No. 22-166

IN THE

Supreme Court of the United States

GERALDINE TYLER, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

HENNEPIN COUNTY, AND DANIEL P. ROGAN, AUDITOR-TREASURER, IN HIS OFFICIAL CAPACITY,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONER

WENDY LIU
Counsel of Record
SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
wliu@citizen.org

Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer-advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues involving protection of consumers and workers, public health and safety, and maintaining openness and integrity in government. Public Citizen has a longstanding interest in issues involving the protection of economically vulnerable people from harms to their constitutional rights. Public Citizen often submits briefs as amicus curiae in this Court and others in cases implicating its interests.

Public Citizen submits this brief to explain that when the government appropriates and sells property for the purpose of recouping delinquent taxes, the Takings Clause requires it to pay the property owner just compensation to the extent that the value of the property taken exceeds the amount owed by the property owner.

SUMMARY OF ARGUMENT

The government's appropriation of a home is the paradigmatic example of a taking. Where the government takes a person's real property for "public use," the Takings Clause imposes a requirement that the person receive "just compensation" for the taking.

When Hennepin County took Geraldine Tyler's condominium for the public purpose of recouping

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[1] This brief was not written in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of the brief.

property taxes owed to the State, the Takings Clause required the County to pay just compensation. The measure of just compensation is the fair market value of the property less the amount needed to satisfy the tax debt (including penalties, costs, and interest). Here, the County compensated her in part by extinguishing her tax debt, but the County failed to provide Ms. Tyler with full compensation for the value of what it took. The County therefore violated the just compensation requirement of the Takings Clause.

Sales of homes for unpaid taxes often result in devastating losses for homeowners. Vulnerable populations such as the elderly and disabled, as well as low-income and minority populations, are disproportionately harmed by tax sales. By retaining the entirety of the value of the property taken—often in the form of proceeds from tax sales—the government reaps a windfall at the expense of people struggling for financial stability. The Takings Clause forbids this outcome.

ARGUMENT

The Takings Clause, made applicable to the States by the Fourteenth Amendment, provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *Murr v. Wisconsin,* 137 S. Ct. 1933, 1942 (2017). "As its text makes plain," the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power" by requiring "*compensation* in the event of otherwise proper interference amounting to a taking." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005) (citation omitted).

The "principle reflected in the Clause" is the protection of private property from uncompensated takings. *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). The Takings Clause likely was adopted in reaction to early American resentment at "appropriations of their personal property during the Revolutionary War," *Horne*, 576 U.S. at 359, to "obtain[] supplies for the army, and other public uses, by impressment … without any compensation whatever," *id.* (quoting 1 Blackstone's Commentaries, Editor's App. 305–306 (1803)).

"The critical terms [in the Clause] are 'property,' 'taken' and 'just compensation.'" *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945). Thus, "[t]extually and logically," the "three basic questions" that must be answered are: "what 'private property'" is implicated; "whether that property has been 'taken' for 'public use'"; and what "'just compensation' the owner is due." *Murr*, 137 S. Ct. at 1951 (Roberts, C.J., dissenting). The answers in this case are: the private property is Ms. Tyler's condominium; the County took that property for the public use of recouping taxes; and Ms. Tyler is owed just compensation equal to the fair market value of the property less the amount of the tax delinquency and related expenses.

I. The County's appropriation of title to Ms. Tyler's condominium is a taking for public use requiring just compensation.

A. The "private property" is the condominium.

The term "private property" in the Takings Clause "denote[s] the group of rights inhering in [a] citizen's relation to the physical thing, as the right to possess, use and dispose of it." *Gen. Motors Corp.*, 323 U.S. at 378. The Clause "is addressed to every sort of [property] interest the citizen may possess." *Id.* 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 *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

It is well-settled that real property is at the heart of the meaning of the term "private property" in the Takings Clause. *See Horne*, 576 U.S. at 358; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982); *Gen. Motors Corp.*, 323 U.S. at 378. Here, the property right at stake is the entire collection of rights that Ms. Tyler possessed in her condominium—that is, her "right to possess, use and dispose" of the condominium. *Gen. Motors Corp.*, 323 U.S. at 378.

