No. 25-203

IN THE
Supreme Court of the United States

JOHANNA MCGEE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JACQUELINE MCGEE, *et al.*,
Petitioners,

v.

ALGER COUNTY TREASURER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Michigan

BRIEF OF AMICI CURIAE PIONEER INSTITUTE, INC., AND GREATER BOSTON LEGAL SERVICES, INC., IN SUPPORT OF PETITIONERS

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IDENTITIES AND INTERESTS OF AMICI CURIAE[1]

Pioneer Institute, Inc. (the "Pioneer Institute") and Greater Boston Legal Services, Inc. ("GBLS") respectfully submit this brief in support of Petitioners Johanna McGee and Lillian Joseph.

The Pioneer Institute is a nonprofit, nonpartisan entity that was founded in 1988 to promote open and accountable government, educational and economic opportunities, and freedom of speech and association in Massachusetts and across the country. The Pioneer Institute achieves its mission by providing public policy research and programs on a wide variety of issues affecting the public interest, such as housing, education, and healthcare. The Pioneer Institute is committed to the foundational principle that the government must protect, and not usurp, the property rights of its citizens. To that end, the Pioneer Institute believes it is crucial that the courts uphold a bedrock right set forth in the U.S. Constitution: When the government takes private property for a public purpose, it must provide just compensation to the property owner. In our ordered liberty, the right to just compensation is automatic and unequivocal.

GBLS is a nonprofit, nonpartisan legal aid organization based in Boston, Massachusetts. GBLS'

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[1] Counsel of record for all parties received notice of amici curiae's intent to file this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

mission is to provide critical legal advice and representation to low-income individuals and families in Boston and its surrounding cities and towns. GBLS regularly represents individuals facing municipal foreclosures due to unpaid taxes or fines. GBLS' clients facing tax foreclosures are often elders or individuals with disabilities who may face significant challenges in complying with short deadlines and interpreting complex or confusing communications. The rights of such individuals are central to the question presented in this case. And legislation alone is insufficient to protect these vulnerable individuals. Indeed, just last year, Massachusetts enacted legislation reforming the Commonwealth's municipal tax foreclosure process in the wake of *Tyler v. Hennepin County*, 598 U.S. 631 (2023)—yet the Massachusetts legislature has already been presented proposals to weaken homeowners' rights. *See, e.g.*, Mass. H.B. 4003 § 27 (2025) (bill that would modify tax foreclosure timelines). Elders, individuals with disabilities, and other homeowners facing tax foreclosure are dependent on the courts and the U.S. Constitution to protect the equity they have built in their homes.

SUMMARY OF THE ARGUMENT

This Court should grant certiorari to consider overruling *Nelson v. City of New York*, 352 U.S. 103 (1956). In *Nelson*, the Court upheld a city ordinance permitting New York City to foreclose on property due to unpaid water bills, and then retain 100% of the proceeds from the sale of the property (or retain title to the property) if the property owner did not fulfill certain procedural requirements, even though the sale

proceeds (or value of the property) far exceeded the amount of the debt.

Nelson is an aberration in the long history of government takings jurisprudence. Anglo-American law dating to at least the Magna Carta has limited the government to take only so much property as would satisfy the debt owed. By allowing the government to retain a property owner's assets far beyond what is owed, *Nelson* conflicts with the Takings Clause of the Fifth Amendment. The government's retention of surplus equity means the government can take private property without paying *any* compensation, let alone just compensation. For this reason alone, *Nelson* should not stand.

Additionally, *Nelson* opens the door to an unworkable patchwork approach to the recovery of equity that the government has retained after a taking and to which the government has no legal right. Under *Nelson*, state and municipal governments are spurred to devise a panoply of procedural requirements that will make it less and less likely that homeowners will recover the surplus equity to which they are constitutionally entitled. Governments will regularly take "private property . . . for public use, without just compensation," in violation of the Fifth Amendment.

The Court should also grant certiorari and request that the parties brief whether the Michigan tax foreclosure statute violates the Eighth Amendment because the value of the property retained bears "no correlation to any damages sustained by" the government. *Tyler v. Hennepin*

County, 598 U.S. 631, 648-49 (2023) (Gorsuch, J., joined by Jackson, J., concurring) (cleaned up). Nelson did not address this question. The Michigan statute at issue here, like the ordinance at issue in *Nelson*, allows violations of the Excessive Fines Clause.

