No. ____

In The
Supreme Court of the United States

SANDRA K. NIEVEEN,

Petitioner,

v.

TAX 106, a Nebraska general partnership, VINTAGE MANAGEMENT, LLC, a Nebraska limited liability company, RACHEL GARVER, Lancaster County Treasurer, in her official capacity, LANCASTER COUNTY, a political subdivision in the State of Nebraska, and DOUGLAS J. PETERSON, Attorney General of the State of Nebraska, in his official capacity,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

DEBORAH J. LA FETRA
Counsel of Record
CHRISTINA M. MARTIN
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
DLaFetra@pacificlegal.org

Counsel for Petitioner (additional counsel inside cover)

CAITLIN CEDFELDT
JENNIFER GAUGHAN
MARK T. BESTUL
Legal Aid of Nebraska
209 South 19th Street, Suite 200
Omaha, Nebraska 68102
Telephone: (308) 632-4734

QUESTIONS PRESENTED

Under Nebraska's tax sale scheme, the state stole the full value of Sandra K. Nieveen's home by allowing a private investor to take title after paying Nieveen's back taxes and penalties. Nieveen, an elderly woman who suffers from physical and mental disabilities, owed $3,796; her home was worth $61,900. The Nebraska Supreme Court summarily rejected Nieveen's claims under the Takings Clause and Excessive Fines Clause under the analysis in *Continental Resources v. Fair*, 311 Neb. 184 (2022). A petition for writ of certiorari in *Fair* is pending before this Court, docket no. 22-160, and the questions presented in this case are identical:

1. Does the government violate the Takings Clause when it confiscates property worth more than the debt owed by the owner?

2. Does the forfeiture of far more property than needed to satisfy a delinquent tax debt plus interest, penalties, and costs constitute an excessive fine within the meaning of the Eighth Amendment?

LIST OF ALL PARTIES

Petitioner Sandra K. Nieveen was the appellant in the Nebraska Supreme Court and Nebraska Court of Appeals and the plaintiff in the trial court.

Respondents are TAX 106, a Nebraska general partnership; Vintage Management, LLC, a Nebraska limited liability company; Rachel Garver, Lancaster County Treasurer, in her official capacity; Lancaster County, a political subdivision of the State of Nebraska; and Douglas J. Peterson, Attorney General of the State of Nebraska, in his official capacity. All were named defendants in the trial court and appellees in the Nebraska Court of Appeals and Nebraska Supreme Court.

STATEMENT OF RELATED PROCEEDINGS

Nieveen v. TAX 106, et al., case no. S-21-364. Nebraska Supreme Court opinion filed May 13, 2022, affirming the decision of the Nebraska District Court for Lancaster County.

Nieveen v. TAX 106, et al., case no. A 21-364, transferred to the Nebraska Supreme Court before decision, Sept. 7, 2021.

Nieveen v. TAX 106, et al., case no. CI19-1433 (Neb. Dist. Ct. Lancaster County), Opinion and Order filed April 1, 2021, granting Defendants' Motion for Summary Judgment.

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PETITION FOR A WRIT OF CERTIORARI

Sandra K. Nieveen respectfully petitions for a writ of certiorari to review the judgment of the Nebraska Supreme Court.

OPINIONS BELOW

The opinion of the Nebraska Supreme Court is published at 311 Neb. 574 (2022), reprinted in the Petitioner's Appendix (App.) at 1a. The trial court's order granting defendants' motion to dismiss federal claims is dated December 4, 2019, is unpublished, and reprinted at App.23a. The Nebraska Supreme Court's order denying the motion for rehearing on June 22, 2022, is reprinted at App.58a.

JURISDICTION

The judgment of the Nebraska Supreme Court was entered on May 13, 2022. App.1a. Petitioner's petition for rehearing was denied on June 22, 2022. Pursuant to Rule 13.1, this Petition is timely. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

The Fifth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Eighth Amendment to the U.S. Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall

any State deprive any person of life, liberty, or property, without due process of law[.]"

Excerpts of the relevant statutes in effect at the time of the foreclosure, Neb. Rev. Stat. 77-1801, 77-1806, 77-1807(2)(a)-(c),(f), 77-1808, 77-1814, 77-1818, 77-1824, 77-1831, 77-1837, and 77-1838, are reprinted at App.60a.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

The Lancaster, Nebraska, county treasurer granted a private investor absolute title to Sandra Nieveen's $62,000 home that she owned outright, including $58,500 in equity above and beyond the tax debt, penalties, 14% interest, and costs she owed. App.24a–25a. Nieveen sued, arguing that the confiscation of her entire home was a taking without just compensation and a taking for the primary benefit of a private investor, not any public use. App.21a. She also claimed, alternatively, that the confiscation of her home was primarily to punish her for not promptly paying her taxes and thereby violates the Excessive Fines Clause. *Id.* In resolving Nieveen's claims, the court below adopted in full its analysis and decision in *Continental Resources v. Fair*, 311 Neb. 184 (2022), *pet. for cert.*, docket no. 22-160 (filed Aug. 18, 2022). App.21a–22a. Like *Fair*, this Petition urges the Court to grant certiorari to address whether government takes private property without just compensation when it forecloses on the entire value of a property for a much smaller tax debt. Under the Nebraska tax deed scheme, Neb. Rev. Stat. § 77-1801, *et seq.*, real property of *any* value—even $10 million—can be wholly transferred to a private investor who pays *any* amount of delinquent taxes—even a single

dollar. The failure to return to the property owner the equity in the property remaining after the debts and related costs and interest are paid constitutes a taking without just compensation.[1]

Alternatively, Nebraska confiscated Nieveen's $62,000 home because she failed to pay a $3,800 debt, a punitive confiscation of property worth *sixteen* times the amount owed. This Court should determine whether this $58,000 penalty falls within the definition of a "fine" as that term is used in the Excessive Fines Clause of the Eighth Amendment. The court below again relied solely on its analysis and decision in *Fair* to rule against Nieveen's Excessive Fines claim. App.22a.[2]

For these reasons, Ms. Nieveen asks this Court to grant both this petition and the petition in *Fair v. Continental Resources* to address the severe injustice wrought by home equity theft.

