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 *Amici Curiae* National Tax Lien Association, the Arizona County Treasurers Association, and the Tax Collectors & Treasurers Association of New Jersey in Support of Respondents**


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## Table of Contents

Table of Contents ........ i

Table of Authorities ........ ii

Interest of *Amici Curiae* ........ 1

Summary of the Argument ........ 4

Argument ........ 6

I. States have various methods for collecting delinquent taxes and distributing surplus proceeds, so a universal approach will impact more rights than it protects. ........ 6

A. Local property tax collection schemes do not all follow a singular approach. ........ 6

B. Despite the various collection systems, each still provides resources to avoid or redeem from tax sales. ........ 13

C. States treat surplus proceeds in many ways, but almost all require paying the proceeds to the government at some point. ........ 21

II. States have made conscious policy choices in enacting their enforcement statutes to balance competing interests. ........ 25

A. States regularly tweak their taxing statutes and have adopted different collection methods as a matter of policy ........ 25

B. A broad rule here could reverberate through the states. ........ 30

Conclusion ........ 33

## Table of Authorities

**Cases** **Page(s)**

*Adair Asset Mgmt., L.L.C. v. Terry's Legacy, LLC,*
875 N.W.2d 421 (Neb. 2016) .............................. 8–9

*Arizona State Legislature v. Arizona Indep. Redistricting Comm'n,*
576 U.S. 787 (2015) ............................................. 25

*BCS Servs., Inc. v. Heartwood 88, LLC,*
637 F.3d 750 (7th Cir. 2011) ................................. 8

*Bull v. United States,*
295 U.S. 247 (1935) ............................................... 6

*Cedar Point Nursery v. Hassid,*
141 S. Ct. 2063 (2021) .......................................... 31

*Cent. Properties v. Fairway Gardenhomes, LLC,*
225 So. 3d 441 (La. 2017) ...................................... 9

*Friedemann v. Kirk,*
5 P.3d 950 (Ariz. Ct. App. 2000) ......................... 14

*Gregory v. Ashcroft,*
501 U.S. 452 (1991) ...................................... 29–30

*In re Smith,*
811 F.3d 228 (7th Cir. 2016) ................................. 7

*In re Grandote Country Club Co.,*
252 F.3d 1146 (10th Cir. 2001) ............................. 7

*Lawrence v. State Tax Comm'n of Mississippi,*
286 U.S. 276 (1932) ............................................. 25

**Table of Authorities—Continued**

**Page(s)**

*Luessenhop v. Clinton Cnty., New York,*
466 F.3d 259 (2d Cir. 2006) .................................. 12

*Ly v. Lafortune,*
832 A.2d 757 (Me. 2003) ........................................ 9

*Madden v. Kentucky,*
309 U.S. 83 (1940) .............................................. 31

*Nat'l Priv. Truck Council, Inc. v. Oklahoma Tax Comm'n,*
515 U.S. 582 (1995) ............................................. 30

*Nelson v. City of New York,*
352 U.S. 103 (1956) ............................................. 24

*Nordell v. Mantua Twp.,*
132 A.2d 39 (N.J. Super. Ct. Ch. Div. 1957) ....... 12

*Plemons v. Gale,*
396 F.3d 569 (4th Cir. 2005) ............................... 12

*Polonsky v. Town of Bedford,*
190 A.3d 400 (N.H. 2018) ................................... 23

*Porter v. Town of Sandwich,*
891 A.2d 521 (2006) ............................................ 17

*Princeton Off. Park, LP v. Plymouth Park Tax Services, LLC,*
93 A.3d 332 (N.J. 2014) ....................................... 10

*Sw. Prod. Co. v. U.S. Through I.R.S.,*
882 F.2d 113 (4th Cir. 1989) ............................... 32

*Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.,*
560 U.S. 702 (2010) ........................................ 4, 31

**Table of Authorities—Continued**

**Page(s)**

*Texaco, Inc. v. Short,*
454 U.S. 516 (1982) .............................................. 15

*Thoden v. Hallford,*
310 So. 3d 1156 (Miss. 2021)................................ 12

*United States v. State of Colo.,*
872 F.2d 338 (10th Cir. 1989) ............................ 32

*United States v. Taylor,*
104 U.S. 216 (1881) .............................................. 24

*Valenzuela v. Snyder,*
26 P.3d 1120 (N.M. 2014)..................................... 11

**Constitutional Provisions**

Ariz. Const. art. IX, § E(4) ........................................ 17

Colo. Const. art. X, § 3.5 ............................................ 15

Kan. Const. art. XIV, § 9............................................. 15

La. Const. art VII § 20 ............................................... 15

La. Const. art. XII, § 25 ................................................ 9

S.C. Const. art. X, § 3(i) ............................................. 15

Va. Const. art. X, § 6(b)............................................... 15

**Statutes**

15 U.S.C. § 9058d........................................................ 20

26 U.S.C. § 6321(b)(6) ................................................. 32

26 U.S.C. § 7425........................................................... 32

26 U.S.C. § 7425(a)–(b) ............................................... 32

Ala. Code §§ 40-9-19 *through* -21 ............................ 15

**Table of Authorities—Continued**

**Page(s)**

Ala. Code § 40-10-11 .......... 12
Ala. Code § 40-10-28 .......... 22
Ala. Code § 40-10-75 .......... 13
Ala. Code § 40-10-180(b) .......... 26
Alaska Stat. Ann. § 29.45.030(e) .......... 15
Alaska Stat. Ann. § 29.45.480(b) .......... 21
Ariz. Rev. Stat. §§ 42-17301 through -17313 .......... 16
Ariz. Rev. Stat. §§ 42-18001 *through* -18267 .......... 8
Ariz. Rev. Stat. § 42-18056(A) .......... 18
Ariz. Rev. Stat. § 42-18114 .......... 8
Ariz. Rev. Stat. § 42-18201 .......... 11–12
Ariz. Rev. Stat. § 18204 .......... 12
Ark. Code § 26-37-205(c) .......... 22, 24
Baltimore Cty. Ord. 20.427 (Nov. 2, 2020) .......... 19
Cal. Rev. & Tax. Code § 20505 .......... 15
Cal. Rev. & Tax. Code §§ 20581–20622 .......... 18
Cal. Rev. & Tax. Code § 3729(a) .......... 13
Colo. Rev. Stat. Ann. §§ 39-3-201 *through* -210 .......... 15
Conn. Gen. Stat. Ann. § 12-157 .......... 28
Conn. Gen. Stat. Ann. § 12-170aa .......... 15
Fla. Stat. § 196.031 .......... 15
Fla. Stat. § 197.222 .......... 15
Fla. Stat. § 197.319 .......... 18

**Table of Authorities—Continued**

**Page(s)**

Fla. Stat. § 197.582(5) ... 21
Fla. Stat. § 197.3195 ... 18
Ga. Code Ann. § 48-4-1(a)(3) ... 11
Ga. Code Ann. § 48-4-5 ... 22
Ga. Code Ann. §§ 48-5-44 *through* -47 ... 15
Ga. Code Ann. § 48-4-45 ... 11
Ga. Code Ann. § 48-4-76(a) ... 11
Ga. Code Ann. § 48-4-81(c)(3) ... 11
Haw. Cnty. Code § 19-45 ... 22
Haw. Rev. Stat. § 231-62 ... 11
Haw. Rev. Stat. § 231-63 *through* -70 ... 11
Idaho Code Ann. §§ 63-701 *through* -704 ... 15
Idaho Code Ann. § 63-705A ... 16
35 Ill. Comp. Stat. § 200/15-175 ... 15
35 Ill. Comp. Stat. § 200/15-180 ... 17
35 Ill. Comp. Stat. §§ 200/19-5 *through* 22-95 ... 8
35 Ill. Comp. Stat. § 200/21-215 ... 8
35 Ill. Comp. Stat. § 200/21-310 ... 12
35 Ill. Comp. Stat. § 200/21-350 ... 28
Ind. Code § 6-1.1-12-37(b) ... 15
Ind. Code § 6-1.1-24-6.4(d) ... 22
Ind. Code § 6-1.1-25-4(k) ... 18
Iowa Code Ann. § 425.1 ... 15

