NO. 22-166

IN THE

Supreme Court of the United States

GERALDINE TYLER, on behalf of herself and all others similarly situated,

Petitioner,

v.

HENNEPIN COUNTY, and DANIEL P. ROGAN, AUDITOR-TREASURER, in his official capacity,

Respondents.

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

BRIEF OF OAKLAND COUNTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Under Michigan's General Property Tax Act (GPTA), the Oakland County Treasurer acts as the collection agent for the municipality where property is located when taxpayers become delinquent on their Michigan property taxes. Oakland County is the petitioner in a pair of proceedings now pending before this Court involving a previous version of the GPTA, cases in which the County and its Treasurer are accused of taking property without just compensation merely by foreclosing on tax-delinquent properties. See *Meisner* v. *Hall*, No. 22-874, and *Meisner* v. *Sinclair*, No. 22-894. In both cases, after the Oakland County Treasurer foreclosed, a municipal government exercised its statutory right to acquire the property in exchange for paying the tax delinquency. There was no surplus.

After federal district courts dismissed both cases based on Michigan property law principles, the Sixth Circuit reversed, holding that a taking under the *federal* Takings Clause occurs the moment a Michigan taxing authority forecloses, because the authority has taken what the Sixth Circuit characterized as the owner's "equitable title." *Hall* v. *Meisner*, 51 F.4th 185 (6th Cir. 2022); *Sinclair* v. *Meisner*, 2022 WL 18034473 (6th Cir. Dec. 29, 2022). Those rulings wrongly create a new property right—equitable title—that does not exist under Michigan law. And they are inconsistent with hundreds of years of American history and tradition.

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

Oakland County has a strong interest in the Court's resolution of the present case because, like Oakland County, Hennepin County seeks to vindicate both its sovereignty vis-à-vis federal courts and the authority of state and local taxing authorities to enforce "reasonable conditions" on land ownership—like paying property taxes—through forfeiture of the entirety of a tax-delinquent property. *Texaco, Inc.* v. *Short*, 454 U.S. 516, 526 (1982). Oakland County files this brief to urge this Court to affirm the Eighth Circuit's common-sense decision below and to grant, vacate, and reverse the Sixth Circuit's decisions in *Hall* and *Sinclair*.

BACKGROUND

Under Michigan's General Property Tax Act (GPTA), the county treasurer acts as the collection agent for the municipality where the property is located when taxpayers become delinquent on their property taxes. After approximately three years of delinquency, multiple notices, and various hearings, a judgment of foreclosure is entered in favor of the county and title is transferred to the county treasurer. Mich. Comp. Laws § 211.78 (2019), et seq.

Under the prior version of the GPTA, if the tax-delinquent property was not redeemed by March 31st in a given year, title was vested in the county treasurer and (1) the state or local municipality had the right to claim the property in exchange for the payment to the county of unpaid taxes, interest, and other costs (the "minimum bid"), or (2) if the state or municipality did not exercise its right of first refusal, the property was put up for sale at a public auction in

July and, if not sold, again in October. Mich. Comp. Laws § 211.78m (2019).[2]

In both *Hall* and *Sinclair*, Oakland County's Treasurer foreclosed on tax-delinquent properties after years of non-payment and notice. Since the subject properties were in the City of Southfield, Michigan, the City exercised its right to claim the property by paying the Oakland County Treasurer the minimum bid. Oakland County did not sell the subject properties at a tax-foreclosure auction, and there was no surplus.

Nonetheless, the delinquent taxpayers filed suit and claimed that Oakland County and its Treasurer had wrongfully taken the surplus equity in their properties. The district court in each case dismissed because, under Michigan law as determined by the Michigan Supreme Court, "a former property owner has a compensable takings claim *if and only if the tax-foreclosure sale produces a surplus*." *Rafaeli, LLC* v. *Oakland County*, 952 N.W.2d 434, 462 (Mich. 2020) (emphasis added). Indeed, former owners of tax-foreclosed properties are not entitled to compensation "*until* their properties [sell] for an amount in excess of their tax debts." *Ibid.* (emphasis added).

