No. 22-166

IN THE

Supreme Court of the United States

GERALDINE TYLER,

Petitioner,

v.

HENNEPIN COUNTY, MINNESOTA, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. One of those ideas is that the Constitution prohibits the government from arbitrarily confiscating private property without just compensation.

AFPF has a particular interest in this case because it believes that it is unjust and unconstitutional for the government to seize real property, in excess of that which it is owed to satisfy a tax debt, without compensating the property owner. AFPF is also concerned that the Minnesota tax-forfeiture scheme at issue in this case—much like many civil asset forfeiture schemes—creates perverse pecuniary incentives for the government to run roughshod over citizens' constitutional rights as a means of funding its operations, as happened here. This concern is heightened where, as here, the government exempts itself from the rules that apply to everyone else, as the

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[1] No counsel for a party authored this brief in whole or in part and no person other than amicus made any monetary contributions intended to fund the preparation or submission of this brief.

Minnesota tax-forfeiture scheme purports to do, even though in the private law context Minnesota law recognizes equity interests as property protected against confiscation. AFPF believes the government should not be allowed to extinguish property interests and core constitutional rights in this way through legislative fiat. After all, "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

SUMMARY OF ARGUMENT

The Constitution recognizes two primary means by which the government can confiscate property worth more than it is owed for taxes or other bona fide debt: (1) a taking for public use requiring just compensation; and (2) imposing a "fine." Both require due process to ensure the confiscation comports with law. And each is subject to the limitations of the Fifth or Eighth Amendments, respectively.

This case is about whether the government can expand its power to take from taxpayers without constitutional scrutiny more than it is owed through creative labeling and legislative *ipse dixit*—declaring the confiscation is neither a taking nor a fine but some other method of making property disappear from the owner's grasp and magically reappear in the state's coffers free from constitutional scrutiny. But like any illusion, a peek behind the curtain reveals the

banality of the trick. The usual rules of transportation[2] apply, as does the Constitution.

State and local governments can fund their operations through taxation and fees. And states can pass generally applicable laws for collecting debts. It does not follow, however, that the taxing power can be used to supersede constitutional protection of property rights, allowing states to confiscate surplus equity interest in taxpayers' homes simply because the homeowner owes a tax debt. To claim otherwise, flies in the face of established precepts of property law. Indeed, using force to take property valued at more than is owed is theft—and the government is no different. *Cf. Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting) ("In some legal precincts that sort of behavior is called theft.").

But that is what Respondents have done, pursuant to a Minnesota statute purporting to extinguish homeowners' traditional property interest in surplus equity based on the government's interest in funding its operations. Hennepin County sold ninety-three-year-old Petitioner Geraldine Tyler's condominium "for $40,000, although the outstanding taxes and fees were only $15,000," and she "did not receive and has no way to obtain any of the excess funds generated by the sale of her home." JA. 5. Instead, the county kept $25,000 of Petitioner's property—more than *ten times*

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[2] *See, e.g.*, The Prestige, The Transported Man Trick, *available at* https://www.youtube.com/watch?v=etsiRLgSrsA.

what she owed in delinquent property taxes and more than double the total amount she owed including fees and penalties—as a windfall. *See* Pet. 5 n.1. In short, Respondents "forcibly took property worth vastly more than the debts" Petitioner "owed, and failed to refund any of the difference." *Hall v. Meisner*, 51 F.4th 185, 196 (6th Cir. 2022). That is a taking, requiring the state to pay Ms. Tyler the value of property taken less any undisputed debt. And Minnesota cannot use legislation to exempt its taking from the Constitution.

To be sure, the scope of "property" protected by the Fifth Amendment's Takings Clause is *generally* determined by examining currently applicable state property law. But under certain circumstances, the Clause's protection against takings without just compensation sweeps more broadly to incorporate property rights historically recognized under the common law backdrop of the Constitution. Indeed, as Judge Kethledge recently explained, "the Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Hall*, 51 F.4th at 190. That observation resonates here, particularly because in the private law context Minnesota law *does* recognize a protected property interest in surplus equity for circumstances in which the government is not the beneficiary. This dichotomy is not only unjust and patently unconstitutional but exposes the state's appreciation of the property right involved, and protection of those rights when its own pecuniary interests are not involved.

