

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
MARK V. CHAPIN, Auditor-Treasurer in his
official capacity,
Respondents.

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

**BRIEF OF AMICI CURIAE AARP, AARP
FOUNDATION, AND NATIONAL CONSUMER
LAW CENTER SUPPORTING PETITIONER
AND URGING REVERSAL**

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STATEMENT OF INTEREST¹

It is undisputed that Minnesota tax authorities, to collect a \$15,000 property tax debt from ninety-three-year-old Geraldine Tyler, seized all \$40,000 of the equity in her modest condominium, keeping \$25,000 for public use. The State offered no compensation in return. This shocking result was no aberration under present Minnesota law. Minnesota *requires* that the excess be seized for public use. Minn. Stat. §§ 282.07-08.

Another shocking fact is that Minnesota is not alone in this regard. While most states protect homeowners' "surplus equity" against foreclosure, at least a dozen states permit the seizure of homeowners' entire equity to pay modest property tax debts.² Some states, like Minnesota, directly seize the money for government coffers; others, like Nebraska,³ collect delinquent tax debts by selling tax liens to private investors and permitting *them* to seize the excess equity as profit if the debt remains unpaid. Jenna

¹ Pursuant to the Court's Rule 37.6, amici state that this brief was not authored in whole or part by any party or its counsel and that no person other than amici, their members, or their counsel contributed any money intended to fund the preparation and submission of this brief.

² Tyler Petition for Writ of Certiorari (No. 22-166) (hereinafter "Tyler Pet.") at 29-33.

³ Amici AARP and AARP Foundation also had filed an amicus brief supporting a Petition for Writ of Certiorari in a case addressing the constitutionality of Nebraska's tax lien regime. *Fair v. Continental Res.*, No. 22-160.

Christine Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real. Prop. Tr. & Est. L.J. 93, 133 n.32 & 56 (2019). Either way, homeowners lose excess home equity that they, not the government or private investors, earned through years of financial sacrifice. Nevertheless, an Eighth Circuit panel upheld the constitutionality of the Minnesota statute. *Tyler v. Hennepin Cnty.*, 26 F.4th 789 (8th Cir. 2022).

Amici strongly urge the Court to condemn the Minnesota law as violating the Constitution’s Fifth Amendment Takings Clause (“Nor shall private property be taken for public use, without just compensation.”).⁴ Such statutes are of extreme concern to amici given those laws’ devastating impact on the financial security of lower-income homeowners, including, in particular, older adults who depend most heavily on this equity for their economic survival.

AARP is the nation’s largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP’s charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

⁴ U.S. Const. amend. V. Amici address only the Takings Clause claims raised by Petitioner Tyler.

These efforts have included filing amicus briefs in state and federal court on this precise issue.⁵

The National Consumer Law Center (“NCLC”) is recognized nationally as an expert in consumer protection issues. For more than 53 years, NCLC has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a twenty-one volume Consumer Credit and Sales Legal Practice Series. Many of these volumes address tax foreclosure issues including Home Foreclosures (1st Ed., 2019), which has an appendix containing summaries of the tax sale procedures in each state. A major focus of NCLC’s work is to increase public awareness of unfair and deceptive practices perpetrated against low-income and elderly consumers, and to promote protections against such practices. NCLC frequently appears as amicus curiae in consumer law cases before trial and appellate courts throughout the country. NCLC has an interest in seeking strong and effective enforcement of consumer protection laws.

⁵ Cases in which AARP and AARP Foundation filed amicus briefs in support of the homeowner include *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019); *Tyler v. Hennepin Cnty.*, 26 F.4th 789 (8th Cir. 2022); *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 380 (2017); *Coleman v. District of Columbia*, 70 F. Supp.3d 58 (D.D.C. 2009); *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434 (Mich. 2020).