The Sixth Circuit reversed in both cases, beginning with *Hall*. The *Hall* plaintiffs essentially argued that the court of appeals should apply the Michigan Supreme Court's decision in *Rafaeli*, but in

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[2] The Michigan Legislature amended the GPTA to allow the state or municipalities to purchase tax-foreclosed properties "at the greater of the minimum bid or its fair market value[.]" Mich. Comp. Laws § 211.78m(1) (2021). That provision applies going forward, but not in the *Hall* and *Sinclair* cases pending before this Court.

their favor rather than to their detriment. Appellants' 6th Cir. Br., pp. 28–39, *Hall* v. *Meisner*, No. 21-1700. Nowhere in their briefing did the plaintiffs argue that the GPTA effected a "strict foreclosure" prohibited as a matter of federal common law because it amounted to a taking of the plaintiffs' "surplus equity" interest.

Yet that is what the court of appeals held *sua sponte*. In derogation of *Rafaeli*—and without certifying any question regarding state property law to the Michigan Supreme Court—the panel undertook an independent historical review of "the rules governing equitable interests in real property" going back to the "12th century." *Hall* v. *Meisner*, 51 F.4th 185, 190 (6th Cir. 2022). Giving Oakland County no opportunity to brief the historical record, the panel eschewed comparable state tax-foreclosure cases and looked almost exclusively at private-party transactions—principally those involving mortgages—to conclude that the history of the American common law prohibited so-called "strict foreclosures," a history that Michigan purportedly contravened with its enactment of the GPTA. *Id.* at 190–94. A separate Sixth Circuit panel followed the *Hall* decision without further analysis in the *Sinclair* case. *Sinclair* v. *Meisner*, 2022 WL 18034473, at *3 (6th Cir. Dec. 29, 2022).

As a result, the Sixth Circuit federalized Michigan property law for purposes of a Takings claim, contrary to this Court's clear instruction that federal courts defer to state property law when assessing claims under the federal Takings Clause.

SUMMARY OF THE ARGUMENT

This Court has admonished that, as a general matter, "the property rights protected by the Takings Clause are creatures of *state* law." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2076 (2021) (cleaned up, emphasis added). By deferring to Minnesota's definition of property rights in the context of a tax foreclosure, the Eighth Circuit here appropriately respected Minnesota's sovereignty. In stark contrast, by creating an "equitable title" property right that Michigan has never recognized, the Sixth Circuit in *Hall* and *Sinclair* did the opposite, defining for itself the scope of Michigan property interests. This Court should affirm the decision here and grant, vacate, and remand *Hall* and *Sinclair*.

As Petitioner explains at length, there is a long and venerable history in the United States of allowing states to enforce "reasonable conditions" on land ownership—like paying property taxes—through forfeiture of the entirety of a tax-delinquent property. *Texaco, Inc.* v. *Short*, 454 U.S. 516, 526 (1982); Respondents' Br. 17–25. To induce this Court to grant certiorari, Petitioner relied on the Sixth Circuit's *Hall* decision, which purported to find a contrary tradition. But the court of appeals' analysis in *Hall* relied almost exclusively on the common-law history of *private* foreclosures for the nonpayment of *mortgage* debt, all while recognizing that Michigan courts do not apply an "equitable title" theory in tax-foreclosure cases. Consistent with history and tradition, this Court should uphold the reasonable foreclosure regimes that Minnesota, Michigan, and many other states have adopted. The Court should keep lower courts out of the business of redefining state property rights, in foreclosure proceedings or otherwise.

ARGUMENT

I. This Court has repeatedly held that federal courts should not use the Takings Clause to federalize the scope of state property rights.

This Court recently reaffirmed that, as a general matter, "the property rights protected by the Takings Clause are creatures of state law." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2076 (2021) (citing *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 164 (1998), and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)). That makes sense. As this Court has explained, the U.S. "Constitution protects rather than creates property interests." *Phillips*, 524 U.S. at 164. Accordingly, "[t]he existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Ibid.* (quoting *Bd. of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972)).

For example, in *Lucas*, the owner of beachfront property sued the South Carolina Coastal Council, claiming that the Council's application of South Carolina's Beachfront Management Act to the owner's property was a federal taking without just compensation. The Court made clear that the proper analysis involved examining state historical limitations on the land owner's title. 505 U.S. at 1029. That is why "the owner of a lakebed . . . would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land," constituting nuisance as a matter of law. *Ibid.* The use of the property for what is "now expressly prohibited purposes was always unlawful, and (subject to other

constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit." *Id.* at 1030.

