No. 22-166

In The
Supreme Court of the United States

GERALDINE TYLER,

Petitioner,

v.

HENNEPIN COUNTY, MINNESOTA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF MINNESOTA, NEW JERSEY AND OREGON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici are the States of Minnesota, New Jersey and Oregon. The *Amici* States have an interest in defending the authority of state legislatures to devise and implement tax systems, a sovereign power that this Court has repeatedly recognized as "essential to the very existence of government." *N. C. Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2219 (2019) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819)). The founders, after all, believed that the "right of taxation in the [S]tates is sacred and inviolable," an authority that the States retain "in the most absolute and unqualified sense." *McCulloch*, 17 U.S. at 344 (quoting The Federalist No. 32 (Alexander Hamilton)). Collection and enforcement are essential aspects of the taxing power. *See Jones v. Flowers*, 547 U.S. 220, 234 (2006). State and local tax revenues fund "the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995). Equally well-established is the province of elected state legislatures to define the parameters of constitutionally-protected property rights. The *Amici* States are concerned that a reversal of the Eighth Circuit's well-reasoned decision would erode these areas of State authority, depriving States of the flexibility needed to develop and implement tax schemes and to recognize property interests. A host of unintended consequences could result, rendering large swaths of statutory regimes vulnerable to a constitutional challenge and state governments unable to meet the diverse and ongoing needs of their citizenry.

SUMMARY OF THE ARGUMENT

In our federalist tradition, states possess broad authority to define property rights and develop taxation systems that respond to the needs of their constituents. When developing property tax regimes, state legislatures take into account many factors unique to their State including demographic trends, the mix of rural and urban land, the presence of natural resources (lakes, timber, minerals, oil), the availability of capital, taxing traditions, the real estate market, the presence of blight or abandoned properties, and the financial needs of the state government, among others. By deferring to the policy judgments decisions of those state lawmakers, federalism allows the States to develop the structure of their own sovereign governments and

> allows local policies more sensitive to the diverse needs of a heterogenous society, permits innovation and experimentation, enables greater citizen 'involvement in democratic processes, and makes government 'more responsive by putting the States in competition for a mobile citizenry.

Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 817 (2015) (internal quotation marks and citations omitted).

The main federal-constitutional limit on each state's sovereign power to tax is the Due Process Clause of the Fourteenth Amendment. Here, Petitioner concedes she received due process, Pet. Br. 2 n.1, but attacks Minnesota's taxing scheme nonetheless. Adopting the constitutional rule that Petitioner proposes would not only infringe on core attributes of state sovereignty, but would also inhibit the States' ability to address abandoned property and related financial and public-safety issues. Petitioner's proposed rule also would have unintended consequences outside the domain of residential property. The *Amici* States ask this Court to affirm the Eighth Circuit.

ARGUMENT

I. The Power to Tax is a Core Attribute of State Sovereignty.

The States' power to tax is central to their sovereignty. *See Arkansas v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826 (1997); *accord Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994). As this Court has long—and consistently—observed, the States' taxing power was "not abridged by the grant of a similar power to the government of the Union." *Farm Credit Servs.*, 520 U.S. at 826 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 425); *see also* The Federalist No. 31 (Alexander Hamilton). Instead, the taxing power was "retained by the States . . . and it is to be concurrently exercised by the two governments." *Farm Credit Servs.*, 520 U.S. at 826 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 425). Simply put: "The power to tax is basic to the power of the State to exist." *Id.*

The broad scope of the States' taxing power extends to "property, business, and persons, within their respective limits." *Lane v. Oregon*, 74 U.S. 71, 77 (1868). "The extent to which [the taxing power] shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power." *Id.* States are thus "free to pursue [their] own fiscal policies," with "the responsibility for devising just and productive sources of revenue" left to "the wit" of state legislatures. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444–45 (1940).

Given the centrality of the taxing power to sovereignty, Congress has recognized the States' primacy over their own tax systems, and it has sought to limit the federal courts' interference with state-tax systems. In 1937, for example, Congress passed the Tax Injunction Act, which divested the federal district courts of jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The animating purpose behind the Tax Injunction Act is "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981).