SUMMARY OF ARGUMENT

First, amici urge the Court to consider the larger policy consequences of one specific aspect of the Eighth Circuit panel opinion – the inappropriate burden of proof it places on homeowners to meet the threshold showing that they possessed a property interest in their own home equity. Here, Ms. Tyler, citing an abundance of statutory and common law, proved that this obvious right had existed for over a hundred years in Minnesota. The panel conceded as much, but then held that the very statute at issue – alleged to be unconstitutional – “abrogated” that right: “[E]ven 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.” *Tyler*, 26 F.4th at 793. This approach offends Takings Clause jurisprudence. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998) (Nor can the government “by *ipse dixit* . . . transform private property into public property without compensation simply by legislatively abrogating the traditional rule.”) (internal quote omitted).

Second, amici ask the Court to consider the human cost of such laws for the nation’s older homeowners in particular. Inevitably, those laws will have a disproportionately greater impact on older homeowners of modest means. These homeowners are most at risk of property tax foreclosure in the first place, often for reasons beyond their control. Many live on low fixed incomes and face steadily rising food, utilities, and medical expenses, suffer physical

ailments, and are forced to navigate complex financial waters without access to affordable professional financial advice. These challenges not only raise the risk of being sued for unpaid taxes, but also imperil their ability to defend themselves and resist foreclosure. Moreover, for them, tax authorities' seizure of their excess home equity is nothing short of catastrophic. That equity in their home often is their only sizeable financial asset. And, unlike their younger counterparts, many older homeowners no longer have the option of re-entering the workforce to try to recoup the loss.

ARGUMENT

I. The Eighth Circuit Panel Decision Imposes a Harsh Test of Property Rights in Surplus Equity at Odds with Supreme Court Jurisprudence, State Law, and Common Sense.

Geraldine Tyler owned outright a condominium home in Minneapolis and, after moving to a rental for safety reasons, failed to pay a property tax debt of \$2,300. This modest debt quickly ballooned to \$15,000 with the addition of penalties, fees, costs, and interest imposed by Hennepin County. As required by state statute, Hennepin County took title to Tyler's entire property, giving notice of a three-year right of redemption if the debt were repaid. At the expiration of the period, Hennepin County sold the property for \$40,000 and kept the \$25,000 surplus for itself. The Minnesota tax collection statute contains detailed provisions on the public uses to which Ms. Tyler's

funds could be applied, including county parks, schools, and county and city budgets. Minn. Stat. §§ 282.07-08.

Tyler challenged the County's seizure of her property on several grounds, including the Takings Clause of the Fifth Amendment. To prove the obvious – that she possessed a property right in the surplus equity in her own home⁶ – Tyler in the Eighth Circuit pointed to English and American treatises;⁷ U.S. Supreme Court decisions;⁸ a wide variety of supportive federal and state court opinions; and the fact that most states expressly protect this right. On the Minnesota front, Tyler further pointed to a persuasive early Minnesota Supreme Court decision *Farnham v. Jones*, 19 N.W. 83, 85 (1884) (the “right to

⁶ See *Phillips v. Washington Legal Found.*, 524 U.S. at 164 (“Because the [Takings Clause] protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law.”).

⁷ Two of many examples included Am. Jur. 2d State and Local Taxation § 911 (1974) (“Any surplus remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner.”) and 2 William Blackstone, Commentaries *452 (when officials seize property for delinquent taxes, “they are bound, by an implied contract in law” to return it if the debt is paid before sale, or to sell it and “render back the overplus”).

