No. 22-166

IN THE

Supreme Court of the United States

GERALDINE TYLER,

Petitioner,

v.

HENNEPIN COUNTY, MINNESOTA and MARC V. CHAPIN, AUDITOR-TREASURER, in his official capacity,

Respondents.

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

BRIEF OF FRANCIS J. COFFEY, as PERSONAL REPRESENTATIVE of the ESTATES OF LEONA M. WARSOWICK and ROBERT F. REGAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

A. The Sole Asset of Regan's Estate, Including his Home Equity, Was Unconstitutionally Taken.

Amicus curiae, Francis J. Coffey (Coffey) is the personal representative and heir-at-law of the estates of Leona M. Warsowick (Warsowick) and Robert G. Regan (Regan).[1] In this capacity, Coffey filed suit in the U.S. District Court for the District of Massachusetts in the matter of *Coffey v. Town of Bourne*, Docket Number 1:22-cv-11972-WGY (the District Court Action). Coffey brought this action against the Defendant, the Town of Bourne (Town), for having taken his deceased cousin's property located at 34 Diandy Road, Sagamore Beach, MA (the Property), worth between ±$330,000 to $500,000, based on a claimed principal real estate tax liability of $899.28.

Coffey's cousin, Regan, suffered from chronic obstructive pulmonary disease (COPD) that caused Regan to lose gainful employment as a forklift driver and survive on long-term disability payments starting in 2011. Regan died of COPD in the winter of 2018. In 2016, the Property, Regan's home for more than 14 years, was putatively taken without personal notice, or any opportunity to be heard for $899.28 in partial claimed tax arrearages, while Regan was beset by the chronic medical condition that killed him. Regan then was not personally provided notice about any of these facts, until a citation issued from the Massachusetts Land Court (Land Court) in the Town's action to

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[1] This brief was written exclusively by counsel for the amicus with no financial support from any other party. No counsel for any other party authored any portion of this brief.

foreclose Regan's equity of redemption (the Tax Foreclosure Action), eighteen months later.

Like Minnesota, Massachusetts has no mechanism for property owners to be compensated for so-called "excess" or "surplus funds." Indeed, subject matter jurisdiction in tax lien foreclosure proceedings in the Land Court is highly-circumscribed—the proceedings are only quasi-judicial—being presided over by the Recorder, that court's clerk magistrate, who need not be and is not today an attorney. Parties cannot contest the amount of an assessment; only whether it is void. The sole purpose of these proceedings, when they are adversarial, is for the Recorder to set the amount owed and the date upon which that amount is to be paid. Neither occurred for Regan or Coffey because Regan, who was dying, was defaulted and Coffey was never permitted to participate.

After he was defaulted, and around the entry of a default decree, Regan nonetheless sent a check for $800 to the Town, which was returned. It was only when Regan passed away in December 2018 that Coffey, as Personal Representative and heir-at-law of Regan's estate, had standing to redeem the Property. Pursuant to M.G.L c. 60, § 69, the Town has consistently refused to allow Coffey to redeem the Property, voluntarily, and pay the modest principal tax debt, substantial interest (at 16% per annum), costs and legal fees. Even though Coffey brought motion practice pursuant to M.G.L. c. 60, § 69A, within the first year as required by the statute, and Regan's terminal illness would appear to define excusable neglect, the Land Court and the Massachusetts Appeals Court have now held that

deadly incapacity (for Regan) and a total legal bar to participation (for Coffey until Regan had died) did not justify relief from the foreclosure decree. The Supreme Judicial Court denied further appellate review on October 13, 2022. The District Court Action was filed on November 18, 2022.

In summary, the Town took the Property without personal notice and a hearing. No court or judicial officer determined whether the Town's claim of a tax deficiency was accurate before the Property was taken. Thereafter, there was no notice that the taking occurred, until notice of the Tax Foreclosure Action was given ±18 months later. Subsequently, since the taxpayer, here Regan, who was dying, did not redeem the Property before a default foreclosure decree entered, its full value became the property of the Town because the Massachusetts General Laws, like Minnesota's, make no provision for the return of excess funds. Now, Coffey can neither pay off the lien and redeem the Property, nor obtain the difference between the amount that is owed and the amount that will be realized when the Property is liquidated by the Town. As this matter demonstrates, this difference is staggering and would not be legally-countenanced if a bank were to have held a defeasible estate in the Property and foreclosed. But, Coffey is not the only citizen who has been victimized by the Commonwealth's wholly unconstitutional tax taking and foreclosure statutory schema.

B. Something is Rotten in the Commonwealth of Massachusetts.

As the late Chief Justice of the Massachusetts Supreme Judicial Court (SJC) opined, the tax taking and foreclosure process is both "archaic and arcane[.]"

