No. 22-166

In The
Supreme Court of the United States

GERALDINE TYLER,

Petitioner,

v.

HENNEPIN COUNTY, MINNESOTA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

The Fifth Amendment's Takings Clause (also known as the Just Compensation Clause), applicable to each State and its political subdivisions through the Fourteenth Amendment, recognizes that private ownership of property, and in turn, economic liberty, is intrinsic to our nation's social fabric. ALF has participated as *amicus curiae* in many cases where, as here, overly aggressive, and indeed avaricious, governmental action raises serious taking concerns. *See, e.g.*, Br. of Atl. Legal Found., et al.

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[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

As *Amici Curiae* In Support of Petitioners, *Sackett v. U.S. EPA*, No. 21-454 (U.S. filed Apr. 14, 2022).

This is such a case. The question presented—whether a local government violates the Just Compensation Clause when it pockets, as authorized by a state statute, the surplus proceeds from sale of a home that it seizes to collect a delinquent property tax or other debt—squarely aligns with ALF's mission of protecting private property from unjust and uncompensated governmental enrichment.

INTRODUCTION

Under the Minnesota tax lien scheme at issue in this appeal,[2] all private property owned in fee simple is held subject to a "perpetual lien."[3] Where, as here, a Minnesota property owner owes back taxes and becomes delinquent, a court administrator enters judgment against the property, and the county auditor, on behalf of the State, "purchases" the property "associated with an unsatisfied judgment for an amount equal to the delinquent taxes, penalties, costs, and interest owed" on the property.[4] This so-called purchase vests title to the property "in the State, 'subject only to the rights of redemption' allowed by statute."[5]

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[2] *See* Pet. App. 2a–4a (discussing Minn. Stat. § 279.03 *et seq.*).

[3] *Id.* 2a (citing Minn. Stat. § 272.31).

[4] *Id.* 3a-4a (quoting Minn. Stat. §280.01).

[5] *Id.* 3a (quoting Minn. Stat. § 280.41).

If the property owner fails to redeem her property under the Minnesota statute, "absolute title" vests in the State, free and clear of any prior interests, including the prior owner's entire equity estate.[6] At that point, the county can decide whether to retain the property for some public purpose or "sell it to a private buyer for not less than its appraised value."[7] Once sold, the county then distributes the net proceeds for various county public purposes.[8]

In other words, Minnesota's "tax-forfeiture plan *does not allow the former owner to recover any proceeds of the sale that exceed her tax debt*."[9]

Here, Respondent Hennepin County, Minnesota, following the steps prescribed under the Minnesota forfeiture scheme, sold Petitioner Geraldine Tyler's home for $40,000 to collect a $15,000 tax debt, and retained the $25,000 in surplus proceeds for itself.[10]

SUMMARY OF ARGUMENT

Well over a century ago, this Court in *United States v. Lawton*,[11] held that "[t]o withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution, and . . . take his property for public use

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[6] *Id.* 4a (Minn. Stat. §§ 282.18, 282.07).

[7] *Id.* (quoting Minn. Stat. § 282.01).

[8] *Id.* (Minn. Stat. § 282.08).

[9] *Id.* 4a (emphasis added).

[10] *Id.*

[11] 110 U.S. 146, 150 (1884).

without just compensation."[12] The Court explained that "so far as such owner is concerned, the surplus money is set aside as his as fully as if it had come from a third person."[13]

Years later, in *Nelson v. City of New York,*[14] the Court narrowed the *Lawton* holding, explaining that *Lawton* prohibits only statutes that preclude an owner from obtaining the surplus proceeds of a judicial sale.[15] Distinguishing *Lawton*, the Court in *Nelson* stated that

> we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale . . . . What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover[] any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.[16]

Because the Minnesota forfeiture scheme provided Tyler with an opportunity to *redeem* her property before

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[12] *Id.*

[13] *Id.*

[14] 352 U.S. 103 (1956).

[15] *Id.* at 110.

[16] *Id.*

absolute title vested in the State, the Eighth Circuit asserted that "nothing in the Federal Constitution prevents" the government from retaining the surplus "where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings."[17] According to the court of appeals, "[w]here state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking."[18] Misinterpreting *Nelson*'s holding, the court denigrated the Fifth Amendment's protection of property rights from substantive to merely procedural, denying just compensation if adequate notice is rendered.

