

No. 22-237

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

**REPLY IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

 I. Nieveen’s Petition Should be Considered
 Alongside *Fair v. Continental Resources*,
 no. 22-160..... 2

 II. The Decision Below Conflicts with Courts
 Holding that Home Equity Is a Property
 Right that Cannot be Taken Without Just
 Compensation 4

 III. A \$58,000 Penalty for Failure to Promptly
 Pay Taxes Is a Fine Subject to the Excessive
 Fines Clause..... 8

 IV. Fourteen States Unconstitutionally Steal
 People’s Homes in the Name of Tax
 Collection, a Widespread Problem that
 Deserves this Court’s Review 10

CONCLUSION..... 12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Almota Farmers Elevator & Warehouse Co. v. United States,</i> 409 U.S. 470 (1973)	4
<i>Ardoin v. Robinson,</i> 142 S.Ct. 2892 (2022)	3
<i>Arlene’s Flowers Inc. v. Washington,</i> 138 S.Ct. 2671 (2018)	4
<i>Bratrsovsky v. Nestor,</i> 145 Neb. 614 (1945).....	8
<i>Continental Resources v. Fair,</i> 311 Neb. 184 (2022).....	2–4, 9
<i>In re Feiler,</i> 218 F.3d 948 (9th Cir. 2000)	5
<i>Hall v. Meisner,</i> 51 F.4th 185 (6th Cir. 2022).....	2
<i>Hansen v. Hansen,</i> 199 Neb. 462 (1977).....	8
<i>Kokoszka v. Belford,</i> 417 U.S. 642 (1974)	5
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n,</i> 138 S.Ct. 1719 (2018)	4
<i>Mundy v. Mundy,</i> 151 A.3d 230 (Pa. Super. 2016).....	8
<i>Nathey v. Nathey,</i> 292 So.3d 483 (Fla. Dist. Ct. App. 2020)	8

<i>Nelson v. New York</i> , 352 U.S. 103 (1956)	2
<i>Phillips v. Washington Legal Foundation</i> , 524 U.S. 156 (1998)	6–8
<i>Rafaeli, LLC v. Oakland Cnty.</i> , 505 Mich. 429 (2020)	9
<i>River City Capital, L.P. v. Bd. of Cnty. Comm’rs, Clement Cnty., Ohio</i> , 491 F.3d 301 (6th Cir. 2007)	10
<i>Russian Volunteer Fleet v. U.S.</i> , 282 U.S. 481 (1931)	10
<i>Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.</i> , 429 U.S. 363 (1977)	5
<i>U.S. v. Craft</i> , 535 U.S. 274 (2002)	5
<i>Webb’s Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980)	6
<i>Wisner v. Vandelay Investments, L.L.C.</i> , 300 Neb. 825 (2018)	1, 10

Statutes

Neb. Stat. § 25-2146.....	7
Neb. Stat. § 76-1011.....	7
Neb. Stat. § 76-1909(2)	8

Other Authorities

- Ayres, Samuel T., Note, *State Water Ownership and the Future of Groundwater Management*, 131 Yale L.J. 2213 (2022)..... 8
- Bigley, Thomas W., *Property Law—the Equity of Redemption: Who Decides When It Ends?*, 21 Wm. Mitchell L. Rev. 315 (1995) 7
- Chen, Celene, Note, *Homeowners’ Rights: How Courts Can Prevent States from Stealing Home Equity During Property Foreclosure*, 41 Rev. Banking & Fin. L. 385 (2021) 11
- Duggan, Joe, *‘Legal Ripoff’? Nebraska Makes it Easier for Investors to Take Farms, Homes for Unpaid Taxes*, (Nov. 17, 2018)
https://omaha.com/state-and-regional/legal-riporff-nebraska-makes-it-easier-for-investors-to-take-farms-homes-for-unpaid-taxes/article_00777ae3-f354-5172-8a8d-629c7614be29.html 1
- Erickson, Angela C., et al., *End Home Equity Theft* (Nov. 29, 2022), <https://homeequitytheft.org>..... 11
- Klempert, Kristen, *Average Time to Sell a House in Nebraska* (Nov. 3, 2022), <https://listwithclever.com/real-estate-blog/average-time-to-sell-a-house-in-nebraska/> 9

