NO. _____

IN THE

Supreme Court of the United States

ANDREW MEISNER, Oakland County Treasurer, AND OAKLAND COUNTY, MICHIGAN,

Petitioners,

v.

MARION SINCLAIR,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

William H. Horton
John R. Fleming
GIARMARCO, MULLINS & HORTON
101 W. Big Beaver Road
Tenth Floor
Troy, MI 48084-5280

Solon M. Phillips
Corporation Counsel
Oakland County, Michigan
1200 N. Telegraph Rd.
Bldg. 14 East
Pontiac, MI 48341

JOHN J. BURSCH
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley Ave.
No. 78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Counsel for Petitioners

QUESTIONS PRESENTED

Under Michigan's General Property Tax Act (GPTA), a local taxing authority may foreclose on a property for nonpayment of taxes after a nearly three-year process that includes ample notice and multiple chances for the owner to pay the delinquent taxes. In *Rafaeli, LLC* v. *Oakland County*, 952 N.W.2d 434 (Mich. 2020), the Michigan Supreme Court held that, if the taxing authority sells tax-foreclosed property at auction for more than the taxes owed, the authority's keeping of the surplus is a taking under the Michigan Constitution's Takings Clause.

Here, Petitioner Oakland County did not sell Respondent's tax-foreclosed property because a municipal government exercised its statutory right to acquire the property in exchange for paying the tax delinquency. So there was no surplus. In *Rafaeli*, the Michigan Supreme Court determined that a taking only arises when surplus proceeds are not paid to the former owner, so the district court here appropriately dismissed. But the Sixth Circuit reversed, holding that a taking under the *federal* Takings Clause occurs the moment a Michigan taxing authority forecloses and takes "absolute title" to a delinquent taxpayer's property because the authority has taken the owner's "equitable title." This makes Michigan's right-of-first-refusal-without-a-sale approach unconstitutional under federal law. The question presented is substantively the same one this Court is already considering in *Tyler* v. *Hennepin County*, No. 22-166:

1. Whether foreclosing on a home for the nonpayment of taxes constitutes a violation of the federal Takings Clause whenever the home is worth more than the tax delinquency.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are Andrew Meisner, Oakland County Treasurer, and Oakland County, Michigan.

Respondent is Marion Sinclair.

Co-defendants below who are not Petitioners here are the Oakland County Tax Tribunal, the City of Southfield, Kenson Siver, Frederick Zorn, Gerald Witkowski, Sue Ward-Witkowski, Irv Lowenberg, Michael Mandlebaum, Donald Fracassi, Daniel Brightwell, Myron Frasier, Lloyd Crews, Nancy Banks, Southfield Non Profit Housing Corporation, Mitchell Simon, Rita Fulgiam-Hillman, Lora Brantley-Gilbert, Earlene Trayler-Neal, Southfield Neighborhood Revitalization Initiative, Etoile Libbett, Habitat for Humanity, GTJ Consulting, LLC, and JBR Disposal, LLC.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit, No. 22-1264, *Sinclair* v. *Meisner, et al.*, judgment entered December 29, 2022.

U.S. District Court for the Eastern District of Michigan, No. 2:18-cv-14042-TGB-MJH, judgment entered February 28, 2022.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

DECISIONS BELOW

The district court's order denying Plaintiff's Motion to Amend and dismissing the complaint with prejudice is reported at 587 F. Supp. 3d 597 (E.D. Mich. Dec. 29, 2022) and reprinted in the Appendix (App.) at App.14a.

The Sixth Circuit's opinion reversing the district court's order is not reported but is available at 2022 WL 18034473 (6th Cir. Dec. 29, 2022) and reprinted at App.1a.

STATEMENT OF JURISDICTION

The Sixth Circuit entered judgment on December 29, 2022. Lower courts had jurisdiction under 28 U.S.C. 1331, 1346(a), and 1361. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

The Sixth Circuit's decision below doubles down on that court's recent decision in *Hall* v. *Meisner*, 51 F.4th 185 (6th Cir. 2022), which federalized state property law for purposes of a Takings claim. The holding violates this Court's admonition that state law is the source of Takings litigation. It is contrary to the notion that different state supreme courts might view property rights—and takings claims—differently. It supplants a recent Michigan Supreme Court decision. And it creates a circuit split. Because the question presented here is also the first question presented in *Tyler* v. *Hennepin County*, No. 22-166, and is derivative of the question in *Hall*, this Court should hold the petition, then reverse, vacate, and remand for reconsideration in light of *Tyler* and *Hall*.