Nor are Respondents' actions immune from scrutiny under the Eighth Amendment. And this Court should make clear that *any* government confiscation exceeding the value of what is properly owed to the government as compensation, with reasonable interest and fees, is necessarily a "fine" subject to constitutional scrutiny under the Eighth Amendment.

The Excessive Fines Clause, as an original matter, does not exempt so-called "remedial penalties" from constitutional scrutiny. Indeed, "the notion of 'nonpunitive penalties' is 'a contradiction in terms.'" *Toth v. United States*, 143 S. Ct. 552, 553 (2023) (Gorsuch, J., dissenting from denial of certiorari) (quoting *United States v. Bajakajian*, 524 U.S. 321, 346 (1998) (Kennedy, J., dissenting)). And Respondents' insistence below that "[t]he purpose of the tax forfeiture provision is to encourage the collection of taxes" and "the ultimate possibility of loss of property serves as a deterrent to those taxpayers considering tax delinquency," JA. 42, is wholly consistent with this view. If, counterfactually, "deterrence" could justify the taking without just compensation, then it would be a fine. To the extent *Bajakajian* can be read otherwise, as the district court seemed to think, *see* Pet. App. 42a–44a, this Court should repudiate that precedent. Instead, the key inquiry to determine whether a sanction or forfeiture is a "fine" under the Excessive Fines Clause is whether it is *solely* compensatory; that is, whether it is no more than necessary to make the government whole. If not, then the exaction falls within the Eighth

Amendment's sweep, necessitating a separate inquiry as to whether it is "excessive."

Enforcing the original public meaning of the Constitution's guarantees of just compensation and protection against excessive fines would go a long way to ending the perverse incentive structures various forfeiture schemes create.

ARGUMENT

I. RETENTION OF SURPLUS EQUITY IS A TAKING REQUIRING JUST COMPENSATION.

A. Respondents' Taking Absolute Title to Petitioner's Home is a Per Se Physical Taking Requiring Just Compensation.

Respondents appear to rationalize retaining the entire value of Ms. Tyler's home by trying to distinguish between physically taking the home and retaining the portion of her equity interest that exceeds her debt to the state. *See* BIO 21–22. But that equity interest cannot be treated separately from the physical taking of the home and dismissed as if no physical taking occurred at all. It is undisputed Respondents physically dispossessed Ms. Tyler of her home, extinguishing every property right associated with her ownership. The only open question is the measure of what is owed to her—not whether she is owed anything in the first place. The Fifth Amendment draws no distinctions that would allow specious relabeling of sticks in the bundle of property rights to extinguish those rights when the property has been physically taken in its entirety. Instead, it

commands just compensation for the entire taking regardless of whether the state was owed a portion of the value of the property.

"Constitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244–45 (2022) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 186–89 (1824); 1 J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (1833)). The Takings Clause states: "[N]or shall private property be taken for public use, without just compensation."[3] U.S. Const. amend. V. As its text makes clear, "[t]he Takings Clause is a prohibition, not a grant of power[.]" *Kelo v. City of New London*, 545 U.S. 469, 511 (2005) (Thomas, J., dissenting). It "is addressed to every sort of interest the citizen may possess," *United*

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[3] Although not at issue here, it bears noting that, as an original matter, the Fourteenth Amendment's Privileges or Immunities Clause incorporated all rights enumerated in the Bill of Rights. *See McDonald v. Chicago*, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring in part and concurring in judgment); *see also Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring). "At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' The two words, standing alone or paired together, were used interchangeably with the words 'rights,' 'liberties,' and 'freedoms,' and had been since the time of Blackstone." *McDonald*, 561 U.S. at 813 (Thomas, J., concurring in part and concurring in judgment) (citing 1 W. Blackstone, Commentaries *129). *Cf. Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (discussing scope of "privileges and immunities" protected by Art. IV, § 2).

