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 ET AL.

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

BRIEF OF MONICA TOTH AS AMICA CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICA CURIAE[1]

In 2015, the federal government sued amica Monica Toth to enforce a $2.1 million civil FBAR penalty. FBAR penalties are "among the harshest civil penalties the government may impose." Nat'l Taxpayer Advocate, *2022 Purple Book* 77 (Dec. 31, 2021). And across the Nation, the government has recognized these penalties for what they are: a tool for deterring and punishing violations of federal law. *E.g.*, U.S. Resp. to Def.'s Mot. for Partial Summ. J. at 1, *United States* v. *Kaufman*, No. 18-cv-787 (D. Conn. Jan. 15, 2020) (Doc. 67) (noting that FBAR violations are "punishable by imposition of FBAR penalties"); *see also Bittner* v. *United States*, 598 U.S. ___, ___ (2023) (opinion of Gorsuch, J.) (slip op. at 14) (likening FBAR-penalty regime to a "penal statute[]" (emphasis and citation omitted)). In Monica Toth's case, however, the First Circuit held that FBAR penalties are not even partly punitive but are instead "remedial." *United States* v. *Toth*, 33 F.4th 1, 19 (2022). On that basis, the court held that Toth's civil penalty "is not a 'fine' and as such the Excessive Fines Clause of the Eighth Amendment does not apply to it." *Id.* Over a dissent, this Court denied Toth's petition for certiorari this past January.

Ten days before denying Toth's petition, the Court granted review in this case, which presents two mutually exclusive questions: whether Minnesota's system of home-equity forfeitures gives rise to a "taking" under the Fifth Amendment or a "fine" under the Eighth. Given the likelihood that the Court's decision in this case will address the Excessive Fines Clause in a way that casts

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than Monica Toth or her counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

doubt on the First Circuit's reasoning in Toth's, Toth has petitioned for rehearing of the denial of certiorari in her case and has asked the Court to consider her case for a GVR order once *Tyler* has been decided. Pet. for Reh'g (No. 22-177). Toth thus has a keen interest in the Court's correctly addressing the Eighth Amendment question presented in *Tyler*. Whether her petition for rehearing is granted or denied, Toth also has an interest in the Court's reaffirming that governments cannot circumvent constitutionally protected property rights. In both Toth's case and Tyler's—and others—the lower courts have made it all too easy for those with power to infringe the rights of those without. Whatever her case's outcome, Toth has a firm interest in the federal courts' executing their duty as a check on the "encroaching spirit of power" in the other branches and levels of government. The Federalist No. 48 (James Madison); *see also McDonald* v. *City of Chicago*, 561 U.S. 742, 840-41 (2010) (Thomas, J., concurring in part and concurring in the judgment) (detailing "the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States").

SUMMARY OF ARGUMENT

In 2012, Geraldine Tyler owned her Minneapolis condominium free and clear. By 2016, Hennepin County had taken title to the condo based on $15,000 in tax debt—unpaid property taxes, penalties, costs, and interest—and sold it for $40,000. The government then kept all the proceeds—not just the $15,000 needed to compensate itself for the tax debt, but the extra $25,000 as well. Tyler does not challenge the County's keeping $15,000 for the debt she owed. But as the opening brief demonstrates, confiscating more than the County needed to compensate itself necessarily implicates one of two constitutional provisions. If confiscating the surplus was at least partly punitive, it is an Eighth Amendment fine and invalid to the

extent it is "excessive." U.S. Const. amend. VIII. If confiscating the surplus was *not* punitive—if, for example, the County kept it as an arbitrary windfall—then it is a taking under the Fifth Amendment, entitling Tyler either to "just compensation" or to damages in the amount of the surplus. U.S. Const. amend. V. There is no middle ground.

