NO. _____

IN THE

Supreme Court of the United States

ANDREW MEISNER, Oakland County Treasurer, AND OAKLAND COUNTY, MICHIGAN,

Petitioners,

v.

TAWANDA HALL, CURTIS LEE, CORETHA LEE, AND KRISTINA GOVAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Michigan's General Property Tax Act (GPTA), a local taxing authority may foreclose on a property for nonpayment of taxes after a nearly three-year process that includes ample notice and multiple chances for the owner to pay the delinquent taxes. In *Rafaeli, LLC* v. *Oakland County*, 952 N.W.2d 434 (Mich. 2020), the Michigan Supreme Court held that, if the taxing authority sells tax-foreclosed property at auction for more than the taxes owed, the authority's keeping of the surplus is a taking under the Michigan Constitution's Takings Clause.

Here, Petitioner Oakland County did not sell Respondents' tax-foreclosed properties because a municipal government exercised its statutory right to acquire the property in exchange for paying the tax delinquency. So there was no surplus. In *Rafaeli*, the Michigan Supreme Court determined that a taking only arises when surplus proceeds are not paid to the former owner, so the district court here appropriately dismissed. But the Sixth Circuit reversed, holding that a taking under the *federal* Takings Clause occurs the moment a Michigan taxing authority forecloses and takes "absolute title" to a delinquent taxpayer's property because the authority has taken the owner's "equitable title." This makes Michigan's right-of-first-refusal-without-a-sale approach unconstitutional under federal law. The question presented is substantively the same one this Court is already considering in *Tyler* v. *Hennepin County*, No. 22-166:

1. Whether foreclosing on a home for the nonpayment of taxes constitutes a violation of the federal Takings Clause whenever the home is worth more than the tax delinquency.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are Andrew Meisner, Oakland County Treasurer, and Oakland County, Michigan.

Respondents are Tawanda Hall, Curtis Lee, Coretha Lee, and Kristina Govan.

Co-defendants below who are not Petitioners here are Southfield Neighborhood Revitalization Initiative, LLC; City of Southfield, Michigan; Frederick Zorn; Kenson Siver; Susan P. Ward-Witkowski; Gerald Witkowski; Irv Lowenberg; Mitchell Simon; E'toile Libbett; and Southfield Non-Profit Housing Corporation.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit, No. 21-1700, *Hall, et al.* v. *Meisner, et al.*, judgment entered October 13, 2022, en banc review denied January 4, 2023.

U.S. District Court for the Eastern District of Michigan, No. 2:20-cv-12230-PDB-EAS, judgment entered May 21, 2021.

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The district court's judgment is reprinted in the Appendix at App.67a.

The Sixth Circuit's opinion reversing the district court's order is reported at 51 F.4th 185 (6th Cir. 2022) and reprinted at App.1a. The Sixth Circuit's order denying rehearing en banc is unreported but available at 2023 WL 370649 (6th Cir. Jan. 4, 2023) and reprinted at App.65a.

STATEMENT OF JURISDICTION

The Sixth Circuit entered judgment on October 13, 2022. Lower courts had jurisdiction under 28 U.S.C. 1331, 1346(a), and 1361. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

The Sixth Circuit's decision below—regarding whether a state property-tax foreclosure is a taking—is a breathtaking federalization of state property law. It violates this Court's admonition that state law is the source of Takings litigation. It is contrary to the notion that different state supreme courts might view property rights—and takings claims—differently. It supplants a recent Michigan Supreme Court decision. And it creates a circuit split. Because the question presented here is also the first question presented in *Tyler* v. *Hennepin County*, No. 22-166, this Court should either grant the petition or hold it until issuing a decision in *Tyler*, then reverse, vacate, and remand for reconsideration in light of *Tyler*.