Michigan's General Property Tax Act (GPTA) authorizes a local taxing authority to foreclose on a property for nonpayment of taxes. The Act requires the taxing authority to follow a carefully reticulated, nearly three-year process that includes ample notice and multiple chances for the owner to pay the delinquent taxes. If the taxpayer fails these multiple chances to satisfy the tax obligation, title vests in the taxing authority. At that point, the Act gives the State of Michigan or a local government a right of first refusal to acquire the property by paying the taxes owed and associated interest and costs. If no entity exercises that right of first refusal, then the local taxing authority is free to sell the property at auction. Since tax-foreclosed properties are frequently distressed properties, many go unsold at auction and many more are sold for the minimum bid: again, the taxes owed and associated interest and costs.

In *Rafaeli, LLC* v. *Oakland County*, 952 N.W.2d 434 (Mich. 2020), the Michigan Supreme Court addressed the situation where no government entity exercised its first refusal right, and a taxing authority sold a tax-foreclosed property at auction for more than the minimum bid. *Rafaeli* held that if the taxing authority keeps the "surplus," that constitutes a taking under the Michigan Constitution's Takings Clause.

The situation here is different because the City of Southfield exercised its right-of-first-refusal power under the GPTA and purchased Respondent's property for the minimum bid. As a result, Petitioner Oakland County did not conduct an auction and received no surplus proceeds. The City then conveyed the property to a for-profit entity, the Southfield Neighborhood Revitalization Initiative, which has rehabbed other tax-delinquent properties and sold them for more than the delinquency.

Respondent filed suit, and the district court dismissed her Complaint because, among other reasons, the Michigan Supreme Court in *Rafaeli* determined that in the context of a Michigan tax foreclosure, the only property interest that can be pursued in a takings action is for the "surplus proceeds," 952 N.W.2d at 466 n.134, and Oakland County received no surplus proceeds here.

The Sixth Circuit reversed—but not based on the Michigan Constitution or even the Michigan Supreme Court's construction of Michigan property rights. Instead, applying its recent decision in *Hall* v. *Meisner*, 51 F.4th 185 (6th Cir. 2022) (cert. petition filed by these same Oakland County Petitioners on March 10, 2023), the court of appeals held that a

taking under the *federal* Takings Clause occurs the moment a Michigan taxing authority forecloses and takes "absolute title" to a delinquent taxpayer's property because the authority has taken the owner's "equitable title." This makes Michigan's right-of-first-refusal-without-a-sale approach unconstitutional as a matter of federal law and conflicts with decisions of this Court and the Eighth Circuit.

To begin, 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). The court of appeals should have deferred to the Michigan Supreme Court's statement in *Rafaeli* that no taking of property occurs until a taxing authority forecloses on a tax delinquent property *and keeps a resulting surplus* from a sale. At minimum, the court of appeals should have certified a question to the Michigan Supreme Court regarding the situation where a government entity exercises its right of first refusal under the GPTA, and the taxing authority is forced to transfer the property for the minimum bid. Yet the court did neither of those things.

Next, the court of appeals' ruling conflicts with the Eighth Circuit's decision in *Tyler* v. *Hennepin County*, 26 F.4th 789 (8th Cir. 2022)—a case that this Court is now reviewing—and with the Nebraska Supreme Court's decision in *Continental Resources* v. *Fair*, 971 N.W.2d 313 (Neb. 2022). In *Tyler*, the Eighth Circuit correctly held that a county's retention of surplus equity following a tax foreclosure did not violate the federal Takings Clause because Minnesota's tax-foreclosure statute implicitly "abrogated any common-law rule that gave a former landowner a

right to surplus equity." 26 F.4th at 793. In other words, the Eighth Circuit appropriately deferred to Minnesota's own understanding of Minnesota property rights. The Sixth Circuit should have done the same regarding Michigan's.

Likewise, in *Fair*, the Nebraska Supreme Court held that there was "no basis to conclude that Nebraska common law recognizes the property interest that is essential for Fair's takings claim to succeed." 971 N.W.2d at 325. The court did not look to federal common law but again deferred to state law, the exact opposite of the Sixth Circuit's approach.