STATEMENT OF THE CASE

A. Lancaster County and TAX 106 confiscate Nieveen's $62,000 property for a $3,800 tax debt

Petitioner Sandra K. Nieveen has lived at 3526 Garfield Street, in Lincoln, Nebraska, since 1977.

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[1] The beneficiary of Nieveen's home equity beyond the tax debt and related costs is not the state but a private investor that turned a 1,631% windfall profit on this property alone, implicating the public use clause of the Fifth Amendment as well as the requirement of just compensation. *Calder v. Bull*, 3 U.S. 386, 388 (1798).

[2] The questions presented here concerning the Just Compensation and Excessive Fines Clauses are also presented in the Petition for Writ of Certiorari in *Tyler v. Hennepin County*, docket no. 22-166 (filed Aug. 19, 2022).

App.66a. Her modest home is an 884 square foot house built in 1925. While able to live independently, Nieveen—now 74 years old—has long suffered from clinically diagnosed depression and anxiety. App.67a. In 2013, she fell behind in her property taxes and, two years later, Respondent TAX 106, a private company, purchased the county's tax certificate at a tax sale for $2,390.48, the amount of delinquent taxes covering 2013 and 2014. Without any notice to Nieveen from the county or TAX 106, the investor subsequently paid Nieveen's delinquent property taxes for 2015, an additional $1,405.90. App.4a. As permitted by Neb. Rev. Stat. § 77-1831 at the time of the foreclosure, Nieveen remained unaware that any of this was occurring until "three months and 45 days" before the county would transfer title to TAX 106. App.28a, 63a.

On March 2, 2018, TAX 106 finally notified Nieveen that she would lose title to her home unless she paid all accumulated taxes, penalties, three years' worth of interest that accrued at 14% per annum, and costs by July 17, 2018. App.24a, 68a. A month prior to the deadline, on June 20, 2018, TAX 106 assigned the tax certificate for Nieveen's home to Vintage Management, LLC.[3] App.4a. Two days later, Vintage Management applied for a tax deed to take full title to Nieveen's home. App.4a, 24a. The county treasurer promptly issued the tax deed to Vintage Management, which had spent a grand total of $3,796.38 to acquire full title to a property that the County assessed as

[3] For simplicity's sake, Petitioner refers to both TAX 106 and Vintage Management as TAX 106 unless specific facts warrant greater precision.

worth $61,900. *Id.*[4] The county recorded the deed on July 5, 2018. *Id.* Nieveen attempted to tender payment of the back taxes, interests, and costs to the county Treasurer's office on May 6, 2019, but her offer was refused because she was no longer the owner listed on the title and no taxes currently were due. *Nieveen v. TAX 106*, No. CI19-1433, Annotated Statements of Disputed Facts at 1 (filed May 15, 2020). Nieveen currently resides in her home solely because the Nebraska Supreme Court has stayed its judgment confirming that Vintage Management owns the home and may evict her. App.58a.

B. Legal proceedings

Proceeding *in forma pauperis*, with the assistance of Legal Aid of Nebraska, Nieveen sued TAX 106, Vintage Management, county officials, and the Nebraska Attorney General. App.65a–66a. She sued on several grounds, including the federal constitutional claim that the state's tax sale scheme that does not return surplus value of her foreclosed home effectively took her property without just compensation and took her property for private use and, alternatively, that the taking of her home should be construed as a penalty levied in violation of the Excessive Fines Clause. App.72a–76a, 78a–79a. Regardless of how much equity a property owner has in his or her property, or how small the tax deficiency owed to a county, state statutes provide that the

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[4] Respondent Vintage Management believed Nieveen's home to be even more valuable: $133,000. App.69a. Zillow estimates the current value of the home at over $158,000. Zillow, *3526 Garfield St, Lincoln, NE 68506*, https://www.zillow.com/homes/3526-Garfield-St-Lincoln,-NE-68506_rb/6624846_zpid/ (visited Aug. 29, 2022).

county will take and transfer the property and all the equity in it to a private purchaser for the amount of the tax deficiency. Neb. Rev. Stat. § 77-1801, *et seq*.

All parties moved to dismiss, with the Attorney General also entering a limited appearance solely to defend the constitutionality of the foreclosure statutes.[5] Nieveen filed a motion for default judgment.[6] The trial court heard all motions at once, granted the Attorney General's motion to dismiss, and denied the others. *Nieveen v. TAX 106*, No. CI19-1433, Order (July 30, 2019).

On the merits of the motions to dismiss, the trial court addressed Nieveen's Fifth Amendment takings claim in an order dated December 4, 2019. App.23a. The court first noted that the Takings Clause in Nebraska's constitution is "coterminous" with federal law in that it generally does not apply to taxes. App.31a–32a (citing *Whipps Land & Cattle Co. v. Level 3 Comms., LLC*, 265 Neb. 472, 482 (2003)). Moreover, the court held that the Takings Clause is not even implicated when plaintiffs seek to recover excess proceeds after a tax sale. App.40a. The trial court considered that the relevant property could be the home itself, *id.*, although this musing did not change the result. This was the court's final ruling on the takings issue. The county subsequently

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[5] *Nieveen v. TAX 106*, No. CI19-1433, Mot. to Dismiss of Defendants Rachel Garver, *et al.* (June 18, 2019); *Nieveen v. TAX 106*, No. CI19-1433, Defendant Douglas J. Peterson's, Attorney General for the State of Nebraska, Mot. to Dismiss and Entry of Limited Appearance (June 28, 2019); *Nieveen v. TAX 106*, No. CI19-1433, Mot. to Dismiss of Defendants TAX 106, *et al.* (filed July 18, 2019).

[6] *Nieveen v. TAX 106*, No. CI19-1433, Mot. for Default Judgment (filed July 12, 2019).

successfully moved for summary judgment on other issues. *Nieveen v. TAX 106*, No. CI19-1433, Order on Motions for Summary Judgment (July 1, 2020) (holding that the county defendants had no further interest in Nieveen's former home once it transferred title to TAX 106 and Vintage Management and could therefore be dismissed from the lawsuit). After a trial on the last remaining issue of whether Nieveen's mental disabilities entitled her to an extended time to redeem the property, the trial court issued a final order rejecting her claim. *Nieveen v. TAX 106*, No. CI19-1433, Order (Apr. 1, 2021).