⁸ See, e.g., *United States v. Taylor*, 104 U.S. 216, 219, 221-22 (1881) (construing tax collection statute to hold former owner entitled to surplus proceeds from the sale of his tax delinquent property).

the surplus exists independently” of the property tax collection provisions at issue). She also pointed to Minnesota statutes and court opinions that, in analogous contexts, treat home equity as private property.⁹

Given the self-evident nature of Ms. Tyler’s property right, those sources should have been more than enough for the Eighth Circuit. The panel, in fact, conceded the probable earlier existence of the right in common law. However, the panel then held that the very statute at issue in this case – alleged to be unconstitutional – “abrogated” that right. With no note of the irony, the panel stated:

We conclude 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 and/or rental of any parcel of forfeited land.” 1935 Minn. Laws, ch. 386, § 8. The statute allocated the entire surplus to various entities but allowed for no

⁹ See, e.g., Minn. Stat. § 580.10 (surplus proceeds from mortgage foreclosure after paying debts returned to former owner); *id.* § 550.20 (“No more shall be sold than is sufficient to satisfy the execution”); *Batsell v. Batsell*, 410 N.W.2d 14, 15 (Minn. Ct. App. 1987) (recognizing equity as proper subject of marital property division).

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.

Tyler, 26 F.4th at 793.

Of course, this begged the question before the court – was that “abrogation” constitutional? Was it a “tak[ing] for public use, without just compensation?” The panel, seeing no issue, proceeded to detail the exact “public uses” to which Ms. Tyler’s funds could be put without compensation, such as forest development, school funding, and padding city and county budgets. To the panel, the statute’s detailed accounting was merely further evidence that “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.” *Id.*

The panel’s approach offends both common sense and Fifth Amendment Takings jurisprudence. First, it implies that even an unconstitutional statute can serve as the last word on the existence of the property right. That cannot be the law. In *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434 (Mich. 2020), the Michigan Supreme Court agreed that it cannot, striking down its own confiscatory state law and expressly addressing the “abrogation” point:

This right [to surplus proceeds following a tax foreclosure sale] existed at common

law; was commonly understood to exist in the common law before the 1963 ratification of our Constitution; and continues to exist after 1963... *Because this common-law property right is constitutionally protected by our state's Takings Clause, the Legislature's amendments of the GPTA could not abrogate it. While the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause.*

Rafaeli, 952 N.W.2d at 460 (discussing Michigan state constitutional language that closely tracks the Fifth Amendment Takings Clause) (emphasis added).

The panel's designation of the offensive debt collection statute as the litmus test for the existence of this property right – versus an abundance of common and statutory law – is particularly inappropriate given the intuitive nature of this property right. If this were a traditional mortgage foreclosure, it would not even occur to American homeowners that the lender possibly could seize home equity twice the size of the debt. Nor could a mortgage lender in Minnesota do so.¹⁰ The panel's casual dismissal of Ms. Tyler's proffered evidence severely undermines the Constitution's promise that "the government's power to redefine [property rights is] necessarily constrained by constitutional limits." *Lucas v. S.C. Coastal*

¹⁰ Minn. Ann. § 580.10.

Council, 505 U.S. 1003, 1014 (1992); see also *First Eng. Evangelical Lutheran Church of Glendale v. Cnty of Los Angeles, Cal.*, 482 U.S. 304, 314 (1987) (The Takings Clause “places a condition on the [government’s] exercise of” the power to take private property in the first instance).

The Supreme Court has made clear that, under the Takings Clause, the government has no more right to redefine the homeowner’s property right in this fashion than does a private mortgage lender. States cannot lawfully extinguish established property rights with a wave of the legislative wand. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the State of Florida cannot “transform private property into public property without compensation” by simply recharacterizing interest in funds held by the court as “public money”); *Armstrong v. United States*, 364 U.S. 40, 44-45 (1960) (ship contractor property rights do not “vanish into thin air” just because Government seeks to collect its own debt). When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner” *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 322 (2002) (citation omitted).¹¹

¹¹ Here, unlike some cases, there can be no genuine disagreement that there was an act of “taking.” “[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a . . . parcel of real property, a ‘per se [takings] approach’ is the proper mode of analysis” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)); *McKesson Corp. v. Div. of Alcoholic*

Petitioner observes that the high courts of Michigan, Minnesota, Mississippi, New Hampshire, Vermont, and Virginia – plus federal district courts in Michigan, Ohio, and West Virginia – have recognized that the government acts unconstitutionally when it forecloses on property to collect delinquent taxes or related debts and keeps more than it is owed.¹² Amici respectfully urge this Court to reverse the decision below and hold that homeowners have a protected property right in their surplus home equity.

