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 DANIEL P. ROGAN, Auditor-Treasurer, in his official capacity,

Respondents.

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

BRIEF OF THE CATO INSTITUTE, AMERICAN CIVIL LIBERTIES UNION, ACLU OF MINNESOTA, NATIONAL ASSOCIATION OF HOME BUILDERS, AND OWNERS' COUNSEL OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests the Cato Institute because when property is taken by the government, the right to just compensation is fundamental. The taking of home equity without any compensation, as occurred in this case, is incompatible with the Fifth Amendment.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Minnesota is the ACLU's Minnesota affiliate. Since its founding in 1920, the ACLU has frequently appeared before this Court in cases challenging government action for transgressing individual rights and liberties. The ACLU is devoted to defending the rights of all, but especially those, like petitioner here, who lack the political power to protect their rights through the political process.

The National Association of Home Builders

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

(NAHB) is a Washington, D.C. based trade association whose mission is to enhance and promote housing availability and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. NAHB is comprised of approximately 140,000 members consisting of home builders, remodelers, suppliers, and other professionals supporting the home building industry.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and economic interests of its members and those similarly situated.

NAHB has nearly 1,100 Minnesota members engaged in home building in the state; thus, NAHB members have a vested interest in the application of Minnesota's draconian tax law. Minnesota is helping itself to windfalls at the expense of its citizens, all under the color of state law. The law extinguishes the fundamental right to equity in one's property. This is a monumental alteration to the common understanding of property rights and a threat to Minnesota homeowners.

Owners' Counsel of America (OCA) is an invitation-only national network over two decades old of the most experienced eminent domain and property rights attorneys in the country. They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every*

Other Right: A Constitutional History of Property Rights (2d ed. 1998). OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide.

As the lawyers on the front lines of property law and property rights OCA understands well the "taking" issue that is central to this case. Simply stated, when property is taken by the government, the payment of just compensation is fundamental to the taking, a constitutional right that cannot be denied or abrogated by a mere legislative enactment.

SUMMARY OF ARGUMENT

The Fifth Amendment guarantees that no "private property [shall] be taken for public use, without just compensation." U.S. Const. amend. V. But today, some local governments assert the authority to seize all the equity in a home, after first confiscating that home and selling it to pay off *de minimis* tax bills. These seizures of equity often target poorer communities—and often the elderly within those communities—who own their homes but have no disposable income with which to pay their taxes. Unlike in most states, where the surplus proceeds from such sales are returned to the owners, these governments keep all the proceeds for themselves. The result can leave impecunious families even more destitute.

94-year-old Geraldine Tyler is just one victim among many of this unjust practice. Tyler owed $2,300 in taxes on a condominium worth around $40,000. Pet.

at 5. When she did not pay her property taxes, she accumulated almost $12,700 in fees and interest. *Id.* Hennepin County, Minnesota, seized her home, sold it for $40,000, paid off her tax debt, and then kept the $25,000 in remaining equity. *Id.* Tyler was left with nothing.

Allowing the government to profit from the seizure of private property is not only unjust—it is unconstitutional. The Fifth Amendment's protections apply not only to real property but also to intangible property interests, such as an owner's equity in her home. Since Magna Carta, English and American common law has required governments to return any surplus from property taken to pay tax debts. *See* Magna Carta Clause 26; *Hall v. Meisner*, 51 F.4th 185, 190–94 (6th Cir. 2022) (discussing the history of treating surplus home equity as the homeowner's property after a tax foreclosure). Nevertheless, today 14 states have abjured English and American common law, allowing local authorities to seize surplus equity and deposit it in government treasuries. Minnesota, at issue in this case, took legislative action to change the state's law and create a tax-debt recovery scheme that allows the government to keep any surplus from the property taken to pay off the debt. *Compare* 1881 Minn. Laws 176–77, *with* Minn. Stat. § 939 (1905).

Before this legislative change, the Minnesota Supreme Court had held that homeowners possess a right to the surplus equity of their homes, in the contexts of satisfying both unpaid tax debt and mortgage payments. *Farnham v. Jones*, 19 N.W. 83, 85 (Minn. 1884) (taxes); *Ayer v. Stewart*, 14 Minn. 97, 98 (1869) (mortgages); *Stromberg v. Lindberg*, 25 Minn. 513, 514–16 (1879) (same). But the Minnesota legislature then changed the rules, codifying a predatory tax scheme that permits the government to keep any surplus from the property taken to pay off the debt. Minn. Stat. § 280.29 (2021).