B. The County's acquisition of title to the condominium is a "taking."

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle*, 544 U.S. at 537; *accord Horne*, 576 U.S. at 337. Such a

taking occurs, for example, when the government "uses its power of eminent domain to formally condemn property," "physically takes possession of property without acquiring title to it," or "occupies property—say, by recurring flooding as a result of building a dam." *Cedar Point Nursery*, 141 S. Ct. at 2071. These kinds of takings—called "*per se* takings"—are "perhaps the most serious form of invasion of an owner's property interests." *Loretto*, 458 U.S. at 435. In such circumstances, the government "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand," "effectively destroy[ing] each of th[e] rights" "'to possess, use, and dispose'" of the property. *Id.*[2]

As this Court has repeatedly held, the government's appropriation of real property is "a *per se* taking that requires just compensation." *Horne*, 576 U.S. at 358; *see also Loretto*, 458 U.S. at 427. Where the government "actually takes title" to property, *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992)—either for itself or to transfer it to a third party—the government's action is a "taking" within the meaning of the Fifth Amendment. *See, e.g.*, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 234, 243–44 (1984) (state's acquisition of title from one private party and transfer of that title to another pursuant to an economic development plan was a taking); *United States v. 50 Acres of Land*, 469 U.S. 24, 26 (1984) (the

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[2] In contrast, when the government "imposes regulations that restrict an owner's ability to use his own property," the test developed in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), applies. *Cedar Point Nursery*, 141 S. Ct. at 2072.

government's acquisition of title pursuant to a condemnation proceeding was a taking); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 16 (1984) (same).

Here, the County effected a *per se* taking of Ms. Tyler's condominium. Pursuant to Minnesota's statutory scheme, the County, on behalf of the state—after obtaining a judgment for Ms. Tyler's tax delinquency and following the expiration of the statutory redemption period—"took absolute title to Tyler's condominium." Pet. App. 4a. Before the County's actions, Ms. Tyler had title to her condominium. Following those actions, that title belonged to the state, and then, after the County sold it, to a private third party. *Id.* The County's acquisition of title "absolutely dispossess[ed]" Ms. Tyler of her property rights in the condominium: The County did not simply "take a single 'strand' from the 'bundle' of property rights"; it "chop[ped] through the bundle" entirely, "effectively destroying" her "rights 'to possess, use and dispose of'" the condominium. *Loretto*, 458 U.S. at 435.

C. The County's taking satisfies the "public use" requirement.

Under the "public use" requirement of the Takings Clause, private property may not be taken "without a justifying public purpose, even though compensation be paid." *Midkiff*, 467 U.S. at 241 (quoting *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937)); *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). "Public use" is defined "broadly, reflecting [the Court's] longstanding policy of deference to legislative judgments in this field." *Kelo*, 545 U.S. at 480. Accordingly, this Court's "public use jurisprudence

has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Id.* at 483. "Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Midkiff*, 467 U.S. at 241.

The public use requirement has been satisfied where private property is "transfer[red] … to public ownership," where it is "transferred … to private parties, often common carriers, who make the property available for the public's use," or where, "in certain circumstances and to meet certain exigencies … the property is destined for subsequent private use." *Kelo*, 545 U.S. at 498 (collecting cases). For example, in *Kelo*, this Court held that "[p]romoting economic development" satisfied the public use requirement because such a purpose was a "traditional and long-accepted function of government." *Id.* at 484.

Here, the government's appropriation of the condominium was for the public purpose of recouping taxes owed to the state. That purpose satisfies the "public use" requirement of the Takings Clause because the government's interest in collecting owed taxes is a traditional and long-accepted interest that fits within the broad understanding of public purpose. *See Springer v. United States*, 102 U.S. 586, 594 (1880) (stating that "[t]he prompt payment of taxes is always important to the public welfare" and "may be vital to the existence of a government"); *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (referencing the "legitimate interest of the individual States in exercising their taxing powers"); Frank S.

Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 755 (2000) (stating that property tax "is the central method by which local governments can, on their own initiative and within their own control, impose taxes to finance government services").

More specifically, the County's taking of the condominium satisfies the public use requirement because under the Minnesota statute, property taken to recoup taxes is either "retained for public use" or sold to a private party with the net proceeds retained by the government. *See* Pet. App. 15a (citing Minn. Stat. §§ 282.01 subd. 1 & 282.08). Because the seized property or its value is ultimately "transfer[red] … to public ownership," the "public use" requirement is satisfied. *Kelo*, 495 U.S. at 497; *see also id.* at 508 (Thomas, J., dissenting) (stating that "[t]he most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever").

D. The "just compensation" owed is the fair market value of the condominium less the amount of the tax debt and related expenses.

The "plain language [of the Takings Clause] requires the payment of compensation whenever the government acquires private property for a public purpose." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321 (2002)). The "'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." *Brown*, 538 U.S.

at 235–36. The property owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934). Although "[h]e must be made whole," he "is not entitled to more." *Id.* Accordingly, if the property "owner's pecuniary loss … is zero," there is "no violation of the Just Compensation Clause." *Brown*, 538 U.S. at 240.

The usual standard of just compensation to make a property owner as well-off pecuniarily as if she retained the property is "the market value of the property at the time of the taking." *50 Acres of Land*, 469 U.S. at 29 (quoting *Olson*, 292 U.S. at 255). Thus, when the government takes real property, the property owner must be paid the fair market value of that property as just compensation for the taking. *See 50 Acres of Land*, 469 U.S. at 26. However, when a taking confers a benefit on the property that was taken, "the benefit may be set off against the value of the land taken." *United States v. Miller*, 317 U.S. 369, 376 (1943); *see also United States v. Sponenbarger*, 308 U.S. 256, 266–267 (1939) ("[I]f governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner.").

Thus, where real property is taken to recoup delinquent taxes, the measure of just compensation is the fair market value of the taken property less the benefit conferred by the cancellation of the tax indebtedness. If the property is sold in a tax sale at a public auction with sufficient notice of the property's sale, the actual sale price likely will represent the fair

market value of the property. *Cf. Kirby Forest Indus., Inc.*, 467 U.S. at 10 (stating that under a standard utilizing fair market value, "the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking'"). In jurisdictions, however, where a property is sold in a tax sale for only the amount of the tax delinquency,[3] the actual sale price likely will fall far short of the property's fair market value. Regardless of whether the property is sold for the amount of the tax debt or its fair market value—or even if the property is not sold at all but retained for government use—the net loss to the property owner is the same: the value of the property taken less the amount of the tax debt and related expenses that are wiped out by the taking.

Here, the County sold Ms. Tyler's condominium at an auction for $40,000. *See* Pet. App. 4a; J.A. 48.[4] Other than cancelling her $15,000 tax debt, the County failed to provide Ms. Tyler with any compensation for its taking of her condominium. *See* Pet. App. 4a. Because the County failed to pay her the fair market value of the condominium less the amount needed to satisfy the tax debt (including penalties, costs, and interest), the County's taking violated the just compensation requirement of the Takings Clause.

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[3] *See* John Rao, *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat'l Consumer Law Ctr. 41 (Jul. 2012), https://www.nclc.org/wp-content/uploads/2022/09/tax-lien-sales-report.pdf (stating that "[n]early one-third of states require that the only bid that may be accepted at the tax sale is the amount owed for the delinquent taxes").

[4] Ms. Tyler has not argued in this Court that the amount realized by the sale was less than the fair market value of the property.

II. The government's interest in tax collection does not excuse it from paying just compensation when it takes property worth more than the taxes owed.

