No. 22-166

IN THE

Supreme Court of the United States

GERALDINE TYLER,

Petitioner,

v.

HENNEPIN COUNTY, MINNESOTA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE PROFESSOR RALPH D. CLIFFORD IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The *amicus* is a Professor of Law at the University of Massachusetts School of Law. He has taught Real Property Law for more than thirty years and has studied the economic impact of tax foreclosures empirically. He has written multiple articles and briefs addressing the issue of the constitutionality of the government keeping any surplus equity upon a tax foreclosure. *E.g.* Ralph D. Clifford, *Massachusetts Has a Problem—The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274 (2018); Brief for Prof. Ralph D. Clifford as *Amicus Curiae* Supporting Appellant Smith, *Town of Oxford v. Smith*, No. 2021-P-0404 (Mass. App. Ct. 2022), https://www.ma-appellatecourts.org/pdf/2021-P-0404/2021-P-0404_04_Amicus_Brief.pdf.

SUMMARY OF ARGUMENT

The financial injury being done to Ms. Tyler is large by itself as it deprives her of over half of the value of her real estate. It is extreme also for other individuals subject to tax foreclosures in states that refuse to return excess equity to the taxpayer resulting in a loss nationally of tens to hundreds of millions of dollars every year.

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[1] This brief was written exclusively by the *amicus* with the financial support of the University of Massachusetts School of Law. No counsel for a party authored any portion of this brief.

The institutional affiliation of the *amicus* is for identification only. This brief does not represent the position of the institution.

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

The Due Process Takings Clause prevents a government taxing authority from appropriating more of a defaulted taxpayer's property than is necessary to pay the debt with reasonable expenses of collection. The government must return any excess collected to the taxpayer. A state's legislature cannot substantially alter this retroactively from the time the estate in fee simple absolute is created as that would "disavow[] traditional property interests long recognized under state law." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998).

ARGUMENT

I. The Economic Impact of a Government Taxing Authority Taking a Property Owner's Equity above the Tax Debt is Large

Minnesota law, along with the law of a minority of other states, *see, e.g.* Mass. Gen. Laws ch. 60, § 53 (2022), authorizes a real estate taxing authority to keep any surplus equity—the value of the property above and beyond the tax debt with expenses—that exists in a property as part of the foreclosure process. *See* Minn. Stat. § 282.08 (2022). The legality of this appropriation is the issue in the case at bar. The scope of this injury to taxpayers is not trivial or insignificant either on the individual or cumulative level.

Individually in the case at bar, Ms. Tyler had approximately $25,000 in equity appropriated, representing 62.5% of the realized value of her $40,000 condominium. *See Tyler v. Hennepin Cnty.*, 26 F.4th 789, 790 (8th Cir. 2022) (case below). Although this is a large injury, Ms. Tyler's equity loss is probably smaller than typical. When the

Massachusetts tax deed foreclosure process was studied—effectively equivalent to the Minnesota procedures under examination in the case at bar—the average taxpayer suffered a loss of 98.38% of his or her equity. Ralph D. Clifford, *Massachusetts Has a Problem—The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274, 283 (2018). All of the taxpayers in the study lost more than half of the property's value. *Id.* Cumulatively, the amount of equity taken is similarly large. When the consequences of Massachusetts tax foreclosures were examined, an annual loss to the property owners was statistically established as $56,600,000. *Id.* at 282.

As detailed foreclosure data from Minnesota are not available, the Massachusetts data can be extrapolated to Minnesota by adjusting them based on the differing real estate values found in the two states. *See generally, Extrapolation: Types and Methods*, Vedantu, (Feb. 4, 2023), https://www.vedantu.com/maths/extrapolation. As reported in a study from 2019, Massachusetts had a median home value of $408,100 while Minnesota had a median of $239,900. Stefan Lembo Stolba, *Median Home Values by State*, Experian (Nov. 18, 2019), https://www.experian.com/blogs/ask-experian/research/median-home-values-by-state/.
Consequently, to correct for the differing value of real estate in the two states, the estimated Minnesota average loss of equity can be calculated by multiplying the ratio of home values for the two states—239,900 divided by 408,100 or 0.58785—with the Massachusetts estimate. This gives an estimation of how much the taxing authorities in

Minnesota take in excess of the tax debt owed of approximately $33,250,000 per year.

This overall loss is very significant to any Due Process Clause case. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). One of three key factors in the due process analysis is an evaluation of the significance of the private party's injury. *Id.* ("due process generally requires consideration of ... the private interest that will be affected by the official action"); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) (holding that if "the potential length or severity of the deprivation does not indicate a likelihood of serious loss ... [the government] may act without providing additional advance procedural safeguards."). In a tax foreclosure in Minnesota (and similar states), the government takes tens of millions of dollars of value every year by depriving taxpayers of a vast majority of their value. This is a "serious loss" which should be ended as being intolerable to due process.