The Court has also been sensitive to undue federal interference with the States' taxing power. Even in cases beyond the scope of the Tax Injunction Act, the Court has held that comity counsels against federal court jurisdiction over state taxation disputes. *See Levin v. Com. Energy, Inc.*, 560 U.S. 413, 421–22 (2010). And, more fundamentally, the Court has explained that the nature of judicial review is "limited" when issues of state taxation come before the Court. *J.C. Penney Co.*, 311 U.S. at 445. As one Justice put it: "Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making." *Id.*

II. States Have Broad Discretion to Enact and Enforce Reasonable Taxation Schemes Within the Boundaries of Due Process and Without Violating the Takings Clause.

Part and parcel of the States' sovereign authority to tax is their ability to design reasonable schemes of taxation, responding to the particular circumstances of each state. This Court has stressed that when the States exercise their taxing power, they are not engaging in takings. Instead, the States have broad authority to enact and enforce taxation schemes within the boundaries of due process. State supreme courts have recognized these same principles.

A ruling for Petitioner rule would significantly circumscribe the States' ability to make independent policy choices. For example, Petitioner identifies Kentucky as one of the States that ostensibly protects home equity in tax foreclosures.[1] But in many ways, Kentucky's tax-foreclosure regime is less generous than Minnesota's. In one common type of tax foreclosure, Kentucky has a presumptive one-year tolling period before the tax lien can be enforced. *See* Ky. Rev. Stat. Ann. § 134.546, subd. 1. That time period is two years shorter than Minnesota's corresponding redemption period. *See* Minn. Stat. § 281.17, subd. a. Nor does Kentucky allow delinquent taxpayers to apply to repurchase their property after title has vested in the State. *But cf.* Minn. Stat. § 282.241, subd. 1. For Petitioner, Kentucky's scheme passes constitutional muster simply because of how it treats any "surplus" from a tax sale. But in reality, Minnesota and Kentucky have just made different policy choices about how property owners can preserve their property interests. The Constitution does not mandate Kentucky's approach—nor does it prohibit Minnesota's.

A. This Court Has Affirmed the States' Broad Authority to Tax and Confirmed That Taxes Are Not Takings.

The States' concurrent taxing power gives them broad authority to design and enforce tax schemes. The

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[1] Pac. Legal Found., *End Home Equity Theft*, https://perma.cc/6FYV-9PK8 (last visited Mar. 28, 2023).

local concerns reflected in state tax policies have been a feature of the tax system since colonial times. *See* 1 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* § 1.01 (3d ed. 2022) (tracing historical development of state and local tax systems, particularly property tax). The States' taxing power is not, of course, boundless. The States may not interfere with "the prerogatives of the National Government or violat[e] the guaranties of the Federal Constitution." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959). But as long as the States are "dealing with their proper domestic concerns," they "have a very wide discretion in the laying of their taxes." *Id.*

That discretion is at its zenith when it comes to property taxes. Property taxes are a pillar of state and local tax policy. *See Dep't of Rev.*, 510 U.S. at 344. These taxes are a major source of revenue for local governments. *See* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L. J. 747, 752 (2000). And property taxes remain uniquely within the control of the States at the level of policy, and local governments at the level of implementation. *Id.* at 754–55. States, counties, and municipalities are thus in the best position to design property-tax systems that are sensitive to local conditions.

The States do not engage in takings when they enforce those reasonable systems of property taxation. "It is beyond dispute that taxes . . . are not takings." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013) (cleaned up). As the Court has long explained, "taxation for a public purpose, however great, is [not] the taking of private property for public use, in the sense of the Constitution." *Mobile Cnty. v. Kimball*, 102 U.S. 691, 703 (1880); *accord, e.g.*, *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *Gilman v. City of Sheboygan*, 67 U.S. 510, 510 (1862). And the Court has cautioned that "the power of taxation should not be confused with the power of eminent domain." *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 264 (1915).

Instead, the principal check on property tax schemes is the Due Process Clause of the Fourteenth Amendment. In "rare and special instances," the Due Process Clause may invalidate a taxing statute wholesale. *See City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 374–75 (1974) (internal quotation marks and citation omitted). For a taxing statute to be invalid for due process reasons, the statute must be "so arbitrary as to compel the conclusion that [the statute] does not involve the exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." *Id.* (internal citation omitted).

In the same vein, due process protects the rights of individual homeowners who fail to pay their property taxes. Due process requires the government to provide an individual property owner with notice and an opportunity to be heard "[b]efore a State may take property and sell it for unpaid taxes." *Jones v. Flowers*, 547 U.S. 220, 223 (2006). That notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Id.* at 226 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). If notice is constitutionally adequate, then "the government may hold citizens accountable for tax delinquency by taking their property." *Id.* at 234.

