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* WISCONSIN COUNTIES ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Wisconsin Counties Association ("WCA") was statutorily authorized in 1935 and is committed to protecting the interests of Wisconsin counties and promoting better county government. Wis. Stat. § 59.52(22). To meet its mission, the WCA represents interests common to Wisconsin's counties. In fact, one of the primary purposes of the WCA is to monitor and participate in the legal developments affecting county governments, and the WCA often appears as *amicus curiae* in cases that could affect county interests in the State of Wisconsin. Some examples of cases in which the WCA has appeared as *amicus curiae*, either on its own or with others, include *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Town of Rib Mountain v. Marathon Cty.*, 386 Wis. 2d 632, 926 N.W.2d 731 (Wis. 2019); *Golden Sands Dairy LLC v. Town of Saratoga*, 381 Wis.2d 704, 913 N.W.2d 118 (Wis. 2018); and *AllEnergy Corp. v. Trempealeau Cty. Environmental & Land Use Committee*, 375 Wis. 2d 329, 895 N.W.2d 368 (Wis. 2017).

This is an important case to the WCA because Wisconsin appellate courts have generally rejected the proposition that a former property owner may recover "equity" or "surplus proceeds" from a subsequent sale when the government obtains title to the property via an *in rem* action for unpaid taxes. *See Oosterwyk v.*

1. No counsel for a party authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. No other person, other than WCA, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

Milwaukee Cty., 31 Wis. 2d 513, 517-18, 143 N.W.2d 497 (1966) (rejecting unjust enrichment claim and stating that "[i]n our opinion, a former owner … is not entitled to any surplus unless the legislature chooses to provide therefor" and "[w]e perceive no basis in equity to hold that if the property is subsequently sold at a profit it is the former owner who is entitled to enjoy such excess"); *Ritter v. Ross*, 207 Wis. 2d 476, 486, 558 N.W.2d 909 (Ct. App. 1996) (rejecting claim under Takings Clause and stating "when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements"). Although Wisconsin, by statute, currently provides for the distribution of any remaining net proceeds to the former owner, *see* Wis. Stat. § 75.36(2m)-(3), that has not always been the case. The WCA is concerned the arguments of Petitioner, if adopted in this case, could effectively create a federal property right in "equity" that would prevent the Wisconsin Legislature from making future changes to Wisconsin law that might alter procedural mechanisms or otherwise strike a different balance between the interests of property owners and the interest of local governments in speedy and effective property tax collection and administration. In short, the WCA seeks to maintain its ability to advocate on behalf of Wisconsin counties for future legislation at the state level on the issues raised by this dispute.

SUMMARY OF ARGUMENT

This Court should affirm the decision of the Eighth Circuit below, as the Petitioner does not allege violations of the Takings Clause or the Excessive Fines Clause.

I. A compensable taking does not occur under the Takings Clause when a government takes ownership of real property via an *in-rem* tax-forfeiture proceeding that results in the cancellation of the tax debt, even if the real property is alleged to be worth more than the underlying debt or subsequently generates surplus proceeds.

A. No unconstitutional taking of the surplus proceeds generated via a subsequent sale of the forfeited property occurs when, as here, state law does not provide a right for the former property owner to receive those surplus proceeds.

B. There is no traditional property right in equity—defined as the value of the real property in excess of the underlying debts—that is "taken" when state laws treat an owner's entire interest in land as forfeited when taxes go unpaid, even if the land is otherwise more valuable than the taxes. Even if there was such a property right, it is appropriate to treat such property interests as forfeited if a property owner, after receiving constitutionally adequate notice, fails to take available steps to preserve those interests.

Further, finding a compensable taking under such circumstances would not be consistent with the purpose of the Takings Clause. A former property owner whose real property serves as compensation for an unpaid tax debt has suffered only a diminishment to the economic value of the property to the former owner. The forfeiture of the owner's entire interest in the property also does not conflict with reasonable expectations when, as here, the parameters of the state's laws have long been in effect. And, such laws do not have the character of traditional

takings but instead represent an exercise of the taxing power that may burden economic values in some cases but do not constitute takings.

C. This Court's prior decision in *Nelson v. City of New York*, 352 U.S. 110 (1956), establishes that no compensable taking occurs when a former property owner receives constitutionally adequate notice and has an opportunity to take action to preserve any excess value in the property by, for example, redeeming the property or selling it.

