

No. 22-160

IN THE
Supreme Court of the United States

KEVIN L. FAIR,

Petitioner,

v.

CONTINENTAL RESOURCES, ET AL.,

Respondents.

**On Petition for Writ of Certiorari to the
Nebraska Supreme Court**

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND BRIEF OF
NATIONAL TAXPAYERS UNION
FOUNDATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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September 16, 2022

**MOTION FOR LEAVE TO FILE *AMICUS*
CURIAE BRIEF IN SUPPORT OF THE
PETITION**

Pursuant to Rule 37.2(b), the National Taxpayers Union Foundation (NTUF) respectfully requests leave to submit a brief as *amicus curiae* in support of the petition for writ of certiorari filed by petitioner Kevin Fair. As required under Rule 37.2(a), National Taxpayers Union Foundation timely provided notice to all parties' counsel of its intent to file this brief. Petitioner and one Respondent, the State of Nebraska, consented to the filing of this brief. Respondent Continental Resources withheld consent. Respondent Scotts Bluff County has not responded to multiple emails and calls by *Amicus* seeking consent.

Founded in 1973, NTUF is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs to uphold taxpayers' rights, challenge administrative overreach by tax authorities, and guard against unconstitutional burdens on interstate commerce.¹

¹ See, e.g., *Boechler v. Commissioner of Internal Revenue*, 596 U.S. ___, 142 S.Ct. 1493 (2022); *Arizona v. California*, 589 U.S. ___, 140 S.Ct. 684 (2020); *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080 (2018).

Because *Amicus* has written extensively on the issues involved in this case, because this Court's decision may be looked to as authority, and because any decision will significantly impact taxpayers and tax administration, *Amicus* has an institutional interest in this Court's ruling.

NTUF seeks to assist the Court by highlighting the importance of the Excessive Fines Clause's constitutional protection in key issues of state taxation, while also explaining how the Clause can be used to protect taxpayers and foster a fair tax administration system. This information may be helpful for the Court in evaluating the petition for certiorari.

For these reasons, National Taxpayers Union Foundation respectfully requests that this Court grant this motion for leave to file a brief as *amicus curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF IN SUPPORT OF THE PETITIONi

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIESiv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT2

ARGUMENT 4

I. A STATE CANNOT IMMUNIZE ITSELF FROM
THE EXCESSIVE FINES CLAUSE BY OFF-
LOADING ENFORCEMENT TO PRIVATE
ENTITIES. 4

II. HISTORICAL PRECEDENT ALSO PROTECTS
HOMESTEADS FROM EXCESSIVE FINES AND
EQUITY THEFT. 6

III. NEBRASKA’S FINE AGAINST MR. FAIR IS
GROSSLY DISPROPORTIONATE. 8

CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

<i>Austin v. United States</i> , 509 U.S. 602 (1993)	3, 8, 9
<i>Browning-Ferris Industries v. Kelco Disposal</i> , 492 U.S. 257 (1989)	2, 5
<i>Continental Resources v. Fair</i> , 971 N.W.2d 313 (Neb. 2022)	5
<i>Douglas v. Roper</i> , ___ So.3d ___, No. 1200503, 2022 WL 2286417 at *10 (Ala. Jun. 24, 2022)	6
<i>Pimentel v. City of Los Angeles</i> , 974 F.3d 917 (9th Cir. 2020)	11
<i>Rafaeli, LLC v. Oakland Cnty.</i> , 952 N.W.2d 434 (Mich. 2020)	6
<i>State v. Timbs</i> , 134 N.E.3d 12 (Ind. 2019)	11
<i>State v. Timbs</i> , 169 N.E.3d 361 (Ind. 2021)	11
<i>Timbs v. Indiana</i> , 586 U.S. ___, 139 S. Ct. 682 (2019)	2, 6
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998)	3, 8, 9
<i>United States v. Halper</i> , 490 U.S. 435 (1989)	8
<i>United States v. Jose</i> , 499 F.3d 105 (1st Cir. 2007)	11

<i>Winberry Realty P’ship v. Borough of Rutherford</i> , 247 N.J. 165 (N.J. 2021)	4
--	---

Constitutional Provisions

DEL. CONST., art. I, §11 (1792)	7
GA. CONST., art. LIX (1777)	7
MASS. CONST., pt. 1, Art. XXVI (1780)	7
MD. CONST., Decl. of Rights, Art. XXII (1776)	7
N.C. CONST., Decl. of Rights, Art. X (1776).....	7
N.H. CONST., pt. 1, Art. 1, §XXXIII (1784).....	7
PA. CONST., Art. IX, §13 (1790).....	7
S.C. CONST., Art. IX, § 4 (1790)	7
U.S. CONST., amend. VIII	2
VA. CONST., Bill of Rights, § 9 (1776)	7
VT. CONST., ch. II, §XXIX (1786)	7