Michigan's General Property Tax Act (GPTA) authorizes a local taxing authority to foreclose on a property for nonpayment of taxes. The Act requires the taxing authority to follow a carefully reticulated, nearly three-year process that includes ample notice and multiple chances for the owner to pay the delinquent taxes. If the taxpayer fails these multiple chances to satisfy the tax obligation, title vests in the taxing authority. At that point, the Act gives the State of Michigan or a local government a right of first refusal to acquire the property by paying the taxes owed and associated interest and costs. If no entity exercises that right of first refusal, then the local taxing authority is free to sell the property at auction. Since tax-foreclosed properties are frequently distressed properties, many go unsold at auction and many more are sold for the minimum bid: again, the taxes owed and associated interest and costs.

In *Rafaeli, LLC* v. *Oakland County*, 952 N.W.2d 434 (Mich. 2020), the Michigan Supreme Court addressed the situation where no government entity exercised its first refusal right, and a taxing authority sold a tax-foreclosed property at auction for more than the minimum bid. *Rafaeli* held that if the taxing authority keeps the "surplus," that constitutes a taking under the Michigan Constitution's Takings Clause.

The situation here is different because the City of Southfield exercised its right-of-first-refusal power under the GPTA and purchased Respondents' properties for the minimum bid. As a result, Petitioner Oakland County did not conduct an auction and received no surplus proceeds. The City then conveyed the properties to a for-profit entity, the Southfield Neighborhood Revitalization Initiative, which rehabbed the properties and sold two of them for substantially more than the tax delinquency. (The Initiative still holds title to the third property.)

Respondents filed suit, and the district court dismissed their Complaint because, among other reasons, the Michigan Supreme Court in *Rafaeli* determined that in the context of a Michigan tax foreclosure, "a former property owner has a compensable takings claim *if and only if the tax-foreclosure sale produces a surplus*." 952 N.W.2d at 462 (emphasis added).

The Sixth Circuit reversed—but not based on the Michigan Constitution or even the Michigan Supreme Court's construction of Michigan property rights. Instead, the court of appeals held that a taking under the *federal* Takings Clause occurs the moment a Michigan taxing authority forecloses and takes

"absolute title" to a delinquent taxpayer's property because the authority has taken the owner's "equitable title." This makes Michigan's right-of-first-refusal-without-a-sale approach unconstitutional as a matter of federal law and conflicts with decisions of this Court and the Eighth Circuit.

To begin, this Court has admonished that, as a general matter, "the property rights protected by the Takings Clause are creatures of *state* law." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2076 (2021) (cleaned up, emphasis added). The court of appeals should have deferred to the Michigan Supreme Court's statement in *Rafaeli* that no taking of property occurs until a taxing authority forecloses on a tax delinquent property *and keeps a resulting surplus* from a sale. At minimum, the court of appeals should have certified a question to the Michigan Supreme Court regarding the situation where a government entity exercises its right of first refusal under the GPTA, and the taxing authority is forced to transfer the property for the minimum bid. Yet the court did neither of those things.

Next, the court of appeals' ruling conflicts with the Eighth Circuit's decision in *Tyler* v. *Hennepin County*, 26 F.4th 789 (8th Cir. 2022)—a case that this Court is now reviewing—and with the Nebraska Supreme Court's decision in *Continental Resources* v. *Fair*, 971 N.W.2d 313 (Neb. 2022). In *Tyler*, the Eighth Circuit correctly held that a county's retention of surplus equity following a tax foreclosure did not violate the federal Takings Clause because Minnesota's tax-foreclosure statute implicitly "abrogated any common-law rule that gave a former landowner a right to surplus equity." 26 F.4th at 793. In other words, the Eighth Circuit appropriately deferred to

Minnesota's own understanding of Minnesota property rights. The Sixth Circuit should have done the same regarding Michigan's.

Likewise, in *Fair*, the Nebraska Supreme Court held that there was "no basis to conclude that Nebraska common law recognizes the property interest that is essential for Fair's takings claim to succeed." 971 N.W.2d at 325. The court did not look to federal common law but again deferred to state law, the exact opposite of the Sixth Circuit's approach.