The Eighth Circuit also held that Tyler had no legal right to the proceeds under state law: "Minnesota's tax-forfeiture plan does not allow the former owner to recover any proceeds of the sale that exceed her tax debt."[19] The court of appeals disagreed with Tyler that Minnesota common law recognizes a property interest in surplus equity in the tax-forfeiture context: "We conclude that any common law right to surplus equity recognized in *Farnham* has been *abrogated by statute*."[20]

According to the court of appeals, Minnesota had legislated away any common-law property rights that may have existed: "[E]ven assuming Tyler had a property

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[17] Pet. App. 8a.

[18] *Id.*

[19] *Id.* 4a.

[20] *Id.* 7a (citing *Farnham v. Jones*, 19 N.W. 83 (Minn. 1884)) (emphasis added).

interest in surplus equity under Minnesota common law as of 1884, she has no such property interest under Minnesota law today."[21] In so holding the court failed to recognize that a State violates the Fifth Amendment if it enacts legislation that redefines private property as public property.

ARGUMENT

A. States cannot legislate away rights secured by the Fifth Amendment

Former Chief Justice John Marshall once stated that "an unlimited power to tax involves, necessarily, a power to destroy."[22] State laws, such as the one at issue here, authorize a local taxing entity to take title to a privately owned home, sell that property in foreclosure to satisfy a tax lien, and keep for itself the surplus proceeds from the home sale, destroying the former owner's equity in her home, without just compensation.

The Minnesota Supreme Court has squarely recognized that under Minnesota law, "[t]he right to the surplus" from proceeds of a tax lien sale "exists independently of [any] statutory provision."[23] The right to just compensation for the taking of surplus proceeds from a judicial sale likewise has been recognized under the Fifth Amendment, which may not be abrogated by statute. "To withhold the surplus from the owner would be to

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[21] *Id.* 8a.

[22] *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819).

[23] *See Farnham* 19 N.W. at 85.

violate the Fifth Amendment to the Constitution and deprive him of his property without due process of law or take his property for public use without just compensation."[24] This is "yet another case in which the government seeks to avoid serious constitutional constraints by dubious definitional ploys."[25]

1. The Just Compensation Clause limits a State's ability to define away constitutionally protected property rights

The Just Compensation Clause provides more than procedural protections for property rights: It affirmatively limits a State's ability to take private property rights by requiring that government shall not take "private property . . . for public use, without just compensation."[26] The Just Compensation Clause limits state actions under the Fourteenth Amendment, which requires States to protect rights guaranteed by the Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[27] There is no question that the equity in one's home

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[24] *Lawton*, 110 U.S. at 150.

[25] Richard A. Epstein, *"Home Equity Theft by the Tax Collector,"* Hoover Inst., Defining Ideas (Jan. 23, 2023), available at https://www.hoover.org/research/home-equity-theft-tax-collector.

[26] U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation.").

[27] U.S. Const. amend. XIV, § 1.

is a recognized property right under Minnesota law.[28] For over a century, the Minnesota Supreme Court has recognized that "[t]he right to the surplus" from proceeds of a tax lien sale "exists independently of [any] statutory provision" under Minnesota law.[29]

In accordance with *Brown v. Legal Found. of Wash.*,[30] the Minnesota tax lien scheme must satisfy two requirements to pass constitutional muster: "While [the Fifth Amendment] confirms the State's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner."[31] Here, while Hennepin County can legitimately claim a right to recover delinquent taxes, plus any reasonable amount of penalties and other costs associated with the collection of delinquent taxes, under no theory of property law can the surplus equity in Tyler's former home be considered state property, much less title to her property, without triggering the Just Compensation Clause.[32]

Any state law that allows a local government to take private property, regardless of the public purpose, must satisfy the constitutional duty to justly compensate the owner of that property: "When the government physically takes possession of an interest in property for some public

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[28] *See*, *e.g.*, *Farnham*, 19 N.W. at 85.

[29] *Id.*

[30] 538 U.S. 216 (2003).

[31] *Id.* at 231-32.

[32] *See id.* at 233.

purpose, it has a categorical duty to compensate the former owner. . . ."[33]

There is no question that Hennepin County took Tyler's property. Once the county declared Tyler delinquent in her property tax payments, it followed the provisions outlined in the Minnesota tax forfeiture statute, under which the State took title to Tyler's home, and later "absolute title" to Tyler's home.[34] Having acquired absolute title to Tyler's property, the County was then free to choose how to use its newly acquired property: for some public use or to sell it, which the County chose to here, retaining for itself the net proceeds of the foreclosure sale.[35] After absolute title to the private property transfers to the State, the Minnesota forfeiture law does not require the government to pay former owners, such as Tyler, any compensation for taking the fair market value of their property taken—including the surplus proceeds realized after the amounts owed for the tax delinquency have been satisfied.[36]

As one commentator has noted, the surplus equity itself could also be the just compensation required for the State's taking of title to real property:

> [T]he amount owed in taxes, interest, and fees is often far less than the value of the home. In those instances, cancelling the

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[33] *Id.*

[34] Pet. App. 9a (citing Minn. Stat. §§ 281.18, 282.07).