That this case involves collection of taxes does not alter the application of the Takings Clause to the appropriation of Ms. Tyler's property. Taxes themselves, of course, "are not 'takings.'" *Koontz v. St. Johns River Mgmt. Dist.*, 570 U.S. 595, 615 (2013) (citation omitted). And there is no dispute that the government may seize property, including real property, as a means of collecting an outstanding tax debt. *Cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 59–60 (1993) (collecting cases). However, this Court's recognition of the government's authority to appropriate property to collect a tax debt does not excuse the government from paying just compensation when the value of the property it justifiably takes to satisfy its claim exceeds the amount of the claim. In such circumstances, absent compensation equal to the difference between the property's value and the amount owed, the owner has not received fair recompense for the government's appropriation of the property, and the government has received an undeserved windfall.

This Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), illustrates the point. There, the Court rejected the notion that the government's right to collect a fee for services rendered in connection with the deposit of a fund in the registry of a court provided a basis for the government to seize interest on the fund that was not in payment for those services. *Id.* at 162, 164–65. The Court held that the appropriation was an

uncompensated taking in violation of the Takings Clause, *id.* at 165, because the county's "exaction" of the interest money was a "forced contribution to general governmental revenues" that was "not reasonably related to the costs of using the courts," *id.* at 163. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (citing *Webb's Fabulous Pharmacies* in stating that the state may not, through a taking, "secure a windfall for itself").

There is no meaningful distinction between the circumstances in *Webb's Fabulous Pharmacies* and the circumstances here. In *Webb's Fabulous Pharmacies*, the government appropriated funds that went beyond what it was owed in payment for court services. Here, the County took a condominium that had a value exceeding the amount of the tax debt, with "the practical effect of appropriating for the [C]ounty," *id.* at 164, more than it was owed. The County's failure to compensate the owner for the difference between the amount owed and the value of what was taken resulted in an "exaction" and "forced contribution to general governmental revenues." *Id.* at 163; *accord Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 464, 484–85 (Mich. 2020) (stating that "[t]he purpose of taxation is to assess and collect taxes *owed*, not appropriate property *in excess of what is owed*" and concluding that the state's retention of the proceeds from a tax sale above the amount of the tax debt violated the Michigan Constitution's Takings Clause).

Nelson v. City of New York, 352 U.S. 103 (1956), supports the conclusion that the government's failure to compensate a property owner when the value of property taken exceeds the amount of a tax debt violates the Takings Clause. There, the plaintiffs argued in their reply brief that the City's retention of

the proceeds from the sale of property for unpaid taxes violated the Takings Clause. *See Nelson*, 352 U.S. at 109. The Court acknowledged that it had previously stated that withholding "surplus" proceeds from the sale of foreclosed property from its owner "would … 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." *Id.* at 110 (quoting *United States v. Lawton*, 110 U.S. 146, 150 (1884)). The Court, however, found no Takings Clause violation on the facts of *Nelson* because "we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale." 352 U.S. at 110. Rather, the state statute in *Nelson* permitted the property owner to assert as a defense that the property "had a value substantially exceeding the tax due" and allowed the owner to recover that excess value. *Id.*

Unlike the state statute at issue in *Nelson*, the Minnesota statute here provides no means for a property owner to receive compensation for value of the property in excess of the amount of the tax debt. *See* Pet. App. 4a. That is, the statute lacks the mechanism that was critical to *Nelson*'s finding that there was no constitutional violation.

Finally, some lower court decisions have held that a taking of private property to satisfy a tax debt without payment of just compensation does not violate the Takings Clause because it is an exercise of the government's taxing power, rather than its eminent domain power. *See, e.g.*, *In re Murphy*, 331 B.R. 107, 128 (Bankr. S.D.N.Y. 2005); *In re Golden*, 190 B.R. 52, 57 (Bankr. W.D. Penn. 1995); *Balthazar v. Mari Ltd.*, 301 F. Supp. 103, 105 n.6 (N.D. Ill.), *aff'd*, 396 U.S.

114 (1969) (summary affirmance). However, "a seeming exercise of the taxing power" can be "a taking … in violation of the 5th Amendment" where the government's actions are "so arbitrary" that they are "not the exertion of taxation, but a confiscation of property." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916); *see also Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590 & n.19 (1935) (identifying the "[t]he power to tax" as "subject to the Fifth Amendment").