As for that federal common law, the Sixth Circuit identified no federal case holding that a state taxing authority's foreclosure on a tax-delinquent property constitutes a taking of surplus equity at the time of foreclosure. Instead, the court of appeals' analysis relied almost exclusively on the common-law history of *private* foreclosures for the nonpayment of *mortgage* debt. App.9a–13a. And Petitioners did not have an opportunity to address those authorities because no party presented them.

In sum, Michigan property law alone dictates the result in this case. By jettisoning the Michigan Supreme Court's decision in *Rafaeli* and instead relying on an inapposite historical analysis of federal common law involving private debt foreclosure, the court of appeals struck down a state statute and rewrote state property law on an issue the state's highest court has already resolved. Accordingly, certiorari is warranted. At a minimum, the Court should hold the petition and grant, vacate, and remand after issuing its decision in *Tyler*.

STATEMENT OF THE CASE

A. Michigan's tax-foreclosure process and Plaintiffs' tax-delinquent properties

Under the prior version of Michigan's General Property Tax Act (GPTA), the county treasurer acts as the collection agent for the municipality where the property is located when taxpayers become delinquent on their property taxes. After approximately three years of delinquency, multiple notices, and various hearings, a judgment of foreclosure is entered in favor of the county and title is transferred to the county treasurer. Mich. Comp. Laws § 211.78 (2019), *et seq*.

If the tax-delinquent property is not redeemed by March 31st in a given year, title vests in the county treasurer and (1) the state or local municipality has the right to claim the property in exchange for the payment to the county of unpaid taxes, interest, and other costs (the "minimum bid"), or (2) if the state or municipality does not exercise its right of first refusal, the property is put up for sale at a public auction in July and, if not sold, again in October. Mich. Comp. Laws § 211.78m (2019).[1]

All of Respondents' former properties were foreclosed for nonpayment of taxes. After Respondents received all the notices the Michigan Constitution and the GPTA require, they agreed to payment plans with the Oakland County Petitioners to prevent the fore-

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[1] After *Rafaeli*, the Michigan Legislature amended the GPTA to allow the state or municipalities to purchase tax-foreclosed properties "at the greater of the minimum bid or its fair market value[.]" Mich. Comp. Laws § 211.78m(1) (2021). That provision applies going forward, but not here.

closure judgments from being finalized. The plans were clear that unless all payments were timely and consistently made, Respondents would "lose their property." Tawanda Hall Payment Plan, *Hall* v. *Meisner*, E.D. Mich., RE.32-2, PageID.353.

Respondents do not contest that they failed to make timely payments. As a result, the foreclosure judgments were recorded and became final. No Respondent appealed. And, since Respondents' former properties were in the City of Southfield, the City claimed the properties by paying the Oakland County Petitioners the minimum bid. Title then transferred to Southfield. Compl., ¶¶ 21–27, RE.1, PageID.5, 6. None of the properties were sold at a tax-foreclosure auction, and there was no surplus.

Respondents' primary objection is what the City of Southfield did with the three properties at issue—convey them to a for-profit entity, the Southfield Neighborhood Revitalization Initiative for a nominal amount. Compl., ¶¶ 21, 25, 27, RE.1, PageID.5, 6–7. The Initiative then rehabbed two of the three properties and sold them, one for $308,000 (against a tax delinquency of $30,547), and another for $155,000 (against a tax delinquency of $43,350). *Id.*, ¶¶ 21, 25. The Initiative still holds title to the third property. *Id.*, ¶ 27. The Oakland County Petitioners did not benefit financially from these transactions in any way and had no choice but to convey the properties once the City of Southfield exercised its statutory right of first refusal. Nonetheless, under the Sixth Circuit's novel view of the federal Takings Clause, it is the Oakland County Petitioners who are now on the hook for the alleged surplus equity that Respondents lost when they repeatedly failed to pay their taxes and then chose not to sell their homes to keep any equity.

