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 *AMICI CURIAE* DAVID C. WILKES, LEGAL SERVICES OF THE HUDSON VALLEY, AND LEGAL AID SOCIETY OF ROCKLAND COUNTY, INC., IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, David C. Wilkes, Esq., Legal Services of the Hudson Valley, and Legal Aid Society of Rockland County, Inc. respectfully submit this brief of *amici curiae* in support of Petitioner Geraldine Tyler.[1]

David C. Wilkes is a globally recognized leader in property taxation, the design of property tax legislation, and related litigation. He also advises clients on major real estate investment and management decisions concerning the effects of transactions on taxes and manages property taxes for major national portfolios. David is the President and a Co-Founder of the National Association of Property Tax Attorneys, and served as Chairman of The Appraisal Foundation, the Congressionally-authorized source of U.S. appraisal standards. He has been selected as the sole featured presenter to the NYS Supreme Court's Appellate Division Judges and Court Attorneys on the subject of property tax law, and is a member of the Real Estate Board of New York.

Legal Services of the Hudson Valley ("LSHV") is a non-profit law firm that provides free civil legal services to individuals in the seven counties of the Hudson Valley in the State of New York. LSHV's

[1] Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* made a monetary contribution to its preparation or submission.

Foreclosure Prevention Unit serves homeowners facing tax foreclosure. LSHV has a distinct interest in the outcome of this case, as it will impact our clients.

Legal Aid Society of Rockland County, Inc. ("LASRC") is a non-profit law office that provides free counsel, advice, and legal representation in Rockland County, New York. LASRC's Foreclosure Project provides representation to homeowners facing foreclosure, including those who are facing tax foreclosure. Many of LASRC's tax foreclosure clients are like the petitioner in this matter, elderly or disabled and unable to work. LASRC has a distinct interest in the outcome of this case, as any decision will affect its clients.

SUMMARY OF THE ARGUMENTS

The Minnesota statutes at issue here, and in New York, allow local governments to seize real property for nonpayment of local taxes and, upon taking the title, retain the surplus that exists due to the former owner's earned equity to benefit government coffers. New York's *in rem* tax foreclosures exemplify the problem of excess retention.

A property owner's right to surplus over debt is a separate property right from the title to the property. The absurdity of the requirement imposed on taxpayers to retain their right to this property interest and to claim the excess renders the legislation here unconstitutional and necessitates just compensation. While a property owner may have a right to property forfeited

due to negligence or abandonment, the Minnesota Act at issue here and like statutes in New York do not offer a rationally related condition antecedent to seizing the excess. While these states rely upon *Nelson v. City of New York*, 352 U.S. 103 (1956) to argue that surplus retention is not a taking, that decision is inapplicable to this case as the New York City statute at issue there permitted a means for property owners to claim the surplus that Minnesota, New York, and several other states presently deny.

Furthermore, *in rem* tax foreclosures violate the Eighth Amendment's Excessive Fines Clause because they are punitive and grossly disproportionate to redemption amounts. Though the Court has applied the excessive fines analysis in the criminal context, it would be counterintuitive to permit an excessive fine for civil violations. This court's precedent in *United States v. Bajakajian*, 524 U.S. 321 (1998) requires that a fine be considered punitive when it is not purely remedial. Though Respondent asserts that Minnesota's *in rem* tax foreclosures are not punitive in nature, the legislative history of RPTL § 1136 emphasizes the punitive purpose behind New York's surplus retention. The Excessive Fines test should be applied to *in rem* tax foreclosures to prevent government fines from having a disparate impact on homeowners with greater equity by arbitrarily taking more than what is required to satisfy the tax debt.

The result of this surplus retention frustrates any plausible remedial purpose, as many property owners, particularly older ones such as Tyler, are at risk of

becoming homeless after forfeiture, causing them to increasingly rely on government support that would not have been needed had they been able to retain the equity in their homes. The detrimental effect this has on homeowners and the added strain on public benefit programs, demonstrates that *in rem* tax forfeitures have all the hallmarks of punishment.

ARGUMENTS

I. Surplus Retention Effectively Violates the Takings Clause.

Only a dozen states have laws similar to the Minnesota statutes at issue here and New York's Real Prop. Tax Law § 1136(3) (McKinney), that permit local governments to seize real property, *in rem*, for the nonpayment of local taxes and, upon taking title, retain for the public coffers the financial surplus that exists by virtue of the former owner's earned equity. The right of the homeowner to retain surplus over debt is a long-recognized property right in Anglo-American common law and equity, notwithstanding any state statute that eradicates such property right.

Moreover, notwithstanding the Eighth Circuit's contrary interpretation (App. 8a-9a), this Court did not hold in *Nelson v. City of New York*, 352 U.S. 103 (1956), that the surplus does not require just compensation. *Nelson* held only that where a statute provides a taxpayer with an opportunity to apply for the surplus—apart from redeeming the property—and the taxpayer

fails to avail itself of that opportunity, there is no unconstitutional taking.