When Minnesota's legislature decreed that delinquent taxpayers' remaining equity would go to the government's treasuries rather than back to the homeowner, the state committed a legislative taking under this Court's precedents.[2]

States can define property rights and legislatures can change common-law rules, but when a state divests a common-law property right via legislation and without compensation, the state takes the property contrary to the Fifth Amendment. The Founders were wary of legislatures taking away property rights—one of the arguments for ratifying the Constitution emphasized that it would prohibit state legislatures from taking away certain property rights. George Van Cleve, *The Antifederalist's Toughest Challenge: Paper Money, Debt, Relief, and the Ratification of the Constitution*, 34 J. Early Republic 529, 534–59 (2014). Although state law (among other principles and customs) may define the contours of property,[3] legislatures cannot

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[2] The term "legislative taking" usually refers to a statute that deprives the property owner of value at the moment of the statute's passage, such as in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). That has not happened here, but the County is claiming that Tyler's surplus home equity was not her property after she failed to redeem it, by operation of a statute. Resp. to Pet. Br. at 21; Minn. Stat. § 281.23. *See also* Minn. Stat. § 280.29. Since the County is claiming it did not take her property, but rather that the operative force of the statute eliminated her property interest in the equity, *amici* believe this is best analyzed as effectively equivalent to a legislative taking.

[3] *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather,

define away property rights without just compensation. And home equity has historically been recognized as protected property. *See Hall*, 51 F.4th at 190–94.

All takings of private property for a public purpose require just compensation under the Fifth Amendment. As this Court recently recognized in *Cedar Point v. Hassid*, 141 S. Ct. 2063 (2021), a takings analysis considers whether the government has completely seized a property interest, or merely restricted it. Here, the state legislature seized all the remaining equity in Tyler's home, leaving her nothing. This is not an instance of a state defining property, but rather of a legislature unconstitutionally eliminating a property interest without just compensation. Because this taking violates the Fifth Amendment and contravenes basic property principles, this Court should reverse the Eighth Circuit's decision.

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they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."); James Madison, *Property*, in 14 *Papers of James Madison* 266–68 (William T. Hutchinson et. al., eds. 1973) (Mar. 29, 1792), https://tinyurl.com/5fj3v6x3 (distinguishing the property interest in the conscience, which comes from natural law, from "other property depending in part on positive law . . . .").

ARGUMENT

I. This Court's Precedents Show that State Redefinitions of Property Can Constitute Takings

This Court has held that it is the role of courts to constrain legislatures when they commit Fifth Amendment takings: "If, therefore, a statute . . . is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). And when a legislature changes a property interest from private to public, it can commit a compensable taking. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (plurality op.) ("If a legislature . . . declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) ("'[A] State, by *ipse dixit*, may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule . . . .") (quoting *Webb's Fabulous Pharms., Inc., v. Beckwith*, 449 U.S. 155, 164 (1980)); s*ee also Hall*, 51 F.4th at 190 ("But 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.") (holding unconstitutional a state statute allowing the government to take surplus equity after a tax lien sale).

This Court recently affirmed that courts must protect property against not only executive but also legislative action. In *Cedar Point Nursery v. Hassid*, the Court explained that it does not matter which branch of government impinged the property interest when "the government has physically taken property[.]" 141 S. Ct. at 2072. Members of this Court have similarly explained why there is no constitutional difference between a taking via legislative act and a particularized *ad hoc* administrative taking. *See*, *e.g.*, *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting). Thus, a legislature is just as capable of committing a taking as agencies or officers of an executive branch.

When a legislature defines an extant property right to no longer be private property, the legislature has committed a taking. In *Webb's*, this Court considered the property status of interest from a private trust fund operated temporarily by the county court registry, interest that the court registry had attempted to take as its own. 449 U.S. at 155. Per traditional, common-law trust rules, the interest follows the trust. Therefore, because the trust was private property, the Court held that the interest was as well. *Id.* at 162. Neither the legislature nor the court registry could recharacterize common-law private property as public property to fill its coffers. *Id.* at 164.