Kushi, Odeta, <i>Homeownership Remains Strongly Linked to Wealth-Building</i> , First American Financial Corporation (Nov. 5, 2020), https://blog.firstam.com/economics/ homeownership-remains-strongly- linked-to-wealth-building	12
Response Brief, <i>Wisner v. Vandelay Investments, L.L.C.</i> , No. S-16-000451, 2018 WL 659770 (Neb. Jan. 4, 2018).....	1
Strobin, E. L., <i>Right to Condemn Property in Excess of Needs for a Particular Public Purpose</i> , 6 A.L.R.3d 297 (1966).....	5
Taddonio, Michael, Note, <i>The Common Law Remedy to the Tax Deed and Tax Lien’s Disparate Impact on Communities</i> , 46 Vt. L. Rev. 642 (2022).....	1

INTRODUCTION

When government agencies in Nebraska foreclose on homes and land to satisfy overdue taxes, interest, penalties, and costs, they also take all the owner's equity over and above what is due. As permitted by these laws, Nebraska counties and predatory investors developed a "symbiotic relationship" dedicated to filling government coffers at the expense of property usually held by low-income, elderly, and disabled homeowners. Michael Taddonio, Note, *The Common Law Remedy to the Tax Deed and Tax Lien's Disparate Impact on Communities*, 46 Vt. L. Rev. 642, 646 (2022); Joe Duggan, *'Legal Ripoff'? Nebraska Makes it Easier for Investors to Take Farms, Homes for Unpaid Taxes*, Omaha World-Herald (Nov. 17, 2018),¹ (third-party purchaser that bought a farm worth over \$1 million² by paying only the tax debt spent \$75,000 to lobby the Nebraska Legislature to block a tax lien reform bill). Here, Lancaster County and investor TAX 106 foreclosed and kept absolute title to Nieveen's home and land, worth approximately \$58,500 more than what she owed in delinquent property taxes, interest, and fees. App.22a. Respondents concede that Nebraska law authorizes confiscation of tax-indebted property with no process to refund the surplus value above the amounts owed. Respondents' Joint Brief in Opposition (BIO) 1.

¹ https://omaha.com/state-and-regional/legal-ripoff-nebraska-makes-it-easier-for-investors-to-take-farms-homes-for-unpaid-taxes/article_00777ae3-f354-5172-8a8d-629c7614be29.html.

² *Wisner v. Vandelay Investments, L.L.C.*, 300 Neb. 825 (2018); Response Brief, *Wisner*, No. S-16-000451, 2018 WL 659770, at *30 (Neb. Jan. 4, 2018).

Nieveen's petition raises pure questions of federal constitutional law that are both of national importance and a source of conflict among lower courts: First, courts conflict as to whether government violates the Takings Clause when in the course of debt collection it confiscates property worth more than what is owed. *Nelson v. New York*, 352 U.S. 103, 109 (1956), identified but did not resolve the question and the Nebraska Supreme Court flatly forbids such a claim while the Sixth Circuit permits it. *See Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022); Petitioner's Supp. Brf. (Oct. 18, 2022) (describing analysis and holding of *Hall*). Second, whether the confiscation of Nieveen's entire \$62,000 home as a response to her failure to pay property taxes on time is a fine subject to review under the Eighth Amendment is an important question that deserves resolution by this Court.

ARGUMENT

I. Nieveen's Petition Should be Considered Alongside *Fair v. Continental Resources*, no. 22-160

As noted in her Petition and emphasized in Respondents' BIO, the Nebraska Supreme Court resolved Nieveen's taking claim in a single paragraph relying entirely on its analysis in *Continental Resources v. Fair*, 311 Neb. 184 (2022), decided two months earlier. *See* Pet. 2–3, 7–8; App.19a–20a; BIO 4 (Respondents' legal arguments duplicate those in the Brief in Opposition filed in *Fair*, but for the

addition of a single paragraph).³ The Court has several options for handling pending petitions that present the same issue.

Ideally, the Court would grant the petition and consolidate it with *Fair*. See, e.g., *Saint Peter's Healthcare System v. Kaplan*, no. 16-86, consolidated with *Advocate Health Care Network v. Stapleton*, no. 16-74, and *Dignity Health v. Rollins*, no. 16-258. See 137 S.Ct. 546 (2016) (petitions on same issue granted and consolidated); 137 S.Ct. 1652 (2017) (decision with all three cases in the caption).⁴

Alternatively, this Court could grant Nieveen's petition and hold the case in abeyance until it resolves *Fair*, a procedure used in *Ardoin v. Robinson*, 142 S.Ct. 2892 (2022) (memorandum granting the petition and holding the case in abeyance pending the decision in *Merrill v. Milligan*, nos. 21-1086, 21-1087); see also *Ardoin v. Robinson*, Emergency Application for Administrative Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment, no. 21A814, at 4 ("Because this case presents the same question as *Merrill*, the Court should grant certiorari in advance of judgment, consolidate the cases, and issue a briefing schedule for this case under which arguments could be heard the same day as *Merrill*, or simply hold the case in abeyance pending the opinion in *Merrill*.")