While there is decisional law suggesting that neglect in complying with a condition precedent to a statute taking property deprives the owner of the right to just compensation, *see*, *e.g.*, *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), this Court's precedents demonstrate that, to trigger such an extraordinary deprivation, the condition precedent must be rationally related to the property interest and the government's purpose in enacting the law. Where the sole condition precedent to the loss of surplus is the redemption of the property—where substantial sums must be paid to realize the return of the surplus, the condition precedent is not rationally related to the property interest and just compensation is due.

A. New York State's Law and Practice Illustrates the Problem of Surplus Retention.

The problem of surplus retention is illustrated by the current law and practice of taxing districts in New York State. In New York, surplus retention occurs expressly by operation of a statute codified as N.Y. Real Prop. Tax Law § 1136(3), which provides, in pertinent part:

> Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such parcel and all persons, including the state, infants, incompetents, absentees and non-residents who may have had

> any right, title, interest, claim, lien or equity of redemption in or upon such parcel shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption. § 1136(3).

New York, by virtue of R.P.T.L. § 1136(3), expressly cuts off all property rights and interests held by the former owner, permitting the foreclosing government to balance its budget on the backs of delinquent taxpayers. *Id.*, *and see*, *Hoge v. Chautauqua Cnty.*, 173 A.D.3d 1731, 1732 (N.Y. App. Div. 2019)

Notably, the entire largess becomes the acquired property of the local government entity that foreclosed. If such a taking of property without compensation for public use is permissible, who is the "public" that benefits? The taking of such a windfall into the treasury of a local town or city is not the result of the type of planning and public discussion that would accompany a purposeful and justifiable taking with compensation, and is, often, rather, simply a political tool that can be manipulated to serve the individual ends of government officials.

The New York law that allows retention of the seized property's equity portion is contained among the catalog of procedures for the enforcement of the collection of delinquent real property taxes, which underwent substantial revision as of January 1, 1995. (Set forth in Article 11 of the Real Property Tax Law, as amended by Chapter 602 of the Laws of 1993, by Chapter 532 of the Laws of 1994 and Chapter 579 of the Law of 1995.)

New York revised its tax foreclosure laws due to policy concerns arising from the sale of tax liens to private parties. "The new tax enforcement system reflects the view that, as a matter of policy, delinquent taxes should be enforced by tax districts, not by private parties." (Tax Enforcement Instructions and Forms, New York State Office of Real Property Services, Office of Counsel, September 1995, at 12.) Enforcement by individuals could in practice be haphazard and result in a variety of abuses of the process that could often go unseen and unremedied. See, e.g., *Elinor Homes Co. v. St. Lawrence*, 113 A.D.2d 25, 27 (N.Y. App. Div. 1985) (directing County to purchase at tax sale "to allow counties to prevent abuses resulting from competitive bidding by unscrupulous tax sale speculators").

Notwithstanding the 1995 revisions, New York's surplus retention statute, N.Y. Real Prop. Tax Law § 1136(3), *infra*, has been allowed to remain in place, in substantially its original form, for nearly a century,[2] where most other states have come to recognize the significant constitutional violation that occurs in a taking of homeowner equity as the result of a tax

[2] Notably, as early as the 1930 Legislative Session of the New York State Legislature, interested parties weighed in on the various imbalances, fraudulent schemes, and other devices that were prevalent as a result of the sale of tax liens to private parties and the involvement of bad actors. "Due to the uncertainty of tax titles, there has been developed what in common parlance has been known as the 'tax shark,' an individual well versed in knowledge of the law of tax sales and tax titles and, it must be said, often-times without scruples." New York Legal Services Governor's Bill Jacket 1930 Chapter 809.

foreclosure. *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429, 442 (2020); *Bogie v. Town of Barnet*, 129 Vt. 46 (1970); *Thomas Tool Servs., Inc. v. Town of Croydon*, 145 N.H. 218, 220 (2000).

Even within New York State, the significant property rights inherent in the surplus have been legislatively recognized by certain jurisdictions that have chosen to opt out of the State scheme and follow practices that align with other states that inherently recognize the taking that occurs in retaining surplus.

Notwithstanding the practice of discrete local jurisdictions, however, the New York State Court of Appeals has held, in *Sheehan v. Suffolk Cnty.*, 67 N.Y.2d 52 (1986), that a taking of a material property right and interest without just compensation is sanctioned so long as due process, in the form of statutory notice, is provided. *Sheehan*'s rationale was that New York's statutory scheme provides an ample redemption period to the homeowner of from two to four years (depending upon local option) in which a delinquency can be addressed and homeownership preserved. *Sheehan*, therefore, misinterpreting *Texaco, Inc. v. Short*, 454 U.S. 516. (*see* Section I.D. *infra*) held that the former owner, after such a long redemption period, could not claim any just compensation after the resale of the property. *Id.* at 59.