As for that federal common law, the Sixth Circuit identifies no federal case holding that a state taxing authority's foreclosure on a tax-delinquent property constitutes a taking of surplus equity at the time of foreclosure. Instead, the court of appeals' analysis in *Hall* relied almost exclusively on the common-law history of *private* foreclosures for the nonpayment of *mortgage* debt while recognizing that Michigan courts do not apply an "equitable title" theory in tax-foreclosure cases.

In sum, Michigan property law alone dictates the result in this case. By jettisoning the Michigan Supreme Court's decision in *Rafaeli* and instead relying on an inapposite historical analysis of federal common law involving private debt foreclosure, the Sixth Circuit effectively struck down a state statute and rewrote state property law on an issue the state's highest court has already resolved. Accordingly, the Court should hold the petition and grant, vacate, and remand after issuing its decisions in *Tyler* and *Hall*.

STATEMENT OF THE CASE

A. Michigan's tax-foreclosure process and Plaintiff's tax-delinquent property

Under the prior version of 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*.

If the tax-delinquent property is not redeemed by March 31st in a given year, title vests in the county treasurer and (1) the state or local municipality has 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 does not exercise its right of first refusal, the property is put up for sale at a public auction in July and, if not sold, again in October. Mich. Comp. Laws § 211.78m (2019).[1]

Respondent's former property was foreclosed for nonpayment of taxes, and she does not contest that she received all the notices the Michigan Constitution and the GPTA require and yet failed to make timely payments. As a result, the foreclosure judgment was

---

[1] After *Rafaeli*, 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 here.

recorded and became final on February 2, 2016, and Respondent did not appeal. And, since Respondent's former property was in the City of Southfield, the City claimed the property by paying the Oakland County Petitioners the minimum bid. Title then transferred to Southfield. Proposed Second Am. Compl., ¶ 59, RE.51-1, PageID.825. Oakland County did not sell Respondent's property at a tax-foreclosure auction, and there was no surplus.

Respondent's primary objection concerns not the Oakland County Petitioners but instead what the *City of Southfield* did next with the property it had purchased for the minimum bid—convey the property to a for-profit entity, the Southfield Neighborhood Revitalization Initiative, for a nominal amount. The Initiative has rehabbed similar tax-delinquent properties in its possession and sold them, sometimes for substantially more than the delinquency. Proposed Second Am. Compl., ¶¶ 39–40. The Oakland County Petitioners did not benefit financially from these transactions in any way; they had no choice but to convey the property once the City of Southfield exercised its statutory right of first refusal. Nonetheless, under the Sixth Circuit's novel view of the federal Takings Clause, it is the Oakland County Petitioners who are now on the hook for the alleged surplus equity that Respondent purportedly lost when she failed to pay her taxes and then chose not to sell her home to ensure she kept any equity.

Notably, the Oakland County Petitioners' liability under the federal Takings Clause is a far cry from how the Michigan Supreme Court views the situation from a Michigan property-rights perspective. In *Rafaeli*, the Michigan Supreme Court held that when a property is sold at a tax-foreclosure auction, the

foreclosing governmental unit must return to the taxpayer the difference between the sale price at the auction and the minimum bid. Otherwise, *retention of the surplus* is a taking under the Michigan Constitution. Critically, the *Rafaeli* court held there is no takings claim absent a surplus: "[A] former property owner has a compensable takings claim *if and only if the tax-foreclosure sale produces a surplus*." *Rafaeli*, 952 N.W.2d at 462 (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). Not before. And the Oakland County Petitioners never sold Respondent's property for an amount in excess of her tax debts.

B. District court proceedings

Respondent filed this action, *pro se*, in the United States District Court for the Eastern District of Michigan, asserting a variety of claims. Compl., R-1. The Oakland County Petitioners moved to dismiss, and the Magistrate issued a Report and Recommendation to grant the motion based on the Tax Injunction Act, principles of comity, and the *Rooker-Feldman* doctrine. App.35a, 41a–54a, 59a. Respondent objected to the Report and Recommendation generally but did not make any specific objections, and so the district court adopted the Report and Recommendation. App.31a. Respondent also sought leave to file an amended complaint. App.34a. But rather than rule on that request, the district court stayed proceedings pending the Sixth Circuit's decision in *Freed* v. *Thomas*, No. 18-2312, a case that the district court expected would address some of the jurisdictional questions at issue here. App.33a–34a.