II. When the Government Appropriates the Excess Surplus after Taking Real Property to Pay Overdue Taxes, It Commits a Violation of the Due Process Takings Clause[2]

A. The Precedents of This Court so Hold

This Court has directly visited the due process issue of a government entity keeping the excess proceeds from a tax seizure twice.[3] The first case is *United States v. Lawton*, 110 U.S. 146 (1884). In *Lawton*, the United States "purchased" land being sold for a tax deficiency for a stated value of $1,100.00 even though the taxpayer only owed $170.50 in taxes and associated costs. *See id.* at 149. The taxpayer's estate demanded the surplus which the government refused. *See id.* The holding it this

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[2] This brief does not address whether Minnesota's tax foreclosure system imposes an excessive fine other than noting that demanding large payments from citizens just because of illness or age, see *Tallage LLC v. Meaney*, 2015 WL 4207424, at *2 (Mass. Land Ct. 2015), seems to make the process fundamentally unjust.

[3] The issue was not directly presented to the Court in *Chapman v. Zobelein*, 237 U.S. 135 (1915) as the plaintiff in that case was only challenging the ultimate disposal of the property by the government, not the amount of property that had been taken. *See id.* at 139 ("this is a bill attacking the title of the purchaser who bought at the second sale"). Whatever rights the plaintiff had to the surplus property had been surrendered by his failure to use the procedures provided to him by California law. *See id.* at 137–38.

case clearly establishes that this retention was inappropriate:

> To withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and deprive him of his property without due process of law or take his property for public use without just compensation. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, and applies for the surplus money, he must receive at least that.

Id. at 150.

The issue was revisited in *Nelson v. City of New York*, 352 U.S. 103 (1956). As in *Lawton*, the government entity, this time the City of New York, took two parcels of real estate that had far more value than the amount of taxes owed. *See id.* at 105–06 (one parcel valued at $6,000 was taken for a $65.00 charge; another valued at $46,000 was taken for a $814.50 charge). The taxpayer defaulted on both seizures and was denied any of the excess proceeds obtained. *See id.* This Court upheld the government's right to keep the proceeds, but in a narrow way that did not contradict the holding in *Lawton*:

> "[W]e do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale. In *City of New York v.*

> *Chapman Docks Co.*, 149 N.Y.S.2d 679 (App. Div. 1956), an owner filed a timely answer in a foreclosure proceeding, asserting his property had a value substantially exceeding the tax due. The Appellate Division construed ... the statute to mean that upon proof of this allegation a separate sale should be directed so that the owner might receive the surplus.

Id. at 110 (footnote omitted). *Nelson* recognizes, therefore, that a taxpayer can procedurally waive a claim to the remaining equity as long as—and this is the critical requirement—such a claim can be made at some point in the proceedings. Consequently, both *Lawton* and *Nelson* stand for the proposition that any surplus property taken has to be returned to the taxpayer upon an appropriately made state-law based demand. Where there is no state-law based method for asserting the claim for the surplus equity and the taxpayer always surrenders it—as happen in Minnesota—the Due Process Takings Clause is violated.

This conclusion is reinforced by this Court's discussion in 2017 in *Nelson v. Colorado*, 581 U.S. 128 (2017). *Colorado* is not a tax foreclosure case; instead, it addresses whether a state is required to refund money collected pursuant to a criminal conviction if that conviction is later permanently overturned on appeal. *See id.* at 130. This Court used the three-part *Mathews v. Eldridge*, 424 U.S. 319 (1976), due process test to require the state to refund the full amount collected. *See Colorado*, 581

U.S. at 134. Just as in *Colorado* where this Court established that a state must return the fines, fees, and costs that proved to be improperly collected, *see id.* at 139, this Court should establish that a government taxing authority must also return the amount of property that was seized in excess of the amounts owed in real estate taxes.

B. Although State Law Helps Define the Nature of Property and Its Ownership, the Due Process Takings Clause Operates Based on the General, American Understanding of Rights

The court below appropriately recognizes that the states have a role in defining property rights. *See Tyler v. Hennepin Cnty.*, 26 F.4th 789, 792 (8th Cir. 2022) (case below). While the concept is compatible with the holdings of this Court, *see Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998), the court below's analysis fails because it did not recognize the difference between defining these property rights and redefining them. *See Webster v. Cooper*, 55 U.S. 488, 504 (1852) (noting that *Shelley's Case* had to remain effective for transactions occurring prior to the rule being abolished by the legislature). As this Court held, "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips*, 524 U.S. at 167; *Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022).