The requirement to pay just compensation upon a public confiscation of property, however, whether personal or real, is categorical, *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015), and therefore could not be abrogated

by allegedly sufficient advance notice as held in *Sheehan, infra.*

Arguably, if the former homeowners were to expressly acknowledge notice of the tax delinquency and passing of the redemption period, and present no defense whatsoever to nonpayment, a taking would be effected under the law and the Constitutional requirement of just compensation is triggered for any portion of homeowner equity that was converted to surplus upon a sale of the property. A longer redemption period does not supplant the requirement of just compensation.

Notwithstanding the sweeping changes made in the 1990s, the New York State Legislature left the key language contained now in R.P.T.L. § 1136(3), *see infra*, unchanged. It may be said that while lawmakers sought to prohibit individuals from profiting at the misfortune of their neighbors, they were unwilling to go so far as to deprive local governments of the opportunity to do the same. This Court now has the opportunity to address this.

Here, to the extent that New York State law would erroneously deprive a property owner of the guaranty of just compensation, the Fourteenth Amendment steps in to correct the wrong:

> At the Founding, states were generally seen as a bulwark protecting the people from the predations of a distant and potentially tyrannical national government. But now the states had revealed themselves as independent

> threats to individual liberty. And the Fourteenth Amendment sought to meet this newly realized danger on two fronts: First, the Amendment restrained the states directly by limiting their ability to, among other things, "deprive any person of life, liberty, or property, without due process of law." 52. *U.S. Const*. amend. XIV, § 1. Second, it gave new powers to the federal government to enforce those limits through section 5, the Fourteenth Amendment's enforcement arm. *Reconciling State Sovereign Immunity with the Fourteenth Amendment*, 129 Harv. L. Rev. 1068, 1075 (2016).

Even where an abundance of advance notice exists to warrant the negation of the right to just compensation—which is not conceded, nothing in the New York scheme results in the kind of predictable outcome the Legislature presumably sought to induce by its 1990s amendments. In practice, local governments pursue enforcement at the time of their own choosing. Some local governments aggressively enforce delinquent taxes and others not at all. In short, as applied, the timing for enforcement of a delinquent property tax lien in New York State can be said to be random or even nonexistent, dependent upon local political will and interest, and surely unpredictable for the homeowner who is in arrears. The notion that a homeowner who is delinquent can have any reliable sense of the period in which a property may be taken in New York State is a fiction.

Surplus retention statutes that persist in a small minority of states that include New York should be recognized as the effective violation of the constitutional guaranty of just compensation that they have always been. The New York State surplus retention statute, like those at issue in *Tyler v. Hennepin Cnty.*, 26 F.4th 789 (8th Cir. 2022) excessively take far more than what is due to the government and go well beyond an appropriate deterrent to those homeowners who would ignore a tax delinquency. A citizen in such circumstances is forced to make the government whole on the taxes owed, pay penalties and interest at rates often far in excess of market terms, and lose the place they call home. The merits, effectiveness, and legal muster of such system are conceded. However, built-up home equity, represented by the surplus funds that may remain after government sale, is a property interest that is protected by the Takings Clause and may not be abrogated by statutory notice. Homeownership is a means to societal advancement; however, local governments in New York may take a potentially significant property, one's home equity wealth, and despoil a fundamental American value.

B. Surplus Retention Is a Property Right Separate from the Right to the Title to Real Property Encumbered by Tax Debt.

A key dispute in this case is whether a property owner's right to surplus over debt is a property right separate from the title to the property. But it has long

been recognized that a property owner's right to the excess value in a property after a debt secured by that property has been paid is a distinct and recognized property interest separate from a property owner's title to the property. As the Sixth Circuit noted, "the rules governing equitable interests in real property arose primarily in the context of what we now call mortgages," in which a property was forfeited to a mortgagee if the debt was not paid on a certain day—the "law day." *Hall v. Meisner*, 51 F.4th 185, 190–91 (6th Cir. 2022). But that harsh rule was assuaged by the Court of Chancery at least as early as 1625 in the recognition of the equity of redemption. And, by the mid-18th century:

> the mortgagor's "equity to redeem" had itself become "a right of property." 6 Holdsworth, A History of English Law 663 (1924). The mortgagor "had an equitable estate in the land; and subject to the legal rights of the mortgagee, was, in equity, regarded as its owner." *Id.* And this equitable estate—which, following Hale, the courts would later call "equitable title"—could be devised or conveyed like any other interest in property. Casborne, 26 Eng. Rep. at 379. *Hall*, 51 F.4th at 191–92.

The Court of Chancery also recognized, however, a remedy for mortgagees, termed "strict foreclosure," that would bar and foreclose "all right, title, interest and equity of redemption" when the mortgagee felt that it had waited long enough after law day without the property having been redeemed. *Id.* at 192 (citation omitted). Courts in England and in the United States

resisted strict foreclosure finding that where, as here, "the mortgaged premises exceed the amount of the debt in value," strict foreclosure would be "unconscionable[.]" *Id.*, quoting *Lansing v. Goelet*, 1827 WL 2536 (N.Y. 1827). To balance the interests of the property owner with the mortgagee, "American courts reconciled these competing interests with the development of foreclosure by sale (with the surplus over the debt refunded to the debtor) as a means of avoiding the draconian consequences of strict foreclosure." *Id.*, quoting *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 541 (1994).