D. Finally, this Court should avoid issuing a decision that has the effect of recognizing the "equity interest" or "surplus proceeds" claimed by Petitioner as a "traditional property right" entitled to federal constitutional protection regardless of its treatment under state law. Each state should be free to strike its own balance of the interests of property owners and the interest of local governments in effective and efficient tax administration and to change its approach to these issues over time.

II. This case also does not implicate the Excessive Fines Clause because the purpose of *in rem* tax-forfeiture statutes like the one at issue here is to ensure the payment of taxes and collection of revenue, not to punish property owners.

ARGUMENT

I. The Petitioner Has Not Plausibly Alleged a Compensable Taking Under the Takings Clause

A violation of the Takings Clause occurs when (1) there is a protected property interest, (2) the government has

taken that property interest for public use, and (3) the government has not provided just compensation for the taking. *See Horne v. Dep't of Agriculture*, 569 U.S. 513, 525-26 (2013) ("[A] Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation." (emphasis in original)); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01, 104 S. Ct. 2862 (1984) (asking whether there is "a property interest protected by the Fifth Amendment's Takings Clause"). No violation of the Takings Clause occurs when, as here, a state or local government obtains absolute title to real property via an *in rem* proceeding that results in the cancellation of tax debt. To the contrary, no "taking" occurs in such a case because it is the property itself that serves as payment of the unpaid taxes and "[i]t is beyond dispute that '[t]axes and user fees … are not takings.'" *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013) (quoting *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 243 n.2 (2003) (SCALIA, J., dissenting)); *Mobile Cty. v. Kimball*, 102 U.S. 691, 703 (1880) ("But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution.").

Further, local governments are empowered to seize and sell real property to satisfy unpaid taxes, and property rights "lost" as a result of such sales are not government takings that implicate the Takings Clause. *See Continental Resources v. Fair*, 311 Neb. 184, 196-97, 971 N.W.2d 313 (2022) (collecting cases and observing that "[i]f taxes, as the U.S. Supreme Court has held, are not takings, we do not see how efforts to collect that tax, whether through the sale of a lien on the property or sale of the property itself, could be characterized as

a taking."), *petition for cert.* filed, No. 22-160 (Aug. 18, 2022); *see also Speed v. Mills*, 919 F. Supp. 2d 122, 129 (D.D.C. 2013) (collecting cases). Rather, in such cases the real property itself acts as payment of the tax. *See Ballard v. Hunter*, 204 U.S. 241, 258 (1907) ("It is from the lands alone, and not from their owner, that the taxes are to be satisfied, and each acre bears its part."), abrogated on other grounds by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Leigh v. Green*, 193 U.S. 79, 90 (1904) ("The statute undertakes to proceed in rem, by making the land, as such answer for the public dues."), abrogated on other grounds by *Mullane*, 339 U.S. 306; *In re Federated Dep't Stores, Inc.*, 270 F.3d 994, 1003 (6th Cir. 2001) (describing an "in rem interest" as "a 'right to payment' from the real property itself"). As this Court has observed, in the context of a Due Process challenge: "People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property." *Jones v. Flowers*, 547 U.S. 220, 234 (2006).

Notwithstanding this authority, the Petitioner nevertheless asserts that a compensable taking occurs when the real property acquired by a government in satisfaction of a tax debt exceeds the value of the tax debt. In such cases, the Petitioner asserts that there is a protected property interest in the value of the property above the outstanding debt and that a taking occurs if the government does not pay for the equity or refund the surplus proceeds from any subsequent sale of the property. This Court should reject the Petitioner's arguments and affirm the court below.

A. The Petitioner Did Not Have a Property Interest Protected by the Takings Clause at the Time Hennepin County Sold the Property

As Respondents point out, the Petitioner's arguments in this dispute appear to have shifted. Resp. Br. 14 n.7. During the proceedings below, Petitioner's claimed property interest appears to have been the $25,000 difference between the Petitioner's unpaid property tax debt of $15,000 and the $40,000 that was paid to Respondents for the property in a sale that occurred in 2016, over a year after the Respondents had obtained absolute title in the property in 2015. Pet. App. 4a, 6a. In other words, the alleged taking was the government's retention of the "surplus" proceeds obtained in the 2016 post-forfeiture sale of the property. *See* Resp. Br. 14 n.7. The Eighth Circuit below correctly concluded that no unconstitutional taking occurred based on the alleged failure to pay petitioner the surplus proceeds of the sale that occurred in 2016 because, under Minnesota law, the petitioner had no property interest in such proceeds at the time they were generated by the sale. Pet. App. 8a ("Where state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking.").