In the case at bar, it is important to recognize what was taken from Ms. Tyler. Before the foreclosure, she held a fee simple absolute title

subject to past due taxes; after it, she held nothing. It is the fee simple absolute that was taken, not just some abstract surplus as the lower court found, *see Tyler*, 26 F.4th at 792–93; indeed, focusing on a subset of rights held by a property owner is not within the normal analysis this Court has established under Taking jurisprudence. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978) ("this Court focuses ... on the nature and extent of the interference with rights in the parcel *as a whole*." (emphasis added)); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017) ("the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation."). Thus, this Court's analysis of what was taken should start with the traditional notions of what owning a "fee simple absolute" means.

The fee simple absolute ownership of real property has been recognized by our common law starting well before the founding of the United States. *See* 1 Frederick Pollock and *Frederic William Maitland, History of English Law before the Time of Edward I* 66 (2d ed. 1898) (discussing origin of fee simple in early, pre-Norman Anglo-Saxon law). Similarly, an individual's interest in owning such an estate has been acknowledged in the Constitution since the Bill of Rights was adopted. *See* U.S. Const. amend. III ("No Soldier shall ... be quartered in any house, without the consent of the Owner...."); *id.* amend. IV ("The right of the people to be secure in their ... houses" is established); *id.* amend V ("depriv[ation] of ... property [shall not occur]

without due process of law"); *id.* ("private property [shall not be taken] ...").

Along with recognizing the historic roots of the fee simple absolute, it is necessary to understand its basic conceptualization, *see, e.g.*, Restatement (Third) of Prop. § 24.2 (Am. L. Inst. 1999), and recognize how prevalent and stable this understanding has been. *Compare id. with* Restatement (First) of Prop. § 14 (Am. L. Inst. 1936). *See also* 1 *Rufford G. Patton & Carroll G. Patton, Patton on Land Titles* § 202 (2d ed. 1957) ("As to the [fee simple absolute], no amplification is necessary."). Importantly, a fee simple absolute is an estate of infinite duration. Restatement (Third) of Prop. § 24.2 ("The estate in 'fee simple absolute' is the present interest in land that is unlimited in duration."); Restatement (First) of Prop. § 14, cmt. a ("All estates in fee simple absolute ... are of potentially infinite duration"); 1 *J. Gordon Hylton, Powell on Real Property* § 13.02 (2022); *Sheldon F. Kurtz, Moynihan's Intro. to the Law of Real Property* 35 (7th ed. 2020). The only terminating event for a fee simple absolute under modern law is the estate being held by a decedent who has no heirs at law and dies intestate. *See, e.g., Hamilton v. Brown*, 161 U.S. 256, 263 (1896); *In re O'Connor's Est.*, 252 N.W. 826, 827 (Neb. 1934).

The Eighth Circuit, however, does not recognize this perpetual ownership. In its view, the State of Minnesota is free to redefine this most traditional estate in a way that removes significant value from the owner. *See Tyler*, 26 F.4th at 793. While this change as described by the Eighth Circuit

could certainly be made for newly created fee simple absolute estates, the Takings Clause prevents it from doing so retroactively for existing fee simple absolute estates.

Creating a new fee simple absolute estate is possible and occurs whenever a state conveys land to another as a fee simple absolute estate. When real property is held by the state, any existing fee simple absolute estate associated with that land would terminate by merging with the state's ultimate interest as sovereign. *See Sheldon v. La Brea Materials Co.*, 15 P.2d 1098, 1099 (Cal. 1932).

> When this [fee simple absolute] expires or is exhausted by reason of the failure of the state or the law to recognize any person or persons in whom such tenancy can be continued, then the real estate reverts to and falls back upon its original and ultimate proprietor ... the state.

In re O'Connor's Est., 252 N.W. 826, 827 (Neb. 1934). Should the state ultimately transfer title of this land to another, a new estate would be created. *Cf. id.* This new fee simple absolute could be created with the kind of modifications the Eighth Circuit discusses as this hypothetical conveyance would be a newly created fee simple absolute and the change removing any right to surplus equity would not be retroactive.

Of course, this hypothetical did not occur in the case at bar. Ms. Tyler's fee simple absolute still existed and was taken by Hennepin County.

In summary, *Phillips v. Washington Legal Found.* instructs that the source of the definition of property rights for the Takings Clause is from "traditional property interests long recognized under state law." *Phillips*, 524 U.S. at 167. This does not mean, as the Eighth Circuit held, that state law is free to redefine property rights as it chooses; instead, this Court was instructing that the traditional standards of property used over time provide the needed definitions. It is the generalized American definition of a fee simple absolute that must be used, not a version of that estate modified by the state to enable it to take property without concern of the Due Process Clause. Any other rule reduces the Due Process Takings Clause to a nullity.

CONCLUSION

The Court should reverse the dismissal of this case by the Eighth Circuit and trial court and remand it for trial.

Respectfully submitted,

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