States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945), including equity interests in property, *see Hall,* 51 F.4th at 194–96.

As this Court recently reaffirmed, "[w]hen the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (citation omitted); *see Horne v. Dep't of Agric.*, 576 U.S. 351, 358 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."); *see also Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 980 (5th Cir. 2022) ("The physical appropriation of private property by the government is the 'clearest sort of taking.'" (quoting *Cedar Point*, 141 S. Ct. at 2071)). This is "a simple, *per se* rule: The government must pay for what it takes." *Cedar Point*, 141 S. Ct. at 2071.

Respondents' confiscation of Petitioner's home is a *per se* physical taking. And Respondents are required to pay just compensation for all property they took at the time they took it.[4] *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019) (Thomas, J., concurring) ("[A] violation of this Clause occurs as soon as the government takes property without paying for it."); *see also United States v. Lawton*, 110 U.S. 146, 150

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[4] Here, there is no dispute Ms. Tyler's condo was worth more than the debt she owed Respondents. The broader question of how the government should comply with its constitutional obligation in other cases in which a surplus equity interest in real property may exist should generally be left to state legislation.

(1884) ("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.").

Here, the taking occurred the moment the state took absolute title to Petitioner's condo, with no right of redemption.[5] *See Hall,* 51 F.4th at 196 ("'[T]he act of taking is the event which gives rise to the claim for compensation.' Here, that event was the County's taking of 'absolute title' to the plaintiffs' homes." (quoting *Knick*, 139 S. Ct. at 2170 (cleaned up)); *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 485 (Mich. 2020) (Viviano, J., concurring). And at that point Respondents had an obligation—subject to other constitutional constraints such as due process—to either promptly sell the property for fair market value and provide Petitioner with any surplus or, alternatively, to keep the property and provide "just compensation."[6] Respondents' failure to do so is unconstitutional.

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[5] *See generally* Minn. Stat. § 281.18 (providing that if an owner fails to redeem by the end of the redemption period, "absolute title . . . shall vest in the state").

[6] "[T]he Takings Clause also prohibits the government from taking property except 'for public use.' Were it otherwise, the Takings Clause would either be meaningless or empty." *Kelo*, 545 U.S. at 507 (Thomas, J., dissenting). "The most natural reading of the [Public Use] 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

B. States Cannot, by Legislative Fiat, Sidestep the Takings Clause.

In Minnesota, an equity interest in a home is a legally recognized and protected property interest, except when the government is involved and has a pecuniary interest in funding its operations through windfalls generated through its tax-forfeiture scheme. That is unconstitutional.

Minnesota law recognizes a property interest in equity for purposes of private law. *See, e.g.*, Minn. Stat. § 550.20 ("No more shall be sold than is sufficient to satisfy the execution"); Minn. Stat. § 580.10; *see also Brown v. Crookston Agric. Ass'n*, 34 Minn. 545 (1886). Minnesota state court decisions likewise make clear that under the common law debtors like Petitioner were entitled to the surplus proceeds from any tax sale. *See, e.g., Farnham v. Jones*, 32 Minn. 7, 12 (Minn. 1884) ("[T]he right to the surplus exists independently of such statutory provision, the province of which would be merely to regulate the

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it for any public purpose or necessity whatsoever." *Id.* at 508 (Thomas, J., dissenting); *see id.* at 521 (Thomas, J., dissenting) ("I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property."). It is, at best, unclear whether Minnesota's tax-forfeiture scheme, as a categorical matter, runs afoul of the Public Use Clause. What is certain, however, is that any home sale to a private party for less than fair market value—thus transferring the equity interest from a tax debtor to a private party for private use and gain—would not be for public use and would therefore be unconstitutional for that independent reason.

manner of enforcing the right."); *State by Burnquist v. Flach*, 213 Minn. 353, 356 (Minn. 1942) ("'It is not the policy of the state, nor should it be, to deprive owners of real estate of their interest therein on account of tax delinquency.'" (quoting *State ex rel. Equity Farms v. Hubbard*, 203 Minn. 111, 116 (Minn. 1938)). That alone should have ended the matter.