The WCA supports affirmance of the Eighth Circuit's decision on this point. Because Minnesota's statutes did not provide a right to Petitioner to receive the excess proceeds from the 2016 sale of the property for which Respondents had acquired absolute title in 2015, Resp. Br. 7, this Court should likewise conclude no protected property interest existed in such proceeds. *See Stop*

the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot., 560 U.S. 702, 707, 130 S. Ct. 2592, 2597 (2010) ("Generally speaking, state law defines property interests[.]"). Indeed, it is the absence of a statutory right to such surplus proceeds that distinguishes this case from those, like *United States v. Lawton*, 110 U.S. 146 (1884), in which this Court observed that it would violate the Takings Clause for the government to withhold surplus proceeds to which a former owner is statutorily entitled. *See Nelson*, 352 U.S. at 109-10.

B. A Compensable Taking Did Not Occur When Respondents Obtained Petitioner's Real Property

The Petitioner now advances a theory that the relevant property interest was her "equity"—which she defines as the difference between the value of her property and her outstanding debt, Pet. Br. 8—and that Minnesota engaged in a taking when it acquired fee simple absolute title to her property without compensating her for this excess. Pet. Br. 24. The Petitioner argues that Minnesota law, by failing to provide a mechanism for compensating her for her alleged equity interest, has impermissibly transformed private property into public property via legislation. Pet. Br. 24-27. The United States as *amicus curiae* supporting neither party also takes this position, asserting that the alleged taking occurred in 2015 when the Respondents acquired title to a property that was allegedly worth more than the underlying tax debt. U.S. Br. 14.[2] These arguments are flawed.

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2. In making these arguments, the Petitioner and the United States seem to be echoing the Sixth Circuit's recent decision

1. Petitioner did not have a protected property interest in the value of the property above its debts.

a. First, as the Respondents demonstrate in detail, there is no legislative taking of a "traditional property interest" when states craft tax-forfeiture frameworks that treat an owner's entire interest in land as forfeited when taxes go unpaid, even if the land is otherwise more valuable than the taxes. Resp. Br. 17-29. There is no uniform common law rule against such forfeitures or how states treat the issue of surplus proceeds when such forfeitures occur. On this point, the WCA submits as an example the contrast between Wisconsin law and Michigan law, which was the state law at issue in *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), *petition for cert.* filed, No. 22-874 (Mar. 9, 2023).

With respect to Michigan law, for example, the Michigan Supreme Court has held that Michigan's "common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property." *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 470, 952 N.W.2d 434 (Mich. 2020). The Michigan Supreme Court in *Rafaeli* relied on prior Michigan Supreme Court

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in *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), *petition for cert.* filed, No. 22-874 (Mar. 9, 2023). In that case, the Sixth Circuit held (1) that property owners have a "traditional property interest" in "an entitlement to the equity in their homes," which the court described as "equitable title," and (2) that a compensable taking of a property owner's "equitable title" occurs when a local government takes absolute title to homes as payment for tax delinquencies that are less than the value of the property. 51 F.4th at 190, 194.

decisions that implied the existence of the common law right that the court recognized. One of those cases was *Dean v. Dep't of Natural Resources*, 399 Mich. 84, 247 N.W.2d 876 (1976), in which the Michigan Supreme Court previously had recognized the right of a property owner to collect the surplus proceeds from a tax-foreclosure sale of the property via a common-law claim of unjust enrichment. The court in *Rafaeli* explained that "[i]nherent in *Dean*'s holding is Michigan's protection under our common law of a property owner's right to collect the surplus proceeds that result from a tax-foreclosure sale." 505 Mich. at 470, 952 N.W.2d at 458. The court explained that "the plaintiff must have had a common-law right to these surplus proceeds" because "[o]therwise, her claim of unjust enrichment would not be actionable because it could not have been said that the state retained a benefit at her expense." *Id.*

In contrast, the Wisconsin Supreme Court has previously rejected the ability of a property owner to use a common-law claim of unjust enrichment to collect the surplus proceeds from the subsequent sale of a tax-foreclosed property. *See Oosterwyk v. Milwaukee Cty.*, 31 Wis. 2d 513, 143 N.W.2d 497 (1966). Just as the Michigan Supreme Court's recognition of the right of a property owner to bring an unjust enrichment claim for the surplus proceeds of a tax-foreclosure sale implied a common law right to those proceeds under Michigan law, the Wisconsin Supreme Court's rejection of the ability of a former property owner to bring an unjust enrichment claim under the same circumstances implies the absence of such a common law right in the State of Wisconsin.

