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 U.S. REPRESENTATIVES TOM EMMER, PETE STAUBER, MICHELLE FISCHBACH, AND BRAD FINSTAD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae are Members of the U.S. House of Representatives, representing various Minnesota Congressional Districts. Congressman Emmer is also the House Majority Whip. *Amici* firmly believe in the rule of law and, in particular, the constitutional limitations on the government's power to take the people's private property as its own. In their view, the decision below runs roughshod over those limitations—to Minnesotans' detriment—and requires reversal.[1]

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

SUMMARY OF ARGUMENT

A 93-year-old Minnesotan widow named Geraldine Tyler owed approximately $15,000 in property taxes and related costs. To recoup that tax debt, Hennepin County sold Ms. Tyler's home for $40,000—and pocketed the entire $40,000, including the $25,000 surplus representing Ms. Tyler's home equity. Minnesota law purports to make this legal. It says that Ms. Tyler has no interest in the $25,000 and it vests "absolute title" to that surplus in the State. Worse, the Eighth Circuit agreed. In the Eighth Circuit's view, there is no Takings Clause problem because there was no taking at all—Ms. Tyler simply had no property interest that could be taken.

History says otherwise. For centuries, courts have understood a debtor to hold equitable title—what we know today as "equity"—to his property subject to any outstanding liabilities. Pursuant to that "long-settled" rule under the common law, "the debtor [is] entitled to any surplus proceeds from [a foreclosure] sale, which represent[s] the value of the equitable title thus extinguished." *Hall v. Meisner*, 51 F.4th 185, 194 (6th Cir. 2022) (Kethledge, J.). In other words, once a debtor's debt is paid, any remainder is his.

Minnesota disavows this history through legislative fiat by turning Minnesotans' surplus proceeds into public property owned by the State. But this Court has seen that trick before—and rejected it: "[A] State, by *ipse dixit*, may not transform private property into public property without compensation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). Indeed, "[t]his is

the very kind of thing" that the Takings Clause "was meant to prevent." *Webb's*, 449 U.S. at 164.

Ignoring this clear history and precedent, the Eighth Circuit invoked a dusty paragraph from this Court's decision in *Nelson v. City of New York*, 352 U.S. 103 (1956), to bless Minnesota's violation of the Takings Clause. The Eighth Circuit characterized the New York foreclosure law in *Nelson* as on all fours with Minnesota's save for a "modest factual difference": Unlike Minnesota law, New York law "allowed the plaintiffs … to recover the surplus." Pet.App.8a–9a. But that "modest" difference goes to the heart of this case. The constitutional problem here is that Ms. Tyler *cannot* recover her $25,000.

At bottom, this is an easy case. When a State helps itself to a nonagenarian widow's property without so much as an apology—let alone just compensation—that is a dark day for our Constitution. The County paints this as a byproduct of legitimate tax collection efforts. But gratuitously taking money a taxpayer never owed is not tax collection; it is theft. And the Takings Clause squarely prohibits it. The Court should reverse.

ARGUMENT

The Fifth Amendment's Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Through that promise, the Clause "stands as a shield against the arbitrary use of governmental power." *Webb's*, 449 U.S. at 164. And it "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The question in this case is whether, in collecting a tax debt, the County may—consistent with the Takings Clause—arbitrarily take the surplus proceeds of a property sale without compensation.

The answer is emphatically no. Judge Kethledge said as much in *Hall* in concluding that Michigan's taking of surplus proceeds under a law materially identical to Minnesota's violated the Takings Clause. And three key facts that he identified compel the same conclusion here: *first*, before and after the Founding, the traditional common-law rule has been that surplus proceeds from a foreclosure sale belong to the property owner; *second*, a State may not legislatively abrogate this common-law rule; and *third*, this Court's decision in *Nelson* is inapposite. The Court should reverse.

A. History Unambiguously Establishes that Surplus Proceeds from a Foreclosure Sale Belong to the Former Property Owner.

Start with the original understanding of the Takings Clause: "'[P]rivate property' shall not 'be taken for public use, without just compensation.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting U.S. Const. amend. V). As the Framers' careful language reflects, "the Constitution *protects* rather than *creates* property interests." *Id.* (emphasis added). Accordingly, "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.'" *Id.* In

conducting that analysis, the Court asks what "[t]he usual and general rule is," *Webb's*, 51 F.4th at 162, looking in particular to "the common law," *Phillips*, 524 U.S. at 165.[2]

The usual and general rule for surplus proceeds from a foreclosure sale has been settled for centuries under the common law: They belong to the former property owner.