[35] *Id.* at 4a.

[36] *Id.*

> debt owed does not put the property in the same position financially as if the property had not been taken because the owner loses more in home equity than the owner gains from the debt cancelation. . . . A more just form of compensation would be the surplus from the tax foreclosure sale. Using this measure of compensation, the government would be able to collect the appropriate amount in taxes and fees and the property owner would not lose all of his or her home equity.[37]

Regardless of how characterized, the Minnesota tax forfeiture scheme violates the Just Compensation Clause and, unchecked, threatens the very concept of private property, as it signals to States that they may appropriate with impunity private property through the simple process of legislating away the private property right.

The Eighth Circuit's analysis of Tyler's property rights highlights this concern. The court's analysis of the property right (home equity) was—to be charitable—truncated. Although correctly noting that property "is determined by reference to existing rules or understandings stemming from an independent source such as state law,"[38] the court below reached the anomalous result that the State can define away a key component of Anglo-American heritage of property

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[37] Jenna Christine Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real Prop. Tr. & Est. L.J. 93, 125-26 (2019).

[38] Pet. App. 6a. (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)).

ownership: Fee ownership of physical property includes "the rights 'to possess, use and dispose of it.'"[39]

Notably missing from the court's analysis is any recognition that the right to own and enjoy one's property is one of the fundamental, indeed inalienable, rights on which our system of law and government rests. James Madison wrote "as a man is said to have a right to his property, he may be equally said to have a property in his rights."[40]

2. States may not abrogate their constitutional obligations by "redefining" private property as public property

As Tyler set forth in her petition, traditional property law has historically recognized home equity as a property right.[41] And as the court below apparently acknowledged, Minnesota law had, prior to enactment of the tax forfeiture scheme, likewise recognized home equity in the context of a tax forfeiture as a property right.[42]

That Minnesota law allows Hennepin County to retain

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[39] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

[40] James Madison, *Property*, 1 Nat'l Gazette 174 (1792) (reprinted in 4 Letters and Other Writings of James Madison 480 (1865)).

[41] *See* Pet. at 11 ("Debtors have a deeply rooted right to be paid for their equity in property seized to pay a debt. . . . While government may seize property to collect a tax . . . it exceeds its legitimate authority to collect the debt when it takes more than what is owed.").

[42] Pet. App. 7a.

the surplus equity proceeds from delinquent tax sales, and then use that money for public projects such as "municipal improvements" and "environmental cleanup,"[43] is no basis for considering the law constitutionally valid. In the American constitutional law system, the ends do not justify the means when individual rights are at stake. As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*:[44] "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[45]

Further, this Court should not be misled by the County's attempt to minimize the constitutional implications of this tax forfeiture scheme by focusing on all the procedural protections, including chances to redeem the property.[46] This Court has previously underscored that even *de minimis* invasions of private property are to be treated as a violation of the Fifth Amendment.[47] Here, owing taxes does not extinguish property rights. Under the County's theory, not being able to pay a tax destroys the ability to rely on a right to equity as a form of life savings.

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[43] Pet. App. 15a.

[44] 260 U.S. 393 (1922).

[45] *Id.* at 416.

[46] *See* Respondents' Response To the Pet. For a Writ of Cert. at 4.

[47] *See, e.g.*, *Loretto,* 458 U.S. at 435-36.

3. The Court repeatedly has invalidated state actions that run afoul of the Fifth Amendment

Property rights derive from equitable concepts rooted in common law and in the principles of equity reflected in the Just Compensation Clause, and constitute a limit on how far a State can go in defining away private property rights. This Court has stated property consists of recognized expectancies.[48] In *Nixon v. United States*,[49] a case involving former President Nixon's presidential papers, the D.C. Circuit observed that the "essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement."[50]

The historical compact recorded in the Just Compensation Clause is that government's power will be constrained by principles of fairness. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law."[51] While government can, under certain circumstances, "take"

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[48] *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979).

[49] 978 F.2d 1269 (D.C. Cir. 1992).

[50] *Id.* at 1275.

[51] *United States v. Fuller*, 409 U.S. 488, 490 (1972) (internal citations omitted); *see also Armstrong v. United States* 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

private property for public use, that taking is unconstitutional unless it provides just or fair payment in return.