A few years earlier, in *Hughes v. Washington*, Justice Stewart similarly concluded that states cannot recharacterize property interests to avoid the Takings Clause, writing that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring). Although that case asked whether a state court opinion interpreting a state constitutional provision was a taking, the analysis is applicable when *any* branch of a state government strips a previously held right. *See id.* Justice Stewart urged that the test for determining if a state action takes a property interest should be whether the action created an "unpredictable change in state law." *Id.* at 297.

More recently, this Court looked at the relationship between common law and legislation in defining property rights. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). The issue in *Lucas* was whether a statute prohibiting new construction close to the tidal line on the beach "took" the Lucas family's property, since the property was left without any economic use. *Id.* at 1007. The Court emphasized that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

Justice Stevens dissented, raising concerns that the Court had cabined legislative freedom, binding legislatures to long-held common-law rules. *Id.* at 1068–69 (Stevens, J., dissenting). Referencing *Munn v. Illinois*, 94 U.S. 113, 123 (1876), Stevens argued that the majority had abandoned this Court's prior holding that legislatures could alter "the law governing the rights and uses of property." *Lucas*, 505 U.S. at 1029.

But in fact, *Munn*'s holding is not in tension with *Lucas*. First, *Munn* concerned the Due Process Clause, not the Takings Clause, which specifically applies to "private property." Further, this Court's decision in *Munn* explicitly differentiated between common-law property rights—which *cannot* be taken away without due process or just compensation—and common-law rules, which can be changed. In *Munn*, the Court examined whether a statutory limit on the prices a warehouse could charge for grain storage deprived the warehouse owners of property under the Due Process Clause. 94 U.S. at 123. The Court held that it did not, even though there was a general common-law rule that sellers could price products and services at their own discretion. *Id.* at 133–34. The Court reasoned that "[r]ights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations." *Id.* at 134. The Court further discussed the limits of property protection in common-law rules, stating that a "person has no property, no vested interest in any rule of the common law." *Id.*

The *Munn* Court thus recognized that merely modifying a common-law rule is very different from removing a "right of property . . . created by the common law." *Id.* *Munn*'s holding is limited, applying only when a rule change "establishes no new principle in the law, but only gives a new effect to an old one." *Id.* Thus, *Munn* does not apply when a "newly legislated or decreed" rule takes away a property right. *Lucas*, 505 U.S. at 1029.

In *PruneYard Shopping Center v. Robins*, Justice Marshall cited *Munn* in a concurrence positing that "[q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way." 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring). *Munn*'s principle has thus been recognized as a limited one. Viewed in context alongside this Court's other precedents, *Munn* does not permit a state legislature to deprive individuals of common-law property rights without due process or just compensation.

This overview of the Court's decisions demonstrates its commitment to protecting common-law property rights against legislative takings. Although legislatures can alter common-law rules, they cannot eliminate private property rights.

In this case, Tyler had a common-law property right in the equity of her home, established both in the "background principles" of property law stemming back as far as Magna Carta and in Minnesota common law. *See Lucas*, 505 U.S. at 1031; *Farnham*, 19 N.W. at 85. The seizure of the surplus equity in Tyler's home was a taking under *Lucas* because the entirety of the property interest—her remaining equity—was taken, leaving her nothing. *Lucas*, 505 U.S. at 1006. This was no less a complete taking than if the Minnesota legislature had turned every fee simple in the state into a life estate and transferred the future interests to the state. The government cannot seize property worth $25,000 without compensation simply because the legislature sought to effectuate that result by eliminating a common-law property right rather than exercising eminent domain or other valid state process.

Further, looking to other tests besides *Lucas*, the forced transfer here would also likely be a taking under Justice Stewart's analysis in *Hughes*. Justice Stewart's test asks whether the legislature created an "unpredictable change in state law." Minnesota did exactly that when it removed a common-law property right over the course of fifteen years via statute. Initially, in 1881, the tax-lien statute was silent regarding the surplus. Minn. Laws Ch. 135 (1881); *Farnham*, 19 N.W. at 85 (explaining that the right to surplus came from a non-statutory source). In 1884, the Minnesota Supreme Court explained that the homeowner had a right to the remaining equity after a tax lien had been satisfied and that this right "exists independently" of any statute. *Farnham*, 19 N.W. at 85.