But Minnesota, like some other states, grants itself a different set of rules, including the power to appropriate equity in real property it could not otherwise claim.[7] *Cf. Hall*, 51 F.4th at 195 ("The only context in which Michigan law does not recognize equitable title as a property interest in land, apparently, is when the government itself decides to take it."). "Unlike a mortgage foreclosure sale, where amounts realized in excess of the debt owed on the property may be held for the owner, in a tax forfeiture, the [State] simply confiscates the homeowner's property. The [State] neither returns the property,

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[7] As alleged in the Complaint, "Minnesota's forfeiture statute requires that any excess proceeds be retained by the State or by the taxing district." JA. 21 (citing Minn. Stat. §§ 282.05, 282.08). Minnesota's surplus distribution provision, Minn. Stat. § 282.08, "governs how every dollar of surplus is to be distributed. First, the net proceeds must cover various expenses related to improving and maintaining the forfeited property. Second, remaining net proceeds must be used to discharge any special assessments charged against the parcel for drainage. The county board may then allocate remaining funds for forest development and county parks and recreation areas. Finally, any remaining balance is to be paid in specified percentages to the county, the school district, and the city." Pet. App. 7a–8a (citing Minn. Stat. § 282.08(1)–(4)). This means that "[t]he homeowner simply loses to the State both the property, its value and its equity." JA. 13.

nor any portion thereof, nor any sale proceeds, to the owner." JA. 13. Respondents "seize the property of homeowners with unpaid real property taxes and/or other charges, title is transferred to the State in trust for the counties or otherwise; and upon the sale or disposition of the property, Defendants retain the excess equity or value in the property even after taxes and associated charges have been fully satisfied. [And] Defendants do not provide any means or mechanism for the owner to reclaim the excess equity or value, sometimes referred to as the surplus." JA. 7.

This double standard is not only arbitrary and illogical but profoundly unfair. Nonetheless, based on Minnesota's decision to, by statute, grant itself special status to further its pecuniary interest to the detriment of its citizens, the decision below mistakenly "conclude[d] that any common-law right to surplus equity recognized in *Farnham* has been abrogated by statute." Pet. App. 7a. That was error of constitutional dimension. *Cf. Hall*, 51 F.4th at 189.

This Court should make clear that state legislatures cannot extinguish, without just compensation, debtors' right to equity interest in real property. For as this Court has previously observed, "at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998). "To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of

governmental power." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980). Thus, "States effect a taking if they recharacterize as public property what was previously private property." *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010). "[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Hall*, 51 F.4th at 190. But that is what Minnesota has sought to do here. *Cf. Baker v. Kelley*, 11 Minn. 480, 499 (Minn. 1866) ("If the legislature by this section attempted to do more than confer on the state the power to take such further steps as were necessary in the collection of the delinquent taxes, or in the perfection of tax titles, then it overstepped the limits which the constitution has fixed to its authority."). This cannot be allowed to stand. "Under the Constitution, property rights 'cannot be so easily manipulated.'"[8] *Cedar Point*, 141 S. Ct. at 2076 (quoting *Horne*, 576 U.S. at 365).

C. The Takings Clause Protects Historically Protected Property Interests, Including Equity Interests in Real Property.

The decision below erred by *exclusively* relying on *current* Minnesota state law to conclude Petitioner had no property interest in the surplus equity

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[8] *Cf. Pascoag Reservoir & Dam, LLC v. Rhode Island*, 217 F. Supp. 2d 206, 226 (D.R.I. 2002) ("The government cannot escape the Takings Clause by opting to sit by until title is transferred to it, and then claim that it is not subject to the United States Constitution. The Takings Clause and adverse possession and prescription statutes cannot be mutually exclusive.").

protected by the Takings Clause.[9] *See* Pet. App. 8a ("[E]ven assuming Tyler had a property interest in surplus equity under Minnesota common law as of 1884, she has no such property interest under Minnesota law today.").