Thus, the concept that the equity of redemption was a property interest of the mortgagor developed into the recognition that the right of the mortgagor in the surplus over the debt is also a property interest; and this recognition is reflected in decisions of this Court from the late 19th century through today. *See United States v. Taylor*, 104 U.S. 216, 217–18 (1881); *United States v. Lawton*, 110 U.S. 146, 149–50 (1884).

C. *Nelson* Is Distinguishable Because the Regulation at Issue Permitted Taxpayers the Opportunity to Claim Surplus.

Nelson v. City of New York, 352 U.S. 103 (1956), a decision pivotally relied upon by the Eighth Circuit herein for its ultimate holding, does not compel a decision in favor of Respondent here. The New York City Administrative Code at issue in *Nelson*, pertaining to the foreclosure of liens for unpaid water charges, permitted the taxpayer an opportunity to claim the

surplus, even if the taxpayer could not redeem the property—as opposed to both the Minnesota statutes at issue in this case and the New York State law, RPTL § 1136(3), that provide for the absolute retention of surplus.

This distinction was recognized and recited by this Court, which stated expressly, "we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale." *Nelson*, 352 U.S. at 110.

Nelson recognized a property owner's right to the surplus over the debt by noting that the statute at issue provided the property owner with a procedural mechanism to claim the surplus, even though that procedure had been foreclosed to the petitioner there by not availing himself of the opportunity of answering the complaint and requesting a sale that would have turned over the surplus. *Id.* (citing *In re Foreclosure of Tax Liens, Borough of Brooklyn sub nom. City of New York v. Chapman Docks Co.*, 1 A.D.2d 895, 149 N.Y.S.2d 679 (1956))

The regulation at issue in *Nelson*, was explained by the New York Appellate Division in *Chapman Docks Co,*, *supra*. The court held that even an answer without defenses to foreclosure was sufficient to trigger a right to a sale making surplus funds available under former title D of chapter 17 of the Administrative Code of the City of New York. The court further explained that

> "if a party serves and files a verified answer, setting forth the nature and amount of his

> interest in the property, § D17–6.0, the court should inquire whether the case is a proper one for directing a sale so that surplus moneys may be available to the answering party, § D17–12.0. If the property of the answering owner has a value substantially exceeding the amount of the tax liens, a proper case for a sale is made out." *Chapman Docks Co.*, 1 A.D.2d 895 (emphasis added).

The regulation in *Nelson* therefore provided a way for taxpayers to claim the surplus other than out-and-out redemption of the property by paying the taxes due. The Eighth Circuit here noted this distinction between the regulation in *Nelson* and the Minnesota statutes here, but termed the distinction as "immaterial" (App., 9a) and "a modest factual difference." (App., 8a.)

The difference is far more essential than the Eighth Circuit characterized it as being. As the Eighth Circuit acknowledged, "[Petitioner] had options only to redeem the property, confess judgment, or apply to repurchase the property." (App., 9a.) While *Nelson* ultimately held that the petitioner in that case had forfeited its right to the surplus because it had not timely availed itself of the regulatory mechanism to claim the surplus, that regulatory mechanism did not require the payment of taxes—the condition needed to preserve title—as the sole condition required to realize the surplus. Thus, the Minnesota statutes at issue here are exactly what this Court found that the *Nelson* regulation was not—"a statute which absolutely precludes

an owner from obtaining the surplus proceeds of a judicial sale." *Nelson*, 352 U.S. at 110. Indeed, if an owner is to lose title to her property anyway, a condition requiring the payment of those taxes to realize the surplus is completely irrational. (*See* Section I.D., *infra.*)

D. Just Compensation Is Due Because the Condition Precedent to Loss of the Surplus Is Not Rationally Related to the Property Interest.

It is the irrationality of the condition placed upon taxpayers to claim the surplus that makes the statutes at issue here constitutionally infirm, requiring just compensation. There is ample case law recognizing that a property owner may have a right to property that is forfeited by neglect or abandonment. This Court's leading case on this issue is *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). In *Texaco*, the state of Indiana enacted a statute requiring holders of mineral interests to either use the mineral rights, including by paying taxes, or to file a statement of claim with the local recorder's office. *Id.* at 516. If neither of these actions was taken for more than twenty years—or, if more than twenty years had already elapsed, within two years of the enactment of the statute—the mineral rights would automatically revert to the current surface owner of the property. *Id.*

The petitioners in *Texaco* failed to take either action and then challenged the statute, among other things, as a taking of property without just

compensation. Noting that "this Court has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time" and citing decisions from as early as 1831, this Court rejected the petitioners' challenge. *Id.* at 526–27. The Court held that "[i]n ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect." *Id.* at 531. The Court proceeded "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation." *Id.*

But, tellingly, in *Texaco*, there was only one property interest at issue—mineral rights—and the action required by the statute to avoid the abandonment of that specific property interest was related to the owner's failure to make use of the property interest. There was no surplus in *Texaco* because there was no sale by the government, the taking was regulatory and merely shifted the title to the mineral rights from the petitioners to third parties.