Tallage Lincoln, LLC v. Williams, 485 Mass. 449, 450 (2020).[2] The Chief Justice further observed that "(1) private homeowners are rarely represented in tax lien foreclosure proceedings, (2) this body of law is difficult to understand even for experienced attorneys, and (3) the complexity and opacity of this process can, and sometimes does, result in catastrophic consequences for homeowners[.]" *Id.*

In Massachusetts, the near universal method of collecting unpaid real estate taxes is "by executing a tax taking, see [M.]G. L. c. 60, § 53." *Tallage,* 485 Mass. at 451. "When a tax collector conducts a tax taking, . . . the municipality obtains 'tax title' to the property, which is best understood as legal ownership of the property subject to the owner's right of redemption." *Id.*, quoting M.G. L. c. 60, § 53. "The statute speaks of tax title as 'security for the repayment of [overdue] taxes,' [M].G. L. c. 60, § 54, but in practice, taking tax title effectively transfers control of the property from the delinquent taxpayer to the city or town." *Tallage*, *supra* at 463. "After taking tax title, the municipality can 'take immediate possession' of the property." *Id.*, quoting M.G. L. c. 60, § 53. "If the property generates rent or other income, the municipality can keep the money." *Tallage*, *supra*, citing § 53. *See* Ralph D. Clifford, "Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed," 13 UNIV. MASS. L. REV. 274, 280 (2018), citing M.G.L. c. 60, § 53.

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[2] While much of the late Chief Justice's decision calls into serious question the constitutionality of M.G.L. c. 60, no constitutional claim was presented, nor decided, in *Tallage*. *See* 485 Mass. at 452 n.4.

For the purposes of the tax taking, "[t]he signature of the municipality's tax collector is factually conclusive and immediately deprives the property owner of any interest[,]" except for the equity of redemption. Clifford, *supra*. "Based on the statute's words . . . the government has taken almost complete title from the former property owner. Significantly, there will have been no hearing held by a magistrate to determine the validity of the taking." *Id.* And, "[t]here are no job qualifications statutorily imposed [for tax collectors], leaving each municipality to hire whomever it wishes to serve in the job." *Id.* at 280 n.30, citing M.G.L. c. 60, § 2.

In addition to these constitutional infirmities, inadequate pre-taking notice is the norm. "The first step in a tax taking is the notice of taking. [M.]G. L. c. 60, § 53. The collector prepares a notice that states the time and place at which the taking will occur and that includes a description of the property, the year and amount of the delinquent taxes, the name of the assessed owner of the property, and any subsequent owners of the property." *Tallage*, 485 Mass. at 462, citing M.G.L. c. 60, §§ 40, 53. "At least fourteen days before the taking is to occur, this notice must be published in a local newspaper and posted in 'two or more convenient and public places.'" *Tallage*, *supra*, citing M.G.L. c. 60, § 53.

"As an alternative to newspaper publication, the collector can personally serve notice of the taking on the owner in the same manner as that required for service of subpoenas." *Tallage*, 485 Mass. at 462, citing § 53 & M.G.L. c. 233, § 2. "However, according to the Massachusetts Collectors and Treasurers

Association, collectors generally do not conduct personal service 'because of the expense involved and the increased chance of an error that could invalidate the taking.'" *Tallage*, *supra*, quoting Massachusetts Collectors and Treasurers Association, Collector's Manual, at 45 (rev. 2017). "Consequently, owners are unlikely to receive actual notice of an impending taking, unless they happen to read the legal notices in the local newspaper or pass by one of the public postings." *Id.* "And even if an owner did chance upon a notice of taking, the document — State Tax Form 300 — is formalistic and *devoid of any mention that the owner risks losing his or her home and all of the equity in it*." *Id.* (Emphasis added).

"Following the taking," as to which citizens get no personal notice, "the municipality must create a 'tax title account,' to which it can 'certify' (i.e., add) subsequent missed tax payments, as well as any fees, charges, and interest accrued, without having to conduct another taking." *Tallage*, 485 Mass. at 451, quoting M.G.L. c. 60, §§ 50, 61. "Interest accrues at fourteen percent annually from the time that the taxes become delinquent until the taking, [M].G. L. c. 59, § 57, and increases to sixteen percent annually after the taking, [M.]G.L. c. 60, § 62." *Tallage*, *supra*. This 16 percent interest is "only 400 basis points shy of the rate that triggers the Commonwealth's criminal usury statute, [M.]G. L. c. 271, § 49." *Id.* at 463. "If the delinquent taxpayer does not 'redeem' the property (i.e., pay the balance of the tax title account) within six months of the taking, the municipality can petition the Land Court to foreclose the taxpayer's right of redemption." *Id.*, citing M.G.L. c. 60, § 65.

Upon filing such a petition, however, the statutory schema itself precludes any ability of a property owner to challenge the validity of the tax taking, or to seek a refund of any excess funds, before, during, or after the taking. *See Tallage*, 485 Mass. at 469; Clifford, *supra* at 302. "The only grant of power to the courts in the statute deal with the possession of the real estate, not title to it." Clifford, *supra* at 302, citing M.G.L. c. 60, § 53. "The statute does not grant the court the power to return title to the taxpayer." Clifford, *supra*. "The authority of the Land Court in the foreclosure of the redemption suit seems likewise circumspect." *Id.* "The taxpayer is allowed to seek to redeem the property but only for the amount fixed by the court." *Id.*, citing M.G.L. c. 60, § 68. "The court is not authorized to evaluate the legality of the taking itself." Clifford, *supra*.