II. Older Homeowners of Modest Means Are Disproportionately Vulnerable to Suffering Catastrophic Loss from Tax Authorities' Seizure of Their Excess Home Equity

Homeownership is the lynchpin of well-being for older Americans. The equity in their homes is a fundamental source of family stability and financial

Beverages and Tobacco, Dep't of Bus. Reg. of Florida, et al., 496 U.S. 18, 36 (1990) (The “exaction of a tax constitutes a deprivation of property[.]”); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430, 436 (1982) (holding that the government’s taking physical control over a property interest for public use is a taking *per se*).

¹² Tyler Brief for Petitioner, at 15-17; Tyler Pet. at 30-32. In two further New York and District of Columbia federal court cases, plaintiffs’ allegations that government’s seizure of surplus equity was unconstitutional survived motions to dismiss. *Dorce v. City of New York*, 608 F. Supp.3d (S.D.N.Y. 2022); *Coleman through Bunn v. D.C.*, No. 13-1456, 2016 WL 10721865 *2-3 (D.D.C. June 11, 2016).

security for this population.¹³ They often use their home equity in retirement to finance health care, home maintenance, and other large expenses and as a safety net that could be used to meet unexpected needs.¹⁴ The importance of protecting older adults' surplus home equity from tax seizures is further magnified because they have a disproportionately high rate of homeownership. As of the fourth quarter of 2020, approximately 28 million (80.2 percent) of 34.93 million householders over age 65 owned their homes.¹⁵

However, many older adults of modest means, especially, face a disproportionate risk of losing their homes to property tax foreclosures, often for reasons beyond their control.¹⁶ These include: (1) they can no longer work and live on limited fixed incomes, yet face

¹³ William M. Rohe & Mark Lindblad, *Reexamining the Social Benefits of Homeownership after the Housing Crisis*, Harv. Univ. Joint Ctr. for Hous. Stud. (Aug. 2013), <https://bit.ly/3sscWAD>.

¹⁴ Lori A. Trawinski, *Nightmare on Main Street: Older Americans and the Mortgage Market Crisis*, AARP Pub. Pol'y Inst. 3 (July 2016), <https://bit.ly/3IU9mwJ>.

¹⁵ *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2020*, U.S. Census Bureau (Feb. 2, 2021), <https://bit.ly/3rtU2rU>; *America's Families and Living Arrangements: 2020*, U.S. Census Bureau (2020), <https://bit.ly/2Pz9khD>.

¹⁶ John Rao, *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat'l Consumer Law Ctr. 5, 8-10 (Jul. 2012), <http://bit.ly/1MLTZMc> [hereinafter "Rao, *The Other Foreclosure Crisis*"].

rising costs for food, utilities, transportation, and medicine; (2) they have no escrow account to help them budget for, and pay, property taxes (having paid off their traditional mortgage or using subprime or reverse mortgages that lack an escrow feature); or (3) they are among the subset of older adults suffering from physical or cognitive impairments that make it difficult to manage their finances.¹⁷ The same factors that make this population vulnerable to tax default also can prevent them from taking steps necessary to protect their interests and redeem their property in the foreclosure process.¹⁸

A. Extraordinary economic pressures make older low-income homeowners disproportionately vulnerable to property tax foreclosure.