To be sure, "the federal Constitution protects rather than creates property interests, which means that the existence of a property interest, for purposes of whether one was taken, 'is determined by reference to existing rules or understandings that stem from an independent source *such as* state law." *Hall*, 51 F.4th at 189–90 (cleaned up and emphasis added); *see also Stop the Beach*, 560 U.S. 702, 707 (2010) ("*Generally speaking*, state law defines property interests[.]" (emphasis added)). But the question whether a property interest exists is not answered *solely* by reference to *current* state law.[10] *Cf. Hall*, 51 F.4th at 189 ("Where we respectfully disagree with the district

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[9] The decision below mistakenly found that by "necessary implication," a 1935 Minnesota law "augment[ing] its tax-forfeiture plan with detailed instructions regarding the distribution of all 'net proceeds from the sale and/or rental of any parcel of forfeited land" "abrogated any common-law rule that gave a former landowner a right to surplus equity." Pet. App. 7a (quoting 1935 Minn. Laws, ch. 386, § 8). *Cf. Whitener v. Dahl*, 625 N.W.2d 827, 829 (Minn. 2001) (statutes in derogation of common law must be strictly construed). It did not, and, in any event, could not without violating the Takings Clause.

[10] It bears noting that there may well be circumstances in which the source of property rights protected by the Takings Clause is *federal* law. *See also Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) ("[O]ur decision should not be misconstrued as suggesting that patents are not property for purposes of . . . the Takings Clause.").

court . . . is in its assumption that the question whether the County took the plaintiffs' property is answered solely by reference to Michigan law."). Were it otherwise, a state could confiscate all private property by simply outlawing it.

That cannot be right. After all, the Constitution's "meaning is fixed according to the understandings of those who ratified it," *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022), based on its original public meaning informed by its common-law backdrop,[11] *see also Kelo*, 545 U.S. at 510 (Thomas, J., dissenting) (noting "Constitution's common-law background"). Indeed, "[i]t is against all reason and justice for a people to entrust a legislature" with the power to enact "a law that takes property from A and gives it to B." *Calder v. Bull*, 3 U.S. 386, 388 (1798). The Constitution flatly prohibits this. To the contrary, "[t]he government may not" by legislative fiat "decline to recognize long-established interests in property as a device to take them." *Hall*, 51 F.4th at 188. *Cf. Griffin v. Mixon*, 38 Miss. 424, 438 (Miss. 1860) (rejecting "the power to appropriate a man's whole estate for default in the payment of a few dollars tax by a simple act of legislation").

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[11] Historical practice at the time of ratification is also relevant. *Cf. Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2428 (2022) ("Establishment Clause must be interpreted by reference to historical practices and understandings[.]" (cleaned up)); *Bruen*, 142 S. Ct. at 2130 ("The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

Courts have long recognized the principle that the government cannot take more property than that which it is properly owed to satisfy tax debt, both before and around the time of the Founding and in 1868. For example, as Chief Justice Marshall wrote: "[T]he collector is authorized to sell land only on the deficiency of personal estate; and then to sell only so much as is necessary to pay the tax in arrear. In this case a sale is made of a whole tract of land, without specifying the amount of taxes actually due for which that land was liable and could be sold. This is proceeding in a manner not strictly regular. The sale ought to have been of so much of the land as would satisfy the tax in arrear." *Stead's Ex'rs v. Course*, 8 U.S. (4 Cranch) 403, 414 (1807). English law at the time of the Founding appears to have been in accord, protecting debtors' equity interest in real property.[12] *See Martin v. Snowden*, 59 Va. 100, 137 (Va. 1868) ("The mode of collecting the land tax in England was by distress. The statute 4 W. & M. ch. 1, which established the land tax as it was continued by annual acts down to the period of the formation of the Federal constitution, . . . goes on to provide, that if the money be not paid within four days, the distress so taken shall be sold for the payment of the money, *and the surplus paid to the owner*." (emphasis added)). Indeed, "[b]y 1759, Lord Mansfield—among English jurists, exceeded in eminence perhaps only by Coke and Hale—would say that the mortgagor's 'equity of redemption is the fee simple in the land.' Hence the

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[12] "The forfeiture of land to the Crown does not appear to have been a means recognized and employed in England, at any period of its history, for enforcing the payment of taxes or other debts to the Crown." *Martin*, 59 Va. at 136.

mortgagor's 'equity to redeem' had itself become 'a right of property.'" *Hall*, 51 F.4th at 191 (quoting *Burgess v. Wheate*, 28 Eng. Rep. 652, 670 (1759); 6 Holdsworth, *A History of English Law* 663 (1924)).