ARGUMENT

I. This Court Should Grant Certiorari to Consider Overruling *Nelson v. City of New York*.

"Stare decisis is not an inexorable command." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024) (cleaned up). The doctrine "is at its weakest when," as here, this Court "interpret[s] the Constitution . . . because only this Court or a constitutional amendment can alter [the Court's] holdings." *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180, 202–03 (2019) (overruling *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). In particular, the Court has held that a precedent's weak reasoning, its departure from clear precedent, and its general "unworkability" all militate in favor of its overruling. *See, e.g.*, *Loper Bright*, 603 U.S. at 407 (overruling *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because of "the quality of the precedent's reasoning [and] the workability of the rule it established") (cleaned up); *Knick*, 588 U.S. at 203 (overruling *Williamson County* because of "the quality of its reasoning, the workability of the rule it established, [and] its consistency with other related

decisions") (cleaned up). *Nelson* suffers from all these fatal defects and should therefore be overruled.

A. *Nelson* Contravenes Centuries of Anglo-American Law.

In *Nelson*, the Court upheld the constitutionality of a New York City ordinance requiring a property owner with unpaid water bills to request the surplus proceeds from the city's foreclosure sale of the owner's property within 20 days after the sale—or else forfeit the entirety of the surplus equity. 352 U.S. at 105–06. Specifically, *Nelson* holds that when a municipality forecloses on and sells property to recover a tax debt, the municipality may retain any surplus (the difference between the amount of the debt and the sales proceeds) if the property owner does not timely act to recover the surplus. *Id*. at 110. Allowing the government to retain the surplus is contrary to centuries of Anglo-American law establishing that, after taking private property, the government may not retain assets in excess of the debt owed to it.

As this Court explained in *Tyler v. Hennepin County*, the history of this obligation dates

> at least as far back as Runnymeade in 1215, where King John swore in Magna Carta that when his sheriff or bailiff came to collect any debts owed him from a dead man, they could remove property "until the debt which is

> evident shall be fully paid to us; *and the residue shall be left to the executors to fulfil the will of the deceased*."

598 U.S. at 639 (emphasis added) (quoting W. McKechnie, Magna Carta, A Commentary on the Great Charter of Kind John, ch. 26, p. 322 (rev. 2d ed. 1914)).

English and American law developed from there, with both English law and the majority of American States requiring the government to *automatically* return any assets taken in excess of the debt. *See Tyler*, 598 U.S. at 639–42. For example, in the 17th Century, the English Crown had "the power to seize and sell a taxpayer's property to recover a tax debt, but . . . any 'Overplus' from the sale [was required to] 'be immediately restored to the Owner.'" *Id*. at 639 (quoting 4 W. & M., ch. 1, § 12, in 3 Eng. Stat. at Large 488–489 (1692)). A century later, English "common law demanded the same: If a tax collector seized a taxpayer's property, he was 'bound by an implied contract in law to restore [the property] on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus.'" *Tyler*, 598 U.S. at 639–40 (quoting 2 William Blackstone, Commentaries on the Laws of England 453 (1771)).

American States followed this tradition. *Tyler*, 598 U.S. at 640–42 (tracking States' laws from 1798 through 2023). As of 2023, "[t]hirty-six States and the Federal Government require[d] that the excess value

be returned to the taxpayer." *Id.* at 642; *see also* Petition for a Writ of Certiorari ("Petition") at 16 (discussing "the unbroken line of cases from early in the nation's history until the current decade," in other areas of the Court's takings jurisprudence, under which the government has the affirmative, categorical duty to pay just compensation for taking private property).

Before *Nelson*, a few States attempted to retain tax sale surpluses, but these forays were "short lived." *Tyler*, 598 U.S. at 641–42 (explaining, for instance, that "Mississippi's highest court promptly struck down its law for violating the Due Process and Takings Clauses of the Mississippi Constitution"). *Nelson*, however, opened the door for municipalities to retain a surplus by imposing onerous requirements on property owners as a precondition to securing the return of their surplus equity.

Imposing these sorts of obligations on property owners violates the well-established principle that when the government takes private property for public use, its payment of just compensation is *mandatory*. Indeed, the Fifth Amendment commands that just compensation be paid for the taking of private property. *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). This Court has repeatedly reaffirmed the rule that the government is required to pay just compensation. *See* Petition at 16–17 (citing cases). Key among this Court's precedents are *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), *Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299 (1923), and *Baltimore &*

Ohio Railroad Co. v. United States, 298 U.S. 349 (1936).