Absent an arbitrary taxing statute or a failure to afford individual homeowners due process, the citizen's security against taxation is "found in the structure of our government itself." *See Dane v. Jackson*, 256 U.S. 589, 599 (1921) (internal quotation marks and citation omitted).

B. State High Courts Have Affirmed States' Broad Authority to Tax and Confirmed That Taxes Are Not Takings.

State courts too have affirmed that the authority to tax is a core aspect of state sovereignty and generally is a function of state legislatures. Maine's high court put it succinctly: "Taxation is recognized as a sovereign right. As such it is an attribute of sovereignty. It is essential to the very existence of government." *City of Auburn v. Mandarelli*, 320 A.2d 22, 27 (Me. 1974) (noting also that any adjustment to taxing statutes "must be made, if at all, by the Legislature, not the courts"); *accord, e.g.*, *Stein v. City of Mobile*, 24 Ala. 591, 594 (1854) ("[T]he power of taxation is inherent in every sovereignty, and extends not only to the people and property of a State, but it may be exercised upon every object brought within its jurisdiction."); *Burtkin Assocs. v. Tipton*, 845 P.2d 525, 529 (Colo. 1993) ("In our view, the tax liens did not violate the Taking Clauses, but were a valid exercise of the sovereign power to assess and collect taxes."); *City of Atlanta v. Stokes*, 165 S.E. 270, 271 (Ga. 1932) ("In the field of direct taxation, the power of the sovereign state is supreme."); *Commw. v. Morrison*, 9 Ky. 75, 89 (1819) ("[T]he direct taxing power is concurrent and in its exercise the states are sovereign."); *N. Mo. R.R. Co. v. Maguire*, 49 Mo. 490, 498 (1872) ("Nor can there be any doubt of the power of the State, by reason of its sovereignty over the whole subject of taxation."); *City of Tulsa v. State*, 278 P.3d 602, 609 (Okla. 2012) ("The power to collect taxes, whether collected by the state or its subdivisions is inherent and is a necessary attribute of sovereignty."); *Edmonson v. Walker*, 195 S.W. 168, 171 (Tenn. 1917) ("There can be no doubt as to the right to tax being a sovereign power . . . inherent in the state."); *Pembroke Limestone Works v. Commonwealth*, 134 S.E. 721, 722 (Va. 1926) ("Taxation is a legislative and not a judicial function. It rests in the sovereign power of the State and is inherent in such sovereignty."); *City of Seattle v. Algar*, 210 P. 664, 666 (Wash. 1922) (noting the state has a "sovereign right of taxation").

As a logical extension of the principles that taxation is a core attribute of sovereignty, and that any complaints about its fairness should be addressed by state legislatures, the high courts of at least fifteen states have concluded that taxation schemes can never be a constitutional taking. These cases span over 150 years of jurisprudence and every region of the nation. In 1891, for example, the Tennessee Supreme Court rejected takings claims under both the state and federal constitution because "[t]axation, however great, for a public purpose, is not a taking of private property for public use within the meaning of a constitutional provision prohibiting such taking." *Williams v. City of Nashville*, 15 S.W. 364, 365 (Tenn. 1891) (internal citation omitted); *see also Clute v. Turner*, 106 P. 240, 243 (Cal. 1909); *Burtkin Assocs.*, 845 P.2d at 529; *Nichols v. City of Bridgeport*, 23 Conn. 189, 189 (1854); *Empress Casino Joliet Corp. v. Giannoulias*, 896 N.E.2d 277, 291 (Ill. 2008); *City of Logansport v. Seybold*, 59 Ind. 225, 228 (1877); *Farmers Nat'l Bank v. Commw. Dep't of Revenue*, 486 S.W.3d 872, 883 (Ky. Ct. App. 2015); *Alcorn v. Hamer*, 38 Miss. 652, 679 (1860); *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 822–24 (Minn. 1998); *N. Mo. R.R. Co.*, 49 Mo. at 501–02; *People ex rel. Griffin v. Mayor of Brooklyn*, 4 N.Y. 419, 420 (1851); *Pendell v. Dep't of Revenue*, 847 P.2d 846, 849–50 (Or. 1993); *In re Est. of Lewis*, 614 S.E.2d 695, 704 (W.Va. 2005); *Kimball v. City of Grantsville City*, 57 P. 1, 3 (Utah 1899). Just last year, the Nebraska Supreme Court agreed: "If taxes, as the U.S. Supreme Court has held, are not takings, we do not see how efforts to collect that tax, whether through the sale of a lien on the property or sale of the property itself, could be characterized as a taking." *Cont'l Res. v. Fair*, 971 N.W.2d 313, 323 (Neb. 2022), *petition for cert. filed*, No. 22-160.