Failure to recognize surplus retention as a separate property interest caused the New York Court of Appeals in *Sheehan*, 67 N.Y.2d at 59 to misinterpret *Texaco*. The abandonment of title by inaction does not strip the right of just compensation when governments take the surplus because the property interest in title

to real property encumbered by tax debt is distinct from the property interest in surplus,.

In a later case, two members of this Court clarified that such a taking by abandonment in the context "of unclaimed property, such as real estate, bank accounts, and other earmarked funds, typically provides as a condition precedent to the escheat an appropriate lapse of time and the provision of adequate notice to make sure that the property may fairly be treated as abandoned." *Hodel v. Irving*, 481 U.S. 704, 728 (1987) (White, J., and Stevens, J., concurring in the judgment). Implicit in that statement is that the condition precedent be reasonable and be rationally related to property interest and the government's purpose in enacting the law.

Here, however, Respondent's seizure of Petitioner's property by final forfeiture, vesting absolute title in Respondent, took not only Petitioner's interest in the title to her real property (a right that Respondent unquestionably had to the extent of satisfying the taxes owed up to the amount of the debt), it also deprived her of her property interest in the surplus over the amount the debt.

The property interest in title to real property and the property interest in surplus are both analytically and practically distinct, even though the taking that deprives a homeowner of both interests may be a single event. And while redemption of real property by payment of taxes may be a condition precedent that is rationally related to the escheat by abandonment of the

title to the property, it is not rationally related to the escheat by abandonment of the property interest in surplus over debt.

A simple, but unfortunately commonplace, illustration of this proposition may be found in homeowners who cannot pay their property taxes because of their extreme poverty. Knowing that they cannot afford to redeem their property, they may rationally decide not to challenge the taking and abandonment of the title to their real property to satisfy their debt. But for a state to determine that the only condition precedent to avoid the escheat by abandonment of their property interest in the surplus over the debt (which is an interest in money) is to pay thousands of dollars they cannot afford is not rationally related to the property interest to be abandoned nor does it serve the government's interest in collection of taxes.

Such an escheat is the equivalent of a legislature determining that a citizen's savings account will be forfeited in full to the state unless the citizen cures the overdraft on his or her checking account with funds other than those in the savings account. If the citizen could afford it, then the checking account overdraft would be paid in order to prevent the greater loss. But if an indigent citizen cannot afford to pay the overdraft, then the citizen loses not only the checking account but the savings account as well, spiraling that citizen into even greater poverty. Such an irrational condition precedent to abandonment of any property interest cannot be maintained.

And neither the Minnesota statute at issue in this case, Minn. Stat. Ann. § 281.18 (West), nor the New York State analogue, N.Y. Real Prop. Tax Law § 1136, offers a condition precedent to the escheat of the surplus other than the redemption of the property through the payment of the taxes owed. Unlike the conditions in the Indiana statute at issue in *Texaco* and to similar statutes analyzed in cases following *Texaco*'s ruling, this condition precedent is not related to the taking of the surplus, it is only related to the taking of the property.

These statutes are distinguishable from the *Nelson* regulation discussed above. (Section I.C. *supra*.) That regulation contained a condition precedent to abandonment by escheat of the surplus over debt that was rationally related to the property interest at stake—an assertion in a pre-judgment answer that surplus exists and that a sale should be structured to preserve that surplus for the property owner. By contrast, the condition precedent contained in the Minnesota statute here—nothing short of redemption of the property for thousands of dollars—is not rationally related to the property interest at stake and is thus insufficient to trigger escheat by abandonment.

It is telling that, in Minnesota, by virtue of the Minnesota Unclaimed Property Act, Minn. Stat. Ann. § 345.31 (West)-.60 (2016), abandoned tangible property, such as bank accounts, shares of stock, unclaimed insurance proceeds, and unclaimed wages may be taken by the state but is held in perpetual custody for the true property owner—without risk of escheat. *Hall*

v. State, 908 N.W.2d 345, 352 (Minn. 2018). And that Minnesota act, derived from the Uniform Unclaimed Property Act, is not unique, as it is widely accepted that states should act as custodian for, as opposed to captor by escheat of, abandoned tangible property. *See Validity, Construction, and Application of State Statutes Implementing the Uniform Unclaimed Property Act or its Predecessor*—Modern Status, 29 A.L.R.6th 507, § 16 (collecting cases distinguishing traditional escheat statutes from state versions of the Uniform Unclaimed Property Act).

It is therefore odd that home equity, very often the largest asset held by individuals, can be escheated by abandonment where smaller and less valuable items cannot, merely by virtue of the fact that the latter are tangible and home equity is illiquid.