Obviously, this case involves neither Wisconsin nor Michigan law as the underlying state law. The WCA

nevertheless believes this contrast is relevant to the extent it demonstrates the differences that exist among the states in how these issues have been treated. Such differences weigh against the Petitioner's claim that Minnesota law interferes with a traditional property right by not allowing her to recover her alleged equity interest.

b. Next, the WCA respectfully submits that allowing a former property owner to claim alleged "equity"—defined as the excess value of the real property over the unpaid tax debt[3]—as the protected property interest in cases like this one improperly conflates the issues of whether a protected property interest exists and whether just compensation has been provided. A different way to view this case is as a claim that Petitioner did not receive just compensation for her real property: i.e., that she only received $15,000 via the elimination of her tax debt, not the full market value of the real property, and that she should be compensated for that excess market value. The protected property interest in this framing of the dispute is the real property itself.

When framed this way, however, the Petitioner's claim necessarily fails because there was no "taking" of the real property. As already discussed, there is no taking when a government obtains absolute title to real property via an *in rem* tax-forfeiture proceeding like the one at issue here. And, the Petitioner does not appear to dispute that Respondents could take her real property to satisfy her tax debt. U.S. Br. 7. Thus, the question of whether

3. Pet. Br. 8 ("The private property interest at issue in this case is Tyler's home equity, the value she possessed in her property above the amount of her total debt.").

Petitioner received "just compensation"—the fair market value of the real property, *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984)—should be irrelevant.

2. If Petitioner did have a protected property interest in "equity," Petitioner forfeited that interest through her own neglect.

Next, even if Petitioner did have an "equity interest" in her real property that would otherwise be recognized as "property" under the Takings Clause, Respondents are correct the Takings Clause does not apply to compensate property owners for the consequences of their own neglect. *See Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982). A legislature may condition the continued retention of vested property rights "on performance of certain affirmative duties" and "[a]s long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties." *United States v. Locke*, 471 U.S. 84, 104, 105 S. Ct. 1785 (1985). Thus, in *Locke* this Court held the Takings Clause did not prevent Congress from enacting a statute "providing that holders of unpatented mining claims who fail to comply with the annual filing requirements of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744, shall forfeit their claims." 471 U.S. at 86, 107-08. This Court explained that there was no violation of the Takings Clause because it was the "failure to file on time—not the action of Congress—that caused the property right to be extinguished." *Id.* at 107.

Similarly, here there was no taking when Petitioner failed to preserve her alleged equity interest by taking

steps to redeem her property or otherwise answer Hennepin County's *in rem* forfeiture action, despite the multitude of opportunities she had to do so. Resp. Br. 6. It is true a state "may not sidestep the Takings Clause by disavowing traditional property interests," *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998), or "*ipse dixit* … transform private property into public property without compensation," *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). A state's imposition of reasonable conditions on the retention of a property right does not conflict with these principles, however. And when a property owner, like Petitioner, fails to comply with reasonable conditions and loses property as a result, it is the property owner's own actions, not the statutes at issue, that result in the loss of the property. *See generally Sheehan v. Suffolk Cty.*, 67 N.Y.2d 52, 59-60, 490 N.E.2d 523 (N.Y. 1986) (applying *Texaco, Inc.* to reject claims similar to Petitioner's).

3. The purpose of the Takings Clause does not support finding a compensable taking under these circumstances.

Rejecting Petitioner's claim and affirming the court below would also be consistent with "the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to the bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001)). This case does not involve the traditional situations in which a government is, through regulation, appropriating property, recharacterizing private property as public property, or otherwise attempting to sidestep

the Takings Clause. This is not a situation, for example, in which the government has committed a physical taking by "us[ing] its power of eminent domain to formally condemn property." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). Nor is this a case of the government "physically tak[ing] possession of property without acquiring title to it." *Id.* The Respondents took physical possession of Petitioner's property via the *in rem* forfeiture of absolute title as compensation for the taxes due on the property, which the Petitioners do not challenge.

Nor would finding a compensable taking under these circumstances be consistent with the standards this Court applies in the regulatory takings context to determine whether a taking has occurred. *See generally Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Although this case does not present a regulatory takings dispute, the WCA respectfully suggests this Court's jurisprudence addressing regulatory takings provides useful principles that, by analogy, indicate no compensable taking occurs when a government obtains title to real property via an *in rem* tax-forfeiture proceeding.