**Table of Authorities—Continued**

**Page(s)**

Iowa Code Ann. § 425.15(1) .......................................... 16
Iowa Code Ann. § 427.10 .............................................. 17
Iowa Code Ann. § 445.16................................................ 18
Iowa Code Ann. § 446.16.................................................. 9
Kan. Stat. Ann. § 79-2401a(b) ................................ 18, 28
Kan. Stat. Ann. §§ 79-2801 *through* -2812............... 11
Kan. Stat. Ann. §§ 79-4501 *through* -4531............... 15
Kaua'i Cnty. Code § 5A-5.9 ......................................... 22
La. Rev. Stat. §§ 47:2221 *through* 2230 ..................... 9
Md. Code Ann., Tax-Prop. § 9-102(b) ......................... 16
Md. Code Ann. Tax-Prop. § 14-819(b) ........................ 22
Md. Code Ann. Tax-Prop. § 14-819(d) ........................ 22
Mass. Ann. Laws ch. 60, §43 ......................................... 9
Me. Rev. Stat. Ann. title 36 § 683............................. 15
Me. Rev. Stat. Ann. title 36, § 841(2) ......................... 17
Me. Rev. Stat. Ann. title 36, § 949...................... 22–23
Me. Rev. Stat. Ann. title 36, § 6271(2)(C) ................ 16
Mich. Comp. Laws § 211.7u......................................... 17
Minn. Stat. §§ 273.01 *through* 280.08........................ 24
Minn. Stat. § 279.05...................................................... 12
Minn. Stat. § 279.37 subd. 2 ........................................ 18
Minn. Stat. § 282.01 subds. 3–4 ................................... 10
Minn. Stat. § 282.01 subd. 4(c) .................................... 28

**Table of Authorities—Continued**


**Page(s)**

Minn. Stat. § 282.241 subd. 1 .......................... 10, 14

Minn. Stat. §§ 290B.01 *through* .11 ........................ 16

Miss. Code Ann. § 27-41-77 ..................................... 22

Miss. Code Ann. § 27-45-27 ..................................... 12

Mo. Rev. Stat. § 140.230(2)...................................... 22

Mont. Code Ann. § 15-16-102(6) ............................... 17

Mont. Code Ann. §§ 15-18-219 *through* -220 .......... 29

Mont. Code Ann. § 70-9-803(1)(k)............................ 22

Neb. Rev. Stat. § 77-1807........................................... 9

Nev. Rev. Stat. § 361.610(4) ..................................... 22

N.H. Rev. Stat. Ann. § 76:16(I)(a) ........................... 17

N.H. Rev. Stat. Ann. § 80:24...................................... 9

N.H. Rev. Stat. Ann. § 80:89.................................... 23

N.H. Rev. Stat. Ann. § 198:57.................................. 17

N.J. Stat. Ann. § 54:5-32..................................... 9–10

N.J. Stat. Ann. § 54:5-33......................................... 22

N.J. Stat. Ann. §§ 54:5-65 *through* -74..................... 18

N.J. Stat. Ann. § 54:5-65......................................... 18

N.J. Stat. Ann. § 54:5-67......................................... 18

N.J. Stat. Ann. § 54:5-86(a) ..................................... 14

N.J. Stat. Ann. § 54:5-87......................................... 14

N.M. Stat. Ann. § 7-38-65(A) ................................... 11

N.Y. Real Prop. Tax Law § 1138............................. 13

## Table of Authorities—Continued


**Page(s)**

N.C. Gen. Stat. § 105-374 ........................................ 11
N.D. Cent. Code Ann. § 57-28-20.............................. 23
Ohio Rev. Code Ann. § 323.31(A)(1) ......................... 19
Ohio Rev. Code Ann. § 5721.20 ................................ 22
Okla. Stat. Ann. title 68, § 3131(C) .......................... 22
72 Pa. Stat. Ann. § 5860.603 .................................... 18
72 Pa. Stat. Ann. § 5860.607 .................................... 12
R.I. Gen. L. § 44-5-8.1 ............................................. 19
R.I. Gen. L. § 44-5-13.40 .......................................... 17
R.I. Gen. L. § 44-9-8 .................................................... 9
R.I. Gen. L. § 44-9-37 ............................................... 22
R.I. Gen. L. § 44-9-43 ............................................... 13
S.C. Code Ann. § 12-37-220(A)(9) ............................ 15
S.C. Code Ann. § 12-45-75(a) ................................... 19
S.C. Code Ann. §§ 12-51-55 and -60 ........................... 7
S.C. Code Ann. § 12-51-90 ...................................... 7–8
S.C. Code Ann. § 12-51-130 ................................. 8, 22
S.C. Code Ann. § 12-51-150 ...................................... 13
S.D. Codified Laws § 10-22-27 .................................. 22
S.D. Codified Laws §§ 10-23-1 *through* -33................ 8
S.D. Codified Laws § 10-23-1.................................... 15
S.D. Codified Laws § 10-23-8...................................... 8
Tenn. Code 67-5-2501 *through* 2516 ....................... 11

**Table of Authorities—Continued**

**Page(s)**

Tex. Tax Code Ann. § 34.03(b) .................................. 24
Tex. Tax Code Ann. § 34.04(a) .................................. 22
Tex. Tax Code Ann. § 34.21(e)(1) .............................. 28
Utah Code Ann. § 59-2-1309 .................................... 23
Va. Code Ann. § 58.1-3967 ........................................ 22
Wash. Rev. Code § 84.64.080(10) .............................. 22
W. Va. Code § 11A-3-56 ............................................ 19
W. Va. Code § 11A-3-65 ...................................... 22, 24
Town of Winthrop Ord. (May 2, 2016) ..................... 23
Wis. Stat. § 75.36(2m) (2021) .................................... 28
Wis. Stat. § 75.36(2m) ........................................ 22, 29
Wyo. Stat. Ann. § 39-13-108(d)(iv)(C) ...................... 22

**Regulations, Guidance, and Court Rules**

26 C.F.R. § 301.7425-1(c)(4) ..................................... 32
26 C.F.R. § 301.7425-2(a) .......................................... 32
26 C.F.R. § 301.7425-2, Example 5 ........................... 32
26 C.F.R. § 301.7425-2, Example 6 ........................... 32
26 C.F.R. § 301.7425-4(c)(3) ..................................... 32
Ariz. Admin. Code § R15-4-116 ................................ 15
Ill. Admin. Code title 47, § 302.202 ........................... 20
N.J. Ct. R. 4:64-1(f) .................................................. 14
N.J. Ct. R. 4:64-6 ...................................................... 14

**Table of Authorities—Continued**

**Pages(s)**

U.S. Treasury Dep't., *Homeowner Assistance Fund Guidance* (amended March 7, 2023) .................................... 20