Because each state has authority to devise a taxation scheme that best fits the unique needs of its state, it is neither unexpected nor problematic that state statutes vary with respect to the process of tax forfeiture. As many state courts have held, any real or perceived inequities in those systems should, and indeed may, be addressed with their state legislatures.

Similarly, because property rights are defined by state law, it is neither unexpected nor problematic that states reached different results on the precise question of "surplus equity" presented in this case. *Compare Automatic Art, LLC v. Maricopa Cnty.*, CV 08-1484-PHX-SRB, 2010 WL 11515708, at *4 (D. Ariz. Mar. 18, 2010) (finding no basis in Arizona law for "the recovery of any funds by a previous owner after a tax sale"); *Cont'l Res.*, 971 N.W.2d at 323 (finding Nebraska common law did not recognize any right to receive any compensation after a tax forfeiture); *Ritter v. Ross*, 558 N.W.2d 909, 485–86 (Wis. Ct. App. 1996) (finding state law silent regarding excess proceeds from tax sale, so no violation of federal takings clause); *City of Auburn*, 320 A.2d at 32 ("No duty arose in the municipality to restore to the defendant the windfall which the city reaped from the taxpayer's and the defendant's negligent noncompliance with the statutory prerequisites for the avoidance of a forfeiture."), *with Douglas v. Roper*, 1200503, 2022 WL 2286417, at *11 (Ala. June 24, 2022) ("This state has long recognized a property owner's right to the excess funds generated from a tax sale of his or her property."); *Coleman v. D.C.*, CV 13-1456 (EGS), 2016 WL 10721865, at *2–3 (D.D.C. June 11, 2016) (finding plaintiffs had sufficiently pleaded takings claim for surplus equity because D.C.'s highest court had arguably recognized property interest in home equity); *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 473–74 (Mich. 2020) (finding Michigan common law recognized a vested right in surplus); *Thomas Tool Servs., Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) (same).

The few state courts that have recognized valid takings claims as a result of a tax forfeiture have done so under their state constitutions. *Rafaeli*, 952 N.W.2d at 447–50, 479; *White v. Town of Wolfeboro*, 551 A.2d 514, 517 (N.H. 1988); *Bogie v. Town of Barnet*, 270 A.2d 898, 899–900 (Vt. 1970). These cases do not support an argument that the United States Constitution dictates to States the manner in which they may or may not enforce their taxation schemes. Instead, these cases demonstrate the variance among state constitutions.

III. Property Interests Are Defined by State Law.

The paramount role of the States in defining property interests is a central feature of this Court's Takings-Clause jurisprudence. The Court has long recognized that States possess "residual authority that enables [them] to define 'property' in the first instance." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980); *accord Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017) (recognizing that "property interests have their foundations in state law"). Just two years ago, the Court stated flatly that property interests protected by the Constitution "are creatures of state law." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021). Part of this inquiry is "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Murr*, 137 S. Ct. at 1946 (internal citation omitted); *see also Pearson v. Dodd*, 429 U.S. 396, 397 (1977) (looking to state law to determine when title vested in the state following a property tax forfeiture). This approach makes sense in light of the truism that States are sovereigns that possess all of the hallmarks of sovereignty, including the authority to define property interests as well as to develop systems of taxation and the means of collecting those taxes. *E.g.*, *PruneYard*, 447 U.S. at 84; *J.C. Penney Co.*, 311 U.S. at 445.