Nieveen appealed as to all issues on April 29, 2021, and filed a notice that the appellate proceedings involved the federal constitutional questions presented by this Petition. App.84a. Shortly thereafter, the Nebraska Supreme Court ordered the case moved from the Court of Appeals docket to its own docket. *Nieveen v. TAX 106*, No. S 21-364, Order (Sept. 7, 2021). On May 13, 2022, the Nebraska Supreme Court affirmed the dismissal of Nieveen's constitutional claims. App.2a. The court rejected Nieveen's takings claim in a single paragraph:

> Nieveen also challenges the district court's dismissal of her claim that the issuance of the tax deed violated the Takings Clauses of the U.S. and Nebraska Constitutions. In support of these claims, Nieveen alleged in her operative complaint that by issuing the tax deed to Vintage, Lancaster County effectuated a taking of her property for a private purpose. Alternatively, Nieveen alleged in her operative complaint that even if the issuance of the tax deed was for

> a public purpose, she was entitled to just compensation because her equity in the real property exceeded her tax debt. Again, however, we recently rejected identical arguments in *Continental Resources v. Fair*, 311 Neb. 184, 971 N.W.2d 313 (2022). In light of that decision, Nieveen cannot show the district court erred by dismissing her claims under the Takings Clauses.

App.21a.

The court similarly rejected Nieveen's Excessive Fines claim, also based entirely on *Fair*. App.22a.

Nieveen sought rehearing and asked the court to stay its mandate pending further legal proceedings. The Nebraska Supreme Court denied rehearing on June 22, 2022, App.53a, and stayed the mandate a week later, App.58a, pending the result of this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. NEBRASKA'S CONFISCATION OF SURPLUS EQUITY TO SATISFY TAX DEBTS CONFLICTS WITH OUR CONSTITUTIONAL HISTORY AND TRADITION AND TAKES PROPERTY IN CONFLICT WITH DECISIONS OF THIS AND OTHER COURTS

The Fifth Amendment requires the government to pay just compensation when it takes private property for a public use. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071 (2021). The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and

justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Government may seize private property for the public purpose of recovering delinquent taxes, but when it takes *more than it is owed*, it must pay just compensation. *See, e.g.*, *Bogie v. Town of Barnet*, 270 A.2d 898, 900, 903 (Vt. 1970). *See Citizens' Sav. & Loan Ass'n v. Topeka*, 87 U.S. 655, 664 (1874); *United States v. Lawton*, 110 U.S. 146, 150 (1884); Thomas M. Cooley, *A Treatise on the Law of Taxation* 343 (1876) (tax collector's power to seize and sell is "exhausted the moment the tax was collected").

Here, Lancaster County took Nieveen's $62,000 home as payment for a $3,800 debt and gave it to TAX 106. Under the Nebraska Supreme Court's reasoning, even the smallest debt entitles government to seize real estate and confiscate its entire value, including the debtor's equity. This violates traditional rights historically protected in this nation, the fairness and justice embodied by the Takings Clause, and takings principles established by this Court.

A well-documented history of tax collection in the United States and England confirm that debtors have a discrete private property interest in the equity of property taken to pay a tax. *See infra* Section I.A. *Cf. Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2428 (2022) (interpreting Establishment Clause based on "historical practices and understandings") (citation omitted); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2130 (2022) (interpreting Second Amendment in light of "the Nation's historical tradition of firearm regulation"). This Court's takings decisions show that a property interest does not simply "vanish[] into thin air" because the

government has a "paramount lien" in the property. *Armstrong*, 364 U.S. at 44–45, 48. Nor can the government "'by *ipse dixit* . . . transform private property into public property without compensation' simply by legislatively abrogating the traditional rule." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

Despite this Court's decisions recognizing that debtors retain ownership of the surplus value of property taken in debt collection, federal and state courts conflict about whether government may confiscate more than it is owed when collecting a debt. The split arises primarily from this Court's dicta in *Nelson v. City of New York*, 352 U.S. 103 (1956). Confusion about *Nelson* will persist and individuals in some jurisdictions will have no recourse to vindicate their constitutional rights unless this Court grants the petition and settles the issue.

A. Taking more property than necessary to pay a tax debt violates deeply rooted property rights

A debtor's property right in the surplus value—i.e., equity—of property seized to pay a debt is deeply rooted in this nation's history and tradition. *See, e.g.*, William Sharp McKechnie, *Magna Carta, A Commentary on the Great Charter of King John*, 322–23 (2d ed. 1914) (Magna Carta limited how much property could be taken to satisfy a debt). While government may seize property to collect a tax, *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 281 (1855), it exceeds its legitimate authority when it takes more than what is owed. *E.g.*, *Tiernan v. Wilson*, 6 Johns. Ch. 411, 414 (N.Y. Ch. 1822);

Cooley, *supra* at 343; Henry Black, *Treatise on Tax Titles* § 157 (1888).

Consequently, under the common law, debtors are entitled to recover the equity value of property seized to pay their debt. "Equity" is the value of property that exceeds encumbering liens. *Crane v. Comm'r*, 331 U.S. 1, 7 (1947). Because equity transforms from an intangible property interest to cash when property is sold, "[a]ny surplus remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner." 72 Am. Jur. 2d *State and Local Taxation* § 911 (1974). This is consistent with English law, as Blackstone explained: officials that seize property for delinquent taxes "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." 2 William Blackstone, *Commentaries on The Laws of England* *452.

From the founding through adoption of the Fourteenth Amendment, which extended the Takings Clause protections against the states,[7] government broadly understood that the taxing power justified taking only as much as was owed. *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429, 462–67 (2020) (tracing the long consistent history of this protection). To protect a debtor-owner's equity interest, states either sold tax-delinquent property to the highest offer and refunded the surplus to the former owner, or took only as much property as needed to satisfy the debt. *Id.*; *Douglas v. Roper*, No. 1200503, __ So. 3d __, 2022 WL

[7] *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (just compensation was the first right in the Bill of Rights "incorporated" against states under the Fourteenth Amendment).

2286417, at *12 (Ala. June 24, 2022); *Martin v. Snowden*, 59 Va. 100, 136 (1868), *aff'd on other grounds sub nom. Bennett v. Hunter*, 76 U.S. 326 (1869) (tracing history of tax collection from England, through the founding, and up to that time); *Tiernan*, 6 Johns. Ch. at 414 ("The proposition is not to be disputed, that a Sheriff ought not to sell, at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand . . . ."); *Stead's Ex'rs v. Course*, 8 U.S. 403, 414 (1808) ("if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority"); *Cooley*, *supra* at 343 (all jurisdictions protected debtors' interests in one of these manners).

