No. 22-166

In the Supreme Court of the United States

GERALDINE TYLER, on behalf of herself and all others similarly situated,

Petitioner,

v.

HENNEPIN COUNTY and MARK V. CHAPIN, Auditor-Treasurer, in his official capacity,

Respondents.

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

Brief of *Amici Curiae* States of Utah, Arkansas, Kansas, Kentucky, Louisiana, North Dakota, Texas, and West Virginia in Support of Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions and Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Amici curiae, the States of Utah, Arkansas, Kansas, Kentucky, Louisiana, North Dakota, Texas, and West Virginia respectfully submit this brief in support of Petitioner.

In Federalist 54, James Madison stated: "Government is instituted no less for the protection of the property, than of the persons, of individuals." The Federalist No. 54, p. 336 (C. Rossiter ed. 1961 (J., Madison)). Private property rights are essential to a free society, and when governments violate those rights, they destabilize the public's trust in and respect for the system under which they live. The practice in a minority of states of confiscating surplus proceeds from a foreclosure sale, after the relevant delinquent taxes and fees are recouped, is just such a violation of these rights.

While *Amici* states do not employ the minority approach, the Eighth Circuit's interpretation of the Takings Clause has implications beyond the individual state law regimes. The federal government too is controlled by that clause, and the Eighth Circuit's interpretation risks harm to *Amici* states' citizens. *Amici* states file this brief to ensure protection for their citizens' property rights. Specifically, confiscation of excess proceeds from a tax-delinquency foreclosure is a violation of its citizens' Fifth Amendment right to "just compensation" when a taking for "public use" is necessary. U.S. CONST. amend. V.

SUMMARY OF ARGUMENT

The Takings Clause of the Fifth Amendment to the United States Constitution protects private property rights by requiring the government to provide just compensation when it takes property for public use. U.S. CONST. amend. V. This clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 315 (1987) (emphasis in original). The clause applies to state governments through the Fourteenth Amendment. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005).

Property taxes imposed by state and local governments are commonly secured by a lien on the property against which they are assessed. If the taxes are not paid, governments can secure payment by foreclosing on the lien. The property tax regimes of most states, including Utah, comply with the Fifth Amendment by taking in foreclosure only the amount owed and returning any surplus to the property owners.

A minority of states, including Minnesota, have adopted property tax regimes that do not provide such protections. Instead, when those states foreclose on property tax liens, they often keep all of the remaining equity, even when the proceeds are orders of magnitude greater than the amount owed. This practice violates the Constitution and often causes starkly unjust results for the most vulnerable property owners, including the elderly, disabled, and low-income individuals.

The decision of the Eight Circuit should be reversed to ensure that property owners in Minnesota and other states are protected by the Takings Clause of the Fifth Amendment.

ARGUMENT

I. The Majority of States Safeguard Homeowners' Surplus Equity After a Tax-Related Foreclosure.

State governments have a constitutional duty to honor the property rights of their residents. This includes following the Fifth Amendment's edict not to take private property without "just compensation." U.S. CONST. amend. V. The sale proceeds from the foreclosure of Petitioner Geraldine Tyler's home far exceeded her tax debt and associated interest and fees. JA. 12-13, 48. As Ms. Tyler outlines in her merits brief, history and tradition recognize that the equity in Ms. Tyler's home is a constitutionally protected property interest, for which this Court's precedents offer further support. *See* Pet. Br. 11-18. And thus, Hennepin County's refusal to return the excess proceeds of the sale to Ms. Tyler was a taking without "just compensation." *See id*. 23-24.

Rather than repeat Ms. Tyler's arguments why Hennepin County's confiscation of her equity violated the Takings Clause, *Amici* states instead provide examples of various state regimes that safeguard homeowners' constitutionally protected property interests when collecting delinquent taxes.

Unlike Minnesota, most states protect a homeowner's right to the surplus equity in a house after that house is sold to satisfy a past-due tax. *See, e.g.*, Jenna Foos, Comment, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real. Prop. Tr. & Est.

L. J. 93, 99–103 & n.38 (2019) (noting that most states "require the foreclosing government unit to return surplus funds from a property tax foreclosure sale to the previous property owner"). Those states demonstrate a willingness to provide several opportunities for homeowners to pay their debts and recover any excess profits if a house must be sold as collateral. The following are descriptions of these alternative approaches to enforcing tax obligations while also respecting property rights.

A. Utah

Utah takes several measures to protect its citizens' real property rights before and after a tax-delinquent foreclosure sale.