Older homeowners living on low fixed income in their retirement years face the same rising costs for food, utilities, transportation, medical care, and other

¹⁷ *Id.*; Stacey Wood & Peter A. Lichtenberg, *Financial Capacity and Financial Exploitation of Older Adults: Research Findings, Policy Recommendations and Clinical Implications*, 40 *Clin. Gerontol.* 3-13 (Jan-Feb 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5463983/> [hereinafter “Wood et al., *Financial Capacity and Financial Exploitation of Older Adults*”]; Peter Boersma, Lindsey I. Black & Brian W. Ward, *Prevalence of Multiple Chronic Conditions Among US Adults, 2018*, 17 *Prev. Chron.* 1-4 (2020), <https://pubmed.ncbi.nlm.nih.gov/32945769/> [hereinafter Boersma, et al., “*Prevalence of Multiple Chronic Conditions Among U.S. Adults, 2018*”].

¹⁸ Rao, *The Other Foreclosure Crisis*, *supra* note 16 at 8-10.

basic needs as their more well-to-do counterparts.¹⁹ Although older individuals as a group are working longer than they did in previous generations, many still struggle to make ends meet.²⁰

One reason is that a growing share of older households are carrying substantial housing and other debt into their retirement years. The share of homeowners age 65 and over with housing debt doubled from 1989 to 2019, from 21 to 42 percent, while their median outstanding mortgage balance rose from \$18,000 to \$86,000 (both in 2019 dollars) over the same period.²¹ Even when low-income homeowners on fixed income have paid off their debt, they will still face not only rising utility, medical, and other costs, but also the substantial cost of maintaining their homes for as long as they live, including replacing

¹⁹ Jack VanDerhei, *Retirement Savings Shortfalls: Evidence from EBRI's 2019 Retirement Security Projection Model*[®], Emp. Benefit Rsch. Inst. (Mar. 7, 2019), <https://bit.ly/2NULnps>.

²⁰ Whitney Airgood-Obrycki, et al., *Housing America's Older Adults 2019*, Joint Ctr. For Hous. Stud. of Harv. Univ. 8 (Marcia Fernald ed., 2019), <https://bit.ly/31mEETO> [hereinafter "Airgood-Obrycki, et al., *Housing America's Older Adults 2019*"] (in 2016 some 5 million households age 65 and over were "severely" cost-burdened, paying over 50 percent of their income on housing).

²¹ Jennifer Molinsky, *Ten Insights About Older Households from the 2020 State of the Nation's Housing Report*, Joint Ctr. for Hous. Stud. of Harv. Univ. par. 5 (Dec. 17, 2020), <https://bit.ly/3w2iMew> [hereinafter "Molinsky, *Ten Insights About Older Households from the 2020 State of the Nation's Housing Report*"].

roofs and heating and cooling systems that typically last only 15-25 years.²²

All told, more than one in four homeowners 65 and older are considered housing cost-burdened (paying more than 30 percent of income for housing).²³ That percentage is even greater among homeowners still paying off mortgage debt, with 43 percent of homeowners 65 and older having cost burdens.²⁴

Not surprisingly, economic security is particularly tenuous for older homeowners in the lowest income brackets, who suffer hunger or food insecurity due to income shortfalls.²⁵ An estimated 5.3 million seniors, or 7.3% of the U.S. senior population,

²² Airgood-Obrycki, et al., *Housing America's Older Adults 2019*, *supra* note 20 at 4.

²³ *Id.* at 8; Molinsky, *Ten Insights About Older Households from the 2020 State of the Nation's Housing Report*, *supra* note 21 at Figure 1 (“In 2019, the number of older adult households paying more than a third of their income for housing reached an all-time high of 10.2 million.”).

²⁴ Airgood-Obrycki, et al., *Housing America's Older Adults 2019*, *supra* note 20 at 8.