**Legislative Materials**

2022 W. Va. Acts 2361 .............................................. 26

2022 Wis. Act 216 Act Memo, Legis. Council (May 16, 2022) ..................................................... 29

Act 17, 2021 Mont. Acts 52 ................................. 22, 29

Ala. Act 2018-577 (House Bill 354) .......................... 26

Ala. Act 2022-208 (House Bill 371) .......................... 26

American Rescue Plan Act of 2021, Pub. L. 117-2 (March 11, 2021) ........................... 20

Federal Tax Lien Act of 1966, Pub. L. 89-719 (Nov. 2, 1966) .............................. 31

H.B. 1191, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) ...................................................... 26–27

Jacque Bland, *Summary of Bills, 2nd session*, 85th Legis. 71 (W. Va. S. Pres., 2022) ................ 26

Mass. Sen. Bill 1174, 193d Gen. Ct. (introduced Jan. 18, 2023) .................................. 27

Me. House Paper No. 69, 131st Me. Legis. (introduced Jan. 10, 2023) .................................. 27

Minn. House File 1929, 93d Legis. (introduced Feb. 16, 2023) .................................. 27

N.Y. Sen. Bill 5383 (introduced March 3, 2023) ................................ 27

**Table of Authorities—Continued**

**Page(s)**

N.J. Assemb. 5302, 220th Legis.
(introduced March 16, 2023) ................................ 27

N.D. House Bill 1267, 68th Legis.
(introduced Jan. 11, 2023).................................... 27

N.D. Sen. Fin. and Taxation Comm., *Testimony of Daniel J. Dew, Esq.*, House Bill 1267
(March 27, 2023)................................................... 27

S.D. House Bill 1164, 98th Legis.
(introduced Jan. 26, 2023).................................... 27

Wis. Act 2022-216 (Senate Bill 829).......................... 29

**Other Authorities**

Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process,*
75 Ind. L.J. 747 (2000) .......................................... 7

Jeffrey S. Sutton, *51 Imperfect Solutions:*
States And The Making of American
Constitutional Law (2018) .................................. 31

*Nat'l Tax Lien Assoc. Found.,*
*available at* www.ntlafoundation.org ................. 19

U.S. Treasury Dep't, HAF Plans......................... 20

## Interest of *Amici Curiae*[1]

This brief is submitted on behalf of the National Tax Lien Association (NTLA), the Arizona County Treasurers Association (ACTA), and the Tax Collectors & Treasurers Association of New Jersey (NJTCTA), which recommend that this Court affirm the United States Court of Appeals for the Eighth Circuit.

1. The NTLA is the primary national organization advancing the legislative, regulatory, business, public relations, and educational interests of the tax lien and tax deed industry. The NTLA seeks to uphold high standards of ethical conduct and to operate in accordance with all applicable federal and state laws related to tax lien auctions and tax deed sales. The NTLA was incorporated in 1997 as a nonprofit business league to represent all industry participants—public and private. The NTLA's constituency includes tax lien bidders, tax collectors, lenders, and portfolio servicers, all of whom recognize the importance of properly collecting tax revenue. The NTLA monitors state legislation,

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[1] No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Respondents are not members of the associations joining this brief as *amici*.

engages in lobbying activity, and participates as *amicus curiae* in courts throughout the nation. Many state legislators, regulators, and tax collection officials nationwide consult the NTLA about laws and policies governing real property tax sales.

2. ACTA is a statewide association of Arizona's county tax collectors united to serve the public and safeguard funds generated from tax sales within the State. Its members represent all 15 Arizona counties. ACTA's purpose is to share in the exchange of ideas, experiences, and opinions among the various county treasurers; more efficiently serve Arizona's citizens and its counties through sharing best practices; and promote legislation supporting the position and duties of county treasurers. Through its membership and education efforts, ACTA enhances local governments' ability to collect delinquent property taxes through efficient notice and sale efforts, thus providing tax revenue required for Arizona's counties, fire districts, and school districts to meet their financial obligations.

3. NJTCTA consists of over 1,000 members from New Jersey's 565 municipalities. Many of the State's tax collectors, deputy collectors, treasurers, deputy treasurers, municipal finance officers, and utility collectors are members of the NJTCTA. Its members ensure all New Jersey property owners receive their tax bills promptly, notify taxpayers in the event of their failure to pay taxes due, and—as a remedy of

last resort—conduct public sales of the various municipal liens to collect delinquent taxes. Under the aegis of Rutgers University, the NJTCTA conducts seminars and tests for those who desire to take the state examination to become tax collectors as required by state statute. NJTCTA also provides yearly seminars to help its members obtain the necessary continuing education credits to maintain the proper certification. NJTCTA is honored to ensure all tax collectors across the State can properly perform their duties according to law.

*Amici* and their members will be affected by the outcome of this case because dramatic changes to how delinquent property taxes are collected across the country could jeopardize the fiscal health of local taxing authorities, resulting in safety and economic consequences for these communities. For these reasons, *Amici* have legitimate interests in this case.

## Summary of the Argument

Having isolated one small portion of a comprehensive statutory method for in rem delinquent tax collection in Minnesota, Petitioner asks this Court to declare Minnesota's statutory scheme unconstitutional under the Takings and Excessive Fines Clauses of the United States Constitution. Such a declaration will reverberate through the country, making a large number of the states' tax collection statutes unconstitutional. Rather than argue to states and local municipalities to reach this result, Petitioner urges the Court to create a constitutionally protected property right under federal law for a delinquent taxpayer that does not exist under state law. But our Constitution generally does not create property rights; it protects those already recognized under state law. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 732 (2010).

How states have chosen to define and divest a property interest in the realm of tax collection enforcement varies. There is no universal collection mechanism, though some common provisions exist, including (a) the tax sale is a remedy of last resort employed by the tax collector after sending various notices and only after delinquent taxpayers have the chance to exempt themselves from taxation, defer their property taxes, enter into payment plans, or sell their properties to avoid losing any interest they may have; and (b) the vast majority of states permit

amounts paid at the tax sale in excess of the delinquent taxes, penalties, and interest owed to transfer to the state or local government after some amount of inaction on the delinquent taxpayer's part.

The methods states, counties, and municipalities use to collect delinquent taxes are not haphazard—they are a part of a comprehensive statutory scheme consciously chosen and implemented. The statutory procedure used by the different local governments are constantly being tweaked to address perceived issues in the process raised by taxpayers to their legislators. The adopted statutory schemes represent policy decisions adopted by the states' legislatures, arising out of a careful balance of competing interests. Delinquent tax collection methods particularly represent a host of compromises and trade-offs embraced to fashion an efficient enforcement mechanism with appropriate protections in place. Federalism concerns warrant deference to those policy choices. Other options short of adopting an overbroad rule limiting delinquent tax enforcement nationwide exist at the state and local level.

As a result, *Amici* request that the Court affirm the courts below or, at the very least, reject the overbreadth with which Petitioner reads the constitutional provisions at issue.

## Argument

### I. States have various methods for collecting delinquent taxes and distributing surplus proceeds, so a universal approach will impact more rights than it protects.

Tax revenue is essential to a local government's survival, *see Bull v. United States*, 295 U.S. 247, 259 (1935), but the methods by which states, counties, and municipalities collect taxes vary considerably. The means by which states accept bids for delinquent properties differ from state-to-state, as do the ways the states distribute surplus proceeds. Regardless of the methods used, states are constantly in search of a more perfect system of enforcement to promote the general welfare of their citizens while also protecting each property owners' rights. Examining some of the different approaches the states take promotes the conclusion that the one-size-fits-all solution Petitioner urges creates various problems.