In 1891, the statute directed that all proceeds be channeled to state tax funds, and since the statute explained what to do when the proceeds were insufficient but not when there was a surplus, this statute implied that any surplus was to be treated like normal tax proceeds. Minn. Laws Ch. 11, § 1576 (1891). In 1894, any proceeds exceeding the amount owed were distributed as normal tax monies. Minn. Laws Ch. 11, § 1617 (1894). And finally, in 1905, the statute directed that "the excess, if any, above the taxes, penalties, interest, and costs . . . be paid in like manner for the benefit of the state." Minn. Laws Ch. 11, § 939 (1905). Thus by 1905 the legislature had completely done away with the homeowner's property right in the surplus. *See id.*; *Minn. Debenture Co. v. Scott*, 106 Minn. 32, 35–36 (1908). This statutory removal (over the course of fifteen years) of a common-law right that "exist[ed] independently of such statutory provision" certainly constituted an "unpredictable change in state law" and is unconstitutional. *Farnham*, 19 N.W. at 85; *Hughes*, 389 U.S. at 296–97 (Stewart, J., concurring).

Finally, as in *Webb's*, the property here is an intangible monetary asset, which this Court has recognized as property under the Fifth Amendment. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613–14 (2013). This Court should follow its prior precedents and hold the seizure of Tyler's equity to be an unconstitutional taking of property.

II. English Common-Law Scholars and Early American Founders Believed That Legislative Takings Violated Property Rights

It is not just this Court's precedents that establish that a state legislature cannot redefine away property at will; English and American common law also establish this principle. Traditionally at English and early American common law, property was seen as a natural right and thus not subject to elimination by mere legislative will without just compensation.

John Locke averred that property is one of the common gifts given to mankind. *See* John Locke, 2 Treatise of Civil Government §§ 25–26. The foundation of property, according to Locke, is the labor one puts into obtaining or maintaining a thing outside of the state of nature. *Id.* §§ 27–30. If one invests her labors into an item to take it from the state of nature, it belongs to her. *Id.* And if she barters that first item for another, the acquired item likewise belongs to her. *Id.* § 46.

Similarly, William Blackstone explained that legislatures could not deprive individuals of their property rights. In his Commentaries, he defined property as "the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 Commentaries 134–35 (1765). The "laws of the land" clause refers to the proper course of legal proceedings—Blackstone was not leaving an opening for legislatures to abolish property rights via mere legislative act. *See* Bernard H. Siegan, *Property Rights: From Magna Carta to the Fourteenth Amendment* 31–32 (2001). Indeed, Blackstone explained that a legislature cannot eliminate a property right without paying just compensation:

> In [eminent domain] . . . the legislature alone, can, and indeed frequently does . . . compel the individual to acquiesce. But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.

Blackstone, *supra*, at 1335. If a legislature took away a property right, it had to pay for it. Blackstone would not have countenanced legislatures "abrogating" property rights at their pleasure without compensation.

In America, the Founders were also acutely concerned with legislatures removing property rights. In Madison's words, "democracies . . . have ever been found incompatible with . . . the rights of property," and legislatures must be constrained from "trampl[ing] on the rules of justice." Federalist No. 10, at 80–81 (James Madison) (Clint Rossiter ed., 1961).

The founding generation distinguished between privileges—which could be removed by legislatures—and private rights, which could not. Legislatures could create public privileges, like use of public roads and waterways, or ownership of the public treasury, and they could remove those privileges at will. Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 567–68 (2007). Legislatures could also create and remove private privileges, which could be enforced against other parties but were merely entitlements granted by the legislature. *Id.* But legislatures could not strip away private "core" rights, like the right to property, which descended from natural rights, without just compensation. *Id.* at 568–69. This principle, that legislatures cannot remove private property rights without just compensation, continued through the nineteenth century. *See Inhabitants of Medford v. Learned*, 16 Mass. (15 Tyng) 215, 217 (1819) ("[N]o legislator could have entertained the opinion, that a citizen, free of debt by the laws of the land, could be made a debtor merely by a legislative act, declaring him one."); *Newland v. Marsh*, 19 Ill. 376, 382 (1857) ("The legislative power . . . cannot directly reach the property or vested rights of the citizen, by providing for their forfeiture or transfer to another . . . ."); *Smith's Lessee v. Devecmon*, 30 Md. 473, 481 (1869) ("The Legislature has no power to pass laws impairing or divesting vested rights . . . .").