In rejecting Tyler's claims, the lower courts misapplied takings precedent and excessive-fines precedent alike. This brief, however, concerns itself mainly with the correct order of operations. Because the Takings Clause and the Excessive Fines Clause are mutually exclusive, the first analytic step is to determine whether extinguishing Tyler's equity implicates either (a) the Fifth Amendment and not the Eighth or (b) the Eighth and not the Fifth. Only by addressing that antecedent issue can the Court resolve whether the County effected a taking (requiring dollar-for-dollar compensation) or imposed a fine (invalid only to the extent it is excessive). The threshold question, then, is whether confiscating the equity "serves even '*in part* to punish.'" *Toth* v. *United States*, 598 U.S. ___, ___ (2023) (Gorsuch, J., dissenting from denial of certiorari) (slip op. at 3). If it does, it is a fine, not a taking, and there would be no warrant for the Court to address the Takings Clause further. If it does not, the Takings Clause question is squarely presented. Several distinctions between Minnesota's equity forfeitures and more traditional civil penalties—like Monica Toth's—suggest that an equity forfeiture may be a taking, not a fine. But either way, the Court's first step should be to address why Minnesota's law implicates one Clause and not the other.

Whichever Clause is at issue, the decision below fundamentally misconstrued the relevant precedent. In rejecting Tyler's takings theory, the court of appeals held that Minnesota had "abrogated by statute" whatever common-law property right Tyler might have had in her

home equity. Pet. App. 7a. But States cannot circumvent the Takings Clause "simply by legislatively abrogating" traditional property interests. *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998). As for the Excessive Fines Clause, the court of appeals co-signed the district court's view that confiscating Tyler's equity was "remedial" and thus outside the Eighth Amendment's compass. Pet. App. 9a, 44a. In this, however, the courts made the same error as did the First Circuit in Toth's case: imprecisely labeling as "remedial" payments that go far beyond "compensating the Government for a loss." *See United States* v. *Bajakajian*, 524 U.S. 321, 329 (1998). Whether viewed through the Fifth Amendment or the Eighth, the court of appeals' decision gives governments *carte blanche* to confiscate property, leaving laws like Minnesota's in a constitutional dead-zone. That result cannot be squared with the ratifiers' solicitude for property rights and hard-earned mistrust of government power. Nor can it be squared with this Court's precedent. The judgment below should be reversed.

ARGUMENT

A. Because the Takings Clause and the Excessive Fines Clause are mutually exclusive, the Court should first address which of the two Clauses is implicated by Minnesota's law.

Geraldine Tyler's petition for certiorari presents two mutually exclusive questions, premised on two mutually exclusive constitutional protections: the Fifth Amendment's Takings Clause and the Eighth Amendment's Excessive Fines Clause. By confiscating more money than it needed to compensate itself, Hennepin County took action that necessarily implicates one of the two Clauses. But not both; an Eighth Amendment fine cannot concurrently be a Fifth Amendment taking, and vice versa. As a

first step, therefore, the Court should determine whether this is a Fifth Amendment case or whether—as Tyler argues in the alternative—it is instead an Eighth Amendment one. Only by resolving this antecedent question can the Court ensure that the rest of its decision addresses the concrete issues the case presents.

1. The Takings Clause and the Excessive Fines Clause are mutually exclusive.

The Takings Clause and the Excessive Fines Clause are mutually exclusive; if a transfer of property to the government is an Eighth Amendment fine, it is not a Fifth Amendment taking. The two concepts do not overlap. For property pressed into public use—a "taking"—the Fifth Amendment "does not prohibit the taking of private property." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation omitted). Rather, it imposes a "clear and categorical" condition on the exercise of that power: the government must pay the owner just compensation. *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2071 (2021). As relevant here, the Fifth Amendment serves "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Lingle*, 544 U.S. at 537 (citation omitted). If the government effects a taking—be it "excessive" or not—it must provide the owner "a full and perfect equivalent for the property taken." *See Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 326 (1893).

The reason is simple fairness. At base, a taking is valid only if it is for "public use." U.S. Const. amend. V. Given that premise, the Fifth Amendment's guarantee of just compensation ensures that those whose property is taken do not have to shoulder alone the "public burdens which, in all fairness and justice, should be borne by the public

as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). When it effects a valid taking, the government thus triggers a "simple, *per se* rule": it "must pay for what it takes." *Cedar Point Nursery*, 141 S. Ct. at 2071.[2]

Fines are different. Unlike for a Fifth Amendment taking, a fine's *raison d'être* is to single out specific people for specific economic burdens. That is why "no one thinks a taking occurs when the government requires *A* to pay a fine for committing a crime." Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 Cal. L. Rev. 53, 93 (1990). The Court's Eighth Amendment precedent tracks that intuition as well: a payment to the government (whether monetary or in-kind) is a "fine" within the meaning of the Excessive Fines Clause only if it serves at least in part to deter and punish. *Austin* v. *United States*, 509 U.S. 602, 610-11, 621-22 (1993); *Toth* v. *United States*, 598 U.S. ___, ___ (2023) (Gorsuch, J., dissenting from denial of certiorari) (slip op. at 3). The entire point is to leave the payor with less.