For example, one factor this Court considers in the regulatory takings context is the economic impact of the state law at issue. Although Petitioner would likely claim she has suffered an adverse economic impact because she did not receive what she alleges is the full value in her property, it is well-established that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S. Ct.

2264 (1993). Yet, that is effectively all that Petitioner is challenging here—again, she does not argue it is the transfer of the title that was the taking, but rather the transfer of the title without providing her a mechanism for recovering the alleged full value of the property.

One way of looking at disputes like this one is that the *in rem* tax-forfeiture framework simply has the effect of diminishing the value to the property owner of the property. Such laws do not render the property valueless, however, because the property still serves as compensation for the unpaid tax debts—in this case, Petitioner's alleged unpaid tax debt of $15,000. Although Petitioner alleges her property was actually worth $40,000, in the regulatory takings context, a 62.5% reduction in value is not the type of loss in value that would typically demonstrate a compensable taking. *See, e.g.*, *Pulte Home Corp. v. Montgomery Cty., Md.*, 909 F.3d 685, 696 (4th Cir. 2018) (eighty-three percent diminution in value does not establish a taking).

In the regulatory takings context this Court also looks to "reasonable investment-backed expectations" as a factor to consider when determining whether a compensable taking has occurred. *Cedar Point Nursery*, 141 S. Ct. at 2071. Here, the Petitioner purchased the condominium at issue in 1999, Pet.App.2a., at which time the relevant aspects of Minnesota's tax-forfeiture process were already well-established. Pet. App. 7a. The Petitioner "cannot claim" that she "reasonably expected" to keep her alleged equity interest in the property if she did not pay her property taxes and took no steps to redeem her property, given that for decades Minnesota's laws have not allowed for the distribution of surplus proceeds to former

owners. *See Murr*, 137 S. Ct. at 1949 ("Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots." (ROBERTS, C.J., dissenting)). Indeed, "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). "Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Texaco, Inc.*, 454 U.S. at 532.

Finally, the character of Minnesota's laws also supports affirmance. Such laws do not exist to acquire "resources to permit or facilitate uniquely public functions." *Penn Cent. Transp. Co.*, 438 U.S. at 128. Rather, laws like Minnesota's are similar to the type of "public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124. Whereas *in rem* tax-forfeiture laws might burden those property owners whose property is worth more than the underlying tax debt, such laws benefit others for whom the tax debt exceeds the value of their properties. Such laws also serve the common good by "return[ing] abandoned land to productive use and the tax rolls." Resp. Br. 17. In doing so, such laws avoid the need to shift more of the property tax burden to those property owners who do pay their taxes. And, as this Court explained in *Penn Central*, "in a wide variety of contexts, [the] government may execute laws or programs that adversely affect recognized economic values" and "[e]xercises of the taxing power are one obvious example." 438 U.S. at 124.

To be clear, it is not WCA's position that this is a regulatory takings case that must be governed by the

standards set forth in *Penn Central*. Those standards may provide useful tools, by analogy, for assessing whether it would be consistent with the purpose of the Takings Clause to find a compensable taking under these circumstances. As discussed above, those standards would weigh against finding a compensable taking when a government obtains title to real property via an *in rem* tax forfeiture process, even when the property may be worth more than the underlying tax debt.

C. This Court's Prior Precedents Support Respondents

WCA agrees with Respondents that this Court's decision in *Nelson v. City of New York*, 352 U.S. 110 (1956), supports affirmance here. The law at issue in *Nelson* allowed for the relevant local official to file with the relevant clerk's office a list of parcels with tax liens that had been unpaid for a certain period of time. 352 U.S. at 104 n.1 (discussing s D17—1.0 et seq.). The list was treated as the commencement of a legal proceeding against the parcels, property owners were required to receive notice, and there was a time period for redeeming (by paying the unpaid taxes and interest) or answering. *Id.* And, if no redemption or answer was made there was a foreclosure that resulted in the conveyance to the City of a fee simple absolute in the property. *Id.*

This Court explained that "[w]hat the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover[] any surplus, retain the property or the entire proceeds of the sale." 352 U.S. at 110. This Court held that "nothing in the Federal Constitution

prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings." *Id.* This is a holding on which states, including Wisconsin, have relied for decades. *See, e.g.*, *Ritter v. Ross*, 207 Wis. 2d 476, 485, 558 N.W.2d 909 (Ct. App. 1996).

