No. 25-451

In the Supreme Court of the United States

FAYTIMA HOWARD,
Petitioner,
v.
MACOMB COUNTY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Macomb County took title to and auctioned Faytima Howard's home, keeping a windfall that was substantially more than she owed. Although this was a taking, *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 639 (2023), the County did not pay just compensation. Instead, it retained every penny of the sale because Howard failed to file the notice of claim paperwork (Form 5743) required under state law to preserve her rights. BIO 12. The Sixth Circuit below held that the County "prevented" the taking by giving Howard two weeks to file Form 5743 after the County cancelled a redemption agreement. App. 10a, 68a. The County opposes certiorari largely by leaning into the due process questions about Michigan's claims procedure that are not at issue in this case. App. 13a (Sixth Circuit noted that Howard "should have" claimed a due process violation).[1]

This case raises an important constitutional question about the Just Compensation mandate of the Takings Clause. Should the Court determine that the due process issues should be addressed at the same time, three pending petitions raise both the takings question challenging the continued viability of *Nelson v. City of New York*, 352 U.S. 103 (1956), as well as the related due process question. Petition for Writ of Certiorari, *Beeman v. Muskegon Cnty. Treasurer*, No. 24-858; Petition for Writ of Certiorari, *Koetter v. Manistee Cnty. Treasurer,* No. 24-1095; Petition for Writ of Certiorari, *McGee v. Alger Cnty. Treasurer*, No. 25-203. The Court

[1] In *Jones v. Flowers*, 547 U.S. 220, 231 (2006), the existence of *ex ante* procedures did not foreclose *post hoc* scrutiny of government action in light of the results of the earlier procedures.

should grant one or all of the petitions and answer the important question raised here.

ARGUMENT

I. The Facts Alleged Suffice to Answer the Questions Presented

Despite entering into repeated agreements with Howard that recognized her as the owner of the home, BIO 11, the County now claims for the first time that Howard was really a lienholder, not the owner, because she failed to file the paperwork to prove her ownership. BIO 10; BIO App. 66a-67a. But this case was dismissed on a 12(b)(6) motion, App. 4a, and Howard's allegation that she is the owner (App. 54a-55a) must be taken as true. *Cunningham v. Cornell University*, 604 U.S. 693, 697 n.2 (2025). Regardless, even a lienholder holds a constitutionally protected property interest under the Takings Clause. *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (lienholder had a constitutionally protected property interest in property that did not simply "vanish[] into thin air" when the government took it); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 601-02 (1935) (Takings Clause protects "substantive rights in specific property," including the right to collect on a debt in a timely manner by seizing and selling that property).

The County also argues this case is a poor vehicle because it is a "bare-pleading Rule 12(b)(6) case" and some of the arguments about the inadequacy of the compensation provided by the statute are speculative because the claim statute in this case was not followed. BIO 32, 34-35. The harm is not speculative: The County took Howard's property—well beyond the amount she owed in taxes—then refused to remit just compensation for the taking of her home because of her failure to

comply with a claims procedure. Whether the Constitution allows this taking, as this Court appeared to hold in *Nelson*, is cleanly presented here.

II. The County Violated Its Categorical Duty to Pay Just Compensation

1. The County claims that "the government never appropriated Petitioner's surplus equity. Instead, the surplus was segregated, deposited into a restricted account, and held for Petitioner and other interest holders to claim through the statutory process." BIO 20. But the County *did* appropriate Howard's home and her surplus equity in it. App. 4a ("In February 2022, the state court entered a judgment of foreclosure that gave the county title to her property.").[2] The government never held any of the surplus money from the sale of Howard's home for *her* benefit because the sale occurred *after* she missed the deadline to file Form 5473. By operation of law, Howard's failure to file the form forfeited her constitutional right to that money before there was any money in the account, weeks before the sale. MCL § 211.78t(2); App. 10a. Whether the Takings Clause tolerates that statutory maneuver is the salient issue of the petition. The County's objection merely begs the question.