Notably, the Oakland County Petitioners' liability under the federal Takings Clause is a far cry from how the Michigan Supreme Court views the situation from a Michigan property-rights perspective. In *Rafaeli*, the Michigan Supreme Court held that when a property is sold at a tax-foreclosure auction, the foreclosing governmental unit must return to the taxpayer the difference between the sale price at the auction and the minimum bid. Otherwise, *retention of the surplus* is a taking under the Michigan Constitution. Critically, the *Rafaeli* court held there is no takings claim absent a surplus: "[A] former property owner has a compensable takings claim *if and only if the tax-foreclosure sale produces a surplus*." *Rafaeli*, 952 N.W.2d at 462 (emphasis added). Indeed, former owners of tax-foreclosed properties are not entitled to compensation "*until* their properties [sell] for an amount in excess of their tax debts." *Ibid.* (emphasis added). Not before.

B. District court proceedings

Respondents filed suit in the United States District Court for the Eastern District of Michigan asserting a variety of claims. Most pertinent, Respondents' lawyers claimed a taking of Plaintiffs' "equity" in their property, the same issue those same lawyers litigated in *Rafaeli*.

The Oakland County Petitioners filed a motion to dismiss, which the district court granted in a comprehensive opinion. App.27a–64a. That court noted that *Rafaeli* (1) expressly rejected Plaintiffs' premise—that just compensation required payment of a tax-foreclosed property's fair market value, (2) explained that owners who lose their property for non-payment of taxes "are largely responsible for the

loss of their properties' value by failing to pay their taxes on time and in full," and (3) recognized that if such owners "were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency." App.55a–57a (quoting *Rafaeli*, 952 N.W.2d at 465-66).

The district court also noted that in *Nelson* v. *City of New York*, 352 U.S. 103 (1956), this Court held that the owner of a tax-foreclosed property has "an interest in surplus only to the extent it is provided under some other source, such as state law, and that federal law does not recognize a former property owner's property interest in potential equity that exists after a tax foreclosure. App.57a (citing *Nelson*, 352 U.S. at 110). Because the Michigan Supreme Court in *Rafaeli* held that "Michigan's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure *sale* of property, 'no more, no less,'" there was no taking of any property interest here that Michigan recognizes. App.58a (quoting *Rafaeli*, 952 N.W.2d at 459, 466) (emphasis added).

C. The Sixth Circuit's decision

On appeal, Respondents essentially argued that the court of appeals should apply *Rafaeli* but in their favor rather than to their detriment. Appellants' 6th Cir. Br., pp. 28–39. Nowhere in their briefing did Respondents argue that the GPTA effected a "strict foreclosure" prohibited as a matter of federal common law because it amounted to a taking of Respondents' "surplus equity" interest.

Yet that is what the panel held *sua sponte*. In derogation of *Rafaeli*—and without certifying any question regarding state property law to the Michigan Supreme Court—the panel undertook an independent historical review of "the rules governing equitable interests in real property" going back to the "12th century." App.9a. Giving the Oakland County Petitioners no opportunity to brief the historical record, the panel eschewed comparable state tax-foreclosure cases and looked exclusively at private-party transactions—principally those involving mortgages—to conclude that the history of the American common law prohibited so-called "strict foreclosures," a history that Michigan purportedly contravened with its enactment of the GPTA. App.9a–17a. Because the panel concluded that the Oakland County Defendants had taken Plaintiffs' "equitable title to their homes," Plaintiffs stated a claim in violation of the federal Takings Clause. App.21a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit took it upon itself to rewrite Michigan property law on an issue where the Michigan Supreme Court had already spoken. In so doing, the panel federalized state tax-foreclosure law, necessitating this Court's review for several reasons.

To begin, the Sixth Circuit's holding conflicts with this Court's repeated admonitions that state law, not federal law, controls federal Takings Clause claims. After all, the U.S. Constitution merely protects property interests; it does not create them.