Here, although the County's seizure of the condominium was an exercise of its power to collect outstanding tax debts, that circumstance merely underscores that the County's taking of property had a public purpose. It does not take the seizure outside the protection of the Takings Clause.

III. Permitting the government to take property to collect a tax debt without compensating the owner for the value exceeding the debt creates skewed incentives that disproportionately harm vulnerable people.

For a homeowner, the home is typically the largest nonfinancial household asset. *See* Board of Governors of the Federal Reserve System, *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 Fed. Res. Bull., no. 5, Sept. 2020, at 16.[5] "In 2020, … home equity accounted for 27.8 percent of household wealth." U.S. Census Bureau, *The Wealth of Households: 2020*, at 3

[5] https://www.federalreserve.gov/publications/files/scf20.pdf.

(Aug. 2022).[6] As of the fourth quarter of 2022, the homeownership rate in the United States is 65.9 percent. U.S. Census Bureau, *Quarterly Residential Vacancies and Home Ownership, Fourth Quarter 2022*, at 1 (Jan. 31, 2023).[7]

Financially distressed homeowners, however, often lose their homes or other property when such property is taken by the state because of unpaid property taxes. For example, according to an investigation conducted by the Washington Post, nearly 200 homes, assessed at a total value of $39 million, were taken through tax lien foreclosures in the District of Columbia between 2005 and 2013. Michael Sallah et al., *Left With Nothing*, Washington Post, Sept. 8, 2013.[8] Approximately 500 other properties—"storefronts, parking lots and vacant land"—also were foreclosed on in the District of Columbia in that same time frame, at "an average of one a week." *Id.* In Detroit, "[f]rom 2011 to 2015, the Wayne County treasurer foreclosed on approximately 100,000 Detroit properties"—or "one in four Detroit properties"—for unpaid property taxes. Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 UC Irvine L. Rev. 847, 848 (2019).

For property owners, tax foreclosures result in both the loss of the home and a "devastating loss of

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[6] https://www.census.gov/content/dam/Census/library/publications/2022/demo/p70br-181.pdf.

[7] https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

[8] https://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/.

home equity." Rao, *supra*, at 4. Indeed, tax debt often represents a shockingly small fraction of the value of homes that are lost. In the District of Columbia, "[o]f the nearly 200 homeowners who lost their homes [from 2005 to 2013], one in three had liens of less than $1,000." *Left With Nothing*, *supra*. For dozens of the other 500 properties that were taken, "the liens were less than $500." *Id.* For example, a 76-year-old retired veteran with dementia reportedly lost his $197,000 home because he failed to pay a $133.88 property tax bill that had "snowballed to $4,999—37 times the original tax bill" in two years because of interest, costs, and fees. *Id.*; *see also Coleman ex rel. Bunn v. District of Columbia*, 70 F. Supp. 3d 58, 64 (D.D.C. 2014). Similarly, in Kalamazoo County, Michigan, a woman lost a home that she had purchased for $156,000 in cash, because of an unpaid $2,000 tax bill; the county sold the home for $80,000 and "retain[ed] all of the profits from the sale." Jenna Christine Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real Prop. Tr. & Est. L.J. 93, 106 (2019).

The "[h]omeowners most at risk" of losing their homes from tax sales "are those who have fallen into default because they are incapable of handling their financial affairs, such as individuals suffering from Alzheimers, dementia, or other cognitive disorders." Rao, *supra*, at 9. "These people generally are less able to take care of themselves, which increases the possibility that they will not pay their property taxes unless someone else assures the payment is made." Foos, *supra*, at 104. Indeed, the Washington Post investigation found that "[t]he hardest hit" from tax sales are "elderly homeowners, who were often sick or

dying when tax lien purchasers seized their houses." *Left With Nothing*, *supra*. For example:

> One 65-year-old flower shop owner lost his Northwest Washington home of 40 years after a company from Florida paid his back taxes—$1,025—and then took the house through foreclosure while he was in hospice, dying of cancer. A 95-year-old church choir leader lost her family home to a Maryland investor over a tax debt of $44.79 while she was struggling with Alzheimer's in a nursing home.

