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 Michigan Court of Appeals

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. *Amicus* also lent its expertise to this Court in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), including discussing *Nelson v. City of New York*, 352 U.S. 103 (1956), the application of which is at the center of this case.

Accordingly, *Amicus* has an institutional interest in this case.

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[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus* certifies timely notice was provided to all parties of the intent to file this brief.

SUMMARY OF THE ARGUMENT

This case is about how many arbitrary hoops citizens must jump through to get what this Court declared is their right to the equity in their homes after a tax sale. Of course, a person who falls behind on their property tax bills is unlikely to have the ability to satisfy complex procedural requirements. But beyond practicalities, this Court unequivocally ruled that the government keeping any money (over the already hefty taxes, fees, and penalties) is a taking. There is no need for the government to get a further windfall.

Presented in this petition is an issue of national importance that needs clarity from this Court, *see* S. Ct. R. 10(c), but one that will not likely garner this Court's attention without a holistic understanding of the tension between the Court's recent decision in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), with lower courts' applications of a 1950s case, *Nelson v. City of New York*, 352 U.S. 103 (1956), that functionally allows the same takings banned by *Tyler*. Here, *Amicus* presents a greater picture of the state of play for those who lose their homes to tax sales.

The facts presented in this case—an untimely death in one instance and a county clerk failing to check the mail in another—show how devastating these procedural hoops can be. *See* Pet. 7–8. It is therefore a good vehicle for this Court to articulate the guiderails needed to prevent takings via prolix processes and enforce the decision and spirit of the *Tyler* decision.

ARGUMENT

I. STATES ERECTED PROLIX EQUITY RECOVERY PROCEDURES, IMPEDING THE EFFECT OF *TYLER*'S RULING.

The case at bar concerns the difficult, almost impossible, procedural hurdles created by Michigan for citizens to claim what is already due to them under *Tyler v. Hennepin County*, 598 U.S. 631 (2023), and its state analog, *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434 (Mich. 2020). But Michigan is hardly unique. New York, New Jersey, and Arizona all provide theoretical paths for recovering the excess value from a tax sale. But the way is so difficult that functionally most former homeowners cannot recover their money at all.

In New York, tax foreclosures are *in rem* actions, that result in the transfer of title to whomever was the highest bidder at the sale. *See generally* N.Y. Real Prop. Tax Law § 1136. In order to stop the transfer of title, the citizen must affirmatively answer the action brought. *See id.* § 1136(3)(a). Otherwise title transfers to the government, or, at the election of the government, directly to the winning bidder. *Id.* § 1136(3)(b).

The filing requirements are exceedingly difficult for a lay person: production of a Certificate of Claims to Surplus Monies, a Notice of Claim, and a Motion to Release Surplus Monies. *See*, *e.g.*, N.Y. State Unified Court System, "Tax Foreclosure: Instructions to Claim

Surplus Monies" (last accessed Oct. 6, 2025).[2] These all need to be filed in the New York State Courts Electronic Filing System, requiring the sophistication to know how electronic filing works, as well as the payment of filing fees. *See id.* No New York Court Clerks can help, since they cannot give legal advice. *See id.* And some of these filings require a complete list of all possible claimants to the land at issue. *Id.* The clerks' offices often also require the claimants to draft the proposed orders for the return of the funds. *See*, *e.g.*, Cnty. Court Clerk, Chemung Cnty, "Instructions to Claim Surplus Monies Action (In Rem Foreclosures)" at 2 ¶(g) (last accessed Oct. 6, 2025).[3] It blinks reality to assume the average person could handle this process.

The complexity is common, but so is requiring an application to receive the excess value *before* the tax sale becomes final. For example, in New Jersey a property owner must proactively request relief and their right to excess value *before* the court issues a final judgment. *See* N.J. Stat. Ann. § 54:5-87(b). Failure to do so is an absolute bar to recovery. *See id.* Likewise in Arizona the property owner must exercise their right to claim the excess value prior to the sale, including "a reasonable estimate of the market value of the property." Ariz. Rev. Stat. Ann. §§ 42-18204(B)(1) (list of items the citizen must bring to the court prior to the sale) and (B)(2) (requiring a

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[2] *Available at*: https://www.nycourts.gov/forms/foreclosure/pdfs/8%20-%20Instructions%20to%20Claim%20Surplus%20Monies.pdf.