Respondent in its brief in opposition to the petition for certiorari (hereinafter, "BIO") argued that Petitioner merely favored as a policy choice the availability of a procedural mechanism for realizing the surplus post-forfeiture as opposed to a long period of redemption. BIO at 15-20. But that argument misses the point that the property interest in retaining title to real property is distinct from the property interest in surplus over debt. Policy preferences aside, a law that escheats both title to real property and surplus over debt may pass constitutional scrutiny as long as there is a condition precedent that is rationally related to <u>both</u> property interests and adequate notice is provided to ensure that both property interests are fairly

considered abandoned. *See Hodel*, 481 U.S. at 728 (White, J., and Stevens, J., concurring in the judgment).

The question of whether a rationally related condition precedent to the abandonment of surplus reflects adequate constitutional notice is not presented in this case at all and should await disposition at a later time. Thus, whether Connecticut's statute, discussed at length by Respondents in their brief (BIO at 18), that permits only 90 days following the deadline for redemption to file a claim for surplus provides constitutionally adequate notice is not at issue here. Reasonable minds may differ as to the policy of that statute, but it is not a taking of the property interest in the surplus over debt without just compensation.

The Minnesota statute at issue here, as well as the analogous New York Statute, N.Y. Real Prop. Tax Law § 1136, do <u>not</u> provide a rationally related condition precedent to the taking of the surplus. As such, under *Texaco*, Petitioner should not be deprived of just compensation for the taking of the surplus over debt and the Eighth Circuit's decision should be reversed.

II. The Eighth Amendment Restraint Against Excessive Fines Is Violated by *In Rem* Tax Forfeitures.

The Eighth Amendment Excessive Fines Clause is a fundamental right. It operates, as a qualification upon powers granted by the People to the government; without such a restriction, the government's exercise or abuse of its power could be dangerous to the people.

Timbs, 203, L. ED 11, at 718–19. (Thomas, J., concurring). The *Austin* Court held that a fine must be "purely remedial" to avoid scrutiny under the Excessive Fines Clause of the Eighth Amendment. *Austin v. United States*, 509 U.S. 602, 610 (1993). If a fine is more than remedial, then it cannot be "grossly disproportional" to the offense. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Here, Ms. Tyler's fine was $20,000 dollars plus the sum certain owed to the County.

Twelve States, including Minnesota and New York, violate the constitutional restraint against excessive fines by seizing homes for unpaid property taxes. The value of the forfeited homes are often grossly disproportionate to the amounts due. Sates that enrich their coffers in this way cause devastating poverty for Americans whose primary wealth is homeownership.

A home is often the most valuable asset a family owns. Like so many clients served by legal services organizations, Geraldine Tyler had most of her savings stored in her home's equity. Her home and her equity were seized by the County when she fell behind on her taxes. Tyler does not dispute that she owed property taxes. Neither does she present a due process challenge to the forfeiture of her home nor the foreclosure itself as a means to satisfy her tax liability, interest and costs of collection. The question presented by the Petitioner is whether Hennepin County's forfeiture of her home was an excessive fine, grossly disproportionate to the redemption amount demanded by the County.

A. Civil *In Rem* Tax Forfeiture Is "Grossly Disproportionate" to the Redemption Amount and Therefore Should Be Considered a Fine within the Meaning of the Eighth Amendment.

New York and Minnesota's *in rem* tax proceedings exceed the limits of the Excessive Fines Clause by seizing lawfully owned real estate without regard to the amount by which the redemption amount exceeds the real estate's market value. The amount of equity built up in a home varies greatly from homeowner to homeowner, but these *in rem* proceedings eliminate all home equity, having wildly disparate impacts on homeowners; taking more from homeowners who have greater home equity, regardless of the amount of taxes which were unpaid.

At common law, an *in rem* proceeding occurs after a statutory violation designates the property 'guilty' and therefore forfeited. Modern *in rem* civil actions take a different approach. "In simply finding that a proper forfeiture had already materialized, prosecutors avoid significant procedural hurdles and obtain absolute title to the property in question." R. Todd Ingram, *The Crime of Property: Bennis v. Michigan and the Excessive Fines Clause*, Denver Law Review, Vol. 74, Issue 1, Article 9 at pg. 5 (January 1996). *Found at* https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1957&context=dlr

The Respondents' BIO state that civil *in rem* tax forfeitures should not be considered a fine within the

meaning of the Eighth Amendment because they have taken absolute title as a remedy. Respondents further assert that the Eighth Amendment limits against excessive fines do not apply to in-kind seizures. However "for the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form of the Star Chamber abuses that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives." *Austin*, 509 U.S. at 624 (concurring opinion of Scalia, J.). In-kind seizures of lawfully owned property should be considered fines, not remedies, when the seized property's value clearly exceeds the redemption amount.