³ Nieveen adopts the arguments presented in the Reply Brief in Support of Kevin Fair's Petition for Writ of Certiorari, and offers additional reasons to grant the petitions in this brief.

⁴ Consolidation of this case with *Tyler v. Hennepin County*, docket no. 22-166, also is warranted to combine all outstanding issues related to home equity theft into a single presentation before the Court.

Finally, this Court could hold the petition pending a final result on the merits in *Fair* and then grant, vacate, and remand *Nieveen* for reconsideration in light of *Fair*. The Court used this procedure in *Arlene's Flowers Inc. v. Washington*, holding the petition filed on July 14, 2017, pending the ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) (decision issued on June 4, 2018); see also no. 17-108 indicating no Court action on Arlene's Flowers' petition between distributing it for conference on December 1, 2017, and redistributing the case after the decision in *Masterpiece Cakeshop* on June 7, 2018. Ultimately, as Petitioner requested, this Court granted Arlene's Flowers' petition and remanded for further consideration in light of *Masterpiece Cakeshop* on June 25, 2018. 138 S.Ct. 2671–72 (2018).

Whichever approach the Court chooses, the result should recognize that *Nieveen's* petition is inextricably bound to *Fair* and resolve them together.

II. The Decision Below Conflicts with Courts Holding that Home Equity Is a Property Right that Cannot be Taken Without Just Compensation

“Just compensation” means the “the full monetary equivalent of what was taken.” *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973). Nebraska foreclosed *Nieveen's* entire home and land, and “what was taken” in this case is her entitlement to the remaining equity above and beyond the debt she owed. Nebraska may enact harsh tax and property laws if it so chooses, but these laws may not deprive people of property without just

compensation. See *U.S. v. Craft*, 535 U.S. 274, 288 (2002) (interpretation of federal law is “by no means dictate[d]” by “state courts’ answers to similar questions involving state law.”) (citing *U.S. v. Rodgers*, 461 U.S. 677, 701 (1983) (the Supremacy Clause “provides the underpinning for the Federal Government’s right to sweep aside state-created exemptions”)). “This Court has consistently held that state law governs issues relating to this property, like other real property, *unless some other principle of federal law requires a different result.*” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (emphasis added). This established principle means that Nieveen does not seek this Court’s “first view” (BIO 27) of the issue; Nieveen seeks resolution of the conflict created by the holding below and this Court’s consistent protection of private property above and beyond that which is owed.

The government generally is liable for a taking when it keeps private funds to which it has no legitimate entitlement. For example, overpayment of taxes results in a tax refund. The government does not get to keep the extra unless the amount is otherwise owed, say, in bankruptcy. *Kokoszka v. Belford*, 417 U.S. 642, 652 (1974) (tax refund is property of a bankrupt person’s estate). The refund constitutes the taxpayer’s private property, such that relinquishing the right to a tax refund transfers a property interest. *In re Feiler*, 218 F.3d 948, 956 (9th Cir. 2000).

Returning an overpayment of taxes that comes in the form of surplus equity is therefore consistent with the “widely recognized principle that the power of condemnation may not be used to condemn property in excess of that needed for public purposes.” E. L.

Strobin, *Right to Condemn Property in Excess of Needs for a Particular Public Purpose*, 6 A.L.R.3d 297 § 2[a] (1966). The takings question presented here is whether government can avoid paying just compensation when it confiscates property worth substantially more than what is owed. The necessary predicate question is whether the equity is private property.⁵

In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), two Texas lawyers and a public interest foundation challenged a state program that required them to give interest on client trust accounts to fund programs of the state's choice. Virtually all states adopted such "Interest on Lawyers Trust Account" (IOLTA) programs where interest income generated by the funds is paid to foundations that finance legal services for low-income individuals. *Id.* at 159. The lawyers argued that the forced transfer of interest to the foundation took their clients' property without just compensation. Courts were split on the foundational question of whether the interest was private property for purposes of the Takings Clause and this Court granted certiorari to resolve the question. *Id.* at 163.