[3] *Available at*: https://www.chemungcountyny.gov/DocumentCenter/View/16367/Claim-Form-Packet.

reasonable estimate of the value of the home, again prior to the sale). And the Court must first determine that the excess funds will exceed $2,500. *See* Ariz. Rev. Stat. Ann. § 42-18204(B).

The Michigan system is so complex its generating multiple cases reaching this Court. *See, e.g.*, *Pung v. Isabella Cnty.*, No. 22-1919/1939, 2025 WL 318222 (6th Cir. Jan. 28, 2025), *cert. granted* U.S. No. 25-95 (Oct. 3, 2025);[4] *Lathfield Investments, LLC v. City of Lathrup Village*, 136 F.4th 282 (6th Cir. 2025), *cert. petition filed* U.S. No. 25-366 (Sep. 25, 2025); *In re Muskegon Cnty. Treas'r for Foreclosure*, 20 N.W.3d 337 (Mich. Ct. App. 2023), *cert. petition filed as Beeman v. Muskegon Cty. Treas'r*, U.S. No. 24-858 (Feb. 7, 2025); *In re Manistee Cnty. Treas'r*, No. 363723, 2024 WL 2981520, (Mich. Ct. App. June 13, 2024) *cert. petition filed as Koetter v. Manistee Cnty. Treas'r*, U.S. No. 24-1095 (Apr. 17, 2025). To save one's equity, the homeowner needs to file Form 5743 by July 1, often while they still retain possession of the house. *See* Mich. Comp. Laws § 211.78t(2). This is much like the preenforcement procedures required by Arizona or New Jersey. And the Form 5743 must list all the other claimants to the property, like New York law. *See id.* Filing of the form must be done by personal service acknowledged by the county or by certified mail, with a return receipt requested. *See id.*; *cf.* Pet. App. 4a.

In each state, the government is expecting a citizen to navigate a complex web of court procedures,

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[4] *Pung*'s questions presented are important, but only the start of Michigan's problems. Beyond the fight about how much equity should be returned, a citizen must also satisfy the prolix process of Form 5743 to even begin to reclaim what is owed under *Tyler*.

tax statutes, and special notice requirements all to get what is already due to them under *Tyler*: the excess value of their home after the tax sale. Worse, Michigan and these other states require this request to happen before the auction, when many homeowners are still hoping to find a way to pay off the taxes, fees, and penalties to keep their home. Rather than the default being automatic payment of any excess, the government is keeping the money and pointing to this Court's *Nelson* decision from 1956. *Nelson* is in tension with 2023's decision in *Tyler*, as discussed below.

II. GOVERNMENT OVERRELIANCE ON *NELSON* CAN UNDO *TYLER*.

Tyler, 598 U.S. 631, ought to stand as a watershed moment for those who lose their homes in tax sales. The government gets it due—taxes, fees, and penalties—while the former homeowner receives any surplus from the sale. *See id*. at 647 ("The taxpayer must render unto Caesar what is Caesar's, but no more."). The *Tyler* decision, exercising prudential discretion to not decide more than was before the Court, left in place *Nelson*, 352 U.S. 103. *Tyler*, 598 U.S. at 644 ("Unlike in *Nelson*, Minnesota's scheme provides no opportunity for the taxpayer to recover the excess value…"). This unfortunately has proven to undue much of the hope the *Tyler* decision promised.