In *Monongahela*, the Court interpreted the plain language of the Takings Clause to mean that "[t]here can . . . be no doubt that the *compensation must be a full and perfect equivalent* for the property taken . . ." 148 U.S. at 326 (emphasis added). In *Seaboard Air*, the Court stated:

> It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right . . . The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.

261 U.S. at 306. And similarly, in *Baltimore & Ohio Railroad*, the Court was clear that "[t]he just compensation clause *may not be evaded or impaired by any form of legislation*." 298 U.S. at 368 (emphasis added).

This Court's precedents—which emerge from and exemplify centuries of history and tradition—establish that the government has the affirmative and

unqualified duty to return to a property owner any surplus resulting from the foreclosure sale of the owner's property. *See Tyler*, 598 U.S. at 639–43. This self-executing and bright-line duty should prohibit any state or local government from forcing the property owner to "earn" just compensation by jumping through procedural hoops. *See Knick*, 588 U.S. at 185.

But *Nelson* allows exactly that. It permits an end-run around the Fifth Amendment by tying the right to just compensation to deadlines, or unyielding and illogical mailing requirements, set by municipalities that stand to profit if a property owner cannot comply. *See* Petition at 7–10. *Nelson* breaks from centuries of Anglo-American law dictating that the government is not entitled to retain private property—including the surplus from tax sales—without paying just compensation to the owner. *Nelson* should be overturned.

B. *Nelson* Is Unworkable.

Beyond contravening the plain language of the Takings Clause, the centuries-old history and tradition of Anglo-American property law, and this Court's clear precedents, *Nelson* is proving to be entirely unworkable in its application. This type of chaotic unworkability warrants overturning *Nelson* to avoid leaving the courts and the country with a poorly reasoned decision that influences future legislation. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022) ("[W]hen one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. . . . [I]n appropriate circumstances we must

be willing to reconsider and, if necessary, overrule constitutional decisions.").

Nelson opened a Pandora's box: a potentially endless assortment of procedural requirements across the nation, imposed at all levels of state government, which property owners with tax debts must fulfill to "perfect" their (automatic) right to just compensation for the surpluses resulting from the government's foreclosure sales of their properties.[2] This potentially unlimited variety of procedural burdens has generated, and is likely to continue generating, a potentially unlimited variety of fact patterns—each of which will require extensive judicial scrutiny, under procedural due process, to decide whether the government's requirements for claiming the surplus proceeds are fair and reasonable under the circumstances of the particular case. "A rule of law that is so wholly in the eye of the beholder . . . invites different results in like cases and is therefore arbitrary in practice." *Loper Bright*, 603 U.S. at 408 (overruling *Chevron* because its two-step test was unworkable) (cleaned up).[3]

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[2] In addition to this case, see, for example, *Koetter v. Manistee County Treasurer, et al.*, No. 24-1095 (cert. pending); *Beeman, et al., v. Muskegon County Treasurer*, No. 24-858 (cert. pending). *See also* Petition at 1 & n.1 (discussing four other states imposing complex procedural requirements for property owner to obtain surplus proceeds from foreclosure sale).

[3] *See also Hudson v. United States*, 522 U.S. 93, 101–02 (1997) (overruling *United States v. Halper*, 490 U.S. 435 (1989), because "*Halper*'s deviation from longstanding double jeopardy principles was ill considered[,] . . . [and] *Halper's* test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable."); *Gulfstream Aerospace v. Mayacamus Corp.*, 485

Nelson is unworkable in its application and has engendered a theoretically endless line of cases that will test the limits of the Court's procedural due process jurisprudence and yield arbitrary results. The Takings Clause could not have been intended to produce such an undesirable and unworkable outcome. *Nelson* should be overruled.

C. *Tyler* Distinguished *Nelson* Without Reaffirming It.

Nothing in *Tyler* prevents the Court from overruling *Nelson*. The Court in *Tyler* "readily distinguished" *Nelson* on the ground that *Tyler* involved the government's *unconditional* refusal to pay the property owner the surplus proceeds, while *Nelson* involved the government's *conditional* refusal to do so. *Tyler*, 598 U.S. at 643. Because of this distinction, the Court did not have to decide whether *Nelson* remained good law. Therefore, the Court's discussion of *Nelson* in *Tyler* should not be misinterpreted as a reaffirmation of *Nelson*. *Tyler* essentially left that issue for another day. That day

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U.S. 271, 283 (1988) (abrogating Court's own rule of decision, announced in earlier cases, that allowed for appealability of district court order denying motion to stay or dismiss federal suit, due to similar pending state court suit, because "the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals."); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), because "[w]e . . . reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation [under the Tenth Amendment] that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' Any such rule leads to inconsistent results. . . .").

has now arrived, and this Court should grant certiorari to consider overruling *Nelson*.