Given this history, it is unsurprising that the Minnesota Supreme Court concluded shortly before the Fourteenth Amendment was ratified that "[f]ew questions are better settled, than that the legislature cannot thus deprive a person of his property or rights" by granting the state beyond that "necessary in the collection of the delinquent taxes, or in the perfection of tax titles[.]"[13] *Baker*, 11 Minn. at 499. *Cf. Farnham*, 32 Minn. at 12 (stating in 1884 that "the right to the surplus exists independently of" statutory source). Other nineteenth-century decisions appear to have recognized a similar principle. *See, e.g., Tiernan v. Wilson*, 6 Johns. Ch. 411, 414 (N.Y. 1822) ("The proposition is not to be disputed that a sheriff ought not to sell at one time more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand . . . . The justice of this rule is self-evident."). *Cf. Margraff v. Cunningham's Heirs*, 57 Md. 585, 588 (Md. 1882) (Tax collector's "duty is to sell no more than is reasonably sufficient to pay the

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[13] To be sure, "there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." *Bruen*, 142 S. Ct. at 2138. But it appears that both at the Founding and in 1868, when the Fourteenth Amendment was ratified, a real property owner's surplus equity interest in the land was considered a form property that the government could not take as a windfall while collecting on back taxes. *See* Pet. Br. 11–15.

taxes and charges thereon, where a division is practicable without injury."). *See generally BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 541 (1994) (noting "development of foreclosure by sale (with the surplus over the debt refunded to the debtor)" in "19th-century America" "as a means of avoiding the draconian consequences of strict foreclosure"). Unsurprisingly, "[t]hirty-three states out of thirty-seven in 1868 had takings clauses in their constitutions.'" Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868*, 87 Tex. L. Rev. 7, 72 (2008).

Minnesota cannot sweep away the centuries of property law forming the backdrop against which the Fifth Amendment was ratified in 1791 and the Fourteenth Amendment in 1868. And to the extent its tax-forfeiture scheme is inconsistent with rights protected by those core constitutional guarantees, that statutory scheme must yield to the Constitution.

D. *Nelson* Did Not Disavow Centuries of Anglo-American Property Law.

Nor does *Nelson v. City of New York*, 352 U.S. 103 (1956), control here, as the decision below mistakenly found. *See* Pet. App. 8a ("*Nelson*'s reasoning on the Takings Clause controls this case despite a modest factual difference."). Unlike the statute at issue in that case, Minnesota's tax-forfeiture scheme does not provide any mechanism for Petitioner to recover the

surplus equity.[14] *See Nelson*, 352 U.S. at 110 ("[W]e do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale"); Pet. App. 8a–9a ("It is true that New York foreclosure law allowed the plaintiffs in Nelson to file an action to redeem the property or to recover the surplus, while Tyler had options only to redeem the property, confess judgment, or apply to repurchase the property."). "That case hardly disavowed more than two centuries of Anglo-American property law; the case was about process, not substantive property rights." *Hall*, 51 F.4th at 195.

II. RESPONDENTS' CONFISCATION OF PETITIONER'S PROPERTY WORTH FAR MORE THAN THE DEBT SHE OWED IS A "FINE" UNDER THE EIGHTH AMENDMENT.