When tax collectors seized more than necessary or kept a windfall from the sale of the property, debtors could bring actions in trespass or conversion or otherwise seek to void the sale. For example, in *Seekins v. Goodale*, 61 Me. 400, 400 (1873), a tax collector who seized and sold more cloth than necessary to pay a debt was liable for trespass and had to pay fair market value to the debtor for the extra cloth that he sold. *See also Cone v. Forest*, 126 Mass. 97, 101 (1879) (tax collector liable for conversion); *Stover v. Boswell's Heirs*, 33 Ky. 232, 235 (1835) ("statutes authorizing the sale of land under execution, which are in derogation of the common law, do not authorize the officer to sell more land than is sufficient to satisfy the execution"). State courts historically rejected attempts to forfeit more property than necessary or to take a windfall at the expense of a debtor, finding such confiscations to be

unconstitutional as uncompensated takings or violations of due process. *Martin*, 59 Va. at 142–43 (government's confiscation of land worth more than a tax debt violates traditional notions of due process of law); *Baker v. Kelley*, 11 Minn. 480, 499 (1866) (statute authorizing forfeiture of land for delinquent taxes would "overstep[]" constitutional limits).

Mississippi's high court vociferously rejected "the power to appropriate a man's whole estate for default in the payment of a few dollars tax by a simple act of legislation." *See Griffin v. Mixon*, 38 Miss. 424, 436–37 (1860), relying on *Wilkinson v. Leland*, 27 U.S. 627 (1829). *Griffin* held that the state compounded the constitutional injury by transferring the confiscated property to a private individual, a power that "[e]ven Hobbes, the most ingenious of all the advocates of despotic power, does not claim." 38 Miss. at 438. *See also King v. Hatfield*, 130 F. 564, 579 (C.C.D. W. Va. 1900) (because statute lacked "provision for a sale thereof and the return of the proceeds" was unconstitutional taking for a private use). The state's power to collect taxes cannot override a property owner's interest in his property that exceeds the amount of a tax debt. As this Court declared in *Loan Ass'n v. Topeka*, 87 U.S. at 664:

> To lay with one hand the power of the government on the property of the citizens and with the other to bestow it upon favored individuals . . . is none the less robbery because done under the forms of law and called "taxation." This is not legislation. It is a decree under legislative forms. Nor is it taxation.

Nebraska followed the common law tradition, protecting debtors' property interest in their equity when government seizes property for delinquent taxes. *See, e.g.*, *Lancaster Cnty. v. Trimble*, 34 Neb. 752, 756 (1892) ("the land may be sold as upon foreclosure of a mortgage, the surplus in excess of taxes due going to [the landowner]"); *Delatour v. Wendt*, 93 Neb. 175, 139 N.W. 1023, 1024 (1913) (former owner had the right to claim $90.48 in surplus proceeds from tax sale). The *Fair* decision on which the court below relied was dismissive of the notion that property owners have a right "to receive compensation if the value of the property transferred to a tax certificate holder exceeded the tax debt." *See Fair*, 311 Neb. at 201. But Nebraska's early laws—including the 1879 statute relied upon by the Nebraska Supreme Court to argue that the law has not meaningfully changed since its founding—required competitive sales of property for either the highest price or smallest piece of the whole. *See, e.g.*, Ann. Stat. Neb. Ch. 105, § 121 (1881) (party offering to purchase "smallest portion" of "any parcel of land" for the amount of taxes due is entitled to a tax certificate); *Gillian v. McDowell*, 66 Neb. 814, 92 N.W. 991, 992 (1902) (tax foreclosure also did not extinguish other lienholders' interest in the surplus proceeds). Nebraska's courts—like this Court—voided tax sales where the treasurer failed to solicit competitive bidding to protect debtors' property rights. *See, e.g.*, *State ex rel. Snow v. Farney*, 36 Neb. 537, 544–45 (1893); *Bd. of Comm'rs of Richardson Cnty. v. Miles*, 7 Neb. 118, 123 (1878) ("The object of the law is to raise revenue, and at the same time protect, as far as possible, the rights of the owner of the land by inviting competition at the sale."); *Slater v. Maxwell*, 73 U.S.

268, 276 (1867) (sale of delinquent property marked with "unfairness" should be "set aside, or the purchaser be required to hold the title in trust for the owner" to protect the debtor's interest in receiving fair payment for the property).

While this Court has not decided whether a legislature can extinguish without compensation a debtor's right in the equity he holds in real property, it has repeatedly resisted federal attempts to do so. In *Bennett*, 76 U.S. at 335, 337, the Court considered the constitutionality of a Civil War-era property tax on landowners that was partly aimed at "suppress[ing] rebellion" in Confederate states and was applied to forfeit title and all equity in tax-delinquent property. This Court avoided the constitutional question by interpreting the statute's term "forfeit" to avoid such a harsh result, allowing the debtor to redeem the property for taxes due plus costs at least up until sale to a third party. *Id.*

Then in *United States v. Taylor*, 104 U.S. 216, 219 (1881), the Court further interpreted the same congressional act to require the government to follow the traditional duty of refunding surplus proceeds when land was taken to pay tax debts. Relying on *Bennett*, the Court noted that the law "was not a confiscation act," and therefore the former owner was entitled to the surplus proceeds. *Id.* at 220–21. Moreover, the statute of limitations did not bar the claim because a "good faith" construction of the statute requires the government to act as trustee in selling the property and holding the funds for the former owner indefinitely. *Id.* at 221–22.

Lastly, building upon *Bennett* and *Taylor*, this Court held in *United States v. Lawton* that "[t]o

withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and . . . take his property for public use without just compensation." 110 U.S. at 150. Later, in *Nelson*, this Court noted that *Lawton* did not answer the constitutional question of whether withholding surplus proceeds effects a taking because the statute in *Lawton* required a return of the surplus. *Nelson*, 352 U.S. at 110. Nevertheless, *Bennett*, *Taylor*, and *Lawton* affirmed that debtors have a protected property interest in their equity and rejected government attempts to confiscate it.