"If the taxpayer fails to file a timely response to the petition, the municipality or private party may immediately move the court to enter a judgment of foreclosure of the right of redemption." *Tallage*, 485 Mass. at 468, citing M.G.L. c. 60, § 67. In reality, "[b]etween fiscal years 2016 and 2020, almost one-quarter of taxpayers did not respond to the petition and therefore were found by the court to have defaulted." *Tallage*, *supra*.[3] "If the taxpayer answers and appears, the Land Court provides the taxpayer with an explanation of his or her rights. For many, *this is the first time that they are provided with any effective notice of their right to redeem — after the*

[3] "Between fiscal years 2016 and 2020, there were 10,301 tax lien cases that reached a final disposition. In 2,498 of these cases, or 24.3 percent, a motion for general default was allowed." *Id.* at 468 n.5.

statutory redemption period has already expired." *Id.* (Emphasis added).

"If the taxpayer does not respond to the petition or fails to redeem the property according to the terms fixed by the Land Court, and the court enters judgment to foreclose the right of redemption, the municipality or private party takes absolute title to the property." *Tallage*, 485 Mass. at 468, citing M.G.L. c. 60, § 69. "This 'strict foreclosure' process is different in several important ways from a foreclosure by power of sale, which is typical of home mortgage foreclosures." *Tallage*, *supra*, citing M.G.L. c. 244, § 11. "When a homeowner fails to make mortgage payments, the lender may sell the property at auction to the highest bidder if the lender has provided proper notice to the borrower and the borrower failed to discharge the mortgage." *Tallage*, *supra* at 469, citing M.G.L. c. 244, §§ 14, 17B; M.G.L. c. 183, § 21. "If the property is sold for more than is owed on the mortgage, the lender retains the amount owed (including interest, penalties, and any costs associated with foreclosure) *and pays any surplus back to the borrower; the borrower thereby keeps any equity in the home*." *Tallage*, *supra*, citing M.G.L. c. 244, § 36 (emphasis added).

"By contrast, there is no sale in a strict foreclosure; the foreclosure judgment extinguishes the taxpayer's remaining interest in the property — the right of redemption — and converts the municipality's or third party's tax title into absolute title." *Tallage*, 485 Mass. at 469, citing M.G.L. c. 60, § 64. "In addition, the foreclosing party takes title free and clear of all encumbrances, including mortgages

and other liens." *Tallage*, *supra*, citing M.G.L. c. 60, § 64.

"Consequently, following the foreclosure, the municipality or third party owns the property outright, and the taxpayer loses any equity that he or she had in the property, no matter how small the amount of the taxes owed." *Tallage*, 485 Mass. at 469, citing *Tallage LLC vs. Meaney*, Mass. Land Ct., No. 11 TL 143094 (June 26, 2015) (failure of taxpayers to pay municipal water and sewer bills amounting to $492.51 resulted in foreclosure on property valued at $270,000). "There is generally equity to lose in these foreclosed properties because most of the property owners who find themselves facing foreclosure have a home with no mortgage on it: if the property were mortgaged, the mortgagee generally would pay the real estate taxes even if the homeowner were in default on the mortgage in order to protect its interest in the property." *Tallage*, *supra*.

"It is no wonder why taking tax title is the remedy of choice." Clifford, *supra* at 284. Indeed, the foregoing words of Chief Justice Gants were empirically proven by Professor Clifford in a random sampling analysis in his article. *See id.* at 282-284. A random sample of just five percent (5%) of the Land Court records of foreclosures filed on or after August 1, 2013, and on or before July 31, 2014, has shown that, for that year alone, *Massachusetts municipalities collected approximately $56,600,000 more from their taxpayers than was owed*. *See id.* at 284. (Emphasis added). However, as the Vermont Supreme Court has noted, "[t]he objective [of statutory schemes providing for real estate tax liens] is to recover taxes and costs incurred in the process of

collection, not to operate a real estate business for profit." *Bogie v. Town of Barnet*, 129 Vt. 46, 49 (1970).

SUMMARY OF ARGUMENT

Since before the birth of this nation, the courts of equity sitting in the Colonies and in England were hostile to so-called "strict foreclosure" regimes, and devised the interest known as the equity of redemption to ameliorate the abjectly inequitable consequences of the same. Namely, a creditor should not have the right to collect more than what is owed, together with interest, and the fees and costs of collection. Any remaining surplus funds should, in equity and good conscience, be returned to the debtor. Longstanding Anglo-American common law has uniformly held that the right to excess funds stands in for the equity of redemption upon its foreclosure. The statute at issue in this case puts centuries of well-entrenched common law (and a vast majority of similarly situated statutory laws) on their head. In accordance with the Takings, Excessive Fines and Due Process Clauses, citizens must be entitled to excess funds, when property taken for tax collection purposes exceeds the value of the tax debt, interest, fees and costs.

