

No. 22-166

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In the  
**Supreme Court of the United States**

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GERALDINE TYLER,

*Petitioner,*

v.

HENNEPIN COUNTY, MINNESOTA, ET AL.,

*Respondents.*

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

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**BRIEF OF AMICUS CURIAE CENTER  
FOR CONSTITUTIONAL JURISPRUDENCE  
IN SUPPORT OF PETITIONER**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including securing the right to own and use property. The Center has participated in a number of cases before this Court raising these issues including *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Murr v. State of Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 2586 (2013); *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012); and *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).

## SUMMARY OF ARGUMENT

The issue in this case is not whether the County could collect the back taxes owed by Ms. Tyler. Instead, the question is whether the County can collect more than what was owed – in this case more than double what was owed.

The confiscation of the surplus in this case has all the hallmarks of a “fine” and thus comes within the scope of the Eighth Amendment’s bar on excessive fines. The confiscated surplus is paid to the sovereign, not a private party, and is not related to any remedial purpose. This history on which the Eighth Amendment was based did not make the distinction between civil and criminal penalties that are found in modern

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<sup>1</sup> In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

law. The decision to create an exemption from the protections of the Eighth Amendment for these new penalties should be based on whether these excessive penalties are different in effect from the excessive fines at common law that sparked the need for the protection against excessive fines found in the English Bill of Rights. The confiscated surplus here does not serve a remedial purpose. It can only be a penalty falling within the scope of the Eighth Amendment.

Because the confiscation is related to the ownership of property the Court must also carefully examine whether it is a Taking within the meaning of the Fifth Amendment. The right to own and use property has a special protection in the Constitution. The founding generation rightly considered the right to own and use property as the foundation on which all of our individual liberties are based. The taking of the value of the property beyond the debt owed to the County here has to be viewed as a Taking within the meaning of the Fifth Amendment of the Constitution. The County has confiscated the value of the property to be used for the public purposes of the County. The Just Compensation requirement equates the monetary value of the property (real or personal) with the individual right to be protected. Confiscation of that value is no different than confiscation of the property itself.

## ARGUMENT

### **I. The County’s Confiscation of Property in Excess of the Amount of the Debt Is a Fine within the Meaning of the Eighth Amendment.**

The County in this case confiscated more than twice what it was owed. The question before the Court is whether this confiscation was a “fine” within the meaning of the Eighth Amendment.

This Court has noted that the Eighth Amendment’s protections against excessive fines is both fundamental and deeply rooted the history and tradition of this nation. *Timbs v. Indiana*, 139 S.Ct. 682, 689 (2019). The prohibition in the Eighth Amendment prevents the government from abusing its power to punish. *Austin v. United States*, 509 U.S. 602, 607 (1993); *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-67 (1989). In determining whether punishment is the object of the charge, the label of “civil” or “criminal” is irrelevant. *Austin*, 509 U.S. at 610; *see Toth v. United States*, No. 22-177 (Gorsuch, J., dissenting from denial of certiorari).

As framed by the Court in *Austin*, the question is whether the charge (in that case a forfeiture) was a “punishment.” *Austin*, 509 U.S. at 610. The *Austin* Court appeared to view the question in simple binary terms – was the forfeiture “remedial” or “punitive.” *Id.* But the Court noted that a sanction can serve both purposes. Thus, even if there is a partial remedial purpose, the punitive portion will place the sanction within the ambit of the Excessive Fines Clause of the Eighth Amendment. *Id.*



In this case, the state law allowing the County to confiscate the value of the property in excess of the debt owed is penal in nature. “The test of whether a law is penal ... is whether the wrong sought to be addressed is a wrong to the public or a wrong to the individual.” *Huntington v. Attrill*, 146 U.S. 657, 668 (1892). Here, the law clearly addresses a public wrong – the failure to pay taxes when due.

The next question is whether the law is “remedial” or “punitive.” This Court has recognized that a law may serve both punitive and remedial purposes. *Austin*, 509 U.S. at 610. If it is meant in part to punish it is subject to the Excessive Fines Clause of the Eighth Amendment. *Id.* (citing *United States v. Halper*, 490 U.S. 435, 448 (1989)).

Clearly, confiscation of the value in excess of the debt is not remedial. The County has been repaid all of the back taxes owed, plus interest, plus administrative expenses. Yet all that the County was owed accounted for less than forty percent of the total amount taken. Is there any way to characterize the confiscation of the other more than sixty percent of the value of the property as anything other than punitive?

If it is not punitive, then it is conversion of private property to public use. If that was the County’s purpose (or the purpose of the state law allowing the confiscation of the excess value), the law runs afoul of the Takings Clause of the Fifth Amendment.

The County may argue that its confiscation of the amount in excess of the debt owed served some other purpose. As already noted, the County cannot argue that the confiscation was remedial – the County was already paid everything it was owed. If the excess

taken was not punitive and if it was not a conversion of the value of private property to public use, then what exactly is the purpose of this law?

Whatever label the County decides to give to the purpose of the law, it must also demonstrate that this new category somehow escapes the strictures of the Eighth Amendment. *See Toth*, No. 22-177 (Gorsuch, J., dissenting from denial of certiorari) (the fundamental and deeply rooted protections of the Eighth Amendment “would mean little if the government could evade constitutional scrutiny ... by the simple expedient” of the label it chooses for the sanction).