This Court relied on the traditional rule, dating back to English common law in the 1700s, that interest follows principal. *Id.* at 165. This rule was "firmly embedded in the common law of the various States" *id.*, and was previously acknowledged as a traditional property interest in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980)

⁵ That this question was not framed precisely in this way below makes no difference, as Respondents acknowledge. BIO 27 (citing *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

But Texas claimed that the state's property laws exempted the IOLTA program from the general rule. *Phillips*, 524 U.S. at 167. This Court rejected the state's attempt to downgrade the generated interest, finding "no 'background principles' of property law [] that would lead one to the conclusion that the owner of a fund temporarily deposited in an attorney trust account may be deprived of the interest the fund generates." *Id.* at 168 (citing *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)). The Court concluded "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Id.* at 172.

The key issue in this case is the same: whether Nieveen has a property right in her home's equity—the value of the property exceeding any debts. *See* BIO 2 (acknowledging this point). The decision below conflicts with the analysis and holding in *Phillips*. In addition to equity's value as private property established by longstanding English and American law, *see* Pet. 9–16,⁶ Nebraska treats home equity as the property owner's asset in multiple contexts. Pet. 17. Nebraska allows mortgage foreclosure by judicial decree or sale by trustee. Both return the surplus to the former owner, after paying debts in order of priority. Neb. Stat. § 25-2146 (judicial sale); § 76-1011 (trustee sale). In divorce proceedings, Nebraska courts consider the value of home equity to determine the

⁶ *See* Thomas W. Bigley, *Property Law—the Equity of Redemption: Who Decides When It Ends?*, 21 Wm. Mitchell L. Rev. 315, 319 (1995) ("English courts developed the principle of equitable redemption to end property forfeitures caused by simple defaults of mortgage agreements. Equity intervened to ensure that a mortgagee did not use the secured transaction as a means to acquire the mortgagor's property.").

amount distributed to each spouse. *Hansen v. Hansen*, 199 Neb. 462, 464 (1977) (apportioning home equity and using equity as a factor to determine alimony).⁷ Homestead laws protect equity from bankruptcy or federal tax liens. Neb. Stat. § 76-1909(2); *Bratrsovsky v. Nestor*, 145 Neb. 614, 622–23 (1945).

Just as *Phillips* identified IOLTA funds as the private property of the clients who supplied the principal despite state rules to the contrary, so too do Nebraska homeowners own their home equity as private property despite the state’s attempt to extinguish this legal interest in the context of its debt collection process. In short, “state property law [] cannot act as a shield to federal regulation, thwart federal common law, or evade federal constitutional scrutiny.” Samuel T. Ayres, Note, *State Water Ownership and the Future of Groundwater Management*, 131 Yale L.J. 2213, 2260 (2022). The conflict deserves this Court’s review.

III. A \$58,000 Penalty for Failure to Promptly Pay Taxes Is a Fine Subject to the Excessive Fines Clause

Because the Nebraska Supreme Court rejected Nieveen’s Eighth Amendment excessive fines claim

⁷This is consistent with other states. See, e.g., *Nathey v. Nathey*, 292 So.3d 483, 485 (Fla. Dist. Ct. App. 2020) (spouse who contributed to the mortgage and home equity line of credit was owed the proportional value of “any increase in the property’s equity due to these payments”); *Mundy v. Mundy*, 151 A.3d 230, 237 (Pa. Super. 2016) (using “the net home equity at the time of marriage” to calculate the net marital value of Husband’s premarital property).

solely on the basis of its decision in *Fair*, Nieveen adopts the argument regarding in *Fair*'s briefs.

Nieveen further notes that the BIO's tone reflects the state's position that Nieveen's negligence was such that she deserved to lose the entirety of her only significant asset. BIO 2–3 (“Nieveen now accepts that she received constitutionally adequate notice informing her that she would lose the property, yet she took no steps to retain the surplus by selling the property herself.”). This indicates the state's view that it is justified in imposing a harsh penalty because Nieveen is culpable for the public offense of failing to pay taxes on time.

Moreover, the BIO assumes that 90 days' notice of losing all rights to her property suffices to locate and hire a real estate agent, prepare the property for sale, list the property, find a buyer, and close the deal. Especially when a property owner has been blindsided by a notice arriving after three years' silence, App.4a, this simply isn't realistic. In Nebraska, the *average* time to sell a home is 80 days. Kristen Klempert, *Average Time to Sell a House in Nebraska* (Nov. 3, 2022).⁸ Respondents also fault Nieveen for failing to apply for loans, BIO 7, although Kevin Fair's attempts to obtain loans generated no mercy from the state. *Fair v. Continental Resources*, No. 22-160, Joint Brief in Opposition at 7–8 (filed Dec. 2, 2022).