ARGUMENT

I. The Uncompensated Expropriation of Equity Interests and Corresponding Surplus or Excess Funds Violates the Takings Clause

The Fifth Amendment to the U.S. Constitution exhorts that "private property [cannot] be taken for public use, without just compensation." The Takings Clause "'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.'" *Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 163 (1980), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "The Takings Clause of the Fifth Amendment [is] made applicable to the States through the Fourteenth[.]" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005), citing *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1897).

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002), citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951). *See also Horne v. Dep't of Agric.*, 576 U.S. 351, 363 (2015). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998),

quoting *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 577 (1972).

While state law may be illuminating, "'a State by *ipse dixit*, may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule that 'earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.'" *Phillips*, 524 U.S. at 167, quoting *Webb's Fabulous Pharms.*, 449 U.S. at 164. And yet, for the following reasons, this unconstitutional subterfuge is precisely how Minnesota (and Massachusetts) seek to circumvent the Fifth and Fourteenth Amendments, and the sanctioning of this circumvention forms the heart of the Eighth Circuit's erroneous analysis.

A. An Equity Interest Is a Cognizable Property Interest Subject to the Takings Clause.

The Takings Clause "is addressed to every sort of interest the citizen may possess." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). This constitutional command applies not only to real property, but also personal property. *See Horne*, 576 U.S. at 357-358. It applies to tangible and intangible personal property. *Compare id.*; *with James v. Campbell*, 104 U.S. 356, 358 (1882). Liens and mortgages, likewise, implicate Fifth Amendment protection. *See Armstrong*, 364 U.S. at 44, citing *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). Based on our longstanding Anglo-American common law tradition, a property owner's equity of redemption plainly meets the Fifth Amendment's standard for a cognizable interest.

"The history of equity in real estate is particularly illuminating because this property right formed in response to foreclosure practices that raised concerns like those in the present case." *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 503 (2020) (Viviano, J., concurring). "In Anglo-American legal history, the rules governing equitable interests in real property arose primarily in the context of what we now call mortgages." *Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022). "Until mortgages came into widespread use, creditors generally obtained a 'gage of land' as security in the debtor's land, but the creditor could not recover possession of the land from the debtor." *Rafaeli, supra*, citing Sutherland, The Assize of Novel Disseisin (Oxford: Clarendon Press, 1973), pp. 12, 138; Hazeltine, General Preface, in Turner, The Equity of Redemption, pp. xxiv-xxx; 3 Holdsworth, A History of English Law (3d ed), pp. 128-129. *See Hall*, *supra* at 190-191 and authorities cited. "That defect, from the creditor's perspective, likely led to the creation of the predominant form of common-law mortgage, in which the mortgagor conveyed the land, usually in fee simple, to the mortgagee on the condition subsequent that it would be reconveyed to the mortgagor when the debt was repaid at the appointed time." *Rafaeli, supra*, citing An Introduction to English Legal History, pp. 311-312; Simpson, An Introduction to the History of the Land Law (London: Oxford University Press, 1961), p. 225; 3 Holdsworth, p. 129; Turner, The English Mortgage of Land as a Security, 20 VA. L. REV. 729, 729 (1934); Lloyd, Mortgages—The Genesis of the Lien Theory, 32 YALE L. J. 233, 234 (1923). *See Hall*, *supra* at 191-192 and authorities cited.

"The harshness of this procedure was evident to many at the time and is similar to harshness involved in the present case, namely that it automatically led to the full loss of the mortgagor's interest in the property no matter how much debt was owed—no surplus was owed or paid to the mortgagor." *Rafaeli*, 505 Mich. at 504, citing Restatement (Third) Property (Mortgages), § 3.1, comment a; 5 Tiffany, Real Property (3d ed, November 2019 update), § 1518; An Introduction to English Legal History, p. 313; An Introduction to the History of the Land Law, pp. 226-227; 5 Holdsworth, A History of English Law (1924), pp. 330-331; Sugarman & Warrington, Land Law, Citizenship, and the Invention of "Englishness": The Strange World of the Equity of Redemption, in Early Modern Conceptions of Property (Brewer & Staves eds, 1995), p. 113; Burkhart, Fixing Foreclosure, 36 Yale L. & POL'Y. REV. 315, 320 (2018); Weinberger, Tools of Ignorance: An Appraisal of Deficiency Judgments, 72 WASH. & LEE L. REV. 829, 849-850 (2015); Mattingly, The Shift From Power to Process: A Functional Approach to Foreclosure Law, 80 MARQ. L. REV. 77, 90 (1996); Wechsler, Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L. REV. 850, 856 (1985).