Statutes

9 ARIZ. REV. STAT. § 42-18205.....	4
COLO. REV. STAT. § 39-11-115.....	4
COLO. REV. STAT. § 39-21-114(b).....	9
GA. CODE § 48-4-5(a)	9
MONT. CODE §§ 15-18-211, 15-18-219	4
NEB. REV. STAT. § 77-1804.....	4
NEB. REV. STAT. § 77-1831	4

NEB. REV. STAT. § 77-1916.....	4
NEB. REV. STAT. § 77-1807.....	4
Ordinance of 1787, § 14, art. 2 (1787).....	6

Other Authorities

Wesley Hottet, <i>What is an Excessive Fine? Seven Questions to Ask After Timbs</i> , 72 ALA. L. REV. 581 (2021).....	10
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INTEREST OF *AMICUS CURIAE*²

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

Because *Amicus* has written extensively on the issues involved in this case, because this Court's decision may be looked to as authority, and because any decision will significantly impact taxpayers and tax administration, *Amicus* has an institutional interest in this Court's ruling.

² Pursuant to Supreme Court Rule 37, Counsel for *Amici* represents that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court has yet to answer a critical question of American law: is a government statute that empowers private third parties to seize a home and all its value for a few thousand dollars in unpaid taxes a “fine” under the Eighth Amendment’s Excessive Fines Clause?

Nebraska and five other states have such a system. Courts below have ruled that these schemes cannot be challenged under the Excessive Fines Clause, U.S. CONST., amend. VIII, because it is a private third party who is imposing the punishment against the homeowner, not the government. It is true that this Court has previously ruled that the Excessive Fines Clause does not apply to civil actions purely between two private parties. *See Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 268 (1989). But here, it is the government empowering the private third party to do its tax collection on the government’s behalf.

This case presents this Court with the opportunity to clarify that *all* government-enabled penalties, even ones deputizing private parties to do the enforcement, are subject to review under the Excessive Fines Clause. Such a holding would be consistent with the Clause’s historical background that makes it a critical fundamental right of all Americans. The right of all free people to be free from excessive fines is enshrined by the Magna Carta and was also protected at the founding, and this Court incorporated this right three years ago in *Timbs v. Indiana*, 586 U.S. ___, 139 S. Ct. 682, 687-88 (2019). Allowing the lower court’s decision to stand would allow governments to get around the Eighth Amendment by empowering private third

parties to do its tax collection work. Allowing such an easy workaround would result in this fundamental right existing on paper but not in practice.

This case also presents the Court with an opportunity to clarify the test for excessive fines. Under this Court's precedents, an excessive fine cannot be "grossly disproportional" to the offense and the government action must be "purely remedial." *See, e.g., United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *Austin v. United States*, 509 U.S. 602, 610 (1993). In the case at bar, Scotts Bluff County, Nebraska confiscated and kept home value of over \$60,000, which is 1,053 percent greater than the \$5,200 Fair owed in unpaid property taxes. Confiscating all of Fair's home equity is a grossly disproportional punishment. It is not remedial because the county is keeping and then transferring to a private developer significantly more wealth than the homeowner owed in taxes. This case presents a crucial opportunity for the Court to protect citizens from these predatory actions that disproportionately effect low-income residents.

Lower courts are struggling to apply this Court's Excessive Fines jurisprudence in cases involving state and local governments, with circuit courts using and prioritizing different factors that have never been articulated by this Court. This discrepancy between lower courts makes it essential for the Court to clarify its precedents, to protect rights and give peace of mind to taxpayers in their homeownership.

ARGUMENT

I. A STATE CANNOT IMMUNIZE ITSELF FROM THE EXCESSIVE FINES CLAUSE BY OFF-LOADING ENFORCEMENT TO PRIVATE ENTITIES.

This case presents an issue of first impression: whether a property tax scheme can become immune from an Excessive Fines Clause challenge because the state legislature empowers a third party to collect the fine rather than the government itself.

Nebraska allows a county to sell a tax certificate to a private third party who can pay the back taxes. *See* NEB. REV. STAT. §§ 77-1807, 77-1831. The third party then becomes the holder of the tax lien, and if the homeowner does not pay the third party the taxes owed plus interest, the third party can obtain the home's deed.³ *See* NEB. REV. STAT. § 77-1804. Essentially the government empowers the third party to act as a tax collector, with the homeowner forced to pay the government-empowered "private" party or lose their home and all of their equity. While Nebraska allows the former owner to receive any excess if the third party sells the home in a foreclosure sale, *see* NEB. REV. STAT. § 77-1916, if the third

³ Six states, including Nebraska, have property tax schemes that allow private parties to foreclose and seize an entire home's equity as a windfall profit. *See* 9 ARIZ. REV. STAT. § 42-18205; COLO. REV. STAT. § 39-11-115; 35 ILL. COMP. STAT. §§ 200/22-40, 200/21-90; MONT. CODE §§ 15-18-211, 15-18-219; *Winberry Realty P'ship v. Borough of Rutherford*, 247 N.J. 165, 173 (N.J. 2021) (describing how New Jersey statutes allow private investor who purchases tax lien for amount of tax debt to foreclose and take full title without sale).

party chooses not to sell the property, the taxpayer is left with nothing. This is what happened to Kevin Fair, and happens to Nebraska homeowners every year.