Against this backdrop, a transfer of property to the government cannot be both a Fifth Amendment taking

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[2] Beyond securing just compensation for valid takings, the Takings Clause also constrains the government's power to take property for illegitimate, non-public uses. *See Kelo* v. *City of New London*, 545 U.S. 469, 477-78 (2005). Tyler's amended complaint pleaded both theories: that her equity had been taken either "without a valid public use" or without "payment of just compensation." Am. Compl., Dist. Ct. Doc. 1-2, at ¶¶ 63, 73. Because surplus equity is fungible, the distinction between a taking's being valid or invalid would appear to be immaterial in this case. If Hennepin County's acquisition of Tyler's equity were a valid taking, the County would owe compensation in the amount of the equity taken; if an invalid taking, it would be liable for compensatory damages in that same amount.

and an Eighth Amendment fine. If extinguishing Tyler's surplus equity were a valid taking, for instance, Hennepin County would be constitutionally required to provide Tyler "a full and perfect equivalent for the property taken"—from the first dollar to the last. *Monongahela Nav. Co.*, 148 U.S. at 326. If extinguishing the equity were a fine, by contrast, the County would owe no such "categorical" duty to compensate. *See Cedar Point Nursery*, 141 S. Ct. at 2071. Unlike with takings, a fine triggers no dollar-for-dollar obligation to repay the person fined. For a fine, it is not the Takings Clause that applies, but the Excessive Fines Clause, which constrains the fine only when it is "so large as to be 'excessive.'" *United States* v. *Ursery*, 518 U.S. 267, 287 (1996). Simply—and while Tyler is correct (Pet. Br. 33-34 n.16) that certain other constitutional provisions may overlap—the two Clauses at issue here share no common ground. Minnesota's law can implicate the Takings Clause or the Excessive Fines Clause, but not both.

2. As a first step, the Court should address which Clause is implicated by Minnesota's law.

Tyler's petition for certiorari presents two alternatives: either Hennepin County effected a Fifth Amendment taking or it imposed an Eighth Amendment fine. Pet. Br. i. These alternatives involve different substantive doctrines, different remedies, different precedent, and different lines of lower-court reasoning. In rejecting Tyler's Fifth Amendment claim, for example, the court of appeals relied on Fifth Amendment precedent, *Nelson* v. *City of New York*, 352 U.S. 103 (1956), to hold that Tyler lacked "a property interest in the surplus equity after the county acquired the condominium." Pet. App. 6a; *see also* Pet. App. 8a ("*Nelson*'s reasoning on the Takings Clause controls this case . . . ."). For Tyler's excessive-fines claim,

by contrast, neither the parties nor the lower courts suggested that *Nelson* affected the Eighth Amendment analysis. Nor did the touchstone of the lower courts' interpretation of the Excessive Fines Clause (the concept of "remedial" confiscations) feature at all in their Fifth Amendment analysis.

Given this posture, the orderly disposition of the case favors the Court's addressing, as a first-order question, whether Minnesota's system of equity forfeiture implicates the Fifth Amendment or the Eighth—in other words, whether Hennepin County confiscated Tyler's equity in service of a public use or of punishment. If the confiscation were punitive, the court of appeals' judgment would merit reversal on the excessive-fines claim, and there would be no warrant for the Court to address the Takings Clause. (The rightness or wrongness of the lower courts' reading of *Nelson*, for instance, matters only if *Tyler* is indeed a Fifth Amendment case.) If, by contrast, confiscating Tyler's equity was *not* punitive—but for a public use or in aid of securing the government an arbitrary windfall—then it was a taking. In short, a necessary first step is to address whether extinguishing Tyler's equity implicates either (a) the Fifth Amendment and not the Eighth or (b) the Eighth and not the Fifth. Only by first situating the case within one of the two can the Court ensure that the rest of its decision does not stray beyond the needs of the case.