²⁵ *Id.* (“Carrying debt has a variety of detrimental impacts on the health and well-being of older adults, and can result in housing and food insecurity.”).

were food insecure in 2018.²⁶ For those with incomes below the poverty line, 29.5% were food insecure.²⁷

Finally, the COVID pandemic dealt many homeowners a financial setback from which they have yet to recover. In 2020, aggregate retirement assets had been projected to decrease by 11.2% or over \$412 billion nationwide.²⁸ Some 21% of homeowners reported loss of employment income that year,²⁹ and older workers were initially hit the hardest. During the first six months of the pandemic, workers aged 55 and older were 17 percent more likely to lose their jobs than employees a few years younger.³⁰

In sum, it is older homeowners of modest means who face the greatest risk of property tax default and, therefore, also face the greatest risk of economic

²⁶ James P. Ziliak & Craig Gundersen, *The State of Senior Hunger in America in 2018*, Feeding America 4 (May 21, 2020), <https://bit.ly/3d5SZte>.

²⁷ *Id.*

²⁸ Jack VanDerhei, *Impact of the COVID-19 Pandemic on Retirement Income Adequacy: Evidence from EBRI's Retirement Security Projection Model*[®], Emp. Benefits Rsch. Inst. (Apr. 23, 2020), <https://bit.ly/3cpihTN>.

²⁹ Molinsky, *Ten Insights About Older Households from the 2020 State of the Nation's Housing Report*, *supra* note 21 at par. 6.

³⁰ Kenneth Terrell, AARP, *Unemployment's Toll on Older Workers Is Worst in Half a Century* (Oct. 21, 2020), <https://bit.ly/3c3hDLK>.

catastrophe if they live in states that permit the seizure of surplus home equity in foreclosure.

B. Many older homeowners are at risk of tax foreclosures because they no longer pay into a monthly mortgage escrow account that provides for automatic payment of property taxes.

For most homeowners with a traditional first mortgage, a portion of their property taxes is collected with their monthly payment and held in an escrow account until the taxes are due. At that time, the mortgage servicer pays accumulated reserves for taxes directly to the taxing authority. Meanwhile, the homeowner simply pays a monthly bill of a fixed amount.

Upon paying off a first mortgage, however, homeowners for the first time are forced to budget for funds sufficient to pay taxes when they come due and to arrange for direct payment in timely fashion. This is an unfamiliar exercise even for financially sophisticated consumers, and many older low income homeowners fail to make the adjustment.³¹ Thus, ironically, paying off one's mortgage – otherwise considered a sign of financial responsibility and economic security – often plays a significant role in

³¹ Rao, *The Other Foreclosure Crisis*, *supra* note 16 at 10.

increasing the homeowner's vulnerability to tax delinquency and tax foreclosure.³²

For those with very low incomes, one challenge is simply being able to save ahead for large one-time payments while juggling other weekly crises and unexpected costs. The many single households that rely almost entirely on Social Security benefits, for example, realistically have little opportunity for income growth beyond cost-of-living increases.³³

It is not only homeowners who have paid off their mortgages who must directly pay property taxes rather than rely on the automatic escrow feature. There are millions of homeowners who have subprime mortgages, home equity loans, and reverse mortgages, these loans also typically lacking an escrow feature.³⁴

³² *Id.* Some 64 percent of older homeowners age 65-79, and 74 percent of homeowners over age 80, own their homes without a mortgage. Airgood-Obrycki, et al., *Housing America's Older Adults 2019*, *supra* note 20 at 7. Thus, this large population also lacks automatic payment of property taxes on a monthly basis via escrow account.

³³ Airgood-Obrycki, et al., *Housing America's Older Adults 2019*, *supra* note 20 at 5 (Social Security payments make up at least 50 percent of the incomes of about half of all recipients, and at least 90 percent of the incomes of a quarter of all recipients).

³⁴ Reverse mortgages insured through the Home Equity Conversion Mortgage (HECM) Program permit borrowers 62 years or older to obtain a lump sum or line of credit based on the value of their home. Homeowners do not pay back the debt while they live in the home, but must continue to pay property taxes. HUD instructs mortgage servicers to declare the entire mortgage due and payable if the borrower does not pay those taxes in

To illustrate the risk, the Consumer Financial Protection Bureau reported in 2012 that homeowners' lack of understanding that they had to directly pay property tax charges was the most significant factor for a surge in reverse mortgage borrowers losing their homes to foreclosure.³⁵

C. Many older homeowners are at increased risk of losing their home to a property tax foreclosure due to worsening health and medical conditions.