In addition, the Sixth Circuit's decision conflicts with recent decisions of the Eighth Circuit and the Nebraska Supreme Court. In those latter decisions,

the courts appropriately recognized that state law controls the scope of state property rights. So if a state has enacted a tax-foreclosure regime that does not account for so-called "surplus equity," that is the end of the inquiry, not its beginning.

Finally, the Sixth Circuit's opinion looks to the wrong historical tradition. As this Court recently clarified, the "job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions *presented in particular cases or controversies*." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022) (second emphasis added). In a dispute over the propriety of state tax-foreclosure proceedings, a historical review of state tax-foreclosure proceedings under state law is required. A historical review of private mortgage foreclosures under English and American common law sheds little if any light on the propriety of a state tax-foreclosure regime.

For all of these reasons, the Court should grant the petition. At minimum, the Court should hold the petition and then grant, vacate, and remand it to the Sixth Circuit for further consideration in light of *Tyler* once the Court issues its decision in that case.

I. The Court should grant review and reverse the Sixth Circuit's use of the Takings Clause to federalize the scope of state property rights.

This Court recently reaffirmed that, as a general matter, "the property rights protected by the Takings Clause are creatures of state law." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2076 (2021) (citing *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 164 (1998), and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)). That makes sense. As this Court has explained, the U.S. "Constitution protects rather than creates property interests." *Phillips*, 524 U.S. at 164. Accordingly, "[t]he existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Ibid.* (quoting *Bd. of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972)).

For example, in *Lucas*, the owner of beachfront property sued the South Carolina Coastal Council, claiming that the Council's application of South Carolina's Beachfront Management Act to the owner's property was a federal taking without just compensation. The Court made clear that the proper analysis involved examining *state* historical limitations on the land owner's title. 505 U.S. at 1029. That is why "the owner of a lakebed . . . would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land," constituting nuisance as a matter of law. *Ibid.* The use of the property for what is "now expressly prohibited purposes was *always* unlawful, and (subject to other

constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit." *Id.* at 1030.

"[T]his recognition that the [federal] Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings' is surely unexceptional," this Court continued. *Lucas*, 505 U.S. at 1030. After all, this Court traditionally resorts to "'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Ibid.* (quoting *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972), and citing *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1011–12 (1984), and *Hughes* v. *Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)). It is only when state action "declares 'off-limits' all economically productive or beneficial uses of land" that "goes *beyond* what the relevant background principles would dictate" that "compensation must be paid to sustain it." *Ibid.* (emphasis added).

Here, the Michigan Supreme Court has already defined, as a matter of state law, the "relevant background principles" that dictate the scope of an owner's right in property in the context of a government foreclosure for the non-payment of taxes. And that scope does not include "equitable title." Contra App.21a. Rather, "a former property owner has a compensable takings claim *if and only if the tax-foreclosure sale produces a surplus*." *Rafaeli*, 952 N.W.2d at 462 (emphasis added).

As a result, former owners of tax-foreclosed properties are not entitled to compensation "*until* their properties [sell] for an amount in excess of their tax debts." *Ibid.* (emphasis added). Here, the Oakland County Petitioners did not sell Respondents' property for an amount in excess of their tax debts, nor did Petitioners retain a surplus. Rather, the Oakland County Petitioners received the statutory minimum bid, i.e., the amount of back taxes plus costs and interests, not a penny more.

Given all that, it was exceedingly strange that the Sixth Circuit would saddle the Oakland County Petitioners with Takings Clause liability for the purported taking of equitable title. Worse, the Sixth Circuit violated this Court's admonition to define Respondents' property interests by referencing "state law" rather than looking to the common law. *Phillips*, 524 U.S. at 164 (quoting *Roth*, 408 U.S. at 577). Moreover, as explained below, the Sixth Circuit did not even look to the common law of foreclosures for the non-payment of taxes, but instead looked to the law of private mortgage foreclosures. The result was to create a new Michigan property interest—so-called "equitable title"—that the Michigan Legislature has not created and the Michigan Supreme Court has never recognized in the context presented here. That decision warrants this Court's review and reversal.