After the Sixth Circuit issued its *Freed* ruling, Respondent, now represented by counsel, filed a motion to amend with a proposed complaint. App.14a. The Oakland County Petitioners opposed that motion, arguing that Michigan "law does not recognize the property right of which Plaintiff claims to be deprived," such that "any amendment would be futile." *Ibid.* The district court agreed with the Oakland County Petitioners.

The court began with an analysis of the Michigan Supreme Court's decision in *Rafaeli*, explaining that under Michigan law, "an owner of real or personal property has a right to any surplus proceeds that remain after property is sold to satisfy a tax debt." App.22a (quoting *Rafaeli*, 952 N.W.2d at 454–55). After concluding that the Oakland County Petitioners received no surplus as a result of the City of Southfield exercising its statutory right of first refusal, App.23a–24a, the district court held that Respondent could not prevail on the theory that the Oakland County Petitioners took her equitable title without compensation because that theory "was explicitly *not* recognized by the majority in *Rafaeli*," only in a concurring opinion, App.24a (emphasis added). Indeed, the Michigan Supreme Court stated that it was "unaware of any authority affirming a vested property right to equity held in property generally." *Ibid.* (quoting *Rafaeli*, 952 N.W.2d at 466 n.134). And while the district court recognized the factual difference between this case and the one in *Rafaeli*, the *Rafaeli* analysis "strongly suggests that the Michigan Supreme Court would not accept Plaintiff's argument that there is a vested property interest in equity generally." App.25a–26a.

After disposing of Respondent's remaining proposed claims, the district court denied Respondent's motion to amend as futile, and it dismissed the case with prejudice. App.29a. Respondent appealed to the Sixth Circuit.

C. The Sixth Circuit's decision

Between the district court's dismissal order and the Sixth Circuit's decision, the Sixth Circuit issued its opinion in *Hall* v. *Meisner*, 51 F.4th 185 (6th Cir. 2022) (cert. petition filed by these same Oakland County Petitioners on March 10, 2023). There, 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*, 51 F.4th at 190. The panel eschewed comparable state tax-foreclosure cases and looked 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 190–96. Because the panel concluded that the Petitioners here had there taken Ms. Hall and co-Plaintiffs' "equitable title to their homes," Plaintiffs stated a claim in violation of the federal Takings Clause. *Id.* at 196–97.

In its per curiam order here, the Sixth Circuit reversed and held that Respondent's proposed amended complaint stated valid claims under *Hall*. App.7a–12a. It vacated the district court's judgment and remanded for further proceedings on the claims in the amended complaint. App.13a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit panel's analysis here followed *Hall* in toto, even though *Hall* rewrote Michigan property law on an issue where the Michigan Supreme Court had already spoken. In so doing, the Sixth Circuit federalized state tax-foreclosure law, necessitating this Court's review for several reasons.

To begin, the Sixth Circuit's holding conflicts with this Court's repeated admonitions that state law, not federal law, controls federal Takings Clause claims. After all, the U.S. Constitution merely protects property interests; it does not create them.

In addition, the Sixth Circuit's decision conflicts with recent decisions of the Eighth Circuit and the Nebraska Supreme Court. In those latter decisions, the courts appropriately recognized that state law controls the scope of state property rights. So if a state has enacted a tax-foreclosure regime that does not account for so-called "surplus equity," that is the end of the inquiry, not its beginning.

Finally, the Sixth Circuit in *Hall* looked to the wrong historical tradition. The "job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions *presented in particular cases or controversies*." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022) (second emphasis added). A dispute over state tax-foreclosure proceedings requires a historical review of state tax-foreclosure proceedings under state law, not a review of private mortgage foreclosures.

The Court should hold the petition, then grant, vacate, and remand for further consideration in light of *Tyler* and *Hall*.

I. A grant, vacate, and remand is necessary to reverse the Sixth Circuit's use of 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).

Here, the Michigan Supreme Court has already defined, as a matter of state law, the "relevant background principles" that dictate the scope of an owner's right in property in the context of a government foreclosure for the non-payment of taxes. And that scope does not include "equitable title." Contra App.21a. Rather, "a former property owner has a compensable takings claim *if and only if the tax-foreclosure sale produces a surplus*." *Rafaeli*, 952 N.W.2d at 462 (emphasis added).