B. Confiscating a $62,000 house as payment for a $3,800 debt conflicts with this Court's takings decisions

The court below refuses to recognize home equity as an established property interest, App.19a, relying on *Fair*, 311 Neb. at 201. Yet, conceptually, home equity is no different than money, liens, mortgages, and interest on money, none of which may be taken without just compensation. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 601–02 (1935) (Takings Clause protects "substantive rights in specific property," including the right to collect on a debt in a timely manner by seizing and selling that property); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013) (Takings Clause protects money and "a right to receive money that is secured by a particular piece of property"); *Phillips*, 524 U.S. at 168 (accrued interest); *Armstrong*, 364 U.S. at 48 (liens). *Cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54 (1993) ("exploitable economic value of Good's home" is a "significant" property interest protected by due process).

Nebraska law commonly recognizes home equity as private property. For example, Neb. Rev. Stat. § 40-101 provides a homestead exemption of up to $60,000 in real property, an amount determined based on the claimant's equity interest above the mortgages and other valid liens. *See, e.g.*, *Hoy v. Anderson*, 39 Neb. 386, 388 (1894); *Mundt v. Hagedorn*, 49 Neb. 409, 412 (1896). *See also* Neb. Rev. Stat. § 25-1540 (on execution of judgment, surplus returned); *Millatmal v. Millatmal*, 272 Neb. 452, 460–61 (2006) (equity value of marital home weighed when determining the value of the marital estate). Moreover, when a tax lienholder pursues a judicial foreclosure instead of an administrative foreclosure (like that at issue in this case), the property is sold to the highest bidder and the surplus paid over to the former owner. Neb. Rev. Stat. § 77-1916.

Equity stands in for, and is equivalent to, the real property itself. *See Timm v. Dewsnup*, 86 P.3d 699, 703 (Utah 2003) (equity stands in place of the foreclosed property, subject to the same liens and interests that were attached to the land); *Grand Teton Mountain Invs., LLC v. Beach Props., LLC*, 385 S.W.3d 499, 502–03 (Mo. Ct. App. 2012) (same); *Brown v. Crookston Agr. Ass'n*, 34 Minn. 545, 546 (1886) ("the land is converted into money, and this fund being treated as a substitute for the mortgaged estate"). Thus, laws that purport to confiscate equity in tax-indebted properties via tax foreclosure violate the Takings Clause in the same way as if the real property itself is confiscated. *See Morris v. Glaser*, 106 N.J. Eq. 585, 151 A. 766, 771 (N.J. Ch. 1930), *aff'd mem.*, 110 N.J. Eq. 661, 160 A. 578 (N.J. Err. & App. 1932) (Surplus "usually arises because more land is sold . . . than is necessary to satisfy the mortgage debt

. . . . [T]he money stands for the land and the rights therein are determined as though the court were dealing with the land itself."). The Takings Clause will not permit such a state-authored transformation of a traditional private interest to public property. *Webb's*, 449 U.S. at 164.

The taking of Nieveen's equity interest in her home resembles the injustice condemned by this Court in *Armstrong*, 364 U.S. 40. In that case, a shipbuilder contracted by the United States defaulted on its obligation to build ships. The United States took title to the unfinished boats and materials, pursuant to contractual and common law rights, and refused to compensate the suppliers. *Id.* This refusal effected a taking because property rights in liens do not simply "vanish[] into thin air" when the government takes title to the subject property pursuant to a "paramount lien." *Id.* at 44–45, 48. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id.* The government could only take the underlying property subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id.* at 49. Like the liens in *Armstrong*, equity is a discrete and valuable financial interest in property worthy of compensation when taken.

Similarly, *Webb's* held that government violated the Takings Clause by keeping the interest earned on private funds deposited with a court. 449 U.S. at 164. The Court explained that the Takings Clause cannot be avoided by statutorily redefining private funds as public funds: "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as

'public money' because it is held temporarily by the court." Even while temporarily foregoing possession, the depositors retained their ownership of the principal property including the established right to interest generated by principal. *Id.* ("The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."). Government cannot "by *ipse dixit* . . . transform private property into public property without compensation." *Id.*

In *Phillips*, 524 U.S. at 167, the Court rejected Texas's attempt to abrogate the common law property interest that depositors had in accrued interest. Like Nieveen in this case, the Court relied on the common law in England, early America, and at least eighteen other states, which recognized that the depositors held a traditionally protected property right in accrued interest. *Id.* at 165 & n.5. The Court concluded that "at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests."

Despite *Armstrong*, *Webb's*, and *Phillips*, Nebraska and several other states extinguish the owner's equity and all private liens when foreclosing on tax-delinquent property. This Court should grant the petition to settle the deep and growing split among the lower courts about whether the Takings Clause prevents government from taking more than it is owed in taxes, penalties, interest, and costs.

C. Federal and state courts conflict about whether government must pay just compensation when it confiscates a windfall while collecting a tax debt

Consistent with tradition and this Court's takings decisions, the high courts of Michigan, Minnesota, Mississippi, New Hampshire, Vermont, and Virginia and federal district courts in Michigan, New York, Ohio, West Virginia, and the District of Columbia recognize takings claims when government forecloses on property to collect delinquent taxes or related debts and keeps more than it is owed. *Griffin*, 38 Miss. at 436–37 (uncompensated taking); *Martin*, 59 Va. at 142–43 (violates due process of law by taking more than owed); *Rafaeli*, 505 Mich. at 468 (violates Michigan's Takings Clause); *Proctor v. Saginaw Cnty. Bd. of Comm'rs*, No. 349557, 2022 WL 67248, at *13 (Mich. Ct. App. Jan. 6, 2022) (federal takings claim properly raised); *Bogie*, 270 A.2d at 900, 903 (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation"); *Thomas Tool Servs., Inc. v. Town of Croydon*, 145 N.H. 218, 200 (2000) (violates state constitution's Takings Clause); *Polonsky v. Bedford*, 173 N.H. 226, 227–28, 230–31 (2020) (taking of the equity in the property); *Baker*, 11 Minn. at 480; *King*, 130 F. at 579 (violates constitutional mandate that taking of private property must be for a public use); *Dorce v. City of New York*, No. 19-CV-2216, __ F.Supp.3d __, 2022 WL 2286381, at *12 (S.D.N.Y. June 24, 2022); *Tarrify Properties, LLC v. Cuyahoga Cnty.*, No. 1:19-CV-2293, 2021 WL 164217, at *3 (N.D. Ohio Jan. 19, 2021); *Pung v. Pickens*, No. 18-CV-1334 (W.D. Mich. Sept. 29, 2020); *Freed v. Thomas*, No. 17-CV-13519, 2021 WL 942077, at *4 (E.D. Mich. Feb. 26,

2021) (taking where government retained surplus proceeds from sale of tax-foreclosure); *Coleman through Bunn v. D.C.*, 70 F.Supp.3d 58, 80 (D.D.C. 2014) (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman through Bunn v. D.C.*, No. 13-1456, 2016 WL 10721865, at *2–3 (D.D.C. June 11, 2016) (D.C. law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits).