II. The Court should grant review to resolve an important circuit split.

Certiorari is independently warranted because the Sixth Circuit's decision creates an irreconcilable split with decisions of the Eighth Circuit and Nebraska Supreme Court. The latter jurisdictions correctly follow this Court's takings jurisprudence and define property rights in the tax-foreclosure context by looking exclusively to state law.

In *Tyler* v. *Hennepin County*, 26 F.4th 789 (8th Cir. 2022), cert. granted, 143 S. Ct. 644, a Minnesota taxpayer brought a federal takings claim after a county foreclosed on her condominium to satisfy a tax debt and retained the surplus equity following a subsequent sale. A unanimous Eighth Circuit held that there was no Takings Clause claim. Rather than examine the common-law history back to Magna Charta as did the Sixth Circuit, the Eighth Circuit "look[ed] *to Minnesota law* to determine whether Tyler has a property interest in surplus equity." *Id.* at 792 (emphasis added).

The Eighth Circuit began by explaining that the "first step in evaluating a takings claim is to identify the interest in private property that allegedly has been taken." 26 F.4th at 792. Tyler did not claim that the foreclosure itself was a taking, only the local "county's retention of the surplus equity—the amount that exceeded her $15,000 tax debt." *Ibid.* So the court's inquiry was focused on how "state law" defined the scope of property rights in the context of a tax foreclosure. *Ibid.* (quoting *Phillips*, 524 U.S. at 164).

Tyler invoked an 1884 Minnesota Supreme Court decision for the proposition that Minnesota "recognized a common-law property interest in surplus

equity after a tax-foreclosure sale." 26 F.4th at 792 (citing *Farnham* v. *Jones*, 19 N.W. 83 (Minn. 1884)). The county argued that "the decision merely interpreted the [State's] 1881 statute." *Ibid.* No matter. The Eighth Circuit "conclude[d] that any common-law right to surplus equity recognized in *Farnham* has been abrogated by statute. In 1935, the Minnesota legislature augmented its tax-forfeiture plan with detailed instructions regarding the distribution of all 'net proceeds from the sale.'" *Id.* at 793 (quoting 1935 Minn. Laws, ch. 386, § 8). "The statute allocated the entire surplus to various entities but allowed for no distribution of net proceeds to the former landowner. The necessary implication is that the 1935 statute abrogated any common-law rule that gave a former landowner a right to surplus equity." *Ibid.*

The same was true of "Minnesota's current surplus distribution provision." 26 F.4th at 793 (citing Minn. Stat. § 282.08). "Minnesota's current distribution plan provides how the county must spend the entire surplus [if any], and it does not give the former owner a right to the surplus." *Ibid.* So "even assuming Tyler had a property interest in surplus equity under Minnesota common law as of 1884, she has no such property interest under Minnesota law today." *Ibid.* And "[w]here state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking." *Ibid.* As this Court held in *Nelson* v. *City of New York*, 352 U.S. 103 (1956), "once title passes to the State under a process in which the owner first receives adequate notice and opportunity to take action to recover the surplus, the governmental unit does not offend the Takings Clause by retaining surplus equity from a sale." *Tyler*, 26

F.4th at 794 (citing *Nelson*, 352 U.S. at 110). "That Minnesota law required Tyler to do the work of arranging a sale in order to retain the surplus is not constitutionally significant." *Ibid.*