State authority to define property interests necessarily includes the authority to refine those definitions over time and is part of the state law "rules or understandings" that form property interests. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *see also Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (noting that the common law "presupposes a measure of evolution [. . .]"). Although States "may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law," *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998), the Court has recognized the authority of state legislatures to regulate—and in some circumstances abrogate—property interests created by the common law, *see Providence Rubber Co. v. Goodyear*, 76 U.S. 788, 791–92 (1869) (stating that common-law rule was abrogated by state statute and could not be recognized in the federal courts any more than in the state courts.); *United States v. Texas*, 507 U.S. 529, 534 (1993).[2]

Indeed, this Court has recognized that States have broad authority to abrogate property rights when property owners do not comply with reasonable conditions of ownership—including the payment of taxes. *See Texaco, Inc. v. Short*, 454 U.S. 516, 529 (1982) (concluding that Indiana had power to extinguish property rights in severed mineral interests for failure to pay property taxes); *see also Pearson*, 429 U.S. at 397–98 (dismissing appeal for lack of federal question because, under state law, property owner had no constitutionally-protected interest when absolute title had vested in state for nonpayment of taxes four years earlier). Even more recently, this Court held that the "government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (holding that civil forfeiture of car was not an unconstitutional taking).

The Court's decision in *Texaco* is instructive. In *Texaco*, the Court considered the constitutionality of

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2. Such authority to abrogate common-law property interests is well-established under Minnesota law, which is binding on the Court with respect to the state-law issues at dispute in this matter. *See Zephier v. Agate*, 957 N.W.2d 866, 874–75 (Minn. 2021) (recognizing that legislature may abrogate common-law property interests); *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (recognizing that "state courts are ultimate expositors of state law" and that the Court is "bound by their constructions except in extreme circumstances").

Indiana's mineral-forfeiture law. *See* 454 U.S. at 518–20. Under that law, a mineral owner's interest in severed mineral rights would lapse—and revert to the owner of the surface estate—if the mineral owner failed to take any of three actions: (1) pay taxes; (2) produce minerals; or (3) file a statement of claim with the local recorder of deeds within a specified period. *Id.* Several owners of forfeited mineral interests challenged the statute, alleging that it violated the Due Process, Takings, and Contracts Clauses of the United States Constitution. *Id.* at 522–23.

The Court rejected the challenges across the board. Before addressing the constitutional claims, the Court addressed the State's general power to extinguish property rights. *Id.* at 525–30. Although severed mineral interests were, under Indiana law, "entitled to the same protection as fee simple titles," the Court had "no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain that interest." *Id.* at 526 (internal quotation marks and citation omitted).

Nor could the property owners claim ignorance to avoid the consequences of unpaid taxes. Under long-settled principles of property law, "persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." *Id.* at 532. The Court stressed that this principle applies with particular force "to those statutes relating to the taxation or condemnation of land," which "are universally in force and are general in their application, facts of which the land owner must take into account in providing for the management of the property." *Id.* n.26 (quoting *N. Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925)).

Texaco then proceeded to reject, as relevant here, the takings claim. The Court had "never required the State to compensate the owner for the consequences of his own neglect." *Id.* at 530. Because the *Texaco* owners' property interests were forfeited due to their own neglect, the Court found "no taking that requires compensation." *Id.*

To the extent that Minnesota ever recognized a common-law property interest in "surplus equity," the Minnesota legislature abrogated that right in 1935 when it passed the statute challenged here. There can be no "reasonable expectations about property ownership" that would lead a property owner to expect that they would retain a property right validly abrogated almost 90 years ago. *Murr*, 137 S. Ct. at 1945. Moreover, unlike the state statute at issue in *Phillips*, which siphoned for the government all interest proceeds on private funds, Minnesota's property tax statute is more like the statute in *Texaco*, which merely establishes the conditions under which a property owner may retain that interest. 524 U.S. at 162, 171; *cf. Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155 (1980) (finding unconstitutional a state statute that "deemed" a well-established property right out of existence).

IV. Petitioner's Rule Would Hinder States' Ability to Address Abandoned and Blighted Properties.

Property taxes are a vital aspect of local taxation, accounting for 72 percent of local-government revenues. 1 Hellerstein & Hellerstein, *State Taxation* § 1.02. The Court should not fashion a new constitutional rule on the basis of sympathetic facts and an underdeveloped record, much less a rule that would compromise States' abilities to establish and administer vital property-tax systems. Such systems not only fund a host of local-government programs but also allow States to regulate nuisance properties and return those properties to productive use. Although no federal or state entity collects and compiles data on tax forfeitures in all jurisdictions,[3] information from a sampling of Minnesota counties paints a more accurate picture of the typical tax forfeiture than Petitioner's situation. These examples illustrate the economics of the forfeiture process for the government and highlight the need

[3] Petitioner holds out an article by her counsel as a complete national study of tax-forfeited property. Pet. Br. 7. The appendix to that article makes clear the article surveyed only the 13 States that it attacks as allowing "equity theft." Even within those States, the authors acknowledge their "limited [ ] ability to create a comprehensive dataset," and that the data they collected "cannot be extrapolated to the whole state." Pac. Legal Found., *Appendix: The Data*, *End Home Equity Theft*, https://perma.cc/UYP4-2F7Z (last visited Mar. 28, 2023). In Minnesota, for example, it appears only 12 of 87 counties were analyzed. *Id.* Further, the article relied on a "multiplier" to estimate the amount a homeowner needed to pay to redeem the property, and algorithms to estimate home values. *Id.*

to incentivize private care and maintenance of property.