"Equity courts addressed these concerns—in part because the transaction functioned as an extension of a security interest in the property rather than a true transfer of the fee—by creating the 'equity of redemption,' under which the mortgagee could redeem the property by paying off the debt after defaulting." *Rafaeli*, 505 Mich. at 505-506, citing 1

Coote, A Treatise on the Law of Mortgages (2d ed), pp. 19-20; Sugarman & Warrington, Equity of Redemption, p. 113; Waddilove, The "Mendacious" Common-Law Mortgage, 107 KY. L. J. 425, 457 (2019). "The 'equity of redemption' was considered . . . a property right and came to represent the homeowner's interest in the property, known as 'equity.'" *Rafaeli*, *supra* at 506, citing Restatement, *supra*. *See Hall*, 51 F.4th at 192 and authorities cited.

"By the end of the 18th century American courts of equity had begun to address these issues for themselves. The American courts were uniformly hostile to strict foreclosure in cases—like this one—where the land's value exceeded the amount of the debt." *Hall*, 51 F.4th at 192. After all, "Magna Charta itself had provided that a debtor's lands could be taken only to the extent necessary to satisfy the debt." *Id.* at 193, citing Magna Charta ¶ 26 (1215). "[T]he equity courts 'developed the decree of foreclosure,' which a mortgagee could seek in order to end the mortgagor's period of equitable redemption; when foreclosure by sale was permitted, 'the mortgagee [took] the money owed to her/him, the remainder going to the mortgagor.'" *Rafaeli*, 505 Mich. at 507-508, citing Sugarman & Warrington, Equity of Redemption, pp. 113-114; 2 Dunaway, Law of Distressed Real Estate (December 2019 update), § 26:29; 5 Holdsworth, p. 331; Fixing Foreclosure, 36 Yale L. & POL'Y Rev. at 319-320; How Do Case Law and Statute Differ, 57 J. L. & ECON. at 1094-1095; Through the Looking Glass, 70 CORNELL L. REV. at 859; The English Mortgage, p. 730. "Thus the creation of 'equity' led to the homeowner's right to surplus proceeds from foreclosure sales. Indeed, as stated in

Restatement Property, 3d, Mortgages, § 7.4, comment a, '[W]hen a surplus occurs, it represents what remains of the equity of redemption and is, as such, a substitute res. *The surplus stands in the place of the foreclosed real estate*.'" *Rafaeli*, *supra* at 508-509 (emphasis added).

Massachusetts law followed this same evolution, and provides for the same division of interests between debtor and creditor, mortgagor and mortgagee. *See*, *e.g.*, *Erksine v. Townsend*, 2 Mass. 493, 494-497 (1807). For well over a hundred years, "[u]pon the sale of land under . . . [the] power [of sale] in a mortgage, the surplus of the proceeds, remaining in the hands of the mortgagee after paying his debt and expenses, belongs to the person who is at the time the owner of the equity of redemption in the land." *Gardner v. Barnes*, 106 Mass. 505, 506 (1871). This principle has been codified by statute in the Massachusetts General Laws. *See* M.G.L. 183, § 27 (mortgagee, after deducting debt amounts, fees and costs, must "render[] the surplus, if any, to the mortgagor, or his heirs, successors or assigns").

This principle has been oft-cited and relied upon by the Massachusetts appellate courts to this day. *See Bevilacqua v. Rodriguez*, 460 Mass. 762, 774 (2011), quoting *Maglione v. BancBoston Mtge. Corp.*, 29 Mass. App. Ct. 88, 90 (1990) ("mortgage splits the title in two parts: the legal title, which becomes the mortgagee's, and the equitable title, which the mortgagor retains"); *United Bank v. Mani*, 81 Mass. App. Ct. 75, 79 (2011) ("wife as the individual owner with the equity of redemption, was the sole mortgagor and was entitled to the full amount of the undivided surplus.") In fact, incongruously, Massachusetts law

holds, in relation to the equity of redemption retained as a matter of private mortgage, precisely the position of the Petitioner (and Coffey) advanced here: "*Upon the foreclosure, the surplus stood in the place of the equity of redemption previously existing, and belonged to the devisees of* [*the original mortgagor*]." *Id.*, quoting *Spaulding v. Quincy Trust Co.*, 313 Mass. 752, 753 (1943) (emphasis added).

In sum, the equity of redemption is a property right recognized by Anglo-American common law since before the Constitution was ratified. And, upon foreclosure, this interest is converted into a right to any surplus funds.

These same principles have been applied to tax debt collection since the founding. "In an 1808 case, for example, Chief Justice Marshall held that a tax collector had 'unquestionably exceeded his authority' when he had sold more land than 'necessary to pay the tax in arrear.'" *Hall*, 51 F.4th at 193, quoting *Stead's Ex'rs v. Course*, 8 U.S. 403, 414 (1808). *See also*, *e.g.*, *Margraff v. Cunningham's Heirs*, 57 Md. 585, 588 (1882) (tax collector's "duty is to sell no more than is reasonably sufficient to pay the taxes and charges thereon, when a division is practicable without injury"); *Loomis v. Pingree*, 43 Me. 299, 311 (Me. 1857) (same); *Martin v. Snowden*, 59 Va. 100, 118-119, 139 (1868) (same).[4]

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[4] Ironically, in spite of its present-day statutory practices, Massachusetts originally followed this same rule. *See Den Ex Dem. Murray v. Hoboken Land & Improv. Co.*, 59 U.S. 272, 279 (1856), quoting Massachusetts Act of 1786 (statute required "returning [of] the overplus, if any there be").