The Nebraska Supreme Court used the identical analysis in *Continental Resources* v. *Fair*, 971 N.W.2d 313 (Neb. 2022). That case involved a Nebraska property owner's claim that that state's tax-foreclosure regime constituted a taking under the federal and state constitutions. Like the Eighth Circuit, the Nebraska Supreme Court began with this Court's admonition that "the existence of a property interest [under the Takings Clause] is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Id.* at 324 (quoting *Phillips*, 524 U.S. at 164). Fair maintained that several "Nebraska statutes and a provision in the state constitution . . . recognize a property interest in the equity of his property." *Id.* (citing Neb. Rev. Stat. § 76-101 (Reissue 2018), Neb. Rev. Stat. § 77-102 (Reissue 2018), Neb. Rev. Stat. § 40-101 (Reissue 2016), and Neb. Const. art I, § 25). But "[t]hese general provisions," the court held, "do not recognize a property interest in the surplus equity value of property after a tax certificate has been sold, the redemption period has expired, and a tax deed is requested and issued." *Id.* at 325.

What's more, Fair could not point "to any Nebraska cases recognizing such a common-law property right." 971 N.W.2d at 325. Accordingly, there was "no basis to conclude that *Nebraska common law* recognizes the property interest that is essential for Fair's takings claim to succeed." *Id.* (emphasis added, citing *Tyler* v. *Hennepin Cty.*, 505 F. Supp. 3d 879 (D. Minn. 2020), *affirmed* 26 F.4th 789 (8th Cir. 2022)).

If Respondents' claims had arisen in the Eighth Circuit or the Nebraska Supreme Court, then the Oakland County Petitioners would have prevailed. Rather than looking to inapposite English or other common law, the reviewing court would have looked to Michigan law, applied *Rafaeli*, and held that Respondents had no property interest in so-called "surplus equity." And it cannot be the case that Takings Clause claims are decided differently merely because of the jurisdiction in which the case is brought.

Since this Court has already granted review of the petition in *Tyler*, the most appropriate action is to hold the present petition pending the Court's issuance of the *Tyler* opinion, and to grant, vacate, and remand the present case for reconsideration in light of *Tyler*.

III. The Court should grant review and clarify how lower courts should apply history and tradition to constitutional questions.

Even if this Court overruled *Cedar Point*, *Phillips*, and *Lucas* and directed lower courts to examine English and American common law to determine the scope of property rights for purposes of a federal Takings Clause claim, the Sixth Circuit's approach below was incorrect. The "job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions *presented in particular cases or controversies*." *Bruen*, 142 S. Ct. at 2130 n.6 (second emphasis added). Here, that meant examining the historical record regarding state tax-foreclosures, not private mortgage foreclosures.

The Sixth Circuit opinion's historical review began with the 12th century creation of private mortgages in England. App.9a–10a. The court noted that in such a context, "irrevocable forfeiture of the debtor's entire interest in the land . . . was before long regarded as an intolerably harsh sanction for the borrower's default." App.10a. So the "Court of Chancery soon interposed to assuage the harshness of enforcement of mortgages in courts of law." *Ibid.*

That may be true as a general proposition. But the principle regarding private mortgages says nothing of the harshness of a total forfeiture when a property owner—after years of notice and process—fails to satisfy a tax delinquency. Collection of taxes is essential for a state to provide government services, and the obligation to pay taxes owed has long been considered concomitant with the right to own property. Ignoring all that, the Sixth Circuit opinion continued its survey of historical English courts. App.10a–13a.

Turning to "18th century American courts of equity," the opinion described them as "uniformly hostile" to so-called "strict foreclosure," i.e, cases, "where the land's value exceeded the amount of the debt." App.13a. But the opinion continued to canvass the law of private mortgage foreclosures, *not* government tax foreclosures, App.13a–15a, concluding that, "by the mid-1800s, foreclosure by sale was 'firmly established' in the law of most states, to the exclusion of strict foreclosure." App.15a (citations omitted).

Finally, the opinion pivoted to tax foreclosures, asserting that "American courts' insistence upon foreclosure by sale, rather than strict foreclosure, extended fully to foreclosures for payment of unpaid

taxes." App.15a. But in support of that broad statement of the common-law rule, the opinion cited only four cases. App.15a–16a. And none of those cases bear the weight the opinion assigns to them.