This Court often has invalidated state laws that attempted to define away constitutionally protected property rights. For example—

- In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[52] the Court held unconstitutional a state law that required a plaintiff to deposit the amount of an agreed purchase price into an interpleader account in the state court registry.[53] After satisfying the claims of various creditors and withdrawing court fees, the clerk then returned the remainder of the interpleader account to the owner, but retained the interest the account had earned while in the court's possession.[54] The Court held that the retention of the interest earned on the account was a taking of property in violation of the Fifth Amendment.[55]

> Seminole County has not merely 'adjust[ed] the benefits and burdens of economic life to promote the common good'. . . . Rather the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts.[56]

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[52] 449 U.S. 155 (1980).

[53] *Id.* at 157.

[54] *Id.* at 158.

[55] *Id.* at 164-65.

[56] *Id.* at 163 (internal citations omitted).

As such, the Court held that transfer to the government of "the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments."[57]

In *Webb's* the Court described this forced contribution to the government's coffers as a physical taking, comparable to the physical appropriation of private property seen in cases such as *United States v. Causby*,[58] a case in which the federal government was held to have physically appropriated the airspace above private property for the flight pattern of military aircraft.[59] That analysis applies with equal force here, where Hennepin County has, by legislative fiat, declared itself the owner of the surplus proceeds from the sale of Tyler's former home.

- In *Lucas v. South Carolina Coastal Council*,[60] the Court also flatly rejected the State's argument that title to one's land is "somehow held subject to" an "implied limitation" that the state may "eliminate all economically valuable use" of that property. The Court explained that this argument "was inconsistent" with the "historical compact" recorded in the Fifth Amendment "that has become part of our constitutional culture."[61]

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[57] *Id.* at 165.

[58] 328 U.S. 256 (1946).

[59] *Id.* at 258.

[60] 505 U.S. 1003 (1992).

[61] *Id.* at 1028.

- The Court has also applied the per se taking test to cases involving the forced transfer of money (interest earned on a lawyer's IOLTA trust account) from private to public use—again holding cases like this more analogous to the physical occupation of the rooftop in *Loretto*[62]:

> We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis. As was made clear in *Phillips,* the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal.". . . If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto.*[63]

- The Court has also used a per se analysis to determine that the elimination of a lien to secure payment is a taking:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly

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[62] 458 U.S. at 420.

[63] *Brown v. Legal Found. of Wash.*, 538 U.S. at 235 (*citing Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); and *Loretto*, 458 U.S. 419).

> had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the lien. . . .[64]

- Similarly, the Court has applied a per se analysis to the taking of contract rights. In *Lynch v. United States*,[65] the Court held that Congress cannot reduce expenditures by repudiating contractual obligations of the United States.[66] And in *International Paper Co. v. United States*,[67] the Court found a per se taking of a contract to provide water to power the company's sawmill when the United States requisitioned all Niagara River hydropower for war production.[68]

- In *Louisville Joint Stock Bank v. Radford,*[69] the Court held that a bankruptcy statute that deprived the bank of its pre-existing contract rights under a mortgage constituted a taking, confirming that "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."[70]

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[64] *Armstrong*, 364 U.S. at 49.

[65] 292 U.S. 571 (1934).

[66] *Id*. at 843.

[67] 282 U.S. 399 (1931).

[68] *Id*. at 408.

[69] 295 U.S. 555 (1935).

[70] *Id.* at 589.

● And in *Shelden v. United States*,[71] the Federal Circuit held that when the government obtained title to Ralph Washington's property under the criminal asset forfeiture provisions, its consequent destruction of the mortgage-holder's right to repayment through foreclosure was a taking:

> When the forfeiture order transferred all of Washington's interest in the property to the United States, the government took a property interest from the Sheldens for a public purpose . . . ("*in personam* forfeitures serve the public's interests in enforcing penal sanctions"). In accordance with the principles of the Fifth Amendment, the Sheldens must be compensated.[72]

B. The Eighth Circuit misunderstood and misapplied the tax lien holdings that this Court carefully cabined to avoid a Fifth Amendment taking

In addressing the Court's holding in *Nelson v. City of New York*, the Eighth Circuit mischaracterized a crucial portion of the *Nelson* opinion. In *Nelson* this Court addressed *Lawton*, explaining as follows:

> In affirming a judgment in favor of a foreclosed landowner for the surplus proceeds from the sale of his land, the Court

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[71] 7 F.3d 1022 (Fed. Cir. 1993).

[72] *Id.* at 1026.