For example, Utah allows for a lengthy redemption period before initiating foreclosure and allows installment payments of any amount. In Utah, a county cannot sell a homeowner's house until the resident is at least four years behind on his or her property taxes. Utah Code § 59-2-1346. In addition to this generous redemption period, the state simplifies the redemption process to allow small installment payments over time, which is particularly beneficial to lower-income homeowners. "At any time before the expiration of the period of redemption, the county treasurer shall accept and credit on account for the redemption of property, payments in amounts of not less than $10, except for the final payment, which may be in any amount." *Id.* § 59-2-1346(4)(a).

Furthermore, Utah law allows a county to adjust the amount of delinquent taxes owed by a homeowner based on individual circumstances. Such a provision allows for leniency in cases like Ms. Tyler's that involve elderly, low-income, or otherwise vulnerable persons. The relevant statute provides that "[the] legislative body may accept a sum less than the full amount due, or defer the full amount due, where, in the judgment of the county legislative body, the best human interests and the interests of the state and the county are served." *Id.* § 59-2-1347(1)(a).

Finally, and most importantly for constitutional purposes, when an adjustment in tax debt is not appropriate or the homeowner otherwise fails to timely redeem the property, the homeowner is given three years to claim the surplus proceeds after a sale. Utah Code §§ 59-2-1351.1(7), 67-4a-201(14), 67-4a-903(1).

B. Wisconsin

Like Utah, Wisconsin also explicitly protects homeowners' rights to surplus proceeds from a sale of their property, after their tax and interest obligations are discharged. Wis. Stat. § 75.36(2m). In fact, several aspects of Wisconsin's system for collecting past-due property taxes demonstrate the state's dedication to respecting homeowners' property rights.

Wisconsin provides for a significant amount of time between the accruing of the tax debt and a sale of the real property at issue, thus giving vulnerable populations more opportunity to raise the necessary money. Property taxes are due near the first of the year, but the Wisconsin county treasurers must not issue a "tax certificate" (i.e., lien) listing the affected property until the beginning of September of that same year. *Id.* §§ 74.11(2), 74.57. Then, the issuance of this lien generally commences a two-year redemption period. *Id.* § 74.57(2)(a).

Wisconsin also requires that several notices be sent to a homeowner when property tax is owed. A county treasurer must mail a notice to all property owners within 90 days of the issuance of the tax certificate. Wis. Stat. § 74.57(2)(b). The redemption period does not begin until the certificate is mailed. *Id.* The county treasurer must also publish additional notice between six and ten months before the expiration of the redemption period. *Id.* § 75.07.

After the two-year redemption period expires, Wisconsin law provides for three possibilities for handling the sale of the property, all of which either involve automatic distribution of surplus proceeds to the homeowner or give the homeowner multiple years to reclaim the surplus.

First, the county may conduct the foreclosure as a private mortgage foreclosure, Wis. Stat. § 75.19, and the laws of private mortgage foreclosures in virtually all states protect the equity of all interested parties, *see, e.g.*, Wis. Stat. § 846.162.

Second, the county may proceed with a tax lien foreclosure *in rem*. Wis. Stat. § 75.521(2). In this approach, the refund of surplus proceeds to the former owner doesn't happen automatically, but the owner can recover the surplus by making a claim in court within two years of the foreclosure. *Id.* § 75.521(14a).

Third, the county may apply for a tax deed to take ownership of the property, which requires additional notice to the owner. Wis. Stat. § 75.12. After a tax deed is issued, the county must also notify the homeowner of her right to the surplus proceeds of the forthcoming sale of the property. *Id.* § 75.36(2m). The county typically sells the property and then automatically reimburses the homeowner any surplus proceeds. Wis. Stat. §§ 75.35, 75.36(3)(c).

C. Florida

Florida takes a different approach to property tax collection, but its tax-lien system is also deliberately crafted to protect property rights. Florida is a tax-lien state, which means that the government sells the tax liens (and the power to enforce them) to private investors.

Florida's tax-lien approach is designed to maximize value for the tax-delinquent homeowner in two ways. First, local governments auction tax liens to the person who will pay the amount of delinquency "and demand the lowest" interest rate. Fla. Stat. § 197.432(6). This means whichever auction participant offers the lowest interest rate to the homeowner will become the new lienholder. Second, after a two-year redemption period, the lienholder may apply for a tax deed, which triggers a sale of the real property to the highest bidder. Fla. Stat. §§ 197.502(1), 197.502(5)(c), 197.542(1). Surplus proceeds are then returned to the former owner. *Id.* § 197.582(2)(a); *see* Fla. Stat. § 197.522(1)(a). Thus, in Florida, the process of selling the lien and then selling the property both operate to preserve as much value for the homeowner as possible.

All three of these states offer different examples of systems that effectively recover delinquent property taxes while remaining faithful to the Constitution.