B. Traditional civil penalties offer an instructive contrast with equity forfeitures like Tyler's.

Minnesota's equity-forfeiture law has several features that may distinguish it from traditional civil penalties like Monica Toth's. Comparing Tyler's forfeiture with Toth's civil penalty illustrates why Tyler's may be a taking while penalties like Toth's are quintessential fines.

First, people targeted by Minnesota's law have after-the-fact routes to undo the equity forfeiture; for a time, they may redeem their property by paying the amount of their tax debt or by agreeing to an installment plan. *See* Pet. App. 3a. Traditional monetary penalties offer no path to purge them after a violation has taken place. That difference marks civil penalties as more obviously sanctions to punish past conduct—punitive in a way Minnesota's law may not be.

Second, Minnesota's system could be viewed as more graspingly arbitrary and less designedly punitive than a traditional civil-penalty regime. Conceivably, for instance, Minnesota's equity-forfeiture law may confer an economic benefit on some of its targets, "when the value of the property that is forfeited is less than the amount of taxes owed." Pet. App. 42a. That outcome may well be vanishingly rare in practice. Cert. Reply 11 & n.2. But no such result is even theoretically possible for people targeted with traditional civil penalties; they stand to lose money every time. In this way, civil penalties (like Toth's) fit squarely within the Excessive Fines Clause under the Court's "categorical approach" to determining what is and is not a fine. *See Ursery*, 518 U.S. at 287; *see also Austin*, 509 U.S. at 622 n.14 (noting that in determining whether a statute imposes an Eighth Amendment fine, it "makes sense to focus on [the statute] as a whole"). By contrast, the reverse-lottery nature of Minnesota's law could support a conclusion that it imposes, not punitive fines, but arbitrary takings within the compass of the Takings Clause.

Third, the different remedies available under the Takings Clause and the Excessive Fines Clause (and their precursors) illustrate another contrast between traditional civil penalties and Minnesota's equity forfeitures. Civil monetary penalties are among the modern-day

descendants of the "amercements" addressed in Magna Carta. *See generally Timbs* v. *Indiana*, 139 S. Ct. 682, 687-88 (2019). And much like Magna Carta, the Excessive Fines Clause does not forbid these economic sanctions altogether, but provides only that they may not be "excessive." Equity forfeitures like Minnesota's, by contrast, more closely resemble a different historical predecessor: the English crown's tendency to seize property for debt and "refuse[] to disgorge the surplus." Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 St. Mary's L.J. 1, 47 (2015). This "abusive practice[]," too, was addressed in 1215. *Id.* But unlike its treatment of amercements, Magna Carta's treatment of equity theft bears a closer likeness to the categorical rule of the Takings Clause. Royal debt collectors were barred, not from confiscating only *excessive* amounts of deceased debtors' property, but *anything* beyond "the value of the debt." *Id.* (quoting Magna Carta, cl. 26 (1215)); *see also id.* ("[T]he value of the goods seized had to approximate the value of the debt . . . ."). In this way also, the punitive qualities of traditional civil penalties offer a useful foil in evaluating whether equity forfeitures are Fifth Amendment takings or Eighth Amendment fines.

C. The lower courts' understanding of the Fifth and Eighth Amendments was flawed.

The court of appeals rightly acknowledged that Hennepin County confiscated far more money than it needed to compensate for what Tyler owed. Pet. App. 2a. Yet in the court's view, that confiscatory act fell into a constitutional no-man's land: neither taking nor fine. That was error. When the government takes more money than it needs to compensate for a debt, that is a taking unless it qualifies as a fine. As discussed, several contrasts between Minnesota's law and traditional civil-penalty

regimes suggest that equity forfeitures are not fines, but takings. Whether viewed through the Fifth Amendment or the Eighth, however, the decisions below misapplied this Court's precedent. The lower courts construed both the Takings Clause and the Excessive Fines Clause in ways that make them easily manipulable and that undermine the fundamental rights they protect. Whichever Clause the Court concludes is implicated by Minnesota's law, the judgment below should be reversed.