The Nebraska Supreme Court held that because it is a private party that collects the unpaid tax and eventually took the home's deed, the confiscation is not a fine reviewable under the Excessive Fines Clause because the Clause only covers punishments "directly imposed by, and payable to, the government." See *Continental Resources v. Fair*, 971 N.W.2d 313, 327 (Neb. 2022) (quoting *Browning-Ferris Industries*, 492 U.S. at 268). *Browning-Ferris* involved two private parties suing each other, and the losing party believed that the punitive damages awarded by the jury violated the Clause. See *Browning-Ferris*, 492 U.S. at 260-61. Unlike the situation facing Nebraska homeowners, the government was not a party in the suit, and the underlying transactions were entirely between private parties.

Here, however, it is the state government that allows the scheme in the first place. Fair entered into no agreement with Continental Resources, and Continental Resources only has property interest in Mr. Fair's house because the state granted it power to obtain it. These "private" third parties are doing the government's work in attempting to collect the unpaid tax, and if the homeowner cannot pay the tax, taking title of the property. The whole scheme is government-enabled, which should make its confiscatory practices subject to review under the Excessive Fines Clause.

If this Court allows the Nebraska scheme to carry on, it becomes a clever workaround immunizing the

state from Excessive Fines Clause judicial review. Revenue-hungry state and local governments could simply deputize “private” parties to extract revenue from economically-distressed residents who fall behind on their taxes without fear of a constitutional challenge. Such private enforcement is not private at all, and this Court should grant certiorari to say so.

II. HISTORICAL PRECEDENT ALSO PROTECTS HOMESTEADS FROM EXCESSIVE FINES AND EQUITY THEFT.

This case presents this Court with an opportunity to determine whether empowering private third parties to collect unpaid taxes and engage in title takeovers is a “fine” under the now-incorporated Eighth Amendment.

Protection from excessive governmental fines is a fundamental right all people have and is one of our oldest rights, copied almost verbatim to the Eighth Amendment from the Magna Carta and the English Bill of Rights. *See Timbs*, 139 S. Ct. at 687-88. As the Alabama and Michigan Supreme Courts recently recognized, a property right in the excess funds (*i.e.*, the home equity) after a tax sale was protected in American common law at the founding. *See Douglas v. Roper*, ___ So.3d ___, No. 1200503, 2022 WL 2286417 at *10 (Ala. Jun. 24, 2022); *Rafaelli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 454-55 (Mich. 2020) (discussing English common law at the founding of the United States). The Northwest Ordinance also provided that “[a]ll fines shall be moderate; and no cruel or unusual punishments inflicted.” Ordinance of 1787, § 14, art. 2 (1787).

At the founding, several state Constitutions also protected this right. *See, e.g.*, DEL. CONST., art. I, §11 (1792); MD. CONST., Decl. of Rights, Art. XXII (1776); MASS. CONST., pt. 1, Art. XXVI (1780); N.H. CONST., pt. 1, Art. 1, §XXXIII (1784); N.C. CONST., Decl. of Rights, Art. X (1776); PA. CONST., Art. IX, §13 (1790); S.C. CONST., Art. IX, § 4 (1790); VA. CONST., Bill of Rights, § 9 (1776). Vermont specified that “all fines shall be proportionate to the offences.” VT. CONST., ch. II, §XXIX (1786). Georgia’s 1777 Constitution had an excessive fines clause, GA. CONST., art. LIX (1777), but its 1789 Constitution did not.

As a fundamental right that has existed in America since its founding, it would be odd if governments could immunize themselves from judicial challenges on their punitive punishments by simply empowering third parties to collect the punishment instead. States should not be able to get around protecting fundamental rights by offloading violative enforcement to private entities.

Allowing the lower court’s decision to stand would remove a level of governmental accountability. If this Court affirms Nebraska’s conclusion that the Nebraska scheme is between private parties and involves no government action, politicians can easily evade responsibility and blame the “private” third party for confiscating a homeowner’s house, even though it is the state which enabled the third party to act. Nebraska’s statute punishes the taxpayer and gives the state a clear economic benefit at the expense of the former homeowner.

Besides being unfair and unjust, this scheme undermines public confidence in the tax system.