The County concedes that the Takings Clause requires "reasonable, certain, and adequate" provision for obtaining just compensation. *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). It claims that

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[2] This was a physical taking. But even regulatory takings create a categorical duty to remit compensation. *Hodel v. Irving*, 481 U.S. 704, 713 (1987) ("The framework for examining the question whether a regulation of property amounts to a taking *requiring* just compensation is firmly established.") (emphasis added).

Michigan's procedures are "fair," "simple," and "accessible" and create a "neutral process that harmonizes the State's duty to collect taxes with its obligation to preserve private property rights in remaining value." BIO 1, 3, 16-19, 23, 24, 27, 29, 32, 36. These are self-serving descriptions, not legal analysis. *See McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 42 (1990) (rejecting government's "contrived and self-serving" baseline against which it measured the Petitioner's deprivation of property).

Public records plus the facts developed in this and other cases draw a much less rosy picture. All Michigan counties benefit from the shockingly high failure rate of former owners attempting to navigate those "simple" procedures: more than 95% of owners are denied their money. Pet. 14. *See* 2023 Foreclosure Reports,[3] where Macomb County reported that claimants recovered $152,421.17 of their own money, while the county kept $1,549,845.88—more than 90% of the properties' value.[4] Supp. App. 85a. The process generates huge windfalls of home equity to counties across Michigan, violating the spirit of *Tyler* and the black letter rule that the government has a "categorical duty" to pay just compensation when it takes property. *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). Indeed, the County describes the outcome of this case as "routine." BIO 17.

As Judge Kethledge explained in a similar case, counties keep "all this property 'simply because the Michigan General Property Tax Act said [they] could.'" *Wayside Church v. Van Buren Cnty.*, Nos. 24-1598, 24-1676, 2025 WL 2829601, at *12 (6th Cir. Oct. 6, 2025)

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[3] https://tinyurl.com/5e2zc5fc (visited Dec. 17, 2025).

[4] This calculation does not include property that the government acquired for itself by only paying the tax debt. Supp. App. 85a.

(Kethledge, J., concurring) (quoting *Hall v. Meisner*, 51 F.4th 185, 194 (6th Cir. 2022)). The results are profoundly unjust. "Local governments should serve their people, not prey upon them." *Ibid.* The County offers no explanation for why property tax debtors who lose their homes are treated so differently and adversely than other debtors who have years to recover their property. *See* Pet. 22.

2. The County misreads Howard's takings argument as an attempt to raise an unpreserved due process question. BIO 18, 30. The Takings Clause requires a "reasonable, certain, and adequate provision for obtaining compensation." *Cherokee Nation*, 135 U.S. at 659. This is not a due process requirement; it is part of the government's constitutional obligation to pay for what it takes. Allowing the government to avoid the Takings Clause through procedural gimmicks and unreasonable hurdles would hollow out the constitutional guarantee. "But property rights cannot be so easily manipulated." *Tyler*, 598 U.S. at 645 (internal quote omitted). The Sixth Circuit's approval of Michigan's claims statute leaves payment subject to the government's whim by allowing the government to burden the holder of the just compensation right with an unreasonable opt-in process for maintaining the right. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 158 (2021) (the obligation to compensate is not an "empty formality, subject to modification at the government's pleasure."); *see also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) ("the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded."); *Felder v. Casey*, 487 U.S. 131, 141 (1988) (120-day notice of claim

requirement would impermissibly "burden" rights protected by 42 U.S.C. § 1983).

3. The County incorrectly suggests Howard can only win if the government has a rigid duty to immediately and "automatically" pay her without any process whatsoever. BIO 28-30. Many states provide such automatic remittance. *See, e.g.*, Idaho Code § 31-808(2)(c); Kan. Stat. Ann. § 79-2803; Me. Rev. Stat. Ann. tit. 36, § 943-C; Mont. Code Ann. § 15-18-221; S.D. Codified Laws § 10-25-39; Wis. Stat. § 75.36(2m)(b). But even more modest protections employed in other contexts in Michigan, Pet. 22, and in other states, Pet. 12-13, would have been sufficient for Howard to recover her own money. Instead of adopting a reasonable way to pay Howard for the excess property taken, Michigan made it the "exclusive" process that bars takings claims. *See* BIO 9. The Court should grant review to address Howard's claim that the government violated its duty to pay just compensation by keeping her money.