1. This traditional rule traces back to Magna Carta itself. That famous charter "provided that a debtor's lands could be taken only to the extent necessary to satisfy the debt." *Hall*, 51 F.4th at 193 (citing Magna Carta ¶ 26 (1215)). In particular, after a debtor's death, the Crown could sell his estate to satisfy the tax debt—but, once the debt was satisfied, "the residue" was required to "be given over to the executors to carry out the dead man's will." Magna Carta ¶ 26; *see also Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 455 n.82 (Mich. 2020) (explaining that this provision was a response to abusive practices by which "officials would often seize everything, sell the decedent's property for an amount far in excess of the debt, and refuse to disgorge the surplus to the decedent's heirs.").

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[2] Among the Eighth Circuit's many errors, it misread *Phillips* to say that the Eighth Circuit must "look to Minnesota law." Pet.App.6a. Wrong. As *Webb's* and *Phillips* reflect, *the common law* (as reflected in England, the States, and the federal courts) is essential to identifying the relevant "'background principles' of property law." *Phillips*, 524 U.S. at 168; *see also Hall*, 51 F.4th at 189 (district court erred by assuming that "the question whether the County took the plaintiffs' property is answered solely by reference to Michigan law").

This limitation, moreover, took on special meaning as English courts wrestled with the advent of the mortgage and the harsh consequences of foreclosure that left a debtor with nothing. In the early days, mortgage agreements "were strictly construed." *Hall*, 51 F.4th at 191. English courts understood them to grant the lender "a fee simple interest" in the underlying property, subject to the lender's agreement to convey the property to the borrower when the borrower repaid the indebted amount. *Id.* But that placed borrowers in an untenable position: As Littleton put it in the 1470s, if a borrower failed to repay that amount, his "entire interest in the land" would be "'taken from him forever, and so dead to him.'" *Id.* (quoting 1 Edward Coke, *Institutes of the Law of England* 205a (1628)). This was known as "strict foreclosure," because "the borrower's entire interest in the property was forfeited, *regardless of any accumulated equity*." *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 541 (1994) (emphasis added).

The Court of Chancery, however, used its equitable jurisdiction to blunt the "intolerably harsh" medicine of strict foreclosure. *Hall*, 51 F.4th at 191. In particular, the Court of Chancery recognized that a borrower has "an equitable interest in the land"—what Lord Hale called "'a title in equity.'" *Id.* (quoting *Pawlett v. Att'y Gen.*, 145 Eng. Rep. 550, 551 (1678)). And the Court of Chancery treated that equitable title as a "personal asset[]," meaning personal property. *Id.* (quoting *Casborne v. Scarfe*, 26 Eng. Rep. 377, 379 (1737)). By the late 1700s, therefore, it had become well settled that "[t]he mortgagor 'had an equitable estate in the land; and subject to the legal rights of the mortgagee, was, in equity, regarded as its owner.'" *Id.*

(quoting 6 Holdsworth, *A History of English Law* 663 (1924)).

The Court of Chancery's recognition of equitable title is critical because it gave a borrower a right of "redemption" that allowed him "to regain legal title to [his] land by repayment of the amount due." *Id.* And by doing so, the Court of Chancery short-circuited the strict-foreclosure process that would have otherwise robbed a borrower of his property and equity.

2. American courts of equity took the same approach shortly after the Founding, expressing "uniform[] hostil[ity] to strict foreclosure in cases … where the land's value exceeded the amount of the debt." *Id.* at 192. Notable in this regard is *Lansing v. Goelet*, 9 Cow. 346 (N.Y. 1827), in which New York's highest court proclaimed that strict foreclosure was "unconscionable" in cases where the property "exceed[ed] the amount of the debt in value." *Id.* at 355. Joseph Story took the same dim view. *See Hall*, 51 F.4th at 192.

From that hostility emerged what we know today as foreclosure-by-*sale*—the sale of the underlying property, after which any "surplus over the debt [is] refunded to the debtor." *Resol. Tr. Corp.*, 511 U.S. at 541. That mechanism "avoid[s] the draconian consequences of strict foreclosure," *id.*, because it fully satisfies the creditor while reserving for the debtor the equity that he had built up in his property.