II. This Court Should Grant Certiorari to Consider Whether the Michigan Statute Violates the Excessive Fines Clause.

This Court should grant certiorari for an additional reason: to decide whether the Michigan statute—which permits the government to retain staggering surpluses far beyond the amounts of the debts at issue—runs afoul of the Excessive Fines Clause of the Eighth Amendment. Two Justices of this Court have already considered how the Excessive Fines Clause might apply in circumstances similar to those presented here. *See Tyler*, 598 U.S. at 648–50 (Gorsuch, J., joined by Jackson, J., concurring). The Court should grant certiorari to decide the significant issues raised by those Justices.

In a concurring opinion in *Tyler*, Justice Gorsuch, joined by Justice Jackson, addressed whether the Excessive Fines Clause might apply to a tax-foreclosure scheme allowing the government to keep far more than it is owed. The concurring opinion observed that "[s]o long as [a] law 'cannot fairly be said *solely* to serve a remedial purpose,' the Excessive Fines Clause applies." *Id.* at 648 (quoting *Austin v. United States*, 509 U.S. 602, 610 (1993)). Further, it is not "appropriate to label sanctions as 'remedial' when . . . they bear 'no correlation to any damages sustained by society or to the cost of enforcing the law' and 'any relationship between the Government's actual costs and the amount of the sanction is merely coincidental.'" *Id.* (quoting *Austin*, 509 U.S. at 621–22 & n.14).

Applying that reasoning here, a tax foreclosure scheme like Michigan's is punitive, not remedial, because the retained equity bears no relationship to the harm caused to the government by the unpaid taxes or fees. Indeed, "[e]conomic penalties imposed to deter willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: They cannot be excessive." *Id.* at 649–50.

The Court has never addressed whether the equity retained after a government forecloses on the debtor's property is an excessive fine. *Nelson* does not analyze the issue, and the property owners there did not raise it. *See Nelson*, 352 U.S. at 109 (property owners argued that they had been "deprived of property without due process of law or ha[d] suffered a taking without just compensation"). While the Court stated that (other than notice issues) "nothing in the Federal Constitution" prevented the government from retaining a post-foreclosure surplus, *id.* at 110, this broad language did not reflect the arguments raised or the issues addressed in the Court's opinion. The Court in *Nelson* did not discuss—or even mention—the Excessive Fines Clause.[4]

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[4] Had the Court applied the Excessive Fines Clause, the result in *Nelson* might (and should) have been different. *Nelson* involved two parcels. *Nelson*, 352 U.S. at 104. The first parcel had unpaid water bills totaling $65 and was sold by the City for $7,000, with "the City retaining all the proceeds." *Id.* at 105–06. Thus, for the first parcel, the City retained 107.7 times the amount of the debt. The second parcel had unpaid water bills totaling $814.50 and was assessed at $46,000; the City acquired title to the parcel and retained it as of the date of the opinion in *Nelson*. *Id.* at 106. Thus, for the second parcel, the City retained 56.48 times the

Nor did this Court address the Excessive Fines Clause in *Tyler*. *See Tyler*, 598 U.S. at 648 (Gorsuch, J., joined by Jackson, J., concurring) ("Given its Takings Clause holding, the Court understandably decline[d] to pass on the question whether the Eighth Circuit committed a further error when it dismissed Ms. Tyler's claim under the Eighth Amendment's Excessive Fines Clause."). The issue remains both undecided and critical.

This Court should grant certiorari to address whether and how the Excessive Fines Clause applies to tax foreclosure schemes in which the government is permitted to retain surplus equity in a property, however substantial and however disconnected from the amount owed. The Michigan statute, whether analyzed through the lens of the Excessive Fines Clause or the Takings Clause, violates the rights of vulnerable property owners and the guarantees of the Constitution.

CONCLUSION

This Court should grant Johanna McGee and Lillian Joseph's petition for a writ of certiorari to

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amount of the debt. These fines were grossly disproportional to the debt owed and, therefore, unconstitutional. *See United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding "that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense"); *Cooper Indus., Inc. v. Leatherman Tool Grp.,* 532 U.S. 424, 434–35 (2001) (identifying factors courts consider in determining whether a fine is grossly disproportionate and, therefore, excessive).

consider overturning *Nelson v. City of New York* and applying the Excessive Fines Clause.

October 6, 2025

Respectfully submitted,

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