III. This Case Squarely Presents *Nelson*'s Effect on Takings Jurisprudence

1. *Nelson v. New York* is the reason why state and federal courts authorize widespread confiscations of home equity in Michigan and other states after *Tyler*. The Sixth Circuit relied on *Nelson* to hold that Howard's failure to comply with MCL § 211.78t "prevented" a taking. App. 6a, 11a. Macomb County similarly rests on *Nelson*. BIO 18 ("*Nelson* controls").

The County states that "*Nelson* confirms that no taking occurs when a State provides a fair process and the owner ignores it." BIO 4. This is the standard trope of every government seeking to retain property in excess of taxes owed. *See* United States Am. Brf. Supporting Neither Party, *Pung v. Isabella Cnty.*, No. 25-95, at *18

(filed Dec. 8, 2025) (*Nelson* "suggests that if the owners had simply invoked the City's process, they could have obtained just compensation."); *In re Muskegon Cnty. Treasurer for Foreclosure*, 348 Mich. App. 678, 683 (2023) (property owners "did not similarly follow the law, and because they did not, they forfeited any right to the surplus proceeds that remained after the satisfaction of their tax debts"), petition for writ of certiorari pending sub nom. *Beeman*, No. 24-858. *Nelson* says no taking occurs when a State provides *any* process, regardless of its fairness and regardless of the reason why an owner fails to navigate it. *Cf. Wayside Church*, 2025 WL 2829601, at *12 (Kethledge, J., concurring) (Michigan counties, with "complete lack of remorse," "exploited" legal traps to "prey upon" many "lower-income or elderly" former homeowners, with "catastrophic" results).

Resting entirely on *Nelson*, the County asks this Court to ignore that the foreclosure judgment vested title of Howard's home absolutely in the County, extinguishing her entire interest. App. 55a. Because the value of the property exceeded the tax debts owed, *ibid.*, the County's taking of that excess property was a taking. *Tyler*, 598 U.S. at 635, 647.

Instead of paying just compensation for the taking, Michigan law provides the former owner only a fleeting future contingent right to claim "any remaining proceeds" from a future sale or other transfer of the property. MCL §§ 211.78i(3)(d), 211.78t. The statute defines "remaining proceeds" as the amount remaining after costs, penalties, interest, and fees are deducted, plus an additional five percent cut for the government. MCL §§ 211.78t(12)(b); 211.78m(16)(c). Even assuming that this contingent right to be paid from a future sale satisfies the Takings Clause, it is *extinguished* by

operation of Michigan's statute on July 1 if the owner does not timely and properly serve the notarized notice of claim form. App. 10a. Howard's contingent property interest in receiving "any remaining proceeds" was taken by the government on July 1, 2023, before the existence and amount of surplus value could be known.

2. The County argues that *Nelson* is consistent with *Tyler*, *Knick v. Township of Scott*, 588 U.S. 180 (2019), *Felder*, and *DeVillier v. Texas*, 601 U.S. 285 (2024). It is not. The Fifth Amendment imposes a "categorical duty to pay just compensation" whenever the government takes property for a public use, *Horne*, 576 U.S. at 358, including when the government seizes private property to pay a tax debt, and "confiscate[s] more property than was due." *Tyler*, 598 U.S. at 639. The government must pay for any excess property taken. *Ibid.*

The court below says this Court "stood by *Nelson* in *Tyler*," App. 7a, and the County asserts *Tyler* "reaffirms the continuing force of *Nelson*." BIO 22. This overstates *Tyler*, which "readily distinguished" *Nelson*. *Id.* at 643. A case is distinguished "to minimize the case's precedential effect or to show that it is inapplicable." *Distinguish*, Black's Law Dictionary (11th ed. 2019). *Tyler* avoided the takings question presented here: whether *Nelson* is binding and if so, whether it should be overturned.