"[T]his recognition that the [federal] Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings' is surely unexceptional," this Court continued. *Lucas*, 505 U.S. at 1030. After all, this Court traditionally resorts to "'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Ibid.* (quoting *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972), and citing *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1011–12 (1984), and *Hughes* v. *Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)). It is only when state action "declares 'off-limits' all economically productive or beneficial uses of land" that "goes beyond what the relevant background principles would dictate" that "compensation must be paid to sustain it." *Ibid.* (emphasis added).

Given all that, it is exceedingly strange that Petitioner Tyler relies on the common law and asks this Court to recognize equity in real estate as a private property interest for purposes of every tax foreclosure action in every state. Petr's' Br. 14–17. The interest at stake in such transactions is a matter of "state law," not common law. *Phillips*, 524 U.S. at 164 (quoting *Roth*, 408 U.S. at 577). So much for Minnesota's sovereign authority to define property rights in that State's tax-foreclosure process.

This Court should reject Petitioner's theory. Failure to do so would invent a property right that Minnesota's Legislature has not created and Minnesota state courts have not recognized. It makes a hash of state property law and denies states the authority to define for themselves the scope of such rights. And Petitioner asks this Court to do so for the benefit of delinquent tax taxpayers who "are largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full." *Hall*, 2021 WL 2042298, at *5, *rev'd*, 51 F.4th 185. The Eighth Circuit should be affirmed.

II. Applying history and tradition in this context requires an examination of Minnesota tax foreclosures, and that analysis favors Respondents, not Petitioner.

Petitioner induced the Court to grant review in this case by arguing that the "Eighth Circuit decision here directly conflicts with the Sixth Circuit" in *Hall*. Cert. Pet. Reply Br. 2–4. As Petitioner told the Court, the Sixth Circuit in *Hall* held that "[t]aking [a] property owner's equitable title without compensation violated 'some 300 years of decisions by English and American courts' and the federal Takings Clause." *Id.* at 3 (quoting *Hall*, 51 F.4th at 188). But the Sixth Circuit's approach to history and tradition had little to do with Michigan law or even tax foreclosures. As will be explained, the Sixth Circuit focused almost exclusively on private mortgage foreclosures under English common law, undermining that court's conclusion. This Court should repudiate the Sixth Circuit's historical methodology and defer to Minnesota's definition of property rights.

The Sixth Circuit historical review in *Hall* began with the 12th century creation of private mortgages in England. *Hall*, 51 F.4th at 190–92. The court noted that in such a context, "irrevocable forfeiture of the debtor's entire interest in the land . . . was before long regarded as an intolerably harsh sanction for the borrower's default." *Id.* at 191. So the "Court of Chancery soon interposed to assuage the harshness of enforcement of mortgages in courts of law." *Ibid.*

That may be true as a general proposition. But the principle regarding private mortgages says nothing of the harshness of a total forfeiture when a property owner—after years of notice and process—fails to satisfy a tax delinquency. Collection of taxes is essential for a state to provide government services, and the obligation to pay taxes owed has long been considered concomitant with the right to own property. Ignoring all that, the Sixth Circuit opinion continued its survey of historical English courts. 51 F.4th at 191–92.

Turning to "18th century American courts of equity," *Hall* described them as "uniformly hostile" to so-called "strict foreclosure," i.e, cases, "where the land's value exceeded the amount of the debt." *Id.* at 192. But the opinion continued to canvass the law of private mortgage foreclosures, *not* government tax foreclosures, *id.* at 192–93, concluding that, "by the mid-1800s, foreclosure by sale was 'firmly established' in the law of most states, to the exclusion of strict foreclosure," *id.* at 193 (citations omitted).

Finally, the opinion pivoted to tax foreclosures, asserting that "American courts' insistence upon foreclosure by sale, rather than strict foreclosure, extended fully to foreclosures for payment of unpaid

taxes." 51 F.4th at 193. But in support of that broad statement of the common-law rule, the opinion cited only four cases. *Id.* at 193–94. And none of those cases bears the weight that *Hall* assigned to them.