1. The Takings Clause cannot be circumvented by abrogating traditional property rights.

As Tyler's brief ably demonstrates (Pet. Br. 24-27), one of the through-lines in Takings Clause precedent is that "the government does not have unlimited power to redefine property rights." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). "As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law." *Cedar Point Nursery*, 141 S. Ct. at 2075-76. But that does not mean a State can "sidestep" the Clause simply "by disavowing traditional property interests long recognized under state law." *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998). While state law may inform whether a particular property right exists, it is not the *only* consideration in determining whether the government has taken private property in a way that implicates the Takings Clause. If a property right is "traditional" or rooted in the "English common law," for example, a State cannot redefine that right out of existence, claim ownership over it, and thereby circumvent the Fifth Amendment. *Id.* at 165, 167; *see also Cedar Point Nursery*, 141 S. Ct. at 2076.

The court of appeals broke with this principle; it steadfastly refused to consider whether Tyler's interest

in her surplus equity is a traditional property right secured by the Takings Clause. "[E]ven assuming Tyler had a property interest in surplus equity under Minnesota common law as of 1884," the court reasoned, the Minnesota legislature "abrogated" that right in the 20th century when it passed the predecessor to the current equity-forfeiture statute. Pet. App. 7a, 8a. On that ground, the court held that Tyler had no property interest in her home's equity, meaning no "private property" had been "taken." *See* U.S. Const. amend. V.

The Constitution cannot be thwarted so easily. Contrary to the court of appeals' view, governments cannot opt out of the Takings Clause simply by "legislatively abrogating" the property right they seek to take. *Phillips*, 524 U.S. at 167. Indeed, *any* time government takes property pursuant to a statute, the law could be depicted as having "abrogated" the original owner's right to the property taken. The taking in *Knick* v. *Township of Scott* could have been restyled a municipal abrogation of the petitioner's traditional right to exclude the public from her family cemetery. 139 S. Ct. 2162, 2168 (2019). The taking in *Horne* v. *Department of Agriculture* could have been restyled an administrative abrogation of the petitioners' traditional right to keep their raisins. 576 U.S. 350, 355 (2015). The taking in *Cedar Point Nursery* could have become a regulatory abrogation of the right to exclude union organizers. 141 S. Ct. at 2069. The list goes on.

The property right here is similar. In 2012, Geraldine Tyler owned her home, including the equity. By 2016, Hennepin County had sold her home and divided the surplus equity between itself and other governmental bodies. What once was Tyler's is now the government's. But for the statute the County deployed against her, the surplus would be hers still. Whether that transfer of property is couched as a taking or as a fine, one point is beyond

serious dispute: the County extinguished Tyler's property interest in her equity. That the government executed that forcible transfer in accordance with a state statute does not alone immunize it from liability under the Takings Clause. *Cf. id.* at 2076 ("Under the Constitution, property rights 'cannot be so easily manipulated.'"). In holding differently, the court of appeals started and ended with a mistaken premise: that the government's power to redefine property rights is a matter of state law alone, unchecked by constitutional limits. That holding conflicts with decades of precedent. *E.g.*, *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("[T]he government's power to redefine the range of interests included in the ownership of property [i]s necessarily constrained by constitutional limits."). And if accepted, it would offer a blueprint for governments nationwide to redefine out of existence all manner of protected property rights. If the Court determines that Tyler's case implicates the Takings Clause, the decision below is thus a straightforward candidate for reversal.