The Court held in *Bajakajian* that an 'excessive' fine is one that is 'grossly disproportionate' to the offense. 524 U.S. at 334-35. Webster's dictionary was cited in support of this finding. However, the opinion only used the first of two definitions from Webster's 1828 dictionary, defining "excessive" as "beyond the common measure or proportion." 524 U.S. at 335. The second definition of "excessive" in Webster's dictionary is "[b]eyond the established laws of morality and religion, or beyond the bounds of justice, fitness, propriety, expedience or utility; as excessive indulgence of any kind." *Webster's Dictionary* (1828), *found at* https://webstersdictionary1828.com/Dictionary/excessive. The example Webster provides in the broader, second definition of "excessive" is an Eighth Amendment Clause: "Excessive bail shall not be required." Webster, *supra*. The Court quoted only half of the first definition.

Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 901 (2013). Here, forfeiture of Tyler's home meets the definition of "excessive" according to *Bajakajian*, 524 U.S. 321, and Webster's 1828 dictionary.

Tax jurisdictions utilizing the grossly disproportionate fine of *in rem* forfeiture enrich their coffers at homeowners' expense.

> "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a [s]tate money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 (1991).

Property tax collectors have alternative enforcement mechanisms at their disposal that proportionately remedy delinquent property taxes. New York and Minnesota could require tax lien sales for all their jurisdictions, instead of *in rem* tax foreclosures. States that limit themselves to collecting the actual amounts due use (1) tax liens, (2) expedited foreclosures, and/or (3) super priority lien designation to collect delinquent property taxes.

B. Civil *In Rem* Tax Forfeiture Is not "Purely Remedial" Because It "Bares All the Hallmarks of Punishment."

A penalty is imposed by a government as a consequence of violating a public law, and is intended to deter, not compensate. *Kokesh v. SEC*, (2017). This Court has previously held that civil *in rem* forfeitures that are at least partially punitive are subject to the limitations of the Eighth Amendment's Excessive Fines Clause. *Timbs v. Indiana*, 203 L. Ed. 2d 11 (Feb. 20, 2019). Accordingly, limitations on penal forfeiture are necessary because when they are "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners . . . " *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring).

Many states collect property taxes through tax lien foreclosures that make governments whole while allowing homeowners to redeem their excess home equity. *Supra* Section II.A. *In rem* foreclosures, however, are more than remedial because they have arbitrary and harsh consequences for homeowners. The consequences of forfeiture include loss of life savings, immense poverty, housing insecurity, mental distress, and physical illness. (*See* Section III., *infra*.)

Minnesota and New York collect delinquent property taxes without regard for facts or culpability, just a determination to capture 100% of the surplus as a "broker's fee" for taking the deed from the owner. *See* Bill Jacket, L. 1993, ch. 602 (N.Y. 1993). The legislative

history of New York's RPTL Art. 11 confirms the punitive nature of its *in rem* tax forfeitures. The legislature created a new tax scheme to comply with this Court's decision in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). The legislature stated that *in rem* forfeiture profits are a form of recompense taken by the government for transferring the deed to the government. The New York legislature expressly minimized the public outcry over excessive tax forfeitures so that government coffers could be enriched with them. The legislative history states:

> One recent highly publicized case led to such an intensely adverse public reaction that the Legislature authorized Rensselaer County to pay to Doris Culver[3], the former owner, the surplus received from the sale of her former property (L.1985, c.247). The State Board recommends that State policy permitting retention of surplus by tax districts not be changed. The real property tax is a tax not upon income but upon the wealth which property ownership represents. The revenues derived from the tax make it possible for local governments to provide essential services to their [other] residents. Where a tax goes unpaid, for whatever reason, local officials . . . pursue collection of the amount due. . . . [T]heir responsibility is to foreclose on behalf of the remaining tax payers who have been shouldering the burden of the unpaid tax. . . . Requiring the return of the surplus would

[3] Ms. Culver's case was decided without an Excessive Fines analysis. *Valente v. Culver*, 124 A.D.2d 950 (N.Y. App. Div. 1986).

> effectively compel the tax district to serve as an uncompensated real estate broker for someone who has not paid his or her taxes."

C. The Excessive Fines Test Should Be Applied to Civil *In Rem* Tax Forfeiture.

Civil *in rem* property tax forfeitures are an excessive fine because they do not consider the circumstances of each case, so the value forfeited by each owner is arbitrary and disproportionate to the offense. A new homeowner with liens on the property may lose nothing but the home. A person who paid off a 30-year mortgage on the property and lives on a fixed income may lose hundreds of thousands of dollars. Tax collection should have more predictable and measured outcomes. Justice requires that Eighth Amendment limits be applied to *in rem* tax forfeitures.

The Excessive Fines test has been defined by this Court but applied differently among the Circuits with varied outcomes. The two-pronged test stated in *Bajakajian*, 524 U.S. 321 to wit; whether the amount taken by the government for a violation clearly exceeds the redemption amount, and whether the fine has elements of punishment, including retribution and deterrence as applied to *in rem* tax forfeitures, would affirm the Court's Eighth Amendment precedents and therefore should be applied to all civil *in rem* tax foreclosures.