The role of legislatures in changing property interests also came up during the Articles of Confederation era regarding the issue of paper money. States were combatting post-war economic instability by passing debtor-relief plans and issuing printed money—measures that were widely considered infringements on private property rights. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 Yale J.L. & Feminism 7, 16 (1989). These paper-money emissions devalued debts and allowed debtors to pay off loans without giving creditors real value. Thomas Paine, *Dissertations on Government, the Affairs of the Bank, and Paper Money*, in *Political Writings of Thomas Paine*, at 404–08 (1869). Paper money was seen as a deprivation of property rights, and many, especially propertied individuals, were frustrated with these legislative debt-reduction policies. *See* Paine, *supra*, at 404–08; Van Cleve, *supra*, at 542–43. As William Grayson, a congressman and leading Anti-Federalist wrote, "If . . . an act against the Constitution is void, surely paper money with a tender annexed to it is void, for [is it] not an attack upon property, the security of which is made a fundamental in every State in the Union." Letter from William Grayson to James Madison, Mar. 22, 1786, in 8 *The Papers of James Madison* 508, 509 (William T. Hutchinson, et al. eds.) (1973); Van Cleve, *supra*, at 543.

Thomas Paine wrote against these legislative activities and the use of paper money, arguing that legislation eliminating property and contract rights was unlawful. Paine, *supra*, at 376–77; Van Cleve, *supra*, at 539. In Paine's view, such legislation would be an "actless act, an act that goes for nothing." Paine, *supra*, at 377.

One of the major incentives for ratifying the Constitution was the inclusion of Article I, Section 10,[4] which prohibited states from issuing paper money. Van Cleve, *supra*, at 546, 551–55. *See also* Federalist No. 80, at 475 (James Madison) (describing the Constitution's prohibition on issuing paper money).

The inclusion of Article I, Section 10 in the Constitution largely alleviated concerns with respect to property rights and paper money, and the Takings Clause was not specifically designed to address those property-rights violations. But when the Founders used the term "private property" in the Takings Clause, it stands to reason that they understood that state legislatures, which they had just prohibited from taking away creditors' property rights via Section 10, could not change the definition of property to take away other property rights. Legislatively eliminating

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[4] U.S. Const. art. I, § 10, cl. 1 "No state shall . . . emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts . . . ."

other property rights would also be an "actless act." Paine, *supra*, at 377. The fight over paper money shows the founders' vigilance against legislative attempts to devalue property rights.

Throughout American history, legislatures could not strip away property rights without just compensation. The Founders expected legislatures to pay for any property rights they took, and many people supported the Constitution because it prevented states from devaluing property rights. The Court should follow the early English and American respect for property and reject the legislative takings of home equity in Minnesota and other states via "actless acts."

III. Minnesota's Tax Lien Statute is a Legislative Taking

Minnesota, contrary to both this Court's precedents and English and American history, legislatively took Tyler's vested property interest in her surplus equity.

Minnesota's statute, Minn. Stat. § 280.29 (2021), took away the homeowner's property interest in her surplus home equity after the tax lien had been paid off. The County claims that because "no Minnesota statute create[d] the property interest [Tyler] seeks," and because a Minnesota statute abrogated any property interest, she has no property right in her remaining equity. Resp. to Pet. Br. at 21–22. In other words, the argument goes that since Minnesota did not give her a property right, she has no property right.

The County claims that Tyler's property was not taken "since, under Minnesota law, [Tyler] held no interest in the property after absolute title vested in the state." Resp. to Pet. Br. at 22. This is not a taking, the

County says, because "state law had extinguished any interest [Tyler] once had . . . ." Resp. to Pet. Br. at 25. In other words, Tyler had no property interest after the state took it. But of course, that is the very definition of a legislative taking—the transformation of "private property into public property" via "*ipse dixit*." *Webb's*, 449 U.S. at 164.

In fact Tyler *did* have a property interest in her home equity. Not only did state common law give her a property right in the surplus, *see Farnham*, 19 N.W. at 85, but the surplus equity also met many of the longstanding historical hallmarks for what constitutes property. Specifically, the equity was excludable, a discrete asset, and irrevocable.