The major roadblock for applying the Takings Clause to tax sales after *Tyler* is that this Court in the 1950s approved foreclosure schemes where the government kept the windfall. *See Nelson*, 352 U.S. at 110. In *Nelson*, the City foreclosed on properties to satisfy unpaid water bills—one bill was as low as $65,

or the equivalent of about $763 today.[5] *Id.* at 106. The City sold the property for what today would be about $82,000. *See id.*[6] That windfall was 107 times the value of the unpaid water bills. Nevertheless, this Court ruled that New York's actions did not violate the Fifth Amendment's Takings Clause because the homeowner-taxpayer did not take advantage of a chance to get the surplus back. *See id.* at 109–110. Some state and local governments rely on this holding in *Nelson* to create barriers to recovery of excess value, claiming that they merely need to offer one chance at some point, even a convoluted one or a premature one, to satisfy all constitutional concerns.

The ruling in *Nelson* is therefore a source of tension with this Court's more recent jurisprudence in *Tyler*, even though the *Nelson* Court was careful to insert a caveat: "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, *unless some constitutional guarantee is infringed*." *Id.* at 110 (emphasis added). *Tyler* elaborated that keeping the excess value was just such an infringement of the Fifth Amendment's Takings Clause. *Tyler*, 598 U.S. at 647. By its own terms, *Nelson* should no longer apply to such situations: the standard should not be whether

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[5] Calculated by comparing dollars in December 1956, the date of decision for *Nelson*, to dollars to August 2025, the latest calculation date available. *See* Bureau of Labor Statistics, CPI Inflation Calculator *available at*: https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=65.00&year1=195612&year2=202508.

[6] The sale price was $7,000.00. Using the same criteria as the water bill, the sale price is $82,167.83 today. Bureau of Labor Statistics, CPI Inflation Calculator https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=7000&year1=195612&year2=202508.

some mechanism exists to apply for the excess value, but whether the constitutional right can be vindicated. This Court should take the opportunity to clarify that.

In the absence of such direction, courts across the country are relying on *Nelson* to justify allowing state and local governments to keep the windfall, despite *Tyler*'s ruling. *See*, *e.g.*, *Lynch v. Multnomah Cnty.*, No. 1:23-CV-01434-IM, 2024 WL 5238284, at *7 (D. Or. Dec. 27, 2024) ("Defendants argue that, as alleged, no Fifth Amendment takings occurred because Oregon's foreclosure scheme is more akin to that in *Nelson*…, than in *Tyler*.") (citation omitted); *Sharritt v. Henry*, No. 23 C 15838, 2024 WL 4524501, at *12 (N.D. Ill. Oct. 18, 2024) ("Defendants argue that the Indemnity Fund is like the procedures in *Nelson*"); *Baker v. Baker Cnty.*, No. 2:24-CV-1503-IM, 2025 WL 1474601, at *2 (D. Or. May 21, 2025) ("Defendant argues Plaintiff fails to state viable takings claims because *Nelson*…, not *Tyler*…, controls this case"). This is one such case. *See*, *e.g.*, Pet. App. 15a (relying on an intermediate state court decision that adopted *Nelson*, *In re Muskegon County Treasurer*, 20 N.W.3d at 348)[7]; Pet. App. 16a (relying on *Nelson* to hold that "compensable takings claim cannot exist when the Legislature has provided a valid procedure for foreclosed property owners to recover surplus proceeds.").

When this Court considered *Tyler*, we argued that this Court would need to revisit and overrule *Nelson* sooner or later. *See Tyler v. Hennepin Cnty.*, Br. of

[7] This Court is considering reviewing that decision. *See Beeman v. Muskegon Cty. Treasurer*, U.S. No. 24-858.

Nat'l Taxpayers Union Found. and Mackinac Center for Public Policy as *Amici Curiae* in Supp. of Pet'r at 9 (Mar. 6, 2023, U.S. No. 22-166).[8] Constitutional rights should not exist on a dual track. Some guidance is required on what is needed constitutionally to assure that takings do not happen under the shadow of prolix procedures. The type of person who encountered difficulties in paying their property taxes long enough to be subject to a tax sale is also likely to be confused or to miss the subtle differences of mailing a letter by U.S. Postal Service Priority Mail Express or U.S. Postal Service Certified Mail. *See*, *e.g.*, Pet. App. 7a (describing how Ms. Joseph mailing her claim form by express priority mail rather than certified mail resulted in the denial of her claim). Such arbitrary formalism, especially when the letter actually made it on time, *see id.*, should not override the Fifth Amendment and *Tyler*, and to the extent *Nelson* is read to do so, it should be overruled.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE TENSION IN THE LAW.