Hennepin County is the most populous of Minnesota's 87 counties.[4] There, an average of just 77 parcels forfeit each year out of 440,516 total parcels.[5] Of those forfeited parcels, roughly one-third are vacant land, with no commercial or residential structure. In Ramsey County, Minnesota's second most-populous county, the last two auctions of tax-forfeited property show the vast majority are vacant land (7 of 10 properties auctioned in 2020, and 11 of 15 auctioned in 2019).[6]

Although structures are not common on tax-forfeited property, when structures are present they are often in severe disrepair. A residential example is the house at 420 North 22nd Avenue West in Duluth, Minnesota. (Duluth is Minnesota's fifth most-populous city and is located on the shore of Lake Superior.) The following photo was taken at that property in December 2018.

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[4] *Population*, Office of the Minn. Sec'y of State, https://perma.cc/ED8V-9B6Z (last visited Mar. 29, 2023).

[5] Daniel Rogan, *Tax Forfeiture in Hennepin County* 1–2 (2023), https://perma.cc/7GTC-HNFH.

[6] *Tax-Forfeited Public Sales*, Ramsey Cnty., https://perma.cc/WF5W-88GQ (last visited Mar. 29, 2023).

This home is in a dense middle-class neighborhood. But the forfeiting property owners had allowed the home to develop large holes in its soffit and fascia, as well as pigeon and rodent infestations.[7] The home had been condemned by the city for code violations, and the police and fire department had been called to the property multiple times. It was full of abandoned personal property and became a dumping ground for appliances and mattresses. The forfeiting owners owed

[7] Saint Louis Cnty. Land & Mins. Dep't, Parcel-Project Descriptions 1, 6–7 (2023), https://perma.cc/5UTW-KA66.

$11,289 in property taxes at the time of forfeiture. Saint Louis County spent $24,956 to clean out and demolish the structure and then sold the land for $4,700, its estimated market value.[8]

A commercial example comes from an abandoned building in a small town on Minnesota's Iron Range. 14 North Broadway Street in Gilbert, Minnesota, is a main street building that once housed the local newspaper. No doubt due to the decline of both the mining industry and local newspapers, the building was abandoned. The roof stood open to the elements for years, leading to water damage, mold and mildew growth, and heaving of the foundation slab. The building contained an industrial-size printing press, office equipment, and many other personal effects that had to be removed. The forfeiting property owner owed $7,742 in taxes at the time of forfeiture, and Saint Louis County spent over $24,000 to clean out and demolish the property before selling the land for $2,475.[9]

These are not isolated examples. Local officials charged with managing tax-forfeiture programs speak of buildings packed full of personal property after being abandoned by people with hoarding disorder and condemned by cities, homes of deceased individuals whose beneficiaries will not take responsibility for the

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[8] *Id.* at 1.

[9] *Id.* at 1, 16–17. Clean out of commercial property can be many times more expensive; an abandoned gas station in the City of Calumet has cost the State of Minnesota over a million dollars to clean up. *See* Itasca Cnty. Land Dep't, PID/Property Descriptions 1 (2023), https://perma.cc/3BCJ-UBZT.

property, and properties with repairs so expensive that it is more efficient for owners to simply abandon the building.[10]

Abandoned properties are not merely an eyesore. They foment crime, risk neighbors' health, and reduce nearby property value, all circumstances that contribute to disinvestment in the community. *See* John Accordino and Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. of Urb. Affs. 301, 302–03 (2000). One mayor reported that 41% of fires in his city were in abandoned buildings and 90% of arson happened in abandoned homes.[11] Those abandoned buildings were also being used as drug dens or places to stash guns and other contraband. *Id.* Abandoned properties lower the economic health and welfare of entire communities. The true cost of abandonment to a community cannot be measured merely by the equity differential on a single property.