II. Confiscation of Surplus Equity Results in Serious Injustice in the Minority of States that Allow the Practice.

Approximately 20% of states have tax-lien systems that allow for confiscation of surplus equity. *See* Foos, *supra* at 102 (citing states). The results of such systems are always unconstitutional and often tragic.

A. Tax-Lien Systems of Massachusetts and New Jersey

The property tax lien systems of Massachusetts and New Jersey are illustrative of unjust confiscatory regimes. In both states, property taxes are automatically secured by a lien on the property at the time of assessment. Mass. Gen. Laws ch. 60, § 37; N.J. Stat. § 54:5-6. From there, the two states take slightly different paths to similar ends.

In Massachusetts, when a property tax bill becomes more than two weeks overdue following a demand, "the collector may take such land for the town" on fourteen days' notice. Mass. Gen. Laws ch. 60, § 53. After taking this limited tax title, the collector may immediately take possession and collect any rents or income due to pay down the tax delinquency (with any excess amounts "being paid to the person entitled thereto"). *Id.* Or the municipality may sell tax title to the highest bidder at auction after 14 days' notice. *Id.* § 52. If the owner does not redeem the property within a specified time by paying the full delinquency, plus 16% interest, the municipality or private party may foreclose on the rights of redemption and obtain "absolute" title to the property, *id.* §§ 62, 64, 65, including any surplus equity.

In New Jersey, when property taxes become delinquent, the government may auction the property, subject to redemption. *Id.* §§ 54:4-67, 54:4-67.1, 54:5-31 to 5-32. After the tax sale, interest accrues in an amount determined by the winning bid. *Id.* § 54:5-32. If the taxpayer still does not redeem the property within a certain timeframe, the lienholder can start foreclosure proceedings. *Id.* § 54:5-86(a) . Once the foreclosure proceedings are complete, they result in a judgment that grants the lienholder "an absolute and indefeasible estate of inheritance in fee simple in the lands therein described," *id.* § 54:5-104.64, including any surplus equity.

B. Confiscatory Tax-Collection Schemes Lead to Shockingly Unfair Results.

Tax-lien systems like those of Massachusetts and New Jersey often lead to gross injustice. The Massachusetts state government's website puts the matter bluntly: "if a [tax lien] judgment of foreclosure enters, you can lose *all* of your property's value, even if the amount you owe is much less than the property's value." *See* Commonwealth of Massachusetts, *Frequently asked questions about tax lien foreclosure cases in the Land Court*, Question 19, https://www.mass.gov/info-details/frequently-asked-questions-about-tax-lien-foreclosure-cases-in-the-land-court (last visited Mar. 3, 2023); *see also Tallage Lincoln, LLC v. Williams*, 151 N.E.3d 344, 352 (2020) ("[A]fter a strict foreclosure, the taxpayer loses any equity he or she has accrued in the property, no matter how small the amount of taxes due or how large the amount of equity.").

Examples of clear injustice are legion. In one case, a buyer unknowingly purchased a property for which the previous owner had failed to pay certain property taxes. The lien was sold to a private company that "sent a single letter" to the owner announcing its intention to foreclose. *Ithaca Fin., LLC v. Leger*, 167 N.E.3d 874, 878 (Mass. App. Ct. 2021). The company's subsequent foreclosure action failed to list the owner as a defendant, so the court issued a special citation informing the owner about the foreclosure action. *Id.*

The owner did not respond and default foreclosure was entered. *Id.* The company then waited until all possibility of redemption had expired to inform the owner that the complany was now "the owner of the property which you currently occupy." *Id.* (internal quotation marks omitted). Because of the first owner's failure to pay $3,229.66 in taxes, the next owner ultimately lost all of the equity in her home—while then having to make payments to the new corporate owner. *Id.* at 877-78.

The buyer challenged this procedure in court. The court said that it "cannot overstate the severity of the impact that a tax foreclosure judgment may have on the taxpayer," *id.* at 877 n.3, but the court ultimately concluded that "[w]hile we empathize with [the foreclosed owner's] plight under the unfortunate circumstances of this case, binding precedent requires us" to deny any relief. *Id.* at 880.

In another case, the plaintiff alleged that, despite being a "disabled retiree" living on a fixed income of "less than $1,000 per month," she was rendered homeless and had $210,000 in surplus equity confiscated by a private investment company who purchased a tax lien on her property. *See Foss v. New Bedford*, No. 1:22-cv-10761, Dkt. 1-1, ¶¶ 9-40 (D. Mass. May 17, 2022). And in another, a Massachusetts court foreclosed on a property valued at $270,000 due to an unpaid water and sewer bill of $492.51. *Tallage LLC v. Meaney*, 2015 WL 4207424, at *1 (Mass. Land Ct. June 26, 2015).