Id. Similarly, "[a]n 81-year-old Rhode Island homeowner was evicted two weeks before Christmas from the home she had lived in for more than 40 years because she had fallen behind on a $474 sewer bill. A corporation bought her house at a tax sale for $836.39 and then resold it for $85,000." Rao, *supra*, at 9.

Elderly and disabled populations "are also less likely to have actual notice that they are behind on their payments." Foos, *supra*, at 104. "Many elderly or disabled people cannot pick up their own mail or may lose track of their mail, so although notices to them may be sent, they are not aware that they are behind on their property taxes until their property is sold and the government evicts them." *Id.* at 104–05; *see also* Rao, *supra*, at 5 (stating that "[i]nadequate notice and a lack of judicial oversight over the process leave many homeowners in the dark about steps they can take to avoid a home loss").

In addition, "property tax foreclosures are highly concentrated among low-income communities with large African American and Latino populations." *Id.* For example, according to the Washington Post investigation, "72% of pending foreclosures are in

neighborhoods where less than 20% of the population is white." *Left With Nothing*, *supra*. Moreover, because "[u]rban minority neighborhoods have historically been over-assessed relative to white neighborhoods," urban minority homeowners are "more vulnerable to tax delinquency." Andrew W. Kahrl, *Investing in Distress: Tax Delinquency and Predatory Tax Buying in Urban America*, 43 Critical Sociology, no. 2, 2017, at 199, 201; *id.* at 205 (stating that "urban minority property owners have … been historically more prone to tax delinquency and remain so today" (internal citations omitted)).

In contrast, local governments have profited from tax sales. According to a study of tax sales in Massachusetts, "based on an examination of a typical year, … Massachusetts municipalities are receiving almost $43.00 for each dollar owed by taking tax title to recover delinquent taxes." Ralph D. Clifford, *Massachusetts Has A Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274, 284 (2018). The study found that for properties that were foreclosed on from August 1, 2013, to July 31, 2014:

> The overall estimated assessed value of those [properties] was $57,963,000. These properties were taken to pay an outstanding tax liability of $1,352,000, a difference of $56,611,000 in excess recovery for the towns *in the year*.

Id.

In particular, governments seeking "to bridge … budget gaps" have "institut[ed] more aggressive tax collection practices," "contribut[ing] to an increase in tax sales." Rao, *supra*, at 11. For instance, "[i]n Bay County, Florida, the sale of tax lien certificates in 2008 increased by 48 percent over 2007, and

certificates sold in 2009 increased by 25 percent." *Id.* In addition, "[i]n a county in Mississippi, the number of properties included in the annual tax sale has doubled in recent years." *Id.* Moreover, "in recent decades, fiscally distressed counties and municipalities have attempted to close short-term revenue gaps and relieve themselves of the costs of delinquent tax collection by marketing their tax debts to private investors." Kahrl, *supra*, at 199–200.

Local governments that profit from tax foreclosures are incentivized "to give inadequate notice of tax delinquency status" and "to foreclose on as many properties as possible and thereby make a larger profit." Foos, *supra*, at 95–96.[9] Although "[p]rompt receipt of tax revenue" is important to government budgets, Rao, *supra*, at 42, and foreclosure on tax liens may be an essential means of collection, those considerations provide no justification for allowing governments to profit at the expense of their least financially secure citizens by retaining more than they need to satisfy taxes owed. The just compensation guarantee of the Takings Clause serves to avoid that unjust result.

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[9] Jurisdictions that permit the sale of foreclosed properties to private purchasers for no more than the amount of taxes owed may avoid that incentive because they retain no profit. But there is no public justification for the mere transfer of property value from distressed taxpayers to opportunistic buyers. *Cf. Kelo*, 545 U.S. at 477 (stating that "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation").

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

WENDY LIU
Counsel of Record
SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
wliu@citizen.org
Counsel for Amicus Curiae

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