A significant subset of older homeowners have difficulty managing their finances – including paying their property taxes – due to worsening health and medical conditions. Homeowners most at risk of losing their homes to tax foreclosure are those who have fallen into default because they are incapable of handling their financial affairs, such as individuals suffering from Alzheimer's, dementia, or other

timely fashion. See U.S. Dep't of Hous. and Urb. Dev., *Home Equity Conversion Mortgage (HECM) Financial Assessment and Property Charge Requirements*, Mortgagee Letter 2014-22 (Nov. 10, 2014), <http://1.usa.gov/1MYKrnM>.

³⁵ Sarah B. Mancini & Odette Williamson, *Reversing Course: Stemming the Tide of Reverse Mortgage Foreclosures Through Effective Servicing and Loss Mitigation*, 26 Elder L.J. 85, 102 (2018) (citing Consumer Fin. Prot. Bureau, *Report to Congress on Reverse Mortgages* 81 (June 28, 2012), <https://www.consumerfinance.gov/data-research/research-reports/reverse-mortgages-report>).

cognitive disorders.³⁶ The risk of having such disorders increases exponentially with advancing age.³⁷

Even homeowners with less severe maladies who can afford to pay the taxes can fall into default because they cannot fully read and comprehend late notices in the mail and other critical paperwork, due to such ailments as macular degeneration, glaucoma, and cataracts.³⁸

These same factors can also hinder their ability to navigate critical steps in the foreclosure process. The Minnesota law, for example, provided several procedural avenues for trying to redeem title. However, these steps – empty exercises for many low-income homeowners due to the escalation of the tax debt³⁹ – depend on unsophisticated debtors being able

³⁶ Rao, *The Other Foreclosure Crisis*, *supra* note 16 at 9.

³⁷ Wood, et al., *Financial Capacity and Financial Exploitation of Older Adults*, *supra* note 17 at 6; Boersma, et al., “*Prevalence of Multiple Chronic Conditions Among U.S. Adults*, 2018”.

³⁸ Center for Disease Control and Prevention, *Fast Facts About Vision Loss* (last reviewed Feb 28, 2023), <https://www.cdc.gov/visionhealth/basics/ced/fastfacts.htm> (As of 2012, 4.2 million Americans 40 years and older suffered from uncorrectable vision impairment).

³⁹ Under property tax foreclosure laws like Minnesota’s, even modest tax debts can quickly become unpayable with the addition of exorbitant fees, penalties, and interest, preventing homeowners from redeeming title to their home equity. *See* Rao, *The Other Foreclosure Crisis*, *supra* note 16 at 4, 30-33 (outdated excessive interest rates and other costs “can make it impossible

to read and understand complex legal documents. For those with physical or mental maladies impeding their ability to do so, the risk of losing their entire home equity for payment of a modest tax debt is a very real one. *See Covey v. Somers*, 351 U.S. 141, 146-47 (1956) (recognizing that notice due process requirements are higher where taxing authority knew of the taxpayer's incapacity).

For many older Americans, their home equity is their most important asset, earned through many years of financial sacrifice. Homeowners should not have to face the risk of catastrophic loss of this equity through Minnesota tax authorities' "arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 164.

for some homeowners to save their homes from foreclosure.") Ms. Tyler's situation amply illustrates this, her \$2300 tax debt having increased more than six-fold to \$15,000.

CONCLUSION

For the reasons set forth above, amici curiae AARP, AARP Foundation, and NCLC urge the Court to overturn the Eighth Circuit's ruling and strike down the Minnesota property tax foreclosure statute as violating the Takings Clause of the Fifth Amendment.

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