Tyler's surplus equity was excludable and thus "property," as this Court has reiterated multiple times. The ability to exclude someone from one's property is a fundamental hallmark of ownership. *Cedar Point v. Hassid*, 141 S. Ct. 2063, 2072 (2021); *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–80 (1979). Excludability is the idea that one can declare a certain property to be one's own against anyone else in the world. *See* Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).[5] And excludability is a feature of multiple types of property

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[5] Cohen writes, "that is property to which the following label can be attached:

To the world:

Keep off X unless you have my permission, which I may grant or withhold.

Signed: Private citizen

Endorsed: The state."

ownership—the owner of a fee simple can exclude everyone at all times and use the property as he will; the owner of a leasehold owns exclusion rights from the landlord and can exclude for the length of the lease; the possessor of intellectual property can exclude all others from using certain ideas. *See* Thomas Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 972 (2000).

Here, Tyler could exclude anyone else from her surplus equity. If this had been a foreclosure action, the bank could not have taken her property—Tyler's possession was exclusive of all others. *See* 1858 Minn. Laws 645 (a mortgagor is entitled to "any surplus money, after satisfying the mortgage on which such real estate was sold."). She had an excludable property interest, under both state law and this Court's precedents, which the Minnesota legislature and Hennepin County took unconstitutionally.

Further, Tyler's property interest was also a discrete asset—one that could be sold in the economic market. Definable assets, like land, intellectual property, and money, can be transferred in the market and receive Fifth Amendment protection. *Lucas*, 505 U.S. at 1006 (land); *Ruckleshaus v. Monsanto Co.*, 467 US. 986, 1001–04 (1984) (intellectual property); *Koontz*, 570 U.S. at 613–14 (money). Compare this to financial liabilities, which are not discrete and do not qualify as property under the Takings Clause. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment) (making five votes for the premise that statutorily imposed liabilities did not take property) ("The Coal Act does not appropriate, transfer, or encumber an estate in land (e. g., a lien on a particular piece of property), a valuable interest in an intangible (e. g., intellectual property), or even a bank account or accrued interest."). But money, or financial accounts, are discrete and measurable and thus can be property. *See Koontz*, 570 U.S. at 613–14.

Similar to the monetary payment in *Koontz*, Tyler's interest is definable—she had $25,000 in surplus equity after the taxes and fees were paid. Pet. at 5. Her equity is also the type of asset that is sold in the marketplace—if Tyler had been facing a foreclosure rather than a tax lien she could have sold her home to a third party, paid off the loan, and kept the surplus equity. Lee Nelson, *What Is a Pre-Foreclosed Property, and How Do You Buy One?*, MyMortgageInsider (April 29, 2022).[6] And if the foreclosure action had already occurred, under state law she would have been given the remaining $25,000. *See* 1858 Minn. Laws 645. Her equity was a discrete asset that was private property and could not be taken without just compensation.

Finally, property interests are also irrevocable, at least for a period of time. There must be an expectation that the owner will possess the property interest exclusively for a given period. Merrill, *supra* at 978. Unless specified otherwise at their creation, property rights are irrevocable. *Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 74 (1913). If the interest can be revoked at any time, then it is merely a license, not property. *District of Columbia v. R. P. Andrews Paper Co.*, 256 U.S. 582, 587 (1921). Similarly, "promises of a gratuity" or privileges are not irrevocable, and thus are not compensable. *See United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 280–81 (1943). But distinct from a license, a lease is irrevocable for its duration, and thus could be a protected property right.

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[6] https://tinyurl.com/sdfn6tke.

Here, Tyler's home equity could not be swept away at the discretion of another—it was irrevocable. If the dispute at issue had been over a mortgage, the bank could not have simply voided her equity in the home. This interest is irrevocable and is private property, and Hennepin County cannot claim it for its own.

Tyler has a property interest in her surplus equity, and the County's assertions otherwise flout this Court's precedents and centuries of common-law practice and principle. The definition of property rests in the states, but states cannot "extinguish[] any interest [Tyler] once had." Resp. to Pet. Br. at 25. That is a taking, and without just compensation it is unconstitutional.

CONCLUSION

The taking of home equity is unconstitutional and unjust. For the foregoing reasons, and those described by the Petitioner, this Court should reverse the Eighth Circuit.

Respectfully submitted,

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