#### A. Local property tax collection schemes do not all follow a singular approach.

Although the methods by which tax collection may differ, many refer to the event of divesting ownership (i.e., auction, sale, or forfeiture of a property to collect delinquent taxes) as a remedy of "last resort." Resp. Br. at i; U.S. Br. at 15; Br. *Amici* Utah, et al. at 4–5 (discussing taxpayers' opportunities to redeem in Utah and Wisconsin).

Before examining that remedy of last resort, understanding how the states get to that point in the collection process—after various opportunities to redeem—is important. The collection mechanisms vary dramatically. One commentator suggested that at the turn of the century there were "over 150 different systems in the United States for collecting the property tax." Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 748 (2000). In 2023, that estimate may be low.

Without intending to oversimplify the processes, the States generally employ three broad methods: the overbid method, the interest-rate method, and the percentage-ownership method.

1. Overbid: In an overbid state, properties are auctioned with the first bid being roughly equal to the delinquent taxes, penalties, and interest. *See*, *e.g.*, S.C. Code Ann. §§ 12-51-55 and -60. Additional bids over that amount due are then received using competitive bidding, meaning the "fair market value of the property is at least in theory the ceiling for amounts that might be bid." *In re Smith*, 811 F.3d 228, 237 (7th Cir. 2016); *In re Grandote Country Club Co.*, 252 F.3d 1146, 1152 (10th Cir. 2001) (explaining competitive tax sale bidding in Colorado). A redemption period then follows during which the delinquent taxpayer has a definitive amount of time to redeem by paying the amount of the winning bid, plus a statutory interest rate. *See*, *e.g.*, S.C. Code

Ann. § 12-51-90. The overall interest paid on top of the bid is limited by a statutory cap in most instances. *See*, *e.g.*, *id.* § 12-51-90(B). If the delinquent taxpayer does not redeem, then the winning bidder receives title to the delinquent-tax property. *See*, *e.g.*, *id.* § 12-51-130.

2. Interest Rate: Under this method, prospective lien purchasers offer to pay the outstanding taxes at the sale and then bid down the interest rate of return on the delinquent amounts they pay. *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 752–53 (7th Cir. 2011) (describing interest-rate method). Among other states, Arizona, Illinois, and South Dakota use this method. Ariz. Rev. Stat. §§ 42-18001 *through* -18267; 35 Ill. Comp. Stat. §§ 200/19-5 *through* 22-95; S.D. Codified Laws §§ 10-23-1 *through* -33. The interest rate decreases from a statutory ceiling to a floor set by the market as the minimum interest amount a bidder would accept when a taxpayer or interested party—such as a mortgage holder or judgment lienholder—redeems. *See* Ariz. Rev. Stat. § 42-18114; 35 Ill. Comp. Stat. § 200/21-215; S.D. Codified Laws § 10-23-8. In many states, zero percent interest is the floor.

3. Percentage Ownership: In both the overbid and interest-rate methods, the bidder receives an interest in the entire property. In the percentage-ownership method by contrast—a method referred to as a "statutory relic," *Adair Asset Mgmt., L.L.C. v.*

*Terry's Legacy, LLC*, 875 N.W.2d 421, 424 (Neb. 2016)—bidders compete for the lowest percentage ownership in the underlying property. This tax sale method is rare, but is still used in Iowa and Rhode Island. *See* Iowa Code Ann. § 446.16; R.I. Gen. L. § 44-9-8. Winning bidders must pay the delinquent taxes at the sale and then bring a partition action to request a public sale of the property in order to secure their pro rata interest from the sales proceeds.[2] Although Louisiana revamped its tax sale procedure in 2008, *see Cent. Properties v. Fairway Gardenhomes, LLC*, 225 So. 3d 441, 448 (La. 2017) (noting 2008 revision of former statutes, La. Rev. Stat. §§ 47:2221 *through* 2230), these revisions retained the percentage ownership method because it is enshrined in its State Constitution, La. Const. art. XII, § 25.

Sometimes the states employ a mix of several methods. For example, the winning bidder in New Jersey is the party who will pay the outstanding taxes subject to redemption at the lowest interest rate. N.J. Stat. Ann. § 54:5-32. This part of the

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[2] Other states previously used this procedure but have adopted new methods. *Adair Asset Mgmt.,* 293 Neb. at 35, 875 N.W.2d at 424 (referencing repeal of percentage-ownership method in Neb. Rev. Stat. § 77-1807). Some still have this method on the books, but as an alternative procedure not currently used. *See*, *e.g.*, Mass. Ann. Laws ch. 60, §43; *Ly v. Lafortune*, 832 A.2d 757, 759 (Me. 2003) (referencing alternative percentage-ownership procedure available to cities); N.H. Rev. Stat. Ann. § 80:24.

process is akin to the interest-rate method. Yet bidders who will accept redemption rate "less than 1%, or at no interest," may offer to pay "a premium over and above the amount of taxes, assessments or other charges . . . due the municipality." *Id.* § 54:5-32. The tax lien is then "struck off and sold to the bidder who offers to pay the amount of such taxes, assessments or charges, plus the highest amount of premium." *Princeton Off. Park, LP v. Plymouth Park Tax Services, LLC*, 93 A.3d 332, 338 (N.J. 2014) (quoting N.J. Stat. Ann. § 54:5-32) (alterations omitted). Thus, New Jersey employs aspects of both the interest-rate and overbid methods.

Minnesota also employs a mix of these general categories of collection methods. Although the property is automatically sold to the State roughly two years after the taxes are assessed, Resp. Br. at 5–6, it is not until the title forfeits that the County can accept bids or offers to purchase the property from third parties, *see* Minn. Stat. § 282.01 subds. 3–4. The amount the County may accept is determined by appraisals of the property and other relevant factors. *Id.* The homeowner may still repurchase the property during this time by paying the amount of the outstanding tax debt. *Id.* § 282.241 subd. 1. Thus, Minnesota applies a type of modified overbid method in which delinquent taxpayers retain an opportunity to avoid losing their property.

The degree of court involvement in the tax-collection process differs from state-to-state as well. North Carolina collects taxes in a civil action that is exclusively judicial. *See* N.C. Gen. Stat. § 105-374.[3] Hawaii allows judicial foreclosures, Haw. Rev. Stat. § 231-62, but also permits its taxes to be collected without any court involvement, *id.* §§ 231-63 *through* -70. Others have no court involvement, but rely on an executive-branch office or the tax collector to provide notice and auction the property. *See Valenzuela v. Snyder*, 326 P.3d 1120, 1123 (N.M. 2014) (discussing Department of Taxation and Revenue's process under N.M. Stat. Ann. § 7-38-65(A)); Ga. Code Ann. § 48-4-1(a)(3).[4]

As is true with the bidding methods, some states mix styles; the collection process is administrative at first, but the process ends with a judicial proceeding akin to a quiet title or foreclosure action. *See* Ariz.

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[3] Other judicial tax lien foreclosure states include Kansas and Tennessee. Kan. Stat. Ann. §§ 79-2801 *through* -2812; Tenn. Code 67-5-2501 *through* 2516.

[4] Georgia is similar to Hawaii in that it also offers a judicial alternative. This alternate process, however, is only available to governmental units, which foreclose in the superior court. *See* Ga. Code Ann. § 48-4-76(a). Sales under this method are subject to a 60-day redemption period, and the right to redeem automatically expires. *Id.* § 48-4-81(c)(3). This judicial method differs from Georgia's standard one-year redemption period and the requirement that lienholders bar the right to redeem by giving notice under the standard process. *Id.* § 48-4-45.

Rev. Stat. §§ 42-18201, 18204. Others involve both the judicial and executive branches in collection. *See*, *e.g.*, Ala. Code § 40-10-11 (requiring probate order before auction and redemption processed by county tax collector or revenue commissioner); Minn. Stat. § 279.05 (beginning with court order).