American tax collection works best when the public has faith in the fairness of the tax system and the fairness of the people collecting the tax. While empowering a private third party to seize home worth tremendously more than an unpaid tax bill serves as a strong deterrent factor, the scheme's inherent injustice undermines the tax system as a whole by painting all state and federal revenue collective agencies as revenue-hungry.

Granting certiorari in this case would allow this Court to reaffirm the historical importance of the Excessive Fines Clause in American law and ensure governments cannot evade responsibility for unjust confiscations that they may set in motion.

III. NEBRASKA'S FINE AGAINST MR. FAIR IS GROSSLY DISPROPORTIONATE.

This Court has adopted a two-part test for deciding when the Clause is violated: the fine is "grossly disproportional" to the offense and the government action cannot be "purely remedial." See *Bajakajian*, 524 U.S. at 334; *Austin*, 509 U.S. at 610. This Court in *Austin* was clear that the Excessive Fines Clause applies to both civil and criminal law: "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *Austin*, 509 U.S. at 610 (quoting *United States v. Halper*, 490 U.S. 435 (1989)).

There should therefore be no doubt that a civil action like Nebraska's is a "fine" for the purposes of the Excessive Fines Clause. In this case, the fine is also grossly disproportional to the offense because the offense was \$5,200 in unpaid property taxes, fines,

and interest, and the county responded by transferring a \$60,000 property to a private party. The resulting windfall of nearly \$55,000 “bears no articulable correlation to any injury suffered by the Government” because the only harm the government suffered was unpaid tax revenue. *Bajakajian*, 524 U.S. at 340. Put another way, Scotts Bluff County here imposed a punishment 1,053% *greater* than the unpaid taxes.

Most states do not follow Nebraska’s practice. While losing property is not an uncommon result of unpaid taxes, at least 34 states auction the home but return any excess to the taxpayer after the tax debt has been satisfied. *See, e.g.*, COLO. REV. STAT. § 39-21-114(b); GA. CODE § 48-4-5(a). For low-income taxpayers struggling to get by, a punishment like the one Nebraska imposes is grossly unfair and unjust that confiscates all remaining equity they had in their home. A government punishment over 100 times greater than the value of the unpaid taxes also shows that the County’s action was not “purely remedial” because a solely remedial action for the County would only be to keep what it was owed in unpaid tax.

Nebraska’s statute violates the Excessive Fines Clause because it “can only be explained as serving in part to punish.” *Austin*, 509 U.S. at 610. Such schemes are predatory and by their very nature especially harm low-income taxpayers, contributing to cycles of poverty since entire home equity can be wiped away due to a few thousand dollars in unpaid property taxes.

It is true that this Court has not clarified what makes a fine “grossly disproportionate” to the

offense.⁴ This has led to state and lower courts balancing a multitude of factors to decide when a government forfeiture is grossly disproportional to the illegal action and an excessive fine. For example, on remand in *Timbs*, the Indiana Supreme Court examined *ten* factors:

- the extent to which the forfeiture would remedy the harm caused;
- the property's role in the underlying offenses;
- the property's use in other activities, criminal or lawful;
- the property's market value;
- other sanctions imposed on the claimant; and
- effects the forfeiture will have on the claimant.
- the seriousness of the statutory offense, considering statutory penalties;
- the seriousness of the specific crime committed compared to other variants of the offense, considering any sentences imposed;
- the harm caused by the crime committed; and
- the relationship of the offense to other criminal activity.

See State v. Timbs, 134 N.E.3d 12, 36-37 (Ind. 2019). The court ultimately ruled that the confiscation of Mr. Timbs' car for selling a few hundred dollars' worth of

⁴ Legal academics have taken note that this is one of the areas that needs clarifying after this Court's decision in *Timbs*. *See, e.g.,* Wesley Hottet, *What is an Excessive Fine? Seven Questions to Ask After Timbs*, 72 ALA. L. REV. 581 (2021).

drugs was grossly disproportionate to his offense and a violation of the Excessive Fines Clause. *See State v. Timbs*, 169 N.E.3d 361, 376 (Ind. 2021). But this ten-part test is difficult to work with and it is unclear how it would be applied on slightly different facts.

Meanwhile, the Ninth Circuit considers four factors: “(1) the nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense.” *Pimentel v. City of Los Angeles*, 974 F.3d 917, 921 (9th Cir. 2020). The First Circuit considers three, vastly different, factors: “(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant.” *United States v. Jose*, 499 F.3d 105, 111 (1st Cir. 2007).

This Court has yet to weigh in on any of these tests. This leaves lower courts to grapple with critical questions like what factors to use and whether some factors should have greater weight than others. These multifactor balancing tests lead to an absurd result of someone’s constitutional rights changing at each state’s border. Clarification from this Court on what makes a fine “excessive” can and should be created. Lower courts are in desperate need of this guidance and the very shelter of American homeowners depend on getting the answer right.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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