This equitable foreclosure rule was "firmly established" across America by the mid-1800s—and it "extended fully to foreclosures for payment of unpaid taxes." *Hall*, 51 F.4th at 193. Chief Justice Marshall himself, for example, emphasized in 1808 that "a tax

collector had 'unquestionably exceeded his authority' when he had sold more land than 'necessary to pay the tax in arrear.'" *Id.* at 193–94 (quoting *Stead's Ex'rs v. Course*, 8 U.S. (4 Cranch) 403, 414 (1808), and citing cases). And courts across the country commonly understood this important limitation on taxing authorities. *See, e.g.*, *Rafaeli, LLC*, 952 N.W.2d at 456 ("[E]arly in Michigan's statehood, it was commonly understood that the government could not collect more in taxes than what was owed, nor could it sell more land than necessary to collect unpaid taxes."); *Douglas v. Roper*, __ So. 3d __, 2022 WL 2286417, at *11–12 (Ala. June 24, 2022) (noting that Alabama "has long recognized a property owner's right to the excess funds generated from a tax sale of his or her property," and concluding that this was "a vested right that existed at common law").

As Judge Kethledge summed up the history, long-settled common law establishes a clear "usual and general rule," *Webb's*, 51 F.4th at 162: "[A] debtor [is] entitled to any surplus proceeds from [a foreclosure] sale, which represent[] the value of the equitable title thus extinguished." *Hall*, 51 F.4th at 194.

3. This traditional rule should not come as a surprise to Minnesotan lawmakers. The Minnesota Supreme Court long ago recognized, as a matter of common law, that a property owner enjoys a right to "surplus [equity that] exists independently of [any] statutory provision." *Farnham v. Jones*, 19 N.W. 83, 85–86 (Minn. 1884). Indeed, the Eighth Circuit did not dispute that there was a "common-law rule that gave a former landowner a right to surplus equity." Pet.App.7a.

Not only that, but Minnesotan lawmakers themselves also have followed the traditional rule. Specifically, Minnesota law on mortgage foreclosure sales requires the return of surplus funds *to the debtor*. Minn. Stat. § 580.10. But when it comes to the State? Rules for thee, but not for me, apparently. *See* Minn. Stat. § 282.08(4); *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.").

B. Minnesota Cannot Abrogate Ms. Tyler's Common-Law Right to Surplus Proceeds Through Legislative *Ipse Dixit*.

Because the common law unambiguously recognizes Ms. Tyler's right to the $25,000 in surplus proceeds, the only remaining question is whether Minnesota can simply legislate that private property interest out of existence. The Eighth Circuit thought so. But that is dead wrong under this Court's decisions in *Webb's* and *Phillips*, which the Eighth Circuit never addressed.

1. This Court has long held that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's*, 449 U.S. at 164; *see Cedar Point Nursery*, 141 S. Ct. at 2076 (reaffirming *Webb's* and emphasizing that, "[u]nder the Constitution, property rights 'cannot be so easily manipulated'" (quoting *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015))).

In *Webb's*, a Florida statute allowed a county to keep certain interest generated on private money. That was a Takings Clause violation. Citing "[t]he

usual and general rule," the Court held that interest on such private funds "follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." 449 U.S. at 162. And the Court emphasized that a State's own *ipse dixit* cannot transform that private property into public property. *Id.* at 164. Indeed, "[t]his is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.*

That issue later arose again in *Phillips*, which concerned a similar Texas rule regarding interest on private principal. Was the interest private property? The Court said yes, underscoring that this traditional rule flowed from "English common law" and "the common law of the various States." 524 U.S. at 165. Accordingly, Texas's attempt to make that interest public property ran headlong into the basic rule that "a State may not sidestep the Takings Clause by disavowing traditional property interests." *Id.* at 167.

2. All the same here. Surplus proceeds from a foreclosure sale unambiguously belong to the debtor. *See* Section A, *supra.* Minnesota law minces no words in claiming instead that private surplus proceeds are the State's. *See* Minn. Stat. § 281.23, subdiv. 9 ("[A]bsolute title thereto has vested in the state of Minnesota."); *see also id.* § 282.08(4) (providing that surplus proceeds may be used for, among other things, forest development and the acquisition and maintenance of county parks and recreational areas). But Minnesota "may not sidestep the Takings Clause by disavowing [the debtor's] traditional property interest[]" in surplus proceeds. *Phillips*, 524 U.S. at 167. Thus, Minnesota must face the Fifth Amendment for stealing Ms. Tyler's $25,000.