In 1884, applying the constitutional avoidance doctrine for statutory construction, this Court expressly held that

> [t]o 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*. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, and applies for the surplus money, he must receive at least that.

United States v. Lawton, 110 U.S. 146, 150 (1884) (emphasis added).

Multiple state supreme courts, from the mid-nineteenth century to 2020, have recognized citizens' right to excess funds and the Takings Clause's application to the same. *See Martin v. Snowden*, 59 Va. 100, 136-138 (1868); *Bogie v. Town of Barnet*, 129 Vt. 46, 52 (1970); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981); *Polonsky v. Town of Bedford*, 173 N.H. 226, 239 (2020); *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429, 463 (2020). In fact, as noted by the Eighth Circuit, the Minnesota Supreme Court in *Farnham v. Jones*, 32 Minn. 7 (Minn. 1884) held that, where the tax lien foreclosure scheme is silent with respect to excess funds, a citizen has a common law right to their return. *See id.* at 12.

This is the predominant flaw in the court's analysis below: a common law right that has value cannot be abolished, by statute, practice or otherwise,

without just compensation. To do so offends the Takings Clause. Minnesota (and Massachusetts) "may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule that" the equity of redemption is a property right and that its holder is entitled to excess funds post foreclosure. *Phillips*, 524 U.S. at 167, quoting *Webb's Fabulous Pharms.*, 449 U.S. at 164.

B. The Expropriation of an Equity Interest without Just Compensation Violates the Takings Clause.

Having established that there is a property interest cognizable under the Takings Clause at issue, this Court is, again, asked, "What would justify the county's retention of that interest?" *Webb's Fabulous Pharms.*, 449 U.S. at 162. However, since this Court handed down its decision in *Lingle*, the rationales animating policies that violate the Takings Clause are wholly irrelevant. And, regardless, here as in *Webb's Fabulous Pharms.*, Hennepin County "has not merely '[adjusted] the benefits and burdens of economic life to promote the common good.'" 449 U.S. at 163, quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). "Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to" collecting delinquent taxes or the costs associated therewith; which are not represented by the equity of redemption and surplus funds. *Webb's Fabulous Pharms.*, *supra*.

Likewise, "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." *Mennonite Bd. of Missions*

v. Adams, 462 U.S. 791, 799 (1983). Thus, what Tyler did or did not do does not engage with the relevant constitutional inquiry. As this Court recently reaffirmed, "'the act of taking' is the 'event which gives rise to the claim for compensation.'" *Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019), quoting *United States v. Dow*, 357 U. S. 17, 22 (1958). "Here, that event was the County's taking of 'absolute title' to [Tyler's] home[]. Before that event [she] held equitable title; after it, [she] held no title at all. Thus, so far as the Takings Clause is concerned, the County alone is responsible for the taking of [Tyler's] property." *Hall*, 51 F.4th at 196.

As in *Hall*, any governmental grousing "about the 'serious fiscal consequences' of a decision in [Tyler's] favor here" must be rejected out of hand because such concerns are immaterial. 51 F.4th at 196. This Court, like the Sixth Circuit Court of Appeals, "sit[s] as a court of law, not equity; and meanwhile the equities run very much the other way. The County forcibly took property worth vastly more than the debt[Tyler] owed, and failed to refund any of the difference." *Id.* "'In some legal precincts that sort of behavior is called theft.'" *Id.*, quoting *Wayside Church v. Van Buren County*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting). No government in the United States, whether state, local, or federal, is immune from the Constitution.

II. Forfeiture of Surplus or Excess funds, Beyond all Taxes, Interests and Fees, Is an Excessive Fine in Violation of the Eighth Amendment.

Hennepin County's expropriation of Tyler's excess funds also violates the Eighth Amendment's prohibition against "excessive fines." "The Eighth

Amendment provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" *United States v. Bajakajian*, 524 U.S. 321, 327 (1998), quoting U.S. Const., Amdt. 8. This Court recently confirmed that this provision is incorporated as against the several states pursuant to the Fourteenth Amendment's Due Process Clause. *See Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019). "Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority." *Id.* Pursuant to the Excessive Fines Clause, this Court must analyze whether (1) the deprivation of Tyler's excess funds constitutes a "fine"; and (2) whether such fine is "grossly disproportional to the gravity of [Tyler's] offense." *Bajakajian*, *supra* at 334.

For the reasons that follow, (A) the County's seizure of Tyler's excess funds is a "fine" within the ambit of the Eighth Amendment; and (B) the $25,000.00 in surplus funds, in addition to the $15,000.00 in principal unpaid taxes, quasi-usurious interest, fees and costs that the County lawfully received, is grossly disproportionate to Tyler's "offense" of having failed to pay $2,311.00 in real estate taxes. Each will be addressed *seriatim*.