The Petitioner attempts to distinguish *Nelson* by noting that the New York City law in that case "gave the owners an opportunity to claim the surplus proceeds from a judicial sale of the property." Pet. Br. 30. And, it is true that the New York City law at issue in *Nelson* allowed an owner to file a timely answer in the foreclosure proceeding asserting that the property had a value substantially exceeding the tax due. In such a case, the court would then direct a sale so that surplus moneys could be available to the answering party. *Nelson*, 352 U.S. at 110 (discussing *City of New York v. Chapman Docks Co.*, 1 App. Div. 2d 895, 149 N.Y.S. 2d 679). This opportunity to recover surplus proceeds applied in cases when there was an answering party in the foreclosure proceeding, before passing of title to the state.

What was important in *Nelson* was not the specific details of the mechanisms available to the property owner to preserve his or her interests, however, but that such mechanisms were available. And here, of course, the Petitioner had several mechanisms available to her to preserve her alleged equity interest in her property prior to the transfer of title. The Petitioner could have redeemed her property by paying the tax debt, sold the property to pay the tax debt (in which case she would have kept the excess proceeds), or entered into a payment plan. Resp. Br. 6. Even after the transfer of title, the Petitioner had

the opportunity to apply to repurchase the property for the amount of the tax debt, thus preserving her alleged equity interest. Resp. Br. 7. Under these circumstances, the Eighth Circuit was correct to conclude that any factual differences between Minnesota's statutory framework and the New York City law in *Nelson* were "immaterial" and "not constitutionally significant." App. 9a. What matters for constitutional purposes is that a former property owner received constitutionally adequate notice and had an opportunity to take action to preserve the alleged property interest. That clearly happened here.

Finally, WCA submits there is no merit to Petitioner's claim that this Court's decision in *Nelson* has been "disproven" by this Court's subsequent decision in *Knick v. Township of Scott, PA*, 139 S. Ct. 2162, 2171 (2019)." The Court in *Knick* was addressing the question of whether a property owner must bring a claim in state court for just compensation under state law before bringing a federal takings claim in federal court—the so-called "state-litigation requirement." This Court had first imposed the "state-litigation requirement" in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985). In *Knick* this Court overruled *Williamson County* and held that "[a] property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it" and thus may bring a claim in federal court without first pursuing remedies under state law. 139 S. Ct. at 2167-68. Notably, *Williamson County*, which first imposed the state-litigation requirement at issue in *Knick*, was decided almost thirty years after this Court's decision in *Nelson* and there is no indication in *Knick* that this Court intended to cast doubt on any of its Takings

Clause jurisprudence from before *Williamson County* was decided. There is certainly no basis for concluding that the Supreme Court intended to overrule *Nelson*.

Indeed, Petitioner's reliance on *Knick* is further mistaken to the extent Petitioner compares the procedures available to the property owner in *Nelson* with state law procedures for seeking just compensation after a taking has occurred. The ability of a former property owner to receive any surplus proceeds from the sale of a tax-foreclosed property under state law is not the type of "state law procedure" that was at issue in *Knick*. Further, as discussed above, the New York City law at issue in *Nelson* allowed property owners to file an answer in the foreclosure proceeding raising the difference between the value of the property and the tax due before any taking had occurred, thereby obtaining a judicial sale and recovering the surplus proceeds. The holding in *Knick* that a property owner may bring a takings claim in federal court without first exhausting state law remedies for a taking does not undermine the entirely distinct principle that no taking occurs when property is transferred to the state after the property owner failed to take advantage of state law procedures to avoid forfeiture of the property.

D. This Court Should Avoid Finding a Protected Property Interest in "Equity" Independent of State Law

Finally, WCA respectfully urges the Court not to issue a decision that would have the effect of recognizing the "equity interest" or "surplus proceeds" claimed by Petitioner as a "traditional property right" entitled to federal constitutional protection regardless of its

treatment under state law. *Cf. Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1200 (9th Cir. 1998) ("[T]here is, we think, a 'core' notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny.") As Respondents ably demonstrate there "has never been a universal common-law or constitutional rule" regarding the treatment of the surplus value in excess of the tax debt of a forfeited property and "forfeiture of an entire interest in land has a long historical pedigree, including in the specific context of the failure to pay property taxes." Resp. Br. 1, 17-25, 37. In light of this history, this is not an "exceptional circumstance" justifying a departure from this Court's traditional reliance on state law to define property rights for purposes of the Takings Clause. *Cedar Point Nursery*, 141 S. Ct. at 2075-76 ("As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law."); *Murr*, 137 S. Ct. at 1953 ("State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue." (ROBERTS, C.J., dissenting)). This Court should avoid a ruling that would effectively federalize an issue that resides squarely within the realm of one of the core state powers: tax administration. *See Nat'l Priv. Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995); *see also Leigh*, 193 U.S. at 87.