Petitioner plausibly alleges in the alternative that Respondents imposed a "fine" subject to the Eighth Amendment's Excessive Fines Clause. How can it be otherwise? After all, under the logic of this Court's precedent, the tax penalties Petitioner owed should be

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[14] Contrary to the decision below, that is hardly a distinction without a difference. *See* Pet. App. 9a (finding that "that distinction is immaterial."). *Cf. Dorce v. City of N.Y.*, No. 19-cv-2216, 2022 U.S. Dist. LEXIS 112281, at *36 (S.D.N.Y. June 24, 2022) ("In this case, the plaintiffs adequately allege that no such process for the recovery of their surplus equity exists, and therefore they have adequately pleaded a violation of the Takings Clause at this stage.").

considered "fines" under the Excessive Fines Clause.[15] *See Hudson v. United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines[.]"). *But cf. Toth*, 143 S. Ct. at 553 (Gorsuch, J., dissenting from denial of certiorari). It makes no sense to conclude the indisputably larger surplus equity at issue here ($25,000) is somehow not a "fine" and thus outside the ambit of Eighth Amendment proportionality review. *Cf. Bajakajian*, 524 U.S. at 346 (Kennedy, J., dissenting) ("A sanction proportioned to potential rather than actual harm is punitive, though the potential harm may make the punishment a reasonable one."). This proposition holds true regardless of whether the government chooses to characterize its tax-forfeiture scheme as "remedial."[16]

The Eighth Amendment's Excessive Fines Clause bars the government from "impos[ing]" "excessive fines[.]" U.S. Const. amend. VIII. This Court has

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[15] *See* Pet. 5 n.1 ("Because Tyler's case was dismissed before she could conduct discovery, the trial court record does not reflect how much of the $15,000 was penalties, interest, and fees, but public records indicate that only $2,311 was property taxes."). *See generally* Minn. Stat. § 279.01 subd.1 (due dates; penalties). And all agree that the actual tax debt plus interest is not a fine.

[16] Respondents appear to suggest that Ms. Tyler is to blame for the government taking her property because she "failed to redeem during the three-year redemption period." BIO 21. This "failure," of course, was prior to the taking, which occurred when the state's title to the property became absolute. *See Hall*, 51 F.4th at 196. *Cf.* BIO 21. So as a matter of pure logic, whether Ms. Tyler could be said to have failed in some way prior to the taking, has no bearing on the measure of property taken, *i.e.*, the entirety of the home.

"recognized that the Excessive Fines Clause 'traces its venerable lineage' to Magna Carta and the English Bill of Rights." *Toth*, 143 S. Ct. at 553 (Gorsuch, J., dissenting from denial of certiorari) (citation omitted); *see also Timbs*, 139 S. Ct. at 698 (Thomas, J., concurring in judgment) ("The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of . . . protection.").

"Under . . . [this Court's] cases a fine that serves even '*in part* to punish' is subject to analysis under the Excessive Fines Clause." *Toth*, 143 S. Ct. at 553 (Gorsuch, J., dissenting from denial of certiorari) (quoting *Austin v. United States*, 509 U. S. 602, 610 (1993) (emphasis in original)). "[T]his Court [has] held that civil *in rem* forfeitures fall within the Clause's protection when they are at least partially punitive." *Timbs*, 139 S. Ct. at 689 (citing *Austin*, 509 U.S. 602); *see also Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1807). *See generally Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989) ("at the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense").

And as an original matter, any fine or forfeiture—whether *in rem* or *in personam*, whether labeled criminal or civil—that exceeds the harm caused or the balance owed is a "fine" within the scope of the Eighth Amendment's protections. *But cf. Bajakajian*, 524 U.S. at 345 (Kennedy, J., dissenting) ("In the majority's universe, a fine is not a punishment even if it is much larger than the money owed. This confuses

whether a fine is excessive with whether it is a punishment."). This means a sanction is not "beneath constitutional notice because it serves a 'remedial' purpose. Really, the notion of 'nonpunitive penalties' is 'a contradiction in terms.'"[17] *Toth*, 143 S. Ct. at 553 (Gorsuch, J., dissenting from denial of certiorari) (quoting *Bajakajian*, 524 U.S. at 346 (Kennedy, J., dissenting)). For that matter, no forfeiture of property or other economic sanction—whether civil or criminal and regardless of how the government chooses to label it—that is not solely compensatory in nature should escape constitutional scrutiny under the Eighth Amendment.