A. The Expropriation of Excess Funds Is a Fine per the Eighth Amendment.

"The purpose of the Eighth Amendment . . . was to limit the government's power to punish." *Austin v. United States*, 509 U.S. 602, 609 (1993). "The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in

kind, 'as *punishment* for some offense.' The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.'" *Id.* at 609-610, quoting *United States v. Halper*, 490 U.S. 435, 447-448 (1989) (internal citation omitted) (emphasis in original). "Thus, the question is not . . . whether [Tyler's loss of her surplus funds] is civil or criminal, but rather whether it is punishment." *Austin*, *supra* at 610.

"In considering this question," this Court has been "mindful of the fact that sanctions frequently serve more than one purpose." *Austin*, 509 U.S. at 610. However, as long as an exaction serves in part to punish, it is a punishment. *See id. See also Timbs*, 139 S. Ct. at 689 ("civil in rem forfeitures fall within the Clause's protection when they are at least partially punitive.") Of particular relevance here, this Court has explicitly held that any statutory forfeiture qualifies as a punishment and thus a "fine" for the purposes of the Eighth Amendment. *See Austin*, *supra* at 610-622. As a threshold matter of plain meaning, what occurred here to Tyler facially qualifies semantically as a forfeiture. For not paying all of her real estate taxes, by operation of Minnesota statutory law, Tyler was compelled to forfeit her property, including her equity of redemption and her right to surplus funds. In fact, in incongruously rejecting Tyler's Eighth Amendment claim summarily, the Eighth Circuit referred to and characterized Minnesota's tax lien foreclosure statutory scheme as a "forfeiture" and "Minnesota's tax-forfeiture plan"; wholly eliding its duty to assess the necessary proportionality question, addressed below, given that a statutory forfeiture scheme is at

issue. *Tyler v. Hennepin County*, 26 F.4th 789, 791 (8th Cir. 2022).

The conclusion that a "fine" is at issue is inescapable not merely based on a plain meaning analysis, but also because substantively collecting money or value in excess of a principal tax debt, interests, fees and costs obviously goes beyond being "remedial." *See Kokesh v. SEC*, 137 S. Ct. 1635, 1644-1645 (2017); *Bajakajian*, 524 U.S. at 343-344; *Austin*, *supra*. Indeed, a "'[r]emedial action' is one 'brought to obtain compensation or indemnity'". *Bajakajian*, *supra* at 329, quoting Black's Law Dictionary 1293 (6th ed. 1990). In the present context, a truly "remedial" sanction would "compensate[the] government for lost revenues." *Bajakajian, supra*, quoting *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972). *See Kokesh*, *supra* at 1638-1639, citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) ("When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty.")

Relatedly, in its briefing at the petition stage, the Hennepin County asserts as grounds to sustain the expropriation of Tyler's excess funds its interest in "deterring" property owners from failing to pay their real estate taxes. JA.42. This admission itself establishes that Tyler was "fined" in this matter. "Deterrence . . . has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329.

Finally, this conclusion is supported by our Anglo-American common law tradition. "Magna Carta, the compact signed at Runnymede[,] was aimed at putting limits on the power of the King, on

the 'tyrannical extortions, under the name of amercements, with which John had oppressed his people,') whether that power be exercised for purposes of oppressing political opponents, *for raising revenue in unfair ways*, or for any other improper use. *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257, 271-272 (1989), quoting T. Taswell-Langmead, English Constitutional History 83 (T. Plucknett 10th ed. 1946, and citing 2 W. Holdsworth, A History of English Law 214 (4th ed. 1936) (emphasis added). "Magna Charta . . . required only that amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood." *Bajakajian*, 524 U.S. at 335. *See Timbs*, 139 S. Ct. at 687.

"The Excessive Fines Clause 'was taken verbatim from the English Bill of Rights of 1689,' which itself formalized a longstanding English prohibition on disproportionate fines." *Timbs*, 139 S. Ct. at 687, quoting *Bajakajian*, 524 U.S. at 335. "That document's prohibition against excessive fines was a reaction to the abuses of the King's judges during the reigns of the Stuarts" for levying disproportionate penalties in contravention of Magna Charta. *Bajakajian supra* (internal citation omitted), citing *Browning-Ferris Industries of Vt., supra* at 267 & Earl of Devonshire's Case, 11 How. St. Tr. 1367, 1372 (H. L. 1689) (fine "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land"). Accordingly, the very purpose of the verbatim progenitor of the Excessive Fines Clause was to prohibit the government from raising revenue in unfair ways. A forfeiture that exceeds the value of

unpaid taxes, interests, fees and costs defines raising revenue in an unfair way.

B. The Difference Between the Sum of All Taxes, Interests and Fees, and the Value of Excess Funds is Grossly Disproportionate and Excessive.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334, citing *Austin*, 509 U.S. at 622-623 (noting Court of Appeals' statement that "'the government is exacting too high a penalty in relation to the offense committed'"); *Alexander v. United States*, 509 U.S. 544, 559 (1993) ("It is in the light of the extensive criminal activities which petitioner apparently conducted . . . that the question whether the forfeiture was 'excessive' must be considered"). "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, *supra*.