How is this confiscation not an abuse of the government’s power to sanction for the public offense of failure to pay tax levies in a timely manner? Amicus suggests that the County cannot make this demonstration. The confiscation of more than sixty percent of the value of the property is punitive by any definition. But if the County wishes to argue that the purpose of the law is not to punish, but instead to merely convert the value of private property to public use, then it runs afoul of the Takings Clause of the Fifth Amendment as explained below.

## **II. Confiscation of Property in Excess of the Amount Owed the County Is a Taking in Violation of the Fifth Amendment.**

### **A. Individual Rights in Property Are at the Core of Individual Liberty Protected by the Constitution.**

This case involves the confiscation of the value of real property. It cannot be treated as a simple monetary fine. Ownership of property is the cornerstone of

individual liberty sought to be protected in the Constitution. One of the founding principles of this nation was the view that liberty and individual rights in property are inextricably intertwined. *Cedar Point Nursery*, 141 S.Ct. at 2071; St. George Tucker, *On the Several Forms of Government*, in VIEW OF THE CONSTITUTION AND SELECTED WRITINGS, at 41 (Liberty Fund (1999)). In 1768, the editor of the Boston Gazette wrote: “Liberty and Property are not only join’d in common discourse, but are in their own natures so nearly ally’d, that we cannot be said to possess the one without the enjoyment of the other.” Editor, Boston Gazette, Feb. 22, 1768, at 1. This widespread association of liberty and property, particularly fueled by the availability of land, grew from the background and influence of English law and philosophy.

In his 1765 Commentaries on English Law, William Blackstone explained the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the “absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution.” William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 135 (Univ. of Chicago Press 1979) (1765).

John Locke, who influenced the framers of our Constitution, taught that the right to own private property was a natural right that preceded the state’s political authority. Locke’s 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., PROPERTY RIGHTS: THE GUARDIAN OF EVERY OTHER RIGHT: A

CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (1997). “The great and chief end therefore, of Men’s uniting into Commonwealths, and putting themselves under Government, is the preservation of Property.” John Locke, TWO TREATISES OF GOVERNMENT 380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Property ownership is linked with the preservation of political liberty.

This view of property and liberty was at the root of the revolution and, later, the Constitution. As Arthur Lee of Virginia declared in his revolutionary 1775 publication, “The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.” Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in* PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775).

“Liberty and Property” became the first motto of the revolutionary movement. Ely, PROPERTY RIGHTS, *supra*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote: “Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish.” Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this

philosophy. Delegate John Rutledge of South Carolina, for instance, argued that “Property was certainly the principal object of Society.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling – property came unapologetically first: “I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety.” James Wilson, 2 COLLECTED WORKS OF JAMES WILSON ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). Also in 1790, John Adams proclaimed “Property must be secured, or liberty cannot exist.” John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

The founding generation believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: “Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges.” Noah Webster, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 58-61 (Oct. 10, 1787).

Individual rights in the ownership of private property are the “essence of constitutional liberty.” *Johnson v. United States*, 333 U.S. 10, 17 n.8 (1948). In a word, they are “fundamental.” *In re Kemmler*, 136 U.S. 436, 448 (1890). Justice Washington noted that rights that are “fundamental” are those that belong “to the citizens of all free governments.” *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). He

listed individual rights in property as one of the primary categories of fundamental rights. *Id.* Yet the Constitution did not forbid conversion of property to public use. Instead, the Fifth Amendment expressly designates “just compensation” as the remedy for government taking of property. This remedy of compensation suggests that the Fifth Amendment protects the value of the property. Even if the government only seeks to convert the property to its cash value in order to put that cash to public use, the Fifth Amendment is still violated.

**B. The Just Compensation Clause Requires that the County Pay the Owner the Amount Confiscated in Excess of the Debt.**

The Constitution recognizes the authority of government to “take” property for a public use. However, that power is limited by the requirement that the government pay just compensation. In this case, if the confiscation of the excess value of the property was not a “fine” for purposes of the Eighth Amendment, then it was a “taking” in order to put that money to a “public use” without compensation, and thus a violation of the Fifth Amendment.

As noted above, the protection of the individual rights to private property were a central concern to the founding generation. Nonetheless, the Just Compensation Clause allows government to force an owner to accept a cash payment in exchange for his property. The Constitution protects the economic value of the property.

In line with this protection of economic value, this Court has protected the rights to property by examining the impact of government action on the “value” of the property at issue. *See Murr v. Wisconsin*, 137 S.Ct. at 1943. Thus, under this Court’s view, the economic value of the property is protected

just as much as the physical metes and bounds. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

In this case, the County converted the petitioner's property to its cash value when it sold the property at a tax sale. The petitioner does not question the County's authority to collect the back taxes owed. However, when it converted the real property to cash, the County was only entitled to the sum of cash required to satisfy the tax debt.

The County argues that petitioner's property interest was extinguished when the property was sold to pay the tax debt. However, "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998). The County was entitled to payment of the back taxes – but it had no claim to the entire value of the property. As noted above, the amount owed to the County was less than forty percent of what the County took. The extra sixty percent was just a confiscation for public use. A Taking for purposes of the Fifth Amendment is accomplished regardless of whether what was taken constitutes all of the property owner's interest, or just a portion. *Brown v. Legal Found. of Washington*, 538 U.S. 216, 233 (2003). When a Taking occurs, there is a "categorical duty" to pay compensation. *Id.*

## CONCLUSION

The law at issue in this case is punitive in nature. It seeks to do more than simply provide a remedy to the County for the unpaid taxes. It goes much further and punishes the property owner by allowing the County to take the total value of the property. Whether viewed as a punitive sanction or a taking for public use, the County's action violated the Constitution.

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Respectfully submitted,

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