As a result, 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). Here, the Oakland County Petitioners did not sell Respondent's property for an amount in excess of her tax debts, nor did Petitioners retain a surplus. Rather, the Oakland County Petitioners received the statutory minimum bid, i.e., the amount of back taxes plus costs and interests, not a penny more.

Given all that, it was exceedingly strange that the Sixth Circuit would saddle the Oakland County Petitioners with Takings Clause liability for the purported taking of equitable title. Worse, the Sixth Circuit violated this Court's admonition to define Respondent's property interests by referencing "state law" rather than looking to the common law. *Phillips*, 524 U.S. at 164 (quoting *Roth*, 408 U.S. at 577). Moreover, as explained below, the Sixth Circuit in *Hall*, adopted in toto here, did not even look to the common law of foreclosures for the non-payment of taxes, but instead looked to the law of private mortgage foreclosures. The result was to create a new Michigan property interest—so-called "equitable title"—that the Michigan Legislature has not created and the Michigan Supreme Court has never recognized in the context presented here. That decision warrants reversal.

II. A grant, vacate, and remand will resolve an important circuit split.

Certiorari is independently warranted because Sixth Circuit law is irreconcilably split with decisions of the Eighth Circuit and Nebraska Supreme Court. The latter jurisdictions correctly follow this Court's takings jurisprudence and define property rights in the tax-foreclosure context by looking exclusively to state law.

In *Tyler* v. *Hennepin County*, 26 F.4th 789 (8th Cir. 2022), cert. granted, 143 S. Ct. 644, a Minnesota taxpayer brought a federal takings claim after a county foreclosed on her condominium to satisfy a tax debt and retained the surplus equity following a subsequent sale. A unanimous Eighth Circuit held that there was no Takings Clause claim. Rather than examine the common-law history back to Magna Charta as did the Sixth Circuit, the Eighth Circuit "look[ed] *to Minnesota law* to determine whether Tyler has a property interest in surplus equity." *Id.* at 792 (emphasis added).

The Eighth Circuit began by explaining that the "first step in evaluating a takings claim is to identify the interest in private property that allegedly has been taken." 26 F.4th at 792. Tyler did not claim that the foreclosure itself was a taking, only the local "county's retention of the surplus equity—the amount that exceeded her $15,000 tax debt." *Ibid.* So the court's inquiry was focused on how "state law" defined the scope of property rights in the context of a tax foreclosure. *Ibid.* (quoting *Phillips*, 524 U.S. at 164).

Tyler invoked an 1884 Minnesota Supreme Court decision for the proposition that Minnesota "recognized a common-law property interest in surplus

equity after a tax-foreclosure sale." 26 F.4th at 792 (citing *Farnham* v. *Jones*, 19 N.W. 83 (Minn. 1884)). The county argued that "the decision merely interpreted the [State's] 1881 statute." *Ibid.* No matter. The Eighth Circuit "conclude[d] that any common-law right to surplus equity recognized in *Farnham* has been abrogated by statute. In 1935, the Minnesota legislature augmented its tax-forfeiture plan with detailed instructions regarding the distribution of all 'net proceeds from the sale.'" *Id.* at 793 (quoting 1935 Minn. Laws, ch. 386, § 8). "The statute allocated the entire surplus to various entities but allowed for no distribution of net proceeds to the former landowner. 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 same was true of "Minnesota's current surplus distribution provision." 26 F.4th at 793 (citing Minn. Stat. § 282.08). "Minnesota's current distribution plan provides how the county must spend the entire surplus [if any], and it does not give the former owner a right to the surplus." *Ibid.* So "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.* And "[w]here 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." *Ibid.* As this Court held in *Nelson* v. *City of New York*, 352 U.S. 103 (1956), "once title passes to the State under a process in which the owner first receives adequate notice and opportunity to take action to recover the surplus, the governmental unit does not offend the Takings Clause by retaining surplus equity from a sale." *Tyler*, 26

F.4th at 794 (citing *Nelson*, 352 U.S. at 110). "That Minnesota law required Tyler to do the work of arranging a sale in order to retain the surplus is not constitutionally significant." *Ibid.*