In the first case, *Stead's Executors* v. *Course*, 8 U.S. 403 (1808), this Court held that a tax collector "exceeded his authority" by selling more land than "necessary to pay the tax in arrear," 51 F.4th at 193 (quoting 8 U.S. at 414). But that was because *under the tax laws of Georgia*, "the collector [wa]s authorized to sell land only on the deficiency of personal estate; and then to sell only so much as [wa]s necessary to pay the tax in arrear." 8 U.S. at 414. The Court's holding did not turn on the Takings Clause or any federalization of Georgia property rights, but on the scope of property rights as defined by the State of Georgia.

To the same effect is *Margraff* v. *Cunningham's Heirs*, 57 Md. 585 (1882). There, too, the tax collector's conduct—selling three parcels *en masse* without consideration of the taxes owed—"was an abuse of his power under the [Maryland state] statute." *Id.* at 588. The court's holding did not turn on federal common law but on the scope of rights under a state statute.

The same is true in *Loomis* v. *Pingree*, 43 Me. 299 (1857). In *Loomis*, the court's ruling relied on a Maine statute that authorized a sheriff "to proceed to sell [only] so much of said land as will discharge said taxes." *Id.* at 311. That statutory limitation was the decision's sole basis; there is nary a reference to English or American common law.

Finally, in *Martin* v. *Snowden*, 59 Va. 100 (1868), the Supreme Court of Appeals of Virginia examined two federal statutes, one of which allowed to be sold for nonpayment of taxes "so much of the real estate as

may be necessary" and another, land "without any limitation whatsoever of quantity." *Id.* at 119. The court said the propriety of a given sale "must be decided by the language of the law," not the courts' view of the appropriate penalty to affix to a "default in the payment of taxes." *Id.* at 118–19. The court would have enforced *any* sale that conformed with an applicable statute—even "if excessive and unnecessary according to" the court's own view of the situation. *Id.* at 119.

After this one-paragraph analysis of four, inapposite historical authorities, the *Hall* opinion returned to mortgage foreclosures before examining the panel's views of Michigan equitable title. 51 F.4th 194–96. The panel's methodology was to reject a Michigan rule it did not like. Starting with areas outside the tax foreclosure context, the *Hall* panel noted several different areas of property law where Michigan "*recognizes* equitable title." 51 F.4th at 195 (emphasis added, citing *City of Marquette* v. *Michigan Iron & Land Co.*, 92 N.W. 934, 934 (Mich. 1903) (timber); *Stevens Mineral Co.* v. *Michigan*, 418 N.W.2d 130, 133 (Mich. Ct. App. 1987) (mineral rights); *Reeves* v. *Reeves*, 575 N.W.2d 1, 2 (Mich. Ct. App. 1997) (marital assets)). *Hall* also recognized that the "only context in which Michigan law *does not recognize* equitable title as a property interest in land, apparently, is when the government itself decides to take it." 51 F.4th at 195 (emphasis added). But rather than deferring to Michigan's property regime—which should have been dispositive under this Court's precedents—the Sixth Circuit simply rewrote Michigan's rules and extended the equitable-title concept to tax foreclosures, exactly what Michigan chose *not* to do.

Petitioner's approach to history here is little different than that of the Sixth Circuit's in *Hall*. As Respondents explain, "[s]he misses the long Anglo-American tradition *permitting* forfeiture of delinquent land." Respondents' Br. 25. She omits text from historical authorities that contradict her theory. *Id.* at 25–26. She "conflates "historical limitations on collecting *in personam* tax debts with the long-standing tradition of forfeiting property interests for failure to pay *in rem* taxes." *Id.* at 26. And the cases Petitioner "identifies that involved delinquent land (at 16–17) confirm there was no ancient rule against land forfeiture when owners fail to pay land taxes." *Id.* at 27–28 (discussing *Martin* v. *Snowden*, 59 Va. (18 Gratt.) 100, 123–24 (1868), *aff'd sub nom. Bennett* v. *Hunter*, 76 U.S. (9 Wall.) 326 (1869), *Griffin* v. *Mixon*, 38 Miss. 424 (1860), and *Shattuck* v. *Smith*, 69 N.W. 5 (N.D. 1896)). Indeed, "the United States as *amicus curiae* agrees that, since the Founding, States have permitted forfeiture where a landowner fails to pay property taxes." *Id.* at 29 (citing U.S. Br. 16–18).