Such stories are tragically common in states that allow the seizure of surplus equity. *See, e.g.*, *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting) ("In this case the defendant Van Buren County took property worth

$206,000 to satisfy a $16,750 debt, and then refused to refund any of the difference. In some legal precincts that sort of behavior is called theft. But under the Michigan General Property Tax Act, apparently, that behavior is called tax collection."), *abrogated on other grounds by Knick v. Township of Scott*, 139 S. Ct. 2162, 2167-68 (2019).

C. The Injustice of Confiscatory Tax-Collection Schemes is Exacerbated by the Involvement of Private Investors.

In states like Massachusetts and New Jersey, where rights to tax liens are often sold at auction, profiting from the confiscation of surplus equity has become big business. For example, the book *New Jersey Tax Lien Investing*, whose author is identified as the Chief Financial Officer for a New Jersey municipality that "sell[s] lucrative tax lien certificates," is advertised with the following pitch:

> New Jersey has the highest property taxes in the country. This is fantastic news for investors. . . . Tax liens offer a low risk, high reward investment opportunity. Municipal tax liens accrue interest at up to 18% in the State of New Jersey. Lien investors often earn triple digit returns on an annualized basis. . . . There is an opportunity to gain ownership of a property at a modest cost, often less than a down payment on a home or even a new car.

New Jersey Tax Lien Investing, Amazon.com, https://www.amazon.com/New-Jersey-Tax-Lien-Investing-ebook /dp/B0B2NHJDY9 (last visited Mar. 3, 2023).

Private parties often pay more than the entire amount of the delinquency when purchasing tax liens at auction, knowing that the chance of obtaining surplus equity makes such "premium" bidding worthwhile. N.J. Stat. § 54:5-32 ("[T]he property shall be struck off and sold to the bidder who offers to pay the amount of such taxes, assessments or charges, plus the highest amount of premium."); Mass. Gen. Laws ch. 60, § 52 (providing that "tax titles" may not be sold for "less than the amount necessary for redemption").

These private companies have no incentive to make it easy for homeowners to redeem their properties. As one court explained, such companies "are responsible to their investors, not the citizens of a city or town, and their goals and incentives are not the same. Maximizing return on investment may not include accommodation to individual circumstance to the same extent a municipality, acting for itself, might otherwise deem warranted." *Meaney*, 2015 WL 4207424, at *5; *see also id.* n.10. These systems create perverse incentives for private industry to prey on homeowners, often from the most vulnerable populations.

D. Property Owners in States with Confiscatory Tax-Collection Schemes Lose Tens of Millions in Equity Each Year.

Property owners who are caught up in these confiscatory tax-collection processes suffer massive losses wholly out of proportion to the taxes they owe. For example, one analysis of tax foreclosures from August 2013 to August 2014 estimated that "Massachusetts municipalities collected approximately $56,600,000 more from their taxpayers than was owed." Ralph D. Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274, 282–83 (2018). These municipalities took properties with an average value of $258,462 even though the tax liens being collected averaged only $4,177—and in one case was only $26. *Id.* at 283. In the end, these "towns and cities collected $42.87 for every dollar they were owed." *Id.*

Similarly, an analysis by Pacific Legal Foundation[1] of 31 cities in New Jersey from 2014 to 2021 found that on average, homeowners subjected to the process lost $178,000 in equity. Angela C. Erickson et al., "New Jersey," *End Home Equity Theft* (Arlington, VA: Pacific Legal Foundation, 2022), last modified Feb. 24, 2023, https://homeequitytheft.org/new-jersey. These losses represented an average of 90% of thehomes' value. *Id.* The same analysis found that the amounts recovered represented, on average, approximately 30 times more than the original tax debts that led to the foreclosure. *Id.*

Although Massachusetts and New Jersey provide illustrative examples, this issue is by no means isolated to these states. Pacific Legal Foundation's analysis found that nationwide, "[l]ocalities and private investors foreclosed on and sold at least 8.950 homes from 2014 to 2021." Erickson, *supra*, "Thousands Lose Their Wealth to Home Equity Theft," https://homeequitytheft.org/size-and-scope. For the 6,200 homes for which complete data was available, this analysis found that "[h]omeowners lost more than $860 million in wealth . . . above what they owed in tax debt." *Id.*

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[1] Pacific Legal Foundation is the non-profit law firm that represents Petitioner in this action.

CONCLUSION

The Court should reverse the Eighth Circuit and judgment below.

DATED this 6th day of March, 2023.

Respectfully submitted,

/s/ Melissa A. Holyoak

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