Local taxing authorities do not receive any financial windfall from the work they do rehabilitating properties and neighborhoods. Managing abandoned properties is expensive, necessitating costs for snow removal, lawn care, debris removal, inspections, maintenance, and policing for every property on which the State holds title. All the while, no taxes are being recovered. Instead, just as Hennepin County reports a

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[10] *See generally* Jackie Smith, *Treasurers: Counties Not "Cherry-Picking" Foreclosures for Profit*, Times Herald (Feb. 9, 2018, 1:06 P.M.), https://perma.cc/9VKP-U2SN.

[11] Ken Belson, *Vacant Houses, Scourge of a Beaten-Down Buffalo*, N.Y. Times (Sept. 13, 2007), https://perma.cc/XV5C-GMJ7.

net loss, so do other Minnesota counties.[12] And where the taxes owed are greater than the value of the property, Minnesota's tax-foreclosure statute operates to wipe out the property owners' tax debt, with no further recourse for the government.

It is the government's obligation to be the property owner of last resort. The government has a duty to accept ramshackle buildings and abandoned properties and to turn those properties back to productive use, thereby stemming any broader effects on the community. Yet a finding that the government must pay property owners who stop paying their taxes and elect not to sell their properties themselves would dramatically increase the burden on communities of all sizes.

One reason the government's burden would increase under Petitioner's proposed rule is the unaddressed issue of mortgages. Petitioner's brief appears to claim the difference between the sale price of her condo at auction and her obligation to the county as a taking.[13] Pet. Br. 3, 8, 24. But most homeowners

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[12] *See Rogan*, *supra* note 5, at 3 (noting that the "cost of uncollected taxes along with the cost of administering Minnesota's tax forfeiture laws exceeds the revenues associated with tax forfeited parcels"); *see also Smith*, *supra* note 10 (reporting on foreclosures in two counties in Michigan and noting both counties also experience a net loss in revenue). Every Minnesota county that the Minnesota Attorney General contacted confirmed that they also receive less revenue from tax-forfeited property than they spend administering the program and rehabilitating abandoned properties.

[13] A search of the public property records reflects that in 2015, when the redemption period ended, Petitioner's former property was subject to a $48,750 mortgage (recorded in 2003)

also have mortgages, with banks having recorded interests in the property. Petitioner offers the Court no suggestion how to address that debt.[14] Is it a constitutional taking anytime the sale price exceeds the tax obligation, even if the remaining debt on a mortgage would wipe out that faux surplus? Such a rule would encourage property owners who cannot afford their mortgages to use tax forfeiture as a way to wipe out their mortgage debt while still obtaining a government check based on the value of their property once it is sold. Those incentives are unfair to lenders as well as government entities.

The upheaval in the housing market would be even more drastic under the proposal of the United States, which argues that a constitutional taking happens at the moment a State takes "absolute title," before the subject property is even sold. Br. of *Amicus Curiae* United States at 14. That rule, which also disregards the existence of any mortgages, would incentivize any owner whose property has market value and who wants to increase their liquidity to simply stop paying taxes, forfeit their property to the government, and demand a check immediately at the close of the redemption period. At that point, the proposed rule

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and liens of at least $11,660 for unpaid condominium dues (recorded in 2014). The public property records are available through a record search here: https://www.hennepin.us/residents/property/real-estate-document-copies-and-research (last visited April 3, 2023). With the sale price of $40,000, it is far from certain Petitioner had any true equity in the property in 2015.

[14] All private liens are extinguished when property forfeits to the State in Minnesota. Minn. Stat. § 281.18.

would obligate the local government to pay what could be hundreds of thousands of dollars, after the government was deprived of years of property taxes and before it even receives any income from selling the forfeited property.[15] The impact would be even more absurd when considering the vast quantities of vacant land forfeited to the States.[16] In many instances, the States choose to turn forfeited land into recreational areas or nature preserves,[17] but the United States' rule would obligate a State to pay the forfeiting owner for the market value of the property even in instances where it will never be sold or generate any income. The States are not made of money; such a system is unworkable.

In addition to creating these perverse incentives that would destabilize the real estate market, Petitioner's rule would be expensive to administer and lead to increased litigation. Local governments would be required to introduce complicated new tracking systems, so that every time a lawn is mowed or sidewalk

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[15] This hypothetical would also lead to efforts by lenders to recover their losses by suing the forfeiting owners in court, burdening a second branch of state government.