"Excessive means surpassing the usual, the proper, or a normal measure of proportion." *Bajakajian*, 524 U.S. at 335, citing 1 N. Webster, American Dictionary of the English Language (1828) (defining excessive as "beyond the common measure or proportion"); S. Johnson, A Dictionary of the English Language 680 (4th ed. 1773) ("beyond the common proportion"). Because of deference to legislative choices, and the imprecision of judicial decisions, "the standard of gross disproportionality articulated in [this Court's] Cruel and Unusual Punishments Clause precedents" applies. *Bajakajian*,

supra at 336, citing *Solem v. Helm*, 463 U.S. 277, 288 (1983); *Rummel v. Estelle*, 445 U.S. 263, 271 (1980).

As in *Bajakajian*, Hennepin County's expropriation of $25,000 in excess funds is "grossly disproportional to the gravity of [Tyler's] offense, [and] is unconstitutional." 524 U.S. at 337. Unlike in *Bajakajian*, Tyler committed no crime, nor even a civil regulatory infraction. She simply failed to pay her real estate taxes, interests, fees and costs, before her equity of redemption was foreclosed upon without any legal recourse under Minnesota law to obtain the excess funds. When a penalty is many multiples greater than the cost of the harm sustained to the government by the wrongful conduct, it is grossly disproportionate and an unconstitutional, "excessive fine". *See id.* ("It is impossible to conclude, for example, that the harm respondent caused is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $ 12,000 out of the country in order to purchase drugs.") Indeed, "[c]omparing the gravity of [Tyler's "offense"] with the . . . forfeiture the Government seeks," Hennepin County's expropriation of the surplus funds cannot be sustained. *Id.*

III. The Government Has No Legitimate Interest in Collecting Funds in Excess of Taxes, Interests and Fees and Doing so Violates the Due Process Clause of the Fourteenth Amendment.

While *Lingle* clarified that the ends-means standard for rational basis review under the Due Process Clause has no place in any Takings Clause analysis, Justice Kennedy specifically rendered a concurring opinion to make the point that laws, which

may violate the Takings Clause, may also fail rational basis review under the Due Process Clause. 544 U.S. at 548-549. The two constitutional claims are not mutually exclusive; one goes to the validity of laws, the other to the requirement of just compensation for valid laws that take private property.

In particular, Justice Kennedy wrote, as follows:

> This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry.

Id. For the following reasons and those already set forth above, Minnesota's statutory scheme for the collection of delinquent real estate taxes "'represents one of the rare instances in which even such a permissive standard has been violated.'" *Id.*, quoting *Apfel*, *supra* at 550.

As a threshold matter, before its adoption of modern substantive due process doctrine, this Court already opined that, if a federal tax collection statute were not to provide for excess funds, then such a statute would offend due process:

> 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. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, and applies for the surplus money, he must receive at least that.

Lawton, 110 U.S. at 150 (emphasis added). Regardless of the modern era's grafting onto the Due Process Clause ends-means tests, *Lawton* remains good law, and this Court's impression of the constitutionality of a law, such as Minnesota's here at issue, should control today.

Modern doctrine too supports this conclusion. The Due Process Clause of the Fourteenth Amendment "requires . . . that [any state or local law] be rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997), citing *Heller v. Doe*, 509 U.S. 312, 319-320 (1993); *Reno v. Flores*, 507 U.S. 292, 305 (1993). *See Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 251, 263 (1936), *Standard Oil Co. v. Marysville*, 279 U.S. 582, 586-587 (1929) ("Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary"). It may be "well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), citing

Ferguson v. Skrupa, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955).

However, whereas a state may have a legitimate interest in strongly incentivizing the prompt payment of real estate taxes, this is the reason that borderline usurious interest rates, fees and costs may be constitutionally added to underlying tax liabilities. The government has no legitimate interest in seeking to collect sums in excess of debts already substantially augmented, frequently by multiples of the underlying principal tax liability, to compel prompt payment. The ends-means, embodied by statutes such as Minnesota's, likewise, cannot be credibly held to substantially further the state's legitimate interest in collecting tax debts, by usurping private property worth even more than aggregate tax liens; which, again, themselves, without the addition of excess funds, exceed tax liabilities by many factors.

Indeed, the statutory schema at issue here, because it does not provide a right of a taxpayer to recover excess funds, comprises a rare instance in which a law truly "shocks the conscience[,]" and violates the Due Process Clause. *Borden's Farm Products*, 297 U.S. at 264. This Court must intercede to invalidate the state-law statutory tax lien foreclosure frameworks that do not provide for return of excess funds. These statutes transgress against centuries of our common law tradition.

CONCLUSION

For the reasons set forth above, and those in the Petitioner's brief, the Minnesota statute at issue, here, must be declared by this Court to violate the Takings, Excessive Fines and Due Process Clauses of

the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.

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Respectfully submitted,

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