Rather, this Court should, as it generally does, assess the existence of a property interest here through reference to state law. While Minnesota's statutes and similar statutes of other states may seem harsh to some, by allowing for an owner's entire interest in land to be forfeited as satisfaction of unpaid taxes when the value

of the land may otherwise exceed the amount of unpaid taxes, to others Minnesota's approach may represent an appropriate balance between the interests of property owners and the government's interest in ensuring the collection of tax revenues. Regardless, "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed." *Nelson*, 352 U.S. at 110-111.

In this respect, Wisconsin's treatment of this issue over the past several decades presents an example of how a state's balancing of the interests of property owners and the interest of local governments in effective and efficient tax administration can change over time. In Wisconsin there is no common law right to the surplus proceeds from the subsequent sale of a tax-foreclosed property. The Wisconsin Supreme Court has rejected, for example, the ability of a property owner to use a common-law claim of unjust enrichment to collect such proceeds. *Oosterwyk*, 31 Wis. 2d at 516-17. In that case, a former property owner sought to bring a claim for unjust enrichment against a county that received the property via a tax deed and subsequently retained the surplus proceeds after selling the property. The Wisconsin Supreme Court noted that Wisconsin's tax statutes were silent on the question of the distribution of such surplus proceeds: "Ch. 75 appears to make no provision whatsoever for distribution of a surplus upon sale of land as to which a county had obtained a tax deed." 31 Wis. 2d at 516, 143 N.W.2d at 498. The court went on to reject the former property owner's unjust enrichment claim, stating that "[i]n our opinion, a former owner such as Mr. Oosterwyk is not entitled to any surplus unless the legislature chooses to provide therefor," 31 Wis.

2d at 517, 143 N.W.2d at 499, and that "[w]e perceive no basis in equity to hold that if the property is subsequently sold at a profit it is the former owner who is entitled to enjoy such excess," 31 Wis. 2d at 518, 143 N.W.2d at 499.[4]

Approximately two decades after *Oosterwyk*, in 1987, Wisconsin's policymakers enacted legislation requiring that, when a county obtained fee simple title to real property via a tax deed, the county needed to notify the former owner and allow the former owner sixty days in which to request payment of a share of the proceeds from any future sale. If the former owner made such a request, the county was required to send the former owner any such proceeds minus the delinquent taxes, interest, penalties, and statutory costs (i.e., the surplus proceeds). 1987 Wis. Act 27, § 1560m (available at https://docs.legis.wisconsin.gov/1987/related/acts/27.pdf).

Less than a year later, Wisconsin's policymakers made further changes by enacting legislation limiting the statutory right to surplus proceeds to former owners who "had used the property sold as the former owner's homestead at any time during the 5 years preceding the county's acquisition of it." 1987 Wis. Act 378, §§ 120, 122

4. Because in Wisconsin the common law applies when a statute is silent on a subject, the Wisconsin Supreme Court's pronouncements in *Oosterwyk* represent the common law of Wisconsin. *See Bd. of School Directors of Town of Ashland v. City of Ashland*, 87 Wis. 533, 58 N.W. 377 (Wis. 1894) ("While the statute has no word applicable to the present case, it seems to be a casus omissus. It is left to the disposal of the common law …."); *Gerol v. Arena*, 127 Wis. 2d 1, 13, 377 N.W.2d 618, 623 (Wis. Ct. App. 1985) (common law damages apply when statute "is silent as to remedy").

(available at https://docs.legis.wisconsin.gov/1987/related/acts/378). In other words, homestead property owners had a statutory right to any surplus proceeds remaining after the sale of a tax-forfeited property, but that statutory right did not attach to owners of non-homestead property. *See Ritter*, 558 N.W.2d at 913 n.9. And, even with respect to homestead property, the former property owner forfeited this right if the former property owner did not, within sixty days of receiving a statutorily required notice of the former property owner's potential entitlement to the surplus proceeds of a future sale, make a request in writing for payment of such proceeds.