[16] Minnesota's county with the largest acreage, Saint Louis County, currently "manages just under 900,000 acres of tax forfeit rural land and 13,000 urban parcels." *Tax Forfeiture*, Saint Louis Cnty. Minn., https://perma.cc/76VE-CR9L (last visited Mar. 29, 2023).

[17] For example, Saint Louis County classifies some land as conservation parcels at the time of forfeiture, and those are retained for resource management and made available to the public for hunting, fishing, and camping. *Id.*

shoveled, that cost could eventually show up on the government's side of the ledger. There would be a new round of disputes about the true market value of the property forfeited, and whether the government is marketing its auctions sufficiently, or setting appropriate bid minimums, or selling when the real estate market is robust enough.

V. Petitioner's Rule Would Result in Unintended Consequences.

The Court should also reject Petitioner's theory because it may transform forfeiture of other types of property interests into takings. As noted above, the core of Petitioner's theory appears to be that the government engages in a taking any time it acquires absolute title to property that exceeds the value of a tax debt. *See* Pet. Br. 23–24. The United States expressly adopts this view. *See* Br. of *Amicus Curiae* United States at 13–14, 23–24. If the Court endorses this theory, its decision will sweep in other types of property interests that are subject to taxation—and potential forfeiture—for nonpayment.

Take severed mineral interests, which were the focus of *Texaco*. In Minnesota and elsewhere, a severed mineral interest is "a type of estate in real property—the owner of the estate owns an interest in the minerals produced from the property but does not own the surface of the property." *St. Louis Cnty. v. Fed. Land Bank of St. Paul*, 338 N.W.2d 741, 742 (Minn. 1983). Severed mineral interests "exist in much of Minnesota and are especially common in northeastern Minnesota." *Id.* Indeed, northern Minnesota contains some of the largest iron-ore, taconite and, copper-nickel deposits in the world, as well as deposits of manganese and titanium. *See Mining in Minnesota*, Minn. Dep't of Nat. Res., https://perma.cc/CWQ7-8ZYP (last visited Mar. 17, 2023).

Severed mineral interests "do[] not forfeit if the overlying surface interest forfeits for nonpayment of taxes due on the surface interest." Minn. Stat. § 272.039 (citing *Washburn v. Gregory*, 147 N.W. 706 (Minn. 1914)). Instead, severed mineral interests must be separately taxed and assessed. *Id.* But those interests are notoriously difficult to value. *Id.* So, Minnesota has adopted a flat, per-acre tax on such interests. *See* Minn. Stat. § 272.04, subd. 1; Minn. Stat. § 273.165, subd. 1. If an owner fails to pay the tax, then the interest is subject to forfeiture, with absolute title for the interest vesting in the State at the end of the redemption period. *See* Minn. Stat. § 272.04, subd. 1 ("All laws for the enforcement of taxes on real estate apply to such interest."); *see also* Minn. Dep't of Rev., *Mining Tax Guide* 32–33 (2022), https://perma.cc/5Z43-2ATN (explaining that penalty for not paying the tax is forfeiture); Itasca County, *Itasca County 2023 Delinquent Tax List*, Scenic Range News F., Mar. 16, 2023, at 17–18 (listing severed mineral interests on delinquent tax list).

Under Petitioner's theory, the government would be on the hook for the fair market value of the forfeited mineral interest, less the tax debt. That would be true even though Minnesota's Constitution prohibits the State from selling severed mineral interests, such that no "surplus" from a sale would ever be generated.[18] *See* Minn. Const. art. XI § 10 ("The state shall reserve all mineral and water power rights in lands transferred by the state."). Nor would the value of any forfeited interests be ascertainable absent costly, expert-intensive litigation.

To be sure, the Court's decision in *Texaco* upheld Indiana's mineral-forfeiture scheme. *See* 454 U.S. at 518; Point III, *supra* at 11–12. But a decision in favor of Petitioner would cast the viability of *Texaco* into doubt and open new fronts in taxes-as-takings litigation. The Court should avoid that result and reinforce the States' power to enact reasonable taxation schemes within the reliable boundaries of due process.

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[18] Minnesota is permitted to lease mineral interests that it owns. *See* Minn. Stat. §§ 93.14–93.42. But it cannot sell them. Minn. Const. art. XI § 10.

CONCLUSION

In order to preserve the States' sovereign authority to tax and to define property rights, the decision of the Eighth Circuit should be affirmed.

Respectfully submitted,

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April 4, 2023

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