Remarkably, the Eighth Circuit had next to nothing to say about *Webb's* and *Phillips*. The Eighth Circuit uncritically accepted that Minnesota "abrogated" Ms. Tyler's right to surplus proceeds. Pet.App.7a–8a. And that was dispositive by the Eighth Circuit's lights: "Thus, even 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." *Id.* at 8a. That analysis reads as if *Webb's* and *Phillips* do not exist. The Court's critical point in both cases was that States *cannot* transform private property into public property "simply by legislatively abrogating the traditional rule." *Phillips*, 524 U.S. at 167 (citing *Webb's*, 449 U.S. at 164). In other words, States cannot do what Minnesota has tried to do here. Case closed.

C. *Nelson* Does Not Control.

Finally, contrary to the Eighth Circuit's characterization, this Court's long-dormant decision in *Nelson* does not save Minnesota from the Takings Clause.

1. *Nelson* involved a New York City tax foreclosure statute. The appellants lost their property through foreclosure sales and later sued. In their reply brief in this Court, the appellants claimed for the first time that they suffered an unconstitutional taking because New York kept the "proceeds of sale … far exceeding in value the amounts due." 352 U.S. at 109. But the Court rejected that claim, emphasizing that the appellants had not pursued a "timely action to redeem or to recover[] any surplus," even though New York law permitted them to do so. *Id.* at 110.

According to the Eighth Circuit, this case is *Nelson* reincarnate. No. As Judge Kethledge observed, "[t]he express basis for the decision in *Nelson*" was that the appellants had not timely sought to recover their surplus proceeds, "even though the New York statute expressly gave them opportunity to do so." *Hall*, 51 F.4th at 196. But Minnesota law gave Ms. Tyler no such opportunity. *See id.* (distinguishing Michigan law because it "gave the plaintiffs no such opportunity [to recover surplus proceeds] at all"). The Eighth Circuit characterized this as "a modest factual difference" between the two cases. Pet.App.8a. Yet Minnesota's attempt to *prevent* Ms. Tyler from recovering her $25,000 surplus is the whole point of this case—that attempt is directly contrary to centuries of common law and this Court's precedents. There is nothing modest about that difference. And there is nothing in *Nelson* that can justify upholding the Eighth Circuit's nonsense conclusion that taking Ms. Tyler's $25,000 is no taking at all.

2. Even if *Nelson* could be read to require upholding Minnesota's scheme, however, the Court should not hesitate to overrule *Nelson*.

For starters, the only potentially relevant portion of *Nelson* is a single paragraph briefly responding to a takings argument raised for the first time in a *reply* brief in this Court. 352 U.S. at 109–10. The Court has never mentioned that paragraph again—and in fact, the Court's lone subsequent reference to *Nelson* came in a *cf.* citation in 1983 that is irrelevant here. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983). So, this paragraph is not some sacred north star in the constellation of the Court's Takings Clause jurisprudence.

In addition, *Nelson* (1956) predated the Court's pathmarking decisions in *Webb's* (1980) and *Phillips* (1998)—and in particular, the key principle that "'a State, by *ipse dixit*, may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule." *Phillips*, 524 U.S. at 167 (quoting *Webb's*, 449 U.S. at 164). If *Nelson* stood for the proposition that New York law properly *could* abrogate the traditional right to surplus proceeds, therefore, *Nelson* is no longer good law after *Webb's* and *Phillips*. *See Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) ("[W]e have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law.").

Lastly, to the extent *Nelson* suggests—as the Eighth Circuit understood it to suggest—that a taking is constitutional so long as "adequate notice" precedes it, Pet.App.8a, that is incorrect. Pre-deprivation process (or a lack thereof) may implicate the *Due Process* Clause. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). But no amount of pre-deprivation process determines whether the deprivation of private property violates the *Takings* Clause. If the rule were otherwise, the government need only have created a notice scheme leading up to the seizure of Marvin and Laura Horne's raisins to avoid the Takings Clause violation in *Horne*. "What chumps!" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting).

The Court has instead reiterated that "a property owner has a claim for a violation of the Takings

Clause as soon as a government takes his property for public use without paying for it." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019). And that claim exists "no matter what sort of procedures the government puts in place to remedy a taking." *Id.* Just like the government could not escape the Takings Clause in *Horne* by proclaiming "The Hornes were definitely aware that we were going to take their raisins," therefore, the Eighth Circuit's complaint that "Tyler received adequate notice of the impending forfeiture action" (Pet.App.9a) falls flat. There is no "You were warned" exception to the Takings Clause.

CONCLUSION

The Eighth Circuit's judgment should be reversed.

Respectfully submitted,

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