Whether a particular state's statutes contemplate judicial involvement in the collection process, courts often become involved in tax sales when an error has occurred, the taxing authority incorrectly sold a property, or the tax collector employed an improper method in doing so. *See Plemons v. Gale*, 396 F.3d 569, 576–77 (4th Cir. 2005) (voiding tax sale for purchaser's failure to provide notice consistent with due process); *Luessenhop v. Clinton Cnty., New York*, 466 F.3d 259, 270 (2d Cir. 2006) (remanding for want of due process providing notice to property owners); *Thoden v. Hallford*, 310 So. 3d 1156, 1162 (Miss. 2021) (voiding tax sale for chancery clerk's failure to comply with notice provisions); *Nordell v. Mantua Twp.*, 132 A.2d 39, 42 (N.J. Super. Ct. Ch. Div. 1957) (vacating final judgment of tax foreclosure where the underlying tax assessment was void).

A remedy to address void sales has been codified in some states. *See* 35 Ill. Comp. Stat. § 200/21-310 (sale in error remedies); 72 Pa. Stat. Ann. § 5860.607 (providing court discretion to invalidate tax sale); Miss. Code Ann. § 27-45-27 (providing statutory lien for voided sales). In fact, some states even allow

interested parties affected by an improper tax sale to proceed against the tax collector's official bond or against the local taxing authority. Ala. Code § 40-10-75 ("the officer . . . whose omission or error the defect or insufficiency . . . shall have arisen, together with the sureties on the official bond, shall be liable to the purchaser whose title shall be thus defeated . . ."); Cal. Rev. & Tax. Code § 3729(a) (requiring refund where tax sale declared void).

Courts need not always be involved, however, as some states empower the taxing authority to set aside invalid sales directly. N.Y. Real Prop. Tax Law § 1138 (permitting tax collector to withdraw any parcels from foreclosure proceedings); R.I. Gen. L. § 44-9-43 (permitting municipality and tax sale purchaser to agree to void irregular sale); S.C. Code Ann. § 12-51-150 (permitting tax collector to void sales when warranted).

As shown above, the local governments collect taxes differently. Each have their own nuances born out of state law, as well as local custom and practice. It is impossible to neatly categorize each statutory scheme, much less force them into a one-size-fits-all process that can be addressed on a national scale.

### B. Despite the various collection systems, each still provides resources to avoid or redeem from tax sales.

Petitioner concedes that opportunities to redeem and avoid losing tax-delinquent property exist under

Minnesota law. Pet. Br. at 38. In fact, "[a]ll individuals who owe a tax have several opportunities to pay it, and thus avoid forfeiture . . ." U.S. Br. at 28. This is almost universally true across the states because taxing authorities want to collect taxes, not become real estate moguls. In part, this is why Arizona taxpayers have just short of five years to pay the tax lien in full before the foreclosure process can begin, and even then, the delinquent taxpayer can redeem until the last step in the process. See *Friedemann v. Kirk*, 5 P.3d 950, 952 (Ariz. Ct. App. 2000) (holding that final judgment forecloses redemption rights). The same can be said for Minnesota taxpayers as well—they can repurchase at any time before the county resells the property. *See* Minn. Stat. § 282.241 subd. 1.

New Jersey is not much shorter. Private lienholders must wait two years to foreclose, though a lien held by a municipality may be foreclosed within six months. In either case, a lengthy court process—with required notice at each stage—must occur before taxpayers lose their title to delinquent-tax property. *See* N.J. Stat. Ann. § 54:5-86(a); *id.* § 54:5-87; N.J. Ct. R. 4:64-1(f); N.J. Ct. R. 4:64-6.

Together with the various opportunities to redeem, states and local governments also offer exemptions, discounts, payment plans, and other resources to avoid tax sales and forfeitures altogether. Ample opportunity to avoid the remedy

of last resort altogether mitigates the need to even address the proper distribution of any surplus. *See Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982).

The most common form of exemption is the *ad valorem* homestead exemption, which usually exempts real property from taxes for homeowners over a certain age or that are partially disabled. Ariz. Admin. Code § R15-4-116 (providing complete exemption for total and permanent disability); S.D. Codified Laws § 10-23-1 (providing that homestead is exempt from tax sale). Other states use the homestead exemption for just a portion of the fair market value of property.[5] Although most of these homestead exemptions act as a full or partial deduction from the assessed value, some states provide a tax credit or refund to assist taxpayers. Iowa Code Ann. § 425.1; Kan. Stat. Ann. §§ 79-4501 *through* -4531. At times, these exemptions are even included in the states' constitutions.[6] To assist those

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[5] Ala. Code §§ 40-9-19 *through* -21; Alaska Stat. Ann. § 29.45.030(e); Cal. Rev. & Tax. Code § 20505; Colo. Rev. Stat. Ann. §§ 39-3-201 *through* -210; Conn. Gen. Stat. Ann. § 12-170aa; Fla. Stat. § 196.031; Ga. Code Ann. §§ 48-5-44 *through* -47; Idaho Code Ann. §§ 63-701 *through* -704; 35 Ill. Comp. Stat. § 200/15-175; Ind. Code § 6-1.1-12-37(b); Me. Rev. Stat. Ann. title 36 § 683; S.C. Code Ann. § 12-37-220(A)(9).

[6] Colo. Const. art. X, § 3.5; La. Const. art VII § 20; S.C. Const. art. X, § 3(i); Va. Const. art. X, § 6(b); *but see* Kan. Const. art. XIV, § 9 (providing for homestead, but exempting provision from sale to recover delinquent taxes).

indirectly paying property taxes through rent, some states also offer homestead discounts to tenants meeting similar requirements. *See*, *e.g.*, Md. Code Ann., Tax-Prop. § 9-102(b).

Several programs exist across the country to aid vulnerable taxpayers exempt, defer, or manage their property tax liabilities. Disabled veterans often get additional property-tax exemptions on their homestead, *see*, *e.g.*, Idaho Code Ann. § 63-705A, or a tax credit amounting to a total refund, *see* Iowa Code Ann. § 425.15(1). In Maine, senior citizens of limited means may indefinitely postpone paying their property taxes if their municipality has adopted a senior citizen deferral program authorized by state law. Me. Rev. Stat. Ann. title 36, § 6271(2)(C). Arizona also has a deferral program, allowing individuals over 70 to defer property taxes on their primary residence valued under $150,000. Ariz. Rev. Stat. §§ 42-17301 *through* -17313. Minnesota has had a similar deferral program since 1997, with the legislative declaration that it is "in the public interest of this state to stabilize tax burdens on homestead property owned by qualifying low-income senior citizens through a deferral of certain property taxes." *See* Minn. Stat. §§ 290B.01 *through* .11.