Nelson apparently endorsed New York City's claim exhaustion requirement and established a principle that a valid takings claim can be extinguished if an owner fails to pursue even the narrowest state remedy. 352 U.S. at 110. The Sixth Circuit relied on *Nelson* to hold that no taking occurs unless an owner exhausts Michigan's claim process and is denied compensation, App. 9a-10a, notwithstanding *Knick*'s contrary holding

that a takings claim may be brought "without regard to subsequent state court proceedings." 588 U.S. at 189; App. 11a. Howard brought her takings claim under Section 1983 (App. 53a) and therefore need not pursue state procedures. *See Doe v. Dynamic Physical Therapy, LLC*, No. 25-180, 607 U.S. __, 2025 WL 3506945, at *1 (Dec. 8, 2025) (per curiam) ("[A] State has no power to confer immunity from *federal* causes of action.") (citing *Howlett v. Rose*, 496 U.S. 356, 383 (1990); *Haywood v. Drown*, 556 U.S. 729, 740 (2009); *Williams v. Reed*, 604 U.S. 168, 174 (2025)).

Knick realigned this Court's takings jurisprudence with principles expressed in *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), and *Felder*, 487 U.S. at 142, which held that plaintiffs need not exhaust state administrative remedies by filing a notice of claim form before asserting civil rights claims under Section 1983. *Id.* at 136, 140 (notice-of-claim statutes "are neither universally familiar *nor in any sense indispensable* prerequisites to litigation") (emphasis added). Like Michigan's claim statute, the claim requirement in *Felder* was designed to "minimize governmental liability" and stood out "rather starkly, from rules uniformly applicable to all suits." *Id.* at 141, 145. That holding was consistent with this Court's precedents that "[p]eculiarities of local law may not gnaw at rights rooted in federal legislation." *S. Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 372 (1953). *Felder*'s bottom line is that states "may no more condition the federal right to recover for violations of civil rights than bar that right altogether." 487 U.S. at 144. *Nelson* allows states to do just that.

DeVillier v. Texas, 601 U.S. 285 (2024), offers no shelter to the County. That case asked "whether 'a person whose property is taken without compensation

[may] seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action.'" *Id.* at 287-88. The Court declined to answer the question because the property owners originally sought relief under both the federal and state constitutions in state court. Texas removed the case to federal court then sought dismissal because Section 1983 does not provide a cause of action against states. *Id.* at 289-90. Texas conceded at oral argument that state law provides a cause of action and promised to allow the property owners to amend their complaint and proceed in state court, the forum of their choice. *Id.* at 293. At most, *DeVillier* asked whether state law *created* a cause of action. This case asks whether state law can *extinguish* a cause of action. Pet. 9, 16; BIO 9 (County retains entire property if the owner fails, for any reason, to submit Form 5743 by July 1 in the calendar year preceding a tax foreclosure auction); *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) ("because minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate") (cleaned up, citation omitted).

3. The County strains to dismiss the conflict in the lower courts. For example, it offers a partial quote from *DeVillier* in *Fulton v. Fulton County Board of Commissioners*, 148 F.4th 1224, 1232 (11th Cir. 2025), that "'constitutional concerns do not arise when property owners have other ways to seek just compensation.'"[5] BIO 24. The full quote emphasizes the

[5] *DeVillier*'s full context is: "the absence of a case relying on the Takings Clause for a cause of action does not by itself prove there is no cause of action. It demonstrates only that

Court's decision not to decide the question presented in that case. *Fulton*, however, *did* answer the question, holding that "the Takings Clause does directly authorize suit" and the court "decline[d] to read out of the Constitution the relief it expressly promises for taken property." *Fulton*, 148 F.4th at 1233.

The takings analysis created by *Nelson* hinges on whether the owner preserves her future right to just compensation before she has lost possession to the property and roughly a year before disbursement. *Nelson*'s aberrational approach to takings claims was largely ignored until Michigan and other states sought its cover to avoid compensating people for excess property taken in tax foreclosure actions. This Court should grant review to overturn *Nelson* or hold that the relevant portions are dicta.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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constitutional concerns do not arise when property owners have other ways to seek just compensation." *DeVillier*, 601 U.S. at 292.