The state supreme courts of Indiana, North Dakota, Texas, and Alaska also criticize the idea that government could wholly extinguish equity or liens on tax-delinquent properties and have interpreted tax statutes to avoid the constitutional question. *Lake Cnty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004) (total confiscation would "produce severe unfairness" and likely violate the Takings Clause); *Shattuck v. Smith*, 69 N.W. 5, 12 (N.D. 1896) (statute would likely be unconstitutional "if [it] contained no provision that the surplus should go to the landowner"); *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191–92 (Tex. 1995), *as amended* (June 22, 1995) ("Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit."); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981) (refusing to interpret the law as confiscating the surplus). Similarly, the Sixth Circuit did not reach the merits in *Harrison v. Montgomery Cnty., Ohio*, 997 F.3d 643, 652 (6th Cir. 2021), but noted that when government takes excess property to satisfy a tax debt, the confiscation "implicates debates going back to the founding." Such takings claims "rest[] on the venerable proposition that 'a law that takes property from A. and gives it to B. . . . is against

all reason and justice.'" *Id.* (citing *Calder v. Bull*, 3 U.S. at 388).

Meanwhile, the Eighth Circuit and courts in Arizona, Illinois, Maine, Nebraska, Ohio, Oregon, New York, and Wisconsin hold that the government may take homes—no matter how valuable—as payment for even small property taxes or other municipal debts like water bills. *See, e.g.*, App.19a–20a; *Fair*, 311 Neb. at 201; *Tyler v. Hennepin Cnty.*, 26 F.4th 789, 793 (8th Cir. 2022); *City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Me. 1974); *Ritter v. Ross*, 207 Wis.2d 476, 485 (1996); *Sheehan v. Suffolk Cnty.*, 67 N.Y.2d 52, 60 (1986); *Balthazar v. Mari Ltd.*, 301 F.Supp. 103, 105 n.6 (N.D. Ill.), *summarily aff'd* 396 U.S. 114 (1969); *Automatic Art, LLC v Maricopa Cnty.*, No. CV 08-1484, 2010 WL 11515708, at *5–6 (D. Ariz. Mar. 18, 2010); *Reinmiller v. Marion Cnty., Oregon*, No. CV-05-1926, 2006 WL 2987707, at *3 (D. Or. Oct. 16, 2006); *U.S. Bank Tr. Nat'l Ass'n v. Walworth Cnty.*, No. 21-CV-451, 2022 WL 317728 (E.D. Wis. Jan. 6, 2022) (appeal pending 7th Cir. No. 22-1168).

These conflicts arise primarily from dicta in *Nelson*, 352 U.S. at 110. In *Nelson*, the City of New York foreclosed on two properties to satisfy delinquent water bills. The City kept one property and sold the other and kept the windfall. *Id.* at 106. The former owners alleged procedural due process and equal protection violations. In their reply brief, the owners suggested for the first time that the City took property without just compensation. *Id.* at 109–10. The Court rejected the due process and equal protection claims and then in dicta asserted that the takings argument also failed because City law gave the owners an opportunity to request a sale and claim the surplus

proceeds, which the owners failed to request. *Id.* at 110 (no takings claim because of "the absence of timely action to . . . recover[] any surplus"). Subsequent court decisions rely on the dicta to reject takings claims *even when there is no opportunity to recover surplus proceeds*, as in Nebraska. *See, e.g.*, *Mandarelli*, 320 A.2d at 32; *Tyler*, 26 F.4th at 793. This Court should grant the petition to resolve the conflicts arising from *Nelson* and to decide whether equity is private property protected by the Takings Clause.

II. THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER FORFEITURE OF MORE THAN WHAT IS OWED IN TAXES, PENALTIES, INTEREST, AND COSTS IS A FINE WITHIN THE MEANING OF THE EIGHTH AMENDMENT

The Nebraska Supreme Court rejected Nieveen's Excessive Fines claim on the ground that confiscation of equity when seizing property to collect a debt cannot be considered a fine. App.20a. That decision conflicts with this Court's excessive fines decisions. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609–10 (1993)).

In *Austin*, this Court held that civil forfeiture of a mobile home and auto body shop used in an illicit drug sale was "punishment," and therefore a "fine" subject to the Eighth Amendment. The government had argued that the forfeiture was not a punishment because it served only remedial purposes by removing instrumentalities of crime from society. The Court observed, however, that "a civil sanction that cannot

fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 509 U.S. at 610–11 (emphasis added) (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)). It does not matter whether, in some applications, the sanction could be remedial rather than punitive, *i.e.*, not enough or just enough to cover the government's cost or the social cost of the property owner's offense. *Austin*, 509 U.S. at 610–11. In short, the Eighth Amendment applies when a civil sanction is "at least partially punitive." *Timbs v. Indiana*, 139 S.Ct. 682, 690 (2019).

Austin's analysis hinged on two factors analogous to Nebraska's tax-forfeitures. First, the statutory scheme in *Austin* provided affirmative defenses against forfeiture for innocent owners whose property was misused by others without their consent, knowledge, or willful blindness. 509 U.S. at 619. These exemptions implicate the "culpability of the owner in a way that makes them look more like punishment, not less." *Id.* Second, the forfeitures in *Austin* were neither a fixed sum nor linked to the harm caused by the property owner's actions. *Id*. at 621. They "vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental," defying description as "remedial." *Id*. at 622 n.14.