Other exemptions abound, especially for those who face "circumstances of extreme poverty, ill-health, cognitive disability, and other factors," Pet. Br. at 38, impacting their ability to pay delinquent

taxes. The Arizona Constitution exempts the property of widows and widowers up to certain amounts, providing a partial exemption. Ariz. Const. art. IX, § E(4). Some States have enacted statutes providing similar exemptions. N.H. Rev. Stat. Ann. § 198:57 (providing up to full exemption for individuals based on income). States also provide exemption to the surviving spouses of first responders killed in the line of duty. R.I. Gen. L. § 44-5-13.40. Other states also provide discretion to local officials to discount or abate property taxes for qualifying taxpayers,[7] or to waive delinquent penalties and interest by resolution of the city council, *see* Mont. Code Ann. § 15-16-102(6). Other taxpayers—including those who rebuild their homes after being impacted by a "catastrophic event"—receive an exemption in Illinois to avoid the increased tax burden at a vulnerable time. 35 Ill. Comp. Stat. § 200/15-180. Florida residents can

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[7] Iowa Code Ann. § 427.10 (permitting abatement "for the best interests of the public and the petitioner"); Me. Rev. Stat. Ann. title 36, § 841(2) (allowing municipal and state assessors to "make such abatements as they believe reasonable on the real and personal taxes on the primary residence of any person who, by reason of hardship or poverty, is in their judgment unable to contribute to the public charges."); Mich. Comp. Laws § 211.7u (allowing local government to exempt primary residence from taxation altogether); N.H. Rev. Stat. Ann. § 76:16(I)(a) (permitting local authority to abate taxes for "good cause shown"); *Porter v. Town of Sandwich*, 891 A.2d 521, 523 (2006) (reaffirming that inability to pay may satisfy good cause).

receive a similar tax refund and even an abatement following a natural disaster, such as a hurricane. *See* Fla. Stat. §§ 197.319, 197.3195.

Many states also allow local governments to collect partial payments, *see* Ariz. Rev. Stat. § 42-18056(A), or even offer payment plans for taxpayers struggling to cure delinquencies, *see* N.J. Stat. Ann. §§ 54:5-65 *through* -74. Minnesota is no different—ten-year payment plans are available for taxpayers avoid forfeiture. *See* Minn. Stat. § 279.37 subd. 2. The installment or payment plans in most states are entered into before the delinquency,[8] although states will sometimes stay tax-collection proceedings when taxpayers and the local taxing authority enter into a payment plan while collection efforts are pending.[9]

These installment or repayment plans also differ depending on statutory factors, reflecting a careful balance struck by the state legislatures. Ohio law requires tax collectors to give delinquent taxpayers owning a residence, agricultural property, or a mobile home at least one chance to enter into a

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[8] Cal. Rev. & Tax. Code §§ 20581–20622; Fla. Stat. § 197.222; Kan. Stat. Ann. § 79-2401a(b).

[9] Ind. Code § 6-1.1-25-4(k) (permitting county treasurer to extend redemption period after entering into payment plan); Iowa Code Ann. § 445.16 (permitting post-sale compromise of taxes); N.J. Stat. Ann. §§ 54:5-65 and -67 (permitting municipalities to adopt resolutions suspending foreclosures upon redemption in installments); 72 Pa. Stat. Ann. § 5860.603.

delinquent-sales contract, but gives tax collectors discretion to do so for owners of other types of properties. Ohio Rev. Code Ann. § 323.31(A)(1). West Virginia also distinguishes between residential property and commercial properties when authorizing county auditors to permit redemption in installments "for reasons of financial hardship[.]" *See* W. Va. Code § 11A-3-56. And in South Carolina, installment plans are permitted by statute, but not if the property taxes are paid "through an escrow account," such as through a mortgage servicer. S.C. Code Ann. § 12-45-75(a). In cases when a payment plan may not be authorized, some states allow local governments to waive interest. R.I. Gen. L. § 44-5-8.1 (permitting municipalities to enact ordinances waiving interest on delinquent tax payments).

Municipalities help taxpayers avoid tax sales or forfeitures as well. In 2022, the City of Baltimore established a Tax Sale Exemption Program that sets aside $2 million in the annual budget to remove certain types of properties from the tax sale upon application. *See* Baltimore Cty. Ord. 20.427 (Nov. 2, 2020), *available at* https://bit.ly/3yCD28W.[10]

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[10] Public-private partnerships also exist. Thirty years ago, the NTLA established a foundation to support homeowners with hardships that hinder their ability to avoid a tax sale or forfeiture. Troubled homeowners needing assistance can apply for funds to protect their primary residence. *See* Nat'l Tax Lien Assoc. Found., *available at* www.ntlafoundation.org.

Programs have been enacted on the federal level as well. For example, Congress recently created the Homeowner Assistance Fund (HAF), a $9.9 billion fund overseen by the U.S. Treasury Department and administered by the local governments. *See* American Rescue Plan Act of 2021, Pub. L. 117-2, § 3206 (March 11, 2021), *codified at* 15 U.S.C. § 9058d. Avoiding property-tax delinquency qualifies for assistance under the program. *See* U.S. Treasury Dep't., *Homeowner Assistance Fund Guidance* at 3–4 (amended March 7, 2023) (defining "qualified expenses" to include "payment assistance for delinquent property taxes to prevent homeowner tax foreclosures"), *available at* https://bit.ly/42vkWDr. Almost all of the States that have implemented HAF programs include assistance for delinquent property taxes. *See*, *e.g.*, Ill. Admin. Code title 47, § 302.202. In fact, of the 55 governmental entities that submitted HAF plans to the Treasury Department, only five did not offer delinquent property tax assistance in their plans. *See* U.S. Treasury Dep't, HAF Plans, *available at* http://bit.ly/408MYTP.[11]

The qualification criteria for each of these programs and resources depend on an enabling statute or regulation, which represents calculated policy decisions made by the relevant legislative body. Although these protections and resources may

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[11] These governmental entities included Alabama, Arkansas, Louisiana, Missouri, and the Northern Mariana Islands.

differ by jurisdiction, it remains up to the taxpayer to show some willingness to participate before benefiting from these alternatives to tax sale or forfeiture. By doing so, however, taxpayers avoid divestiture altogether, which also avoids even the creation of a surplus from a tax sale.

### C. States treat surplus proceeds in many ways, but almost all require paying the proceeds to the government at some point.

Just as the collection methods and resources to avoid divestiture vary, how taxing authorities treat proceeds paid by bidders in excess of outstanding taxes, fees, and costs differ from state-to-state. Regardless of these differences, almost every state bars all claims to such proceeds generated by the tax sale, or pays those proceeds to a general government account, after a set time. At least one state measures this time in mere days, *see* Mo. Rev. Stat. § 140.230(2) (paying funds to county's permanent school fund after as little as 90 days, but three years in some cases), while one state prohibits claims just months after the sale, *see* Alaska Stat. Ann. § 29.45.480(b) (barring claim for excess filed after six months of date of sale).[12] At least three states give

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[12] Florida has a six-month claims period, but this limit does not apply to property owners' claims. Fla. Stat. § 197.582(5).

delinquent taxpayers one year to claim any funds.[13] Roughly six states give delinquent taxpayers two years to claim any proceeds that exceed the taxes, fees, and costs owed,[14] and at least three states give delinquent taxpayers three years to do so.[15] Yet others provide longer timeframes to make a claim.[16]

By contrast, Hawaii and Maine allow local governments to determine the appropriate distribution or timeframe. *See*, *e.g.*, Haw. Cnty. Code § 19-45 (two years); Kaua‘i Cnty. Code § 5A-5.9 (one year); Me. Rev. Stat. Ann. title 36, § 949 (permitting

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[13] Nev. Rev. Stat. § 361.610(4); Okla. Stat. Ann. title 68, § 3131(C); S.D. Codified Laws § 10-22-27. Montana may also be included in this group of states. It amended its tax collection statutes in 2021 to remove the five-year period before surplus funds were treated as abandoned to now apply a one-year abandonment presumption. *See* Act 17, 2021 Mont. Acts 52, §§ 9–10 (amending Mont. Code Ann. § 70-9-803(1)(k)).

[14] Ark. Code § 26-37-205(c); Miss. Code Ann. § 27-41-77; Tex. Tax Code Ann. § 34.04(a); Va. Code Ann. § 58.1-3967; W. Va. Code § 11A-3-65; Wyo. Stat. Ann. § 39-13-108(d)(iv)(C).