Recently, Wisconsin made further changes to these statutes. Wisconsin law now requires counties that have obtained an estate in fee simple absolute as a result of an *in rem* foreclosure of a tax lien to notify the former property owner that the former owner may be entitled to a share of the proceeds of a future sale. Wis. Stat. § 75.36(2m). Counties are then required to send any surplus proceeds from a tax-foreclosure sale to the former property owner (without regard for whether the property at issue was homestead property). *Id.* Only if the county is unable to locate the former owner within 5 years following the mailing of the required notice does the former owner forfeit the right to any remaining equity in the property. *Id.*

The WCA has significant concerns that these recent changes to Wisconsin law create unacceptable burdens for Wisconsin counties and could prove immensely difficult to administer. And, the WCA anticipates potentially advocating for changes to the law in the future. Were this Court to adopt Petitioner's arguments, however—by

recognizing a novel traditional property right on the part of a property owner to the "equity" in their property that cannot be abrogated by state legislation and that is taken when a government obtains title to the property for unpaid taxes—this Court would effectively preclude the ability of the Wisconsin Legislature to strike a different balance between property owners and local governments on this topic in the future.

The WCA is also concerned that the arguments of Petitioner and certain *amici*, if adopted, could call into question the constitutionality of Wisconsin's *current* statutory framework, even though Wisconsin law currently allows for former property owners to receive any surplus proceeds left over if a county sells property acquired by the taking of a tax deed. Even under the current statutory framework, a former owner loses any right to surplus proceeds if the former owner cannot be located within 5 years. Wis. Stat. § 75.36. Presumably, were this Court to hold that a former owner has a "traditional property right" to such proceeds that cannot be diminished by state legislation, a future former property owner would claim that such a time-delineated forfeiture of the statutory right still violates the Takings Clause. Further, the statutory right to surplus proceeds in Wisconsin only applies if a county sells the property, and counties are not required to do so. *See* Wis. Stat. § 59.01 (authorizing counties "to acquire and hold, lease or rent real and personal estate for public uses or purposes, including lands acquired under ch. 75"). Were this Court to adopt the position now advocated by Petitioner and the United States, and adopted by the Sixth Circuit in *Hall*—that a compensable taking occurs at the moment a local government takes absolute title to a tax-delinquent property that is worth more than the

tax debt—counties would effectively be forced to sell such properties in order to compensate former property owners even if it might make more sense for the counties to retain the properties.

Finally, the WCA shares the concerns of Respondents that, if this Court concludes a compensable taking occurs when a government takes absolute title to real property for unpaid taxes, such a ruling would create "serious practical problems" relating to when and how such property should be valued. Resp. Br. 42-43. It is inevitable that disputes regarding the value of such properties will arise, if not be the norm, thus introducing more costs, inefficiencies, and uncertainty to a process that exists in order to ensure speedy and effective property tax collection and administration.

II. This Case Does Not Implicate the Excessive Fines Clause

WCA also supports the Respondents in urging affirmance of the Eighth Circuit's determination that this case does not present an unconstitutional excessive fine. Pet. App. 9a-10a. To conclude that a forfeiture is subject to the limitations of the Excessive Fines Clause, this Court "must determine that it can only be explained as serving in part to punish." *Austin v. United States*, 509 U.S. 602, 610 (1993). When a government obtains title to real property via an *in rem* proceeding due to unpaid property taxes, however, the intent is not to punish the former property owner. Rather, the purpose of such proceedings is "to ensure the payment of taxes and the collection of revenue." *Waukesha Cty. v. Young*, 106 Wis. 2d 244, 249, 316 N.W.2d 362 (1982) (describing Wisconsin's *in rem* foreclosure statute); *see*

also In re Golden, 190 B.R. 52, 57 (Bankr. W.D. Pa. 1995) ("The purpose of tax sales is not to strip the taxpayer of his property, but to insure the collection of taxes."). Although in some cases *in rem* forfeiture can result in a government acquiring property that is worth more than the unpaid tax liability, resulting in lost value to the former property owner, in other cases the former property owner benefits because the property is worth less than the outstanding debt that is extinguished. As the United States explains: "A program with those potential benefits to taxpayers—without any consideration of 'fault' or 'innocence'—cannot be considered punitive." U.S. Br. 29.

CONCLUSION

For the foregoing reasons, the Wisconsin Counties Association respectfully requests that this Court affirm the decision and judgment of the court of appeals below.

Dated this 5th day of April 2023.

Respectfully submitted,

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