enough.

The Court should grant the Petition and clarify whether this practice violates the Takings Clause or imposes a fine within the meaning of the Excessive Fines Clause.

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Respectfully submitted,

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