[15] Ind. Code § 6-1.1-24-6.4(d); Ohio Rev. Code Ann. § 5721.20; Wash. Rev. Code § 84.64.080(10). Maryland may also be included in this group of states. *See* Md. Code Ann. Tax-Prop. § 14-819(b). That said, this statute also permits payment within seven years if the collector was unable to locate the person. *Id.* § 14-819(d).

[16] Ala. Code § 40-10-28 (ten years); Ga. Code Ann. § 48-4-5 (five years); N.J. Stat. Ann. § 54:5-33 (five years); R.I. Gen. L. § 44-9-37 (five years); S.C. Code Ann. § 12-51-130 (five years); Wis. Stat. § 75.36(2m) (five years).

municipalities, "by ordinance, [to] disburse to the former owner the excess of any funds received from the disposition of that property."); Town of Winthrop Ord. (May 2, 2016) (setting one-year for payment to general fund), *available at* https://bit.ly/3mNDM8B.

The number of states that have no statute directly barring claims or paying impacted funds to the state, county, or municipality are in the minority.[17] Those states that have statutes directing such funds be retained indefinitely are even fewer in number. Utah Code Ann. § 59-2-1309 ("[A]ny excess . . . shall be deposited with the state treasurer subject to the order of the owner of the property sold, or the owner's heirs or assigns."); *cf.* N.D. Cent. Code Ann. § 57-28-20 (distributing funds to unclaimed property administrator to invest after 90 days).

Although not mentioned in their *amicus* brief, surplus funds in Arkansas, Texas, and West Virginia are not preserved indefinitely and are ultimately remitted to the state or local governments. *Compare* Br. *Amici* Utah, et al. at 3–7 (discussing tax sale procedures, but not short period before surplus

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[17] New Hampshire may fall into this category after its Supreme Court's refusal to classify the State's three-year redemption period as a statute of limitations for return of funds generated by the local municipalities' sale of tax-forfeited property. *Polonsky v. Town of Bedford*, 190 A.3d 400, 407 (N.H. 2018) (declining to consider argument that N.H. Rev. Stat. Ann. § 80:89 served as statute of limitations).

proceeds escheat), *with* Ark. Code § 26-37-205(c) (escheating in as little as two years); Tex. Tax Code Ann. § 34.03(b) (escheating in two years); W. Va. Code § 11A-3-65 (same). The timeframe for escheating in these states is generally less than the roughly five years in which delinquent taxpayers in Minnesota may sell their property to receive payment of any interest they may have exceeding the county tax lien. *See* Resp. Br. at 5–7 (citing Minn. Stat. §§ 273.01 *through* 280.08).

No matter how long before any proceeds exceeding the amount of taxes, penalties, and costs would be distributed under state law, Petitioner's reading of *United States v. Taylor*, 104 U.S. 216 (1881) would invalidate each of these laws altogether. Petitioner interprets *Taylor* as requiring local governments to hold surplus funds from a tax sale in trust "indefinitely." Pet. Br. at 13. Petitioner's interpretation of *Taylor* would invalidate all but Utah's statute because the remaining states cited above bar claims or otherwise allow the funds to be paid to governmental entities after various periods of inaction by delinquent taxpayers.

The more appropriate reading of *Taylor* is to limit its application to that of statutory construction just as the Court did in *Nelson v. City of New York*, 352 U.S. 103, 110 (1956). Doing so prevents a rewriting of state laws that fail to hold proceeds in trust "indefinitely," and avoids the need for the Court to

engage in the public policy analysis a legislative body usually employs in setting the time a delinquent taxpayer must have to claim any such proceeds.

## II. States have made conscious policy choices in enacting their enforcement statutes to balance competing interests.

The Court's decision here could undermine federalism principles associated with allowing states to balance the need for tax revenue against protecting property rights recognized under state law—a balancing act the states are constantly conducting as they refine and modernize their statutory schemes. The Court should defer to these policy considerations in the absence of clear local law creating a property right in surplus proceeds. Otherwise, the Court risks adopting a rule that sends shockwaves through any number of collection schemes at the state and local levels.

### A. States regularly tweak their taxing statutes and have adopted different collection methods as a matter of policy.

As the laboratories of democracy, states often amend their tax collection statutes for many reasons. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015). Just like other statutory schemes interpreted by this Court, states take policy stands through their taxing and enforcement statutes. *See Lawrence v. State Tax Comm'n of Mississippi*, 286 U.S. 276, 283–84 (1932)

(discussing potential policy considerations attendant to State's classifications under its tax code).

Some states have recently passed complete overhauls of their collection schemes. Just last year, West Virginia transformed its process to modernize it. 2022 W. Va. Acts 2361; *see also* Jacque Bland, *Summary of Bills*, 2nd session, 85th Legis. 71 (Office of the W. Va. S. Pres., 2022). Other states have recently adopted alternative methods to increase local governments' flexibility in collecting delinquent taxes. Modeled after the interest-rate method in Arizona, the Alabama Legislature adopted the tax lien sale as an alternative to its traditional tax deed auction. See Ala. Act 2018-577 (House Bill 354). The statutory change gave local governments the option to choose between the two methods each year. *Id.* § 1; *see also* Ala. Code § 40-10-180(b) (permitting selection of tax collection method each year, if desired).[18] These recent changes in West Virginia and Alabama are just two examples of states using their own legislative process to update, amend, or modify their tax collection system to address local concerns with the statutory scheme.

States have even passed statutory changes since the Court granted certiorari in this case. In Arkansas, Governor Sanders signed House Bill 1191

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[18] Alabama passed additional legislation shortly thereafter to address issues arising in the first few lien sales. *See* Ala. Act 2022-208 (House Bill 371).

into law on March 2, 2023, setting a two-year timeline for paying surplus proceeds to the county. H.B. 1191, § 11, 94th Gen. Assemb., Reg. Sess. (Ark. 2023). Legislators in other states have also introduced bills addressing how and when surplus proceeds may be distributed.[19] This includes one bill that would revise North Dakota's surplus-distribution statute to credit those proceeds to the county's general fund. *See* N.D. House Bill 1267, 68th Legis. (introduced Jan. 11, 2023).[20] The Court should be mindful of potentially affecting these legislative efforts to define and address rights to tax sale proceeds under local law.

Because of the importance of tax revenue for local governments, it is no surprise that statutes detailing how taxing authorities collect delinquent taxes are in a constant state of revision. These statutory changes reflect policy preferences the states have adopted.

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[19] Me. House Paper No. 69, 131st Me. Legis. (introduced Jan. 10, 2023); Mass. Sen. Bill 1174, 193d Gen. Ct. (introduced Jan. 18, 2023); Minn. House File 1929, 93d Legis. (introduced Feb. 16, 2023); N.J. Assemb. 5302, 220th Legis. (introduced March 16, 2023); N.Y. Sen. Bill 5383 (introduced March 3, 2023); S.D. House Bill 1164, 98th Legis. (introduced Jan. 26, 2023).

[20] Petitioner's counsel recently testified in opposition to the bill. *See* N.D. Sen. Fin. and Taxation Comm., Testimony of Daniel J. Dew, Esq., House Bill 1267 (March 27, 2023), *available at* http://bit.ly/3lLOxrL. This testimony confirms that participation in the legislative process to address any perceived issues is a viable—and preferred—alternative to creating a sweeping, quasi-federal property right urged by Petitioner.