The Nebraska Supreme Court concluded that the purpose of the statute is to collect taxes, not to punish debtors, but the confiscation of homes worth substantially more than what is owed can "only be explained as [] serving either retributive or deterrent purposes." *Halper*, 490 U.S. at 448. *See also Wilson v.*

Comm'r of Revenue, 656 N.W.2d 547, 554 (Minn. 2003) (harsh tax-related penalty was an excessive fine because it could only be explained by and "*must* be calculated to deter"). As in *Austin*, the value of property forfeited under Nebraska's statute "var[ies] so dramatically that any relationship between" the debt owed and "the amount of the sanction is merely coincidental." *Austin*, 509 U.S. at 621. Nieveen's home was worth approximately $62,000—more than 16 times her $3,800 debt. In another case, the same statute forfeited a widow's home and ranch worth 20 times the tax debt. *Wisner v. Vandelay Invs., L.L.C.*, 300 Neb. 825, 831 (2018); Response Brief, *Wisner*, 2018 WL 659770, at *30. *See also, e.g.*, *Fair*, 311 Neb. at 187 (home worth more than 11 times debt); Petition for Writ of Certiorari, *HBI, L.L.C. v. Barnette*, No. 20-321, *cert. denied*, 141 S.Ct. 1370 (2021) (property worth 21 times debt). Deterrence or punishment is the only plausible goal of these draconian forfeitures. Indeed, in *Bennett v. Hunter*, when the federal government urged an interpretation of the federal tax statute as imposing a forfeiture of title (including all equity value) for delinquent taxes, this Court described such an action as "highly penal." 76 U.S. at 336.

Likewise, the redemption provision in Nebraska's statute resembles the affirmative defense exempting innocent owners from forfeiture in *Austin*. Here, a property owner may escape the confiscation of his property for late payments by taking diligent action to redeem the property. The state softens the harshness of the penalty for those who demonstrate atonement for their presumed negligence. One must say "presumed" negligence, however, because in most cases, property owners fall prey to the forfeiture of

their entire homes under Nebraska's and other states' similar laws for small debts due to mistakes of law or in circumstances of extreme poverty, health or cognitive disability, and other factors resulting in the failure either to make payments or succeed in a timely redemption. John Rao, *The Other Foreclosure Crisis*, Nat'l Consumer Law Ctr. 5, 9, 33, 38 (July 2012).[8] It is not immoral for people to struggle to pay their property taxes. *See Thiede v. Town of Scandia Valley*, 14 N.W.2d 400, 407 (Minn. 1944) (poverty is not a moral failure and courts should give "[m]ore respect for the common rights of man and less regard for the condition of the public exchequer" in administering laws). Their failure does not warrant the punishment of losing the entirety of their single most valuable asset.

The Nebraska Supreme Court also held that the Excessive Fines Clause could not apply because the government did not benefit from the forfeiture. However, this Court implied that the clause applies even where a statute designates the payment to go to another party. In *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913), this Court held unconstitutional a statutory damages provision requiring payment of $500 to another private party no matter how small the offense. The Court held it violated "due process of law" because it was "grossly out of proportion to the possible actual damages." *Id*. *Tucker* foreshadowed this Court's definition for excessive fines as fines that are "grossly disproportional to the gravity of the . . . offense." *See Bajakajian*, 524 U.S. at 337. *See also Stierle v. Rohmeyer*, 260 N.W. 647, 654 (Wis. 1935)

[8] https://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales-report.pdf.

(statute that extinguished mortgage where lender violated statute whether the debt "be $5,000, as here, or 5 cents in another case" would inflict a "penalty").

This Court began developing Excessive Fines Clause jurisprudence only 30 years ago, after two centuries of relative silence. This Court should grant the petition to provide guidance to the lower courts about whether a forfeiture that goes well beyond any remedial costs is a punishment within the meaning of the Excessive Fines Clause.

III. THIS CASE RAISES A PRESSING NATIONAL PROBLEM THAT CAN BE RESOLVED ONLY BY THIS COURT

For most homeowners, their house is their most important and valuable asset. Every year, homeowners lose millions of dollars in equity across the 14 states that allow government or private investors to seize a windfall when collecting delinquent property taxes. *See, e.g.*, Ralph Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274 (2018) (municipalities in Massachusetts took $56 million in equity from property owners in just one year); Carol Park & David J. Deerson, *Looking Up*, Pacific Legal Foundation (2021),[9] (twelve Minnesota counties took more than $11 million windfall from homeowners by selling tax foreclosures for more than owed and keeping the surplus); Ashton Nichols, et al., *Taxpayers Lose Out on at Least $11.25 Million, Homeowners and Banks Lose up to $80 Million in Little-known Foreclosure Process That Skips Sheriff's*

[9] https://pacificlegal.org/minnesota-home-equity-theft/#section1 (visited Sept. 7, 2022).

Sales, Eye on Ohio: Ohio Center for Journalism (Mar. 3, 2020).[10] These windfall regimes have been called "unconscionable," *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 5831013, at *2 (E.D. Mich. Nov. 7, 2018), *rev'd and remanded*, 976 F.3d 729 (6th Cir. 2020), and a "manifest injustice that should find redress under the law," *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546, at *3 (E.D. Mich. June 4, 2015). Judge Kethledge bluntly commented that "[i]n some legal precincts that sort of behavior is called theft." *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting), *reopened under Rule 60*, No. 14-CV-01274, ECF No. 64.

Six states—Nebraska, Arizona, Colorado, New Jersey, Montana, and Illinois—grant a foreclosed home's entire equity windfall to private investors, to devastating effect on homeowners.[11] For example, public records from 19 New Jersey cities reveal that between 2014 and 2020, 683 homes were taken for delinquent taxes—a loss of an estimated $140 million in equity.[12] On average, New Jersey homeowners lost

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[10] https://eyeonohio.com/taxpayers-lose-out-on-at-least-11-25-million-homeowners-and-banks-lose-up-to-80-million-in-little-known-foreclosure-process-that-skips-sheriffs-sales/ (visited Sept. 7, 2022).

[11] Ariz. Rev. Stat. § 42-18205; Colo. Rev. Stat. § 39-11-115; *Winberry Realty P'ship v. Borough of Rutherford*, 247 N.J. 165, 173 (2021) (New Jersey statutes allow private investor who purchases tax lien for amount of tax debt to foreclose and take full title without sale); Mont. Code Ann. §§ 15-18-211, 15-18-219 (issuing a deed to whomever holds a tax lien, but requiring sale and a return of surplus proceeds only for certain residential properties); 35 Ill. Comp. Stat. §§ 200/22-40, 200/21-90.