There are reasons Michigan is at the center of this case and the pending related cases of *Beeman* and *Koetter*. The Michigan Supreme Court ruled on the Takings issue under state constitutional law several years before this Court's *Tyler* decision under the Federal Constitution. *See Rafaeli*, 952 N.W.2d at 484–85 (applying MICH. CONST. art. 10, § 2, the analog to

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[8] *Available at* https://www.supremecourt.gov/DocketPDF/22/22-166/256328/20230306140008337_NTUF%20Mackinac%20Brief%20in%20Tyler%20v.%20Hennepin%20County%20No.%2022-166.pdf.

U.S. CONST. amend. V). The Michigan Legislature therefore reacted before *Tyler* by passing S.B. 1137 in December 2020. Mich. Legis. 256 (2020), 2020 Mich. Legis. Serv. P.A. 256 (S.B. 1137), *codified at* Mich. Comp. Laws § 211.78t.

The citizens of Michigan therefore had a three-year head start on the ability to assert takings claims, but have been thwarted by a complicated procedure to get the excess value from their tax-foreclosed homes. *See* Mich. Comp. Laws § 211.78t. Worse, the intermediate court of appeals for the state has ruled that as long as *some* procedure exists for recovery, that is the end of the analysis—even in bizarre and unjust circumstances. The Michigan Supreme Court is seemingly refusing to review the intermediate court of appeals' application of *Nelson* over its own precedent in *Rafaeli* and this Court's *Tyler* decision, in this and other cases.[9]

This Court's guidance is needed to assure excess value is returned to the former homeowners. There is the trend of multiple states to create complex systems for one to get what is rightfully theirs in excess value (Section I, *supra*). And there is the tension between *Tyler* and *Nelson* in the courts (Section II, *supra*). But this case—and *Beeman* and *Koetter* as well—provide the ideal vehicle to clarify the law.

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[9] Due to an intervening set of judicial elections, the *Rafaeli* court is not the same as the justices that denied review of this case. *See*, *e.g.*, Ballotpedia, "Michigan Supreme Court elections, 2022" https://ballotpedia.org/Michigan_Supreme_Court_elections,_2022 (detailing the change in judicial personal of all but 2 of the seats on the Michigan Supreme Court in 2022).

Each case provides a different angle on how prolix and, arguably arbitrary, procedures can work to undo a right recently articulated by this Court. Lillian Joseph sent in her Form 5743 to request her excess value—which is her right under *Tyler*—yet she sent it by Priority Mail Express instead of Certified Mail. *See* Pet. App. 7a. This Court has the opportunity here to hold that *actual possession* of the letter in the county's own mailroom is enough to comply, or if the Takings Clause is voided if a clerk fails to walk the form down the hall. Similarly, the untimely death of Johanna McGee gives this Court the chance to guide what the Constitution requires when the impossibility of compliance—death of the person who is behind on their tax bill—interferes with timely filing a form. Pet. App. 4a–5a.[10]

With straightforward facts, this case provides a clean template for this Court to either overrule *Nelson* or articulate guidance on what sort of process and protections are needed to assure *Tyler*'s holding remains relevant law. Clarifying the law now will save judicial resources across the country so that citizens and governments alike know how to move forward post-*Tyler*.

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[10] Timeliness is also at issue in the related Michigan cases before this Court. *Kotter* involves being 8 days late in filing the form. *Koetter v. Manistee Cnty. Treasurer*, Pet. at 1 (U.S. No. 24-1095). In *Beeman*, Linda Hughes tried to recover the excess value of her childhood home, but was denied because she did not file the form on time, which was due seven weeks *before* her house was actually auctioned off. *Beeman v. Muskegon Cty. Treasurer*, Pet. at 4 (U.S. No. 24-858).

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court grant a writ of certiorari and reverse the decision below.

Respectfully submitted,

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