The proper analysis is reflected precisely in how the Eighth Circuit proceeded below. "The first step in evaluating a takings claim is to identify the interest in private property that allegedly has been taken," here, in "surplus equity" (if any). *Tyler* v. *Hennepin Cty.*, 26 F.4th 789, 792 (8th Cir. 2022). "Whether a property interest exists 'is determined by reference to existing rules or understandings that stem from an independent source such as state law.'" *Id.* (quoting *Phillips*, 524 U.S. at 164).

Turning to Minnesota state law, the court of appeals recognized the parties' dispute over whether an 1884 decision of the Minnesota Supreme Court, *Farnham* v. *Jones*, 19 N.W. 83 (Minn. 1884), "recognized a common-law property interest in surplus equity after a tax-foreclosure sale or whether the decision merely interpreted [an] 1881 statute." *Tyler*, 26 F.4th at 792. But the court ultimately did not need to resolve that debate because Minnesota enacted a statute in 1935 that included "detailed instructions regarding the distribution of all 'net proceeds from the sale and/or rental of any parcel of forfeited land.'" *Id.* at 793 (quoting 1935 Minn. Laws, ch. 386, § 8). That "statute allocated the entire surplus to various entities but *allowed for no distribution of net proceeds to the former landowner*." *Ibid.* (emphasis added). "The necessary implication is that the 1935 statute abrogated any common-law rule that gave a former landowner a right to surplus equity." *Ibid.*

The Eighth Circuit concluded by examining Minnesota's modern-day "surplus distribution provision." 26 F.4th at 793. It, too, "provides how the county must spend the entire surplus, and it does not give the former owner a right to the surplus. Thus, even assuming Tyler had a property interest in surplus equity under Minnesota common law as of 1884, she has no such property interest under Minnesota law today." *Ibid.*

Petitioner does not seriously grapple with Minnesota's statutory foreclosure regime, nor could she. Nothing in the relevant statutory provisions suggests that Minnesota has granted its property owners a right to surplus equity in the event an owner fails to pay taxes and allows the State to foreclose the property. That should be the end of the inquiry.

Petitioner's demands not only violate federalism and the sovereign authority of states to define state property rights, they work a remarkable inequity on state and local governments. Petitioner's proposal is to invalidate every state's tax-foreclosure laws and replace them with a new regime—created by the federal judiciary—that allows delinquent taxpayers to sit on their rights, conscript local officials as real estate agents, then decide to reenter the picture if it appears there might be a dollar of equity while exiting stage right if the amount of taxes exceeds the property's value. There is no justice in a policy that allows delinquent taxpayers to privatize any gains while socializing all the losses.

What's more, the remedy Petitioner seeks can only be provided by the Legislature. Petitioner frames a consummate policy choice: should the burdens associated with tax-delinquent properties be placed on the property owner who failed to pay taxes, or should they be shifted to local governments and other taxpayers who did nothing wrong? Some states choose the latter policy. Others, including Minnesota, choose the former. And there is nothing unconstitutional about either choice.

Minnesota provides more-than-generous opportunities for delinquent taxpayers to pay their duly owed taxes. Respondents' Br. 4–7. But if a taxpayer fails to take advantage of any of these opportunities or to simply sell the property, pay the taxes, and keep any surplus value, then the public benefits when Minnesota counties demolish or rehabilitate dilapidated or abandoned structures. *Id.* at 7. Putting the onus on those responsible for paying the taxes puts more properties to use, which benefits all Minnesota citizens.

Accordingly, this Court should affirm and hold that a delinquent property owner who decides to keep alleged excess equity in real property has three choices: (1) pay the taxes and keep the property; (2) sell the property, pay the taxes out of the proceeds, and keep any surplus; or (3) persuade the Legislature and the Governor to enact legislation awarding the owner any excess equity, even when the owner flatly refuses to exercise any responsibility by taking steps one or two. In no event should the Court federalize state foreclosure proceedings by reshaping a sovereign state's property rights.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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