Respondents argue that the Tyler forfeiture is not subject to the limits of the Eighth Amendment because it is purely remedial—not punishment—and therefore this Court should not examine the proportionality of the forfeiture. However, respondents misapply the Court's holdings in *Austin*, 509 U.S. 602, *Bajakajian*, 524 U.S. 321, *Kokesh v. SEC*, 581 U.S. 455, and *U.S. v. Ursery*, 518 U.S. 267 to come to this conclusion.

In *Kokesh v. SEC*, 581 U.S. 455, the Court unanimously decided that the hallmarks of a penalty are (1) that they are imposed by a government as a consequence of violating a public law, and (2) they are intended to deter, not compensate. The Tyler forfeiture is a penalty by this definition because the forfeiture was imposed as a consequence for violating a property tax statute and the excess is not intended to compensate the government.

Respondents propose applying the definition of punishment used in *U.S. v. Ursery*, 518 U.S. 267. However, *Ursery* examined criminal standards of punishment for a double jeopardy analysis. The Court specifically noted that the *Ursery* definition of 'punishment' <u>does not</u> impact the definition used in *Austin*, 509 U.S. 602. *U.S. v. Ursery*, 518 U.S. 267 at 286-87.

Respondents also failed to note that the line of cases cited found non-remedial punishment to be proportionate when (1) it seized illicit things, *see Stockwell v. U.S.* 80 U.S. 531 (1871), (2) it disgorged

illicit proceeds, *see Kokesh v. SEC*, 581 U.S. 455, (3) the fine was calculated to increase the penalty proportionally to the size of the crime, *see United States v. Toth*, 33 F.4th 1 (1st Cir. 2022), or (4) it was a nominal amount prescribed by legislation as civil punishment, *see Bajakajian*, 524 U.S. 321. These types of proportionate punishments are also distinguishable because the owners willfully and intentionally violated the law even though they had the means to comply. Geraldine Tyler did not have the means to comply. Respondents' assertion that she chose not to save her home is a cruel disregard for her inability to pay, and her critical need for the home equity funds that went to the municipal coffers. Jurisdictions that utilize forfeiture for delinquent taxes are imposing a fine that is excessive because it (1) disregards willfulness, (2) disregards ability to pay, (3) disregards proportionality and (4) has arbitrarily harsh consequences. Therefore, the excessive fines test should be applied to civil *in rem* tax forfeitures.

III. Tax Forfeiture Is Catastrophic for Homeowners and Strains Public Benefits Programs.

Legal services organizations serve some of the most vulnerable populations in America. Clients include (1) seniors and disabled homeowners on fixed incomes, (2) households suffering a temporary financial setback due to major illness or emergency, (3) domestic violence victims suffering from their spouses' power and control over joint assets, (4) heirs who struggle to pay for surrogate's court proceedings while staying

current on tax bills. *See* Brief for David C. Wilkes *et al.* as *Amicus Curiae* p. 16-22.

Vulnerable populations on fixed incomes do not violate property tax codes intentionally. Due to rising costs and low income, elderly homeowners and disabled homeowners are most at risk of losing their homes to *in rem* tax forfeiture. They are the most likely to suffer from the loss of their home equity surplus. U.S. Dep't of Hous. and Urb. Dev., *Aging in Place: Facilitating Choice and Independence* (Fall 2013), https://bit.ly/3rloGDH. *In rem* forfeitures strains the budgets of local governments. *Out of Reach, The High Cost of Housing* (2023), https://nlihc.org/oor. This is not just an anecdotal problem, but one that affects homeowners nationwide. Homeowners and municipalities could both benefit if the equity is retained by the homeowner.

One of the largest reported reasons for foreclosure and tax delinquency was medical debt that strained household budgets. John Rao, *The Other Foreclosure Crisis*, National Consumer Law Center, (July 2012). In cases like this, property tax delinquency is not willful. Furthermore, the homeowners who are most vulnerable to foreclosure are those who are elderly. Since the elderly generally have limited income, their home equity is their most valuable asset to finance their lives. Lori A. Trawinski, *Nightmare on Main Street: Older Americans and the Mortgage Market Crisis*, AARP Public Policy Institute 3 (July 2016), https://bit.ly/3lU9mwJ. After forfeiture, former owners must find a new home, which frequently requires a good credit

score. However, former owners typically have low credit scores because they struggle to pay bills timely. *Id.* at 3. Low incomes, low credit scores, and insufficient savings make it difficult to find new housing.

Former owners frequently seek government assistance for basic necessities such as food and housing. These vital services are expensive for state and local governments. In New York, the average two-bedroom fair market rent is $1,962 per month, or over $23,000 per year. *Out of Reach, The High Cost of Housing*, (2023), https://nlihc.org/oor. Prior owners may use redeemed equity to enter this rental market or purchase a less expensive home with cash. Prior owners who have lost their home equity to forfeiture often need public benefits to help them secure new housing. Although the current system allows local governments to keep the surplus, this gain is small compared to the overall increase in government spending to house those who have lost their homes.

CONCLUSION

This Court should grant the relief requested by Tyler and clarify the limits of *Nelson's* holding.

Respectfully submitted,

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