[12] These records do not include commercial properties lost under the same statutory scheme. *See, e.g.*, *Johnson v. City of East*

92% of the value of their home, or $219,000, above the tax debt that was owed, which averaged $16,800. Angela C. Erickson, *The size and scope of home equity theft: Shining a spotlight on New Jersey* (Nov. 15, 2021).[13] Windfall statutes like Nebraska's have devastating consequences for homeowners, many of whom are elderly, low-income, disabled, or suffering physical or mental impairments.[14] Examples include a well-maintained home taken for an $8 property tax delinquency;[15] a family farm that over the generations increased to a million dollar value taken from a nursing home patient for a $50,000 debt;[16] farmland worth $38,000 taken as payment for an $84 debt.[17]

Orange, N.J. Super. No. LCV20212798775 (Complaint filed Dec. 1, 2021, alleging taking when city took $80,000 surplus equity in commercial property after a tax foreclosure).

[13] https://pacificlegal.org/size-and-scope-of-home-equity-theft-new-jersey/.

[14] In states with confiscatory tax collection procedures, investment firms quickly adopted a business model to prey on financially distressed property owners and take the windfall of surplus equity. *See, e.g.*, Steven A. Waters, *Gering, Nebraska Delinquent Tax Sale Property*, Tax Lien University, https://taxlienuniversity.com/tax-sales/gering-nebraska-tax-lien-certificates-and-tax-deeds.php (visited Aug. 18, 2022) ("[T]here are generally two outcomes with the purchase of a tax lien certificate; the purchaser will either receive what was paid to satisfy the delinquent property taxes PLUS up to 14% per annum, or Scotts Bluff County Nebraska has the legal right to transfer them the property—often with no mortgage! Once they own the property they can do whatever they like; sell it, rent it for monthly cash-flow, even move in (often with no mortgage payment).").

[15] *Rafaeli*, 505 Mich. at 437.

[16] *Wisner*, 300 Neb. at 831; Response Brief, *Wisner*, No. S-16-000451, 2018 WL 659770, at *30.

[17] *Ritter*, 207 Wis.2d at 478.

Five states retain the windfall for its own use. Minnesota, Maine, and Oregon's municipalities routinely seize a windfall for the government's benefit when foreclosing tax delinquent properties.[18] Ohio and California ordinarily protect debtors' property rights in their equity by requiring government to sell property and refund the surplus proceeds to the former owner, but they confiscate the entire property when municipalities desire indebted property for a public use or economic revitalization. *See State ex rel. Feltner v. Cuyahoga Cnty. Bd. of Revision*, 160 Ohio St.3d 359, 366 (2020) (Fischer, J., concurring), *cert. denied*, 141 S.Ct. 1734 (2021); Jon Coupal & Joshua Polk, *Stop home equity theft by the state of California*, The Orange County Register (Mar. 27, 2022).[19] These statutes create an incentive for government to foreclose on owners. Indeed, until a recent Michigan Supreme Court decision found that taking a windfall from owners like Nieveen effected a taking, some counties planned on such windfalls to balance their budgets. *See, e.g.*, Joel Kurth, et al., *Sorry we foreclosed your home. But thanks for fixing our budget*, Bridge Magazine (June 6, 2017).[20]

In Alabama,[21] Massachusetts, and New York, municipalities have discretion to take a windfall, give

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[18] Me. Rev. Stat. Ann. tit. 36 § 949; Minn. Stat. Ann. § 280.29; Or. Rev. Stat. § 312.100.

[19] https://www.ocregister.com/2022/03/27/stop-home-equity-theft-by-the-state-of-california/.

[20] https://www.bridgemi.com/detroit-journalism-cooperative/sorry-we-foreclosed-your-homethanks-fixing-our-budget.

[21] Ala. Code §§ 40-10-28(a)(1), 40-10-198. But Alabama's courts may be poised to strike down this law, after the Alabama Supreme Court recently held that surplus proceeds from the

it to investors, or protect the debtors.[22] Massachusetts' foreclosure process strips owners of roughly $56,000,000 in equity per year. Clifford, *supra* at 274. Some municipalities sell the properties and take a windfall for the public. But most of the equity benefits investors via a tax lien process (called a "tax taking title") that is similar to Nebraska's. Between 2014 and 2020, a single investment company pocketed $15,000,000 by foreclosing and selling 154 tax-delinquent homes. Angela C. Erickson, et al., *Violating the Spirit of America: Home Equity Theft in Massachusetts*.[23]

Ultimately, these laws overwhelmingly harm society's most vulnerable members like the elderly, sick, and poor. *See* Rao, *supra* at 5, 9, 33, 38. As Justice Thomas wrote about other types of forfeitures, "These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture." *Leonard v. Texas*, 137 S.Ct. 847 (2017) (Thomas, J., concurring in denial of certiorari) (citations omitted). Unless this Court grants review, then any debt—no matter how small—may ultimately be used to strip everything from people like Sandra Nieveen. Such laws violate

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auction of tax-delinquent property were protected at common law and in Alabama. *See Douglas*, 2022 WL 2286417, at *12.

[22] *Tallage Lincoln, LLC v. Williams*, 485 Mass. 449, 451–53 (2020) (describing Massachusetts system which sometimes takes a windfall for cities and sometimes for private investors); *Dorce*, 2022 WL 2286381, at *12 (describing city's ordinance that sometimes protects debtors and sometimes benefits private parties).

[23] https://pacificlegal.org/home-equity-theft-in-massachusetts/#section4-2 (visited Sept. 7, 2022).

the purpose for which governments are formed: to protect individual liberty. *See Cedar Point Nursery*, 141 S.Ct. at 2071 ("protection of property rights is necessary to preserve freedom") (internal quote omitted).

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
CHRISTINA M. MARTIN
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
DLaFetra@pacificlegal.org

CAITLIN CEDFELDT
JENNIFER GAUGHAN
MARK T. BESTUL
Legal Aid of Nebraska
209 South 19th Street, Suite 200
Omaha, Nebraska 68102
Telephone: (308) 632-4734

Counsel for Petitioner