The amount of the penalty suffered by property owners under the tax deed statutes is unbounded. A property owner who underpays by as little as \$8.41 (as in *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429, 437

⁸ <https://listwithclever.com/real-estate-blog/average-time-to-sell-a-house-in-nebraska/>.

(2020)), could lose a property worth more than a million dollars (as in *Wisner, supra*). There is scant relationship between the public offense and the consequent penalty, again demonstrating its punitive rather than remedial character. The state just shrugs and says, “that’s on you.” This Court should grant certiorari to address whether the type of deeply disproportionate and excessive penalty visited on Nebraska homeowners who, due to poverty, illness, or other reasons, fail to promptly pay their property taxes, constitutes a fine subject to Excessive Fines Clause limitation.

IV. Fourteen States Unconstitutionally Steal People’s Homes in the Name of Tax Collection, a Widespread Problem that Deserves this Court’s Review

Respondents downplay the injustice caused by home equity theft by focusing on a few confiscations in the single county in which Nieveen lives. BIO 26–27. But “[t]he Fifth Amendment gives to each owner of property his *individual* right. The constitutional right of owner A to compensation when his property is taken is irrespective of what may be done somewhere else with the property of owner B.” *Russian Volunteer Fleet v. U.S.*, 282 U.S. 481, 491 (1931) (emphasis added). See also *River City Capital, L.P. v. Bd. of Cnty. Comm’rs, Clement Cnty., Ohio*, 491 F.3d 301, 306 (6th Cir. 2007) (Takings clause is a “proscription against government infringement on *individual* rights”) (emphasis added). Even if Nieveen were the only victim of Nebraska’s laws, the Constitution would demand her redress.

This is not, however, a problem confined to a handful of homeowners or a single county. Home equity theft is robbing thousands of people of their homes and all the equity they've built. Celene Chen, Note, *Homeowners' Rights: How Courts Can Prevent States from Stealing Home Equity During Property Foreclosure*, 41 Rev. Banking & Fin. L. 385, 423–26 (2021) (detailing devastating financial losses to homeowners in eight states that confiscate home equity); *see also* Brief of Amici Curiae AARP and AARP Foundation in Support of Petition for Writ of Certiorari, *Fair v. Continental Resources*, no. 22-160 at 4 (Sept. 21, 2022) (AARP Am. Brf.) (older homeowners of modest means are most at risk for property tax foreclosure due to low fixed incomes; rising utility and medical costs; physical and cognitive ailments; the way they often pay property taxes (e.g., no escrow); and the loss of spouses as financial advisors). Localities and private investors foreclosed on and sold at least 7,900 homes in 9 states from 2014 to 2021.⁹ The reality is even worse because this data reflects only a fraction of the jurisdictions and only focused on sold homes. Angela C. Erickson, et al., *End Home Equity Theft* (Nov. 29, 2022), <https://homeequitytheft.org> (data represents 55% of the total population in the analyzed states and includes only owner-occupied residential property, not vacant, industrial, commercial, or farm properties).

Like Nieveen, many people—especially elderly homeowners—who lose their equity to tax foreclosure owe no mortgages. AARP Am. Brf. at 9. With no mortgage, those who lose their homes to tax

⁹ The nine states are Nebraska, Minnesota, Illinois, New Jersey, Massachusetts, Colorado, Oregon, Arizona, and Maine.

foreclosure lost, on average, 86% of their equity, which is to say, the vast bulk of their overall savings.¹⁰ Losing 86% of one's equity is like losing 26 years' worth of payments on a 30-year mortgage. Pacific Legal Foundation's study of 5,600 homes taken in tax foreclosure reveals that homeowners lost more than \$777 million in wealth based on their homes' market value, above what they owed in tax debt. Erickson, *supra*.¹¹ In Nebraska alone, the state took \$17 million in equity from 300 homeowners.¹² This Court should stop this devastating and unconstitutional practice.

CONCLUSION

The petition should be granted.

¹⁰ See Odeta Kushi, *Homeownership Remains Strongly Linked to Wealth-Building*, First American Financial Corporation (Nov. 5, 2020), <https://blog.firstam.com/economics/homeownership-remains-strongly-linked-to-wealth-building>.

¹¹ <https://homeequitytheft.org/size-and-scope>.

¹² <https://homeequitytheft.org/nebraska>.

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