2. The Excessive Fines Clause cannot be circumvented by styling noncompensatory penalties "remedial."

If Tyler's equity forfeiture is not a Fifth Amendment taking, that can only be because it is punitive—an Eighth Amendment fine. On this front, too, the lower courts misconstrued the relevant precedents.

a. Much like in Monica Toth's case, the courts below imprecisely labeled Hennepin County's confiscation of Tyler's equity "remedial" and on that basis exempted it from Eighth Amendment review. That reasoning was unsound. This Court's excessive-fines precedents certainly have distinguished between payments that serve "at least in part as punishment" and those that "serve[] solely a

remedial purpose." *Austin*, 509 U.S. at 610, 622; *see also Toth*, 598 U.S. at ___ (Gorsuch, J., dissenting from denial of certiorari) (slip op. at 3) ("Under our cases a fine that serves even '*in part* to punish' is subject to analysis under the Excessive Fines Clause."). In the Eighth Amendment context, however, *remedial* is best read as *compensatory*; if a payment serves purely to compensate for loss caused by the payor, the Court's precedent suggests that it is not punitive and thus not a fine. As articulated by this Court, then, the line is relatively uncomplicated. If the government imposes a monetary obligation purely for "the remedial purpose of compensating the Government for a loss," that obligation is said not to be punitive. *See United States* v. *Bajakajian*, 524 U.S. 321, 329 (1998). But if the obligation goes beyond securing "compensation or indemnity," it cannot be classified as "remedial." *See id.* (citation omitted). Rather—if it is at least partly punitive—it is a fine. *Cf. Paroline* v. *United States*, 572 U.S. 434, 456 (2014) (noting that criminal restitution may be a fine because although "[t]he primary goal of restitution is remedial or compensatory, . . . it also serves punitive purposes").[3]

[3] The Court has also suggested that forfeiting certain types of property may be "remedial" for Eighth Amendment purposes in other narrow circumstances not relevant here. In *Austin*, for instance, the Court appears to have accepted that confiscating contraband per se would be "remedial" and thus not give rise to a fine within the meaning of the Eighth Amendment. *Austin* v. *United States*, 509 U.S. 602, 621 (1993). It is possible, however, that the same outcome follows from the simpler proposition that people do not have property interests in contraband per se—that is, "objects the possession of which, without more, constitutes a crime." *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 699 (1965); *see also Austin*, 509 U.S. at 621 (rejecting the government's attempt to "extend that reasoning" to property that is not intrinsically illegal to possess).

Like the First Circuit in Toth's case, the courts below misapplied these principles. As applied to Tyler, Minnesota's equity-forfeiture law did far more than "compensat[e] . . . for a loss." *See Bajakajian*, 524 U.S. at 329. Tyler's "outstanding tax debt . . . was just $15,000." Pet. App. 16a. Yet the government kept $25,000 on top of that—what even the court of appeals called the "surplus equity," or the "value . . . in excess of [the] $15,000 tax debt." Pet. App. 2a. The lower courts were thus incorrect to portray the equity forfeiture as the product of a "debt-collection system whose primary purpose is plainly remedial." Pet. App. 44a. Confiscating Tyler's equity did not simply recoup "past-due property taxes" and "compensat[e] the government for the losses caused by the non-payment of property taxes." Pet. App. 44a. Quite the opposite: much like the penalty imposed on Toth, Tyler's equity forfeiture was imposed without "reference to any losses or expenses" incurred by the government. *Toth*, 598 U.S. at ___ (Gorsuch, J., dissenting from denial of certiorari) (slip op. at 2). In fact, much of the proceeds of Minnesota's equity forfeitures go to projects with no link at all to the delinquent taxpayer: to the local school district, to maintaining county parks and recreational areas, and to development projects for "dedicated memorial forests." Minn. Stat. § 282.08(4). Whether Minnesota's system of equity forfeiture is seen as a punitive sanction or a windfall taking, it cannot be called compensatory.

b. The lower courts in *Tyler* are not alone in using the term *remedial* to exempt noncompensatory payments from Eighth Amendment review. The imprecision appears to stem from this Court's use of the term in a different context entirely: the Double Jeopardy Clause. Under double-jeopardy precedent, the relevant line is between punishments that are "criminal" and those that are not; even if a sanction might, "'in common parlance,' be

described as punishment," the Double Jeopardy Clause is triggered only if the sanction is criminal. *Hudson* v. *United States*, 522 U.S. 93, 99 (1997). In articulating that line—between criminal and non-criminal punishments—the mid-century Court used the term *remedial* as a shorthand for the universe of non-criminal sanctions. *See Helvering* v. *Mitchell*, 303 U.S. 391, 399-400 (1938); *see also One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (per curiam). In that context, the word became "a catchall label for sanctions that courts did not want to define as punitive in the criminal sense, but that were clearly not simple compensatory damages." Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1829 (1992).