For example, the redemption period in some states can be reduced if the property has been abandoned or meets other conditions provided by local ordinance. Conn. Gen. Stat. Ann. § 12-157; 35 Ill. Comp. Stat. § 200/21-350 (reducing redemption period from two years to six months for commercial, industrial, and vacant properties).[21] This distinction promotes revitalization of abandoned and dilapidated properties to make communities safer and more vibrant. Other states distinguish between commercial and residential properties for the redemption period set by law. *See* Kan. Stat. Ann. § 79-2401a(b); Tex. Tax Code Ann. § 34.21(e)(1). This distinction is a conscious decision by the states to provide more time for protecting property rights for homeowners than for sophisticated businesses.

These distinctions and classifications spill over into the ways states treat claims for surplus proceeds as well. Until last year, Wisconsin only protected rights to any surplus for 60 days and only in cases when the underlying real estate was the taxpayer's homestead. Wis. Stat. § 75.36(2m) (2021). Last year, however, its legislature created a right to surplus proceeds whether or not the former owner used the

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[21] Minnesota similarly directs that its post-forfeiture process be interpreted "to encourage the sale and utilization of tax-forfeited land in order to eliminate nuisances and dangerous conditions and to increase compliance with land use ordinances." Minn. Stat. § 282.01 subd. 4(c).

property as a homestead and created a five-year escheatment deadline absent from prior law. Wis. Act 2022-216 (Senate Bill 829); *see also* 2022 Wis. Act 216 Act Memo, Legis. Council (May 16, 2022), *available at* https://bit.ly/3yxHFRJ. Thirteen months prior, the Montana Legislature amended its surplus-funds statute to permit a return of surplus for only residential properties. *See* Act 17, 2021 Mont. Acts 52 §§ 6–7 (amending Mont. Code Ann. §§ 15-18-219 *through* -220). To date, Montana appears to be the only state that requires return of the surplus for residential, but not commercial, properties.

In analyzing the tax-collection statutes of ten states around 1801, the Government has recognized that the states had "struck a balance between facilitating tax collection and protecting delinquent taxpayers' rights . . ." U.S. Br. at 15. That balancing act has become all the more delicate as the complexity of tax collection has increased in the 220 years since those statutes were enacted. Yet—as the myriad of statutory schemes and recent legislative enactments discussed above show—the states continue to make conscious policy trade-offs to try to achieve an equilibrium between the need for revenue and the desire to avoid unnecessary intrusion upon taxpayers' property rights. Federalism principles justify respecting those policy decisions made by the states in enacting and implementing their statutory schemes. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (discussing deference provided to states as a

matter of federalism). This is especially true in the delinquent-tax collection arena where the state is enforcing a unique sovereign right to tax. *Nat'l Priv. Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995).

**B. A broad rule here could reverberate through the states.**

Much has changed about tax collection since the Magna Carta, Pet. Br. at 14; Br. *Amici* Buckeye Inst. at 6–7, or since Cooley and Black wrote about tax sales at the dawn of the Republic, Pet. Br. at 15–16. That the states have developed innovative ways to collect delinquent taxes does not mean that the methods by which taxes are collected must be a constitutional taking or impose an excessive fine.

Because of the web of tax-collection schemes that exist across the country, a broad rule adopted to address Minnesota's statutory process would unnecessarily reverberate throughout the country. Casting doubt on one portion of Minnesota's process by labelling it a "taking" could imperil another state's statutory process whose only similarity is the label attributed to that aspect of the process. Given the constant statutory revisions, any such "taking" label will likely impact both enacted and pending legislation across the country.

Were the Court to hold that tax sales or forfeitures are takings by adopting Petitioner's manufactured right in surplus proceeds, some other

statutory schemes using similar concepts would be unnecessarily questioned as constitutionally infirm. This is precisely why the takings analysis turns first on an interpretation of state law, *see Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021), rather than some type of quasi-federal common law as Petitioner tries to fashion. *See* Pet. Br. 14–17. That is, whether a right in surplus proceeds "might have been established or ought to have been established" throughout the nation's history is immaterial. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 732 (2010). Rather than try to usurp the interpretations of the states' legislatures and courts as to the proper scope of property rights, the Court should defer the interpretation of local law to those closest to its source. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) (recognizing "the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have" in upholding state tax classification); *see also* Jeffrey S. Sutton, *51 Imperfect Solutions: States And The Making of American Constitutional Law*, 11 (2018) (discussing the states' ability to safeguard individual rights).

Even Congress recognized the variety of collection schemes when it addressed the competing priority and enforcement mechanisms of federal and state tax liens in the Federal Tax Lien Act of 1966. Pub. L. 89-719 (Nov. 2, 1966). Although Congress conceded that local tax liens have priority over IRS liens in

some cases, *see* 26 U.S.C. § 6321(b)(6), Congress retained the Government's right to receive notice of the sale of land encumbered by junior federal liens, 26 U.S.C. § 7425. Yet the type and timing of notice to the IRS turns on the method of foreclosure under state law. *Id.* § 7425(a)–(b). Congress categorized the process into judicial and nonjudicial sales. *Id.*; 26 C.F.R. § 301.7425-2(a) (defining nonjudicial sale). These two categories apply to private foreclosures and local tax sales. *Sw. Prod. Co. v. U.S. Through I.R.S.*, 882 F.2d 113, 117 (4th Cir. 1989) (applying § 7425 to deed of trust's foreclosure); *United States v. State of Colo.*, 872 F.2d 338, 339–40 (10th Cir. 1989) (applying § 7425 to tax sale). To guide local governments in the type of notice to be given, the IRS provides regulatory examples of how this statute is applied to different types of tax sales. *Compare* 26 C.F.R. § 301.7425-2, Example 5 (analyzing timing of notice to be provided under tax lien sale), *with id.* at Example 6 (overbid tax sale). The IRS's redemption from a sale also turns on local law, *id.* § 301.7425-4(c)(3), but the IRS's claim to the proceeds from the sale turns on federal law, *id.* § 301.7425-1(c)(4).

A broad rule questioning the excessiveness of a tax under the Eighth Amendment could also threaten the careful balance struck by state legislatures between property rights and needed tax revenue. Causing uncertainty in the amount needed for a tax-sale purchase so as to avoid excessiveness under the Eighth Amendment could require tax-

collecting officials to scrutinize the debt-to-value ratio of virtually every property auctioned. For a large county—Maricopa County, Arizona, or Essex County, New Jersey, for example—this could cause the tax sale to grind to a halt. It could also decrease the number of bidders attending the sale by making the auctions drag on longer and causing them to be more mathematically complex. Such delays would undermine the efficiencies intended by the legislatures in developing their collection processes. By decreasing these efficiencies, the tax sales would only become more costly, potentially having the opposite effect of what Petitioner seeks here.

Statutory schemes for assessing, levying, and collecting taxes are fickle. They emerge from a host of trade-offs, concessions, and policy directives during the legislative process, resulting in an interdependent statutory scheme. That scheme only gets more complex when one tries to fashion a rule or process crossing different jurisdictions with varying tax-collection methods. As a result, the Court should decline Petitioner's invitation to tweak one state's tax-sale statutes without being able to confidently account for the immediate and long-term effects on the statutory schemes in the other states.

## Conclusion

The states are best positioned to make informed decisions about how to balance efficiently collecting taxes against their taxpayers' property rights

recognized under state law. The states recognize that due process protections are vital to the process, and those protections are built into the several exemptions, notices, sales, and redemption mechanisms within each statutory scheme. The Court should defer to those policy determinations rather than try to impose a national in rem tax-collection process by creating an amorphous federal common-law property right.

Respectfully submitted,

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