Application of these principles to Minnesota's tax-forfeiture scheme, as applied to Petitioner, confirms that stripping Petitioner of $25,000 in home equity constitutes a "fine" subject to constitutional scrutiny. Here, the district court agreed with Respondents that Minnesota's tax-forfeiture scheme is justified, at least in part, as advancing the state's interest in deterring tax delinquency: "The County further asserts that Minnesota's tax-forfeiture scheme (including the taxpayer's loss of the surplus) is rationally related to that interest because 'the ultimate possibility of loss of property serves as a deterrent to those taxpayers considering tax delinquency.' The Court agrees." Pet.

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[17] To the extent *Bajakajian* can reasonably by read to exempt "[s]o-called remedial penalties, most *in rem* forfeitures, and perhaps civil fines" from constitutional scrutiny under the Eighth Amendment's Excessive Fines Clause, *see* 524 U.S. at 356 (Kennedy, J., dissenting), that decision should be narrowed or overruled.

App. 48a (citing Dist. Ct. ECF 13 at 30 (JA. 42)).[18] Consistent with this, the district court seemed to implicitly acknowledge that this scheme is not *solely* remedial, describing it as "a debt-collection system whose *primary* purpose is plainly remedial: *assisting the government in collecting past-due property taxes* and compensating the government for the losses caused by the non-payment of property taxes."[19] App. 44a (emphasis added). The district court also acknowledged "the operation of Minnesota's tax-forfeiture system may result in a windfall to the government[.]" Pet. App. 43a. That arrangement well describes a "fine" within the meaning of the Eighth Amendment's Excessive Fines Clause.

If it were otherwise, "the government could evade constitutional scrutiny under the Clause's terms by the simple expedient of fixing a 'civil' label on the fines it imposes and declining to pursue any related 'criminal' case." *Toth*, 143 S. Ct. at 553 (Gorsuch, J., dissenting from denial of certiorari). And it would have dire real-world consequences, "incentiviz[ing] governments to impose exorbitant civil penalties as a means of raising revenue." *Id.* Indeed, as Justice Gorsuch has observed:

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[18] The decision below mistakenly affirmed the dismissal of Petitioner's Eighth Amendment claim on the basis of the district court's order. *See* Pet. App. 9a–10a.

[19] As alleged in the Complaint: "When Defendants take real property pursuant to a property tax forfeiture and retain the value or sale proceeds in excess of the amount owed, such retention is not purely remedial in nature but rather is retributive or meant to serve as a deterrent." JA. 10.

> [T]oday's civil laws regularly impose penalties far more severe than those found in many criminal statutes[.] Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are "punitive civil sanctions . . . rapidly expanding," they are "sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*."

Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) (citation omitted).

To the extent *Bajakajian* is to the contrary, it should be narrowed or overruled. For as Justice Kennedy warned in *Bajakajian*:

> At the very least, today's decision will encourage legislatures to take advantage of another avenue the majority leaves open. The majority subjects this forfeiture to scrutiny because it is *in personam*, but it then suggests most *in*

> *rem* forfeitures (and perhaps most civil forfeitures) may not be fines at all. The suggestion, one might note, is inconsistent or at least in tension with *Austin* v. *United States*. In any event, these remarks may encourage a legislative shift from *in personam* to *in rem* forfeitures, avoiding *mens rea* as a predicate and giving owners fewer procedural protections. By invoking the Excessive Fines Clause with excessive zeal, the majority may in the long run encourage Congress to circumvent it.

524 U.S. at 355 (citations omitted). Allowing Respondents' confiscation of $25,000 of Petitioner's property on top of around $12,000 of fees and penalties as a consequence for Petitioner's failure to pay around $2,300 in property taxes to escape *any* constitutional scrutiny under the Eighth Amendment would further exacerbate the concerns Justice Kennedy raised in *Bajakajian*. This Court should not allow that to happen and should instead return to the Excessive Fines Clause's original public meaning.

CONCLUSION

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

Respectfully submitted,

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