> [in *Lawton*] said: "To withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law or to take his property for public use without just compensation."[73]

Nelson then concluded that the Fifth Amendment violation expressed in *Lawton* was not implicated by the statutory scheme challenged in *Nelson*:

> But we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale. In *City of New York v. Chapman Docks Co.*, 149 N.Y.S. 2d 679, an owner filed a timely answer in a foreclosure proceeding, asserting his property had a value substantially exceeding the tax due. The Appellate Division construed . . . the statute to mean that upon proof of this allegation a separate sale should be directed so that the owner might receive the surplus. What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recovery[sic] any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this

[73] 352 U.S. at 109-10 (quoting *Lawton*, 110 U.S. at 150).

> where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.[74]

Nelson stands for the proposition that where a statute does not "absolutely preclude[] an owner from obtaining surplus proceeds of a judicial sale[,]" it does not violate the Constitution.[75] But the Eighth Circuit misconstrued *Nelson's* holding

> that "nothing in the Federal Constitution prevents" the government from retaining the surplus "where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings."[76]

The New York tax lien scheme in *Nelson* passed constitutional muster because it did not preclude "an owner from obtaining the surplus proceeds of a judicial sale," and therefore did not take property without just compensation in violation of the Fifth Amendment—as *Lawton* warned would be the case if surplus were withheld.[77] The Court reiterated in *Nelson* that "[t]o withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive

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[74] *Id.* at 110.

[75] *Id.*

[76] Pet. App. 8a (quoting *Nelson*, 352 U.S. at 110).

[77] *Nelson*, 352 U.S. at 109-10.

him of his property without due process of law or to take his property for public use without just compensation."[78]

Unlike the New York tax lien scheme addressed in *Nelson*, which allowed the plaintiffs "to file an action to redeem the property *or* to recover the surplus,"[79] here, the Minnesota tax scheme allows only redemption of the property without the option to ever recover surplus of any judicial sale.[80] In short, the Eighth Circuit failed to appreciate the difference between surplus from a judicial sale and the right of redemption, resulting in a constitutionally unsound decision.

1. The Eighth Circuit misinterpreted this Court's holding in *Nelson v. City of New York*

The Eighth Circuit's decision was based on its erroneous conflation of the right to recover the surplus proceeds of a judicial sale with the antecedent right to redeem property before a judicial sale is permitted. Specifically, the Eighth Circuit asserted that

> [l]ike the property owners in *Nelson*, Tyler received adequate notice of the impending forfeiture action and enjoyed multiple chances to avoid forfeiture of the surplus. She could have recovered the surplus by redeeming the property and selling the

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[78] *Id.*

[79] Pet. App. 8a-9a.

[80] *Id.*

> condominium, or by confessing judgment, arranging a payment plan for the taxes due, and then selling the property.
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> * * *
>
> *Nelson* provides that once title passes to the State under a process in which the owner first receives adequate notice and opportunity to take action to *recover* the surplus, the governmental unit does not offend the Takings Clause by retaining surplus equity from a sale. That Minnesota law required Tyler to do the work of arranging a sale in order to retain the surplus is not constitutionally significant.[81]

The court of appeals failed to explain its conclusion that Tyler "could have recovered the surplus" by personally redeeming and selling the property before a judicial sale was effectuated, and thus, before any surplus was ascertainable.[82] Thus, the lower court's conflation yielded a logically fallacious interpretation: Tyler could "recover" the "surplus" from a judicial sale before the occurrence of a judicial sale.

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[81] *Id*. 9a (emphasis added).

[82] *Id.*

2. *Nelson* is inapposite where, as here, a state statute precludes a property owner from receiving the surplus proceeds from a judicial sale

As a result of the Eighth Circuit's misunderstanding of *Nelson* and its conflating surplus of a sale with right of redemption, the court of appeals failed to grasp that *Lawton* and *Nelson* stand for the proposition that surplus proceeds from a judicial sale must be recoverable by a homeowner to avoid violating the Fifth Amendment prohibition against taking property without just compensation. The Eighth Circuit—rather than appreciating the import of a property owner's right to surplus proceeds of a judicial sale under the Fifth Amendment's Takings Clause—instead compared the right to surplus from a judicial sale to the right to redeem property, characterizing any distinction as "immaterial."[83] But this distinction could hardly be more material.

Without the right to recover surplus of a judicial sale, the State is taking property from individuals in excess of the tax charges against the property without just compensation—a per se taking of their vested property rights. This Court must not permit the relegation of property owners' Fifth Amendment rights in favor of a state's desire to squeeze as much money as possible out of its tax lien scheme. There is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment,

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[83] *Id.*

should be relegated to the status of a poor relation" among the Bill of Rights.[84]

CONCLUSION

The judgment of the U.S. Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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[84] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).