The Excessive Fines Clause differs materially from the Double Jeopardy Clause. While the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense," *Hudson*, 522 U.S. at 99, the Excessive Fines Clause "includes no similar limitation," *Austin*, 509 U.S. at 608. Whether an economic sanction is an Eighth Amendment "fine" turns not on whether it "is civil or criminal," but on whether it serves "at least in part as punishment." *Id.* at 610. Thus, many civil monetary penalties and forfeitures may be "remedial" (i.e., civil) enough to fall outside the Double Jeopardy Clause while still being "punitive" enough to implicate the Excessive Fines Clause. In fact, the Court has justified reading the Double Jeopardy Clause narrowly in part *because* the Excessive Fines Clause applies more broadly to civil penalties. *Hudson*, 522 U.S. at 102-03; *see also Ursery*, 518 U.S. at 286 (noting that the two Clauses have "never [been] understood as parallel to, or even related to," one another).

Despite these differences, lower courts have persisted in exporting the Double Jeopardy Clause's catchall concept of *remedial* to excessive-fines litigation. Where this Court's excessive-fines precedent has cabined the term to "compensation or indemnity" for a loss, *Bajakajian*, 524 U.S. at 329 (citation omitted), lower courts have held the Excessive Fines Clause inapplicable if penalties can be called "remedial" in even the loosest sense. The courts below, for example, labeled Tyler's equity forfeiture "plainly remedial" even though the government confiscated thousands more than needed to compensate for her tax debt. Pet. App. 44a. The First Circuit in Monica Toth's case classified as "remedial" a $2.1 million civil penalty imposed without "reference to any losses or expenses [the government] had incurred." *Toth*, 598 U.S. at ___ (Gorsuch, J., dissenting from denial of certiorari) (slip op. at 2). Nor are Toth's and Tyler's cases unique. Whatever value the term *remedial* has as a shorthand for *non-criminal* in double-jeopardy cases, its imprecision has fueled confusion elsewhere, with lower courts endlessly on the hunt for "nonpunitive penalties." *Id.* (citation omitted); *see also Hudson*, 522 U.S. at 103 (commenting on "the confusion created by attempting to distinguish between 'punitive' and 'nonpunitive' penalties"); *see generally* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 319 (2014) ("[T]he ratifying generation would likely not have divided remedial and punitive penalties when determining whether a sanction qualified as a fine.").[4]

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[4] In discussing double-jeopardy precedent in *Bajakajian*, the Court's decision could be misconstrued as having suggested that penalties that are "remedial" for double-jeopardy purposes necessarily do not implicate the Excessive Fines Clause either. 524 U.S. 321, 342-43 (1998) (discussing *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam)). Elsewhere, however, the Court has left

This pattern of imprecision calls out for correction (if not in this case, then in a future one). Like the Takings Clause, the Excessive Fines Clause secures a right that is "fundamental to our scheme of ordered liberty." *Timbs*, 139 S. Ct. at 689 (citation omitted). More broadly, both Clauses reflect the ratifying generation's commitment to the view that "[g]overnment is instituted to protect property of every sort." *Davis* v. *Dawson*, 33 F.4th 993, 1001 (8th Cir. 2022) (Stras, J., concurring) (quoting James Madison, *Property*, Nat'l Gazette (Mar. 29, 1792)). The decision below abandoned that promise, letting government impose devastating burdens on its citizens through statutory workarounds and easy labels. Whether viewed through the Takings Clause or the Excessive Fines Clause, the court of appeals' judgment should be reversed.

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no doubt that the Excessive Fines Clause rightly extends to penalties that do not trigger double-jeopardy protection. *United States* v. *Ursery*, 518 U.S. 267, 287 (1996) ("Forfeitures effected under 21 U.S.C. §§ 881(a)(4) and (a)(7) are subject to review for excessiveness under the Eighth Amendment after *Austin*; this does not mean, however, that those forfeitures are so punitive as to constitute punishment for the purposes of double jeopardy."); *see also Hudson* v. *United States*, 522 U.S. 93, 102-03 (1997).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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