In the first case, *Stead's Executors* v. *Course*, 8 U.S. 403 (1808), this Court held that a tax collector "exceeded his authority" by selling more land than "necessary to pay the tax in arrear," Slip Op., p. 11 (quoting 8 U.S. at 414). But that was because *under the tax laws of Georgia*, "the collector [wa]s authorized to sell land only on the deficiency of personal estate; and then to sell only so much as [wa]s necessary to pay the tax in arrear." *Id.* at 414. The Court's holding did not turn on the Takings Clause or any federalization of Georgia property rights, but on the scope of property rights as defined by the State of Georgia.

To the same effect is *Margraff* v. *Cunningham's Heirs*, 57 Md. 585 (1882). There, too, the tax collector's conduct—selling three parcels *en masse* without consideration of the taxes owed—"was an abuse of his power under the [Maryland state] statute." *Id.* at 588. The court's holding did not turn on federal common law but on the scope of rights under a state statute.

The same is true in *Loomis* v. *Pingree*, 43 Me. 299 (1857). In *Loomis*, the court's ruling relied on a Maine statute that authorized a sheriff "to proceed to sell [only] so much of said land as will discharge said taxes." *Id.* at 311. That statutory limitation was the decision's sole basis; there is nary a reference to English or American common law.

Finally, in *Martin* v. *Snowden*, 59 Va. 100 (1868), the Supreme Court of Appeals of Virginia examined two federal statutes, one of which allowed to be sold for nonpayment of taxes "so much of the real estate as

may be necessary" and another, land "without any limitation whatsoever of quantity." *Id.* at 119. The court said the propriety of a given sale "must be decided by the language of the law," not the courts' view of the appropriate penalty to affix to a "default in the payment of taxes." *Id.* at 118–19. The court would have enforced *any* sale that conformed with an applicable statute—even "if excessive and unnecessary according to" the court's view of the situation. *Id.* at 119.

After this one-paragraph analysis of four, inapposite historical authorities, the Sixth Circuit's opinion returned to mortgage foreclosures before examining the panel's views of Michigan equitable title. App.17a–19a. But as the district court held, the Michigan Supreme Court resolved the Michigan property law question here in *Rafaeli,* rejecting the panel opinion's foreclosure-is-the-taking conclusion and instead holding that "a former property owner has a compensable takings claim *if and only if the tax-foreclosure sale produces a surplus*." *Rafaeli*, 952 N.W.2d at 462 (emphasis added).

And if there is any doubt that the Sixth Circuit was rejecting Michigan law and applying its own rule, it is resolved by the opinion's discussion of several different areas of property law where Michigan "*recognizes* equitable title." App.18a (emphasis added, citing *City of Marquette* v. *Michigan Iron & Land Co.*, 92 N.W. 934, 934 (Mich. 1903) (timber); *Stevens Mineral Co.* v. *Michigan*, 418 N.W.2d 130, 133 (Mich. Ct. App. 1987 (mineral rights); *Reeves* v. *Reeves*, 575 N.W.2d 1, 2 (Mich. Ct. App. 1997) (marital assets)). The opinion concludes that the "only context in which Michigan law *does not recognize* equitable title as a property interest in land, apparently, is when the

government itself decides to take it." App.18a–19a (emphasis added). Exactly right. And that lack in Michigan law should have been dispositive under this Court's precedents. Instead, the Sixth Circuit didn't like what it saw and rewrote the rules entirely. In a Takings Clause case, that approach is the exact opposite of what this Court has instructed. And it is also inconsistent with how this Court has directed lower courts to apply history and tradition.

CONCLUSION

The petition for a writ of certiorari should be granted or the petition held, then granted, vacated, and remanded when this Court issues its opinion in *Tyler* v. *Hennepin County*, No. 22-166.

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