The Nebraska Supreme Court used the identical analysis in *Continental Resources* v. *Fair*, 971 N.W.2d 313 (Neb. 2022). That case involved a Nebraska property owner's claim that that state's tax-foreclosure regime constituted a taking under the federal and state constitutions. Like the Eighth Circuit, the Nebraska Supreme Court began with this Court's admonition that "the existence of a property interest [under the Takings Clause] is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Id.* at 324 (quoting *Phillips*, 524 U.S. at 164). Fair maintained that several "Nebraska statutes and a provision in the state constitution . . . recognize a property interest in the equity of his property." *Id.* (citing Neb. Rev. Stat. § 76-101 (Reissue 2018), Neb. Rev. Stat. § 77-102 (Reissue 2018), Neb. Rev. Stat. § 40-101 (Reissue 2016), and Neb. Const. art I, § 25). But "[t]hese general provisions," the court held, "do not recognize a property interest in the surplus equity value of property after a tax certificate has been sold, the redemption period has expired, and a tax deed is requested and issued." *Id.* at 325.

What's more, Fair could not point "to any Nebraska cases recognizing such a common-law property right." 971 N.W.2d at 325. Accordingly, there was "no basis to conclude that *Nebraska common law* recognizes the property interest that is essential for Fair's takings claim to succeed." *Id.* (emphasis added, citing *Tyler* v. *Hennepin Cty.*, 505 F. Supp. 3d 879 (D. Minn. 2020), *affirmed* 26 F.4th 789 (8th Cir. 2022)).

If Respondent's claims had arisen in the Eighth Circuit or the Nebraska Supreme Court, then the Oakland County Petitioners would have prevailed. Rather than looking to inapposite English or other common law, the reviewing court would have looked to Michigan law, applied *Rafaeli*, and held that Respondent had no property interest in so-called "surplus equity." And it cannot be the case that Takings Clause claims are decided differently merely because of the jurisdiction in which the case is brought.

Since this Court has already granted review of the petition in *Tyler*, and this petition is derivative of *Hall*, the Court should hold the present petition and grant, vacate, and remand for reconsideration in light of *Tyler* and *Hall*.

III. A grant, vacate, and remand is necessary to clarify how lower courts apply history and tradition to constitutional questions.

Even if this Court overruled *Cedar Point*, *Phillips*, and *Lucas* and directed lower courts to examine English and American common law to determine the scope of property rights for purposes of a federal Takings Clause claim, the Sixth Circuit's approach in *Hall* and below was incorrect. The "job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions *presented in particular cases or controversies*." *Bruen*, 142 S. Ct. at 2130 n.6 (second emphasis added). Here, that meant examining the historical record regarding state tax-foreclosures, not private mortgage foreclosures.

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." 51 F.4th 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 bear 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 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. But as in *Hall*, the Michigan Supreme Court resolved the Michigan property law question here in *Rafaeli,* rejecting the panel opinion's foreclosure-is-the-taking conclusion and instead holding that "a former property owner has a compensable takings claim *if and only if the tax-foreclosure sale produces a surplus*." *Rafaeli*, 952 N.W.2d at 462 (emphasis added).

And if there is any doubt that the Sixth Circuit was rejecting Michigan law and applying its own rule, it is resolved by *Hall*'s discussion of 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* concludes 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). Exactly right. And that lack in Michigan law should have been dispositive under this Court's precedents. Instead, the Sixth Circuit in *Hall* didn't like what it saw and rewrote the rules entirely. In a Takings Clause case, that approach is the exact opposite of what this Court has instructed. And it is also inconsistent with how this Court has directed lower courts to apply history and tradition.

CONCLUSION

The petition for a writ of certiorari should be held, then granted, vacated, and remanded when this Court issues its opinion in *Tyler* v. *Hennepin County*, No. 22-166, and *Hall* v. *Meisner*, No. 22-____.

Respectfully submitted,

William H. Horton
John R. Fleming
GIARMARCO, MULLINS & HORTON
101 W. Big Beaver Road
Tenth Floor
Troy, MI 48084-5280
(248) 457-7000

Solon M. Phillips
Corporation Counsel
Oakland County, Michigan
1200 N. Telegraph Rd.
Bldg. 14 East
Pontiac, MI 48341

JOHN J. BURSCH
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley Ave.
No. 78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

MARCH 2023