No. 22-160

In the Supreme Court of the United States

KEVIN L. FAIR,
Petitioner,

v.

CONTINENTAL RESOURCES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Nebraska Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CATO INSTITUTE AND MANHATTAN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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September 21, 2022

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute and the Manhattan Institute (MI) respectfully move for leave to file the attached brief as *amici curiae* supporting Petitioner. All parties were provided with timely notice of *amici*'s intent to file as required under Rule 37.2(a). Petitioner's counsel consented to this filing. One of the respondent's counsel withheld consent.

Amici's interest arises from their respective missions to advance and support the rights that the Constitution guarantees to all citizens.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, files *amicus* briefs, publishes books and studies, and produces the annual *Cato Supreme Court Review*.

MI was established as a nonpartisan public policy research foundation whose mission is to promote new ideas fostering economic freedom, individual responsibility, and property rights. To that end, it has historically sponsored scholarship supporting property owners fighting against unconstitutional Fifth Amendment takings. MI recently brought on one of this brief's counsel, Ilya Shapiro, to direct its constitutional studies program, which aims to restore constitutional protections for individual liberty and limited government.

Amici have extensive experience filing briefs in Fifth Amendment cases in this Court and lower courts across the country. This case concerns *amici* because the Nebraska Supreme Court's decision contravenes the Takings Clause by perpetuating a legislative taking of home equity, a long-held common-law type of property.

Amici have no direct interest, financial or otherwise, in the outcome of this case, which concerns them only because it implicates constitutional protections for individual liberty. For the foregoing reasons, *amici* respectfully request that they be allowed to file the attached brief as *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Does the government violate the Takings Clause when, pursuant to legislation, it confiscates property worth more than the debt owed by the owner?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The Manhattan Institute (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice, individual responsibility, and property rights. To that end, it has historically sponsored scholarship supporting property owners defending against unconstitutional takings. MI recently brought on one of this brief's counsel, Ilya Shapiro, to direct its constitutional studies program, which aims to restore constitutional protections for individual liberty and limited government.

This case interests *amici* because the right to just compensation when property is taken is fundamental. Home equity is private property, so the government cannot simply take any that remains after the proceeds from a foreclosure sale satisfy a tax debt.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. Petitioner's counsel consented to this filing. One of the respondent's counsel withheld consent. Further, no party's counsel authored this brief in any part and *amici* alone funded its preparation and submission.

SUMMARY OF ARGUMENT

In 1194 A.D., near Yorkshire, England, a nobleman turned fugitive named Robin of Locksley legendarily stood up against theft dressed as taxes. The Sheriff of Nottingham exacted exorbitant and capricious taxes against the people in Sherwood Forest, filling the coffers of King John, who was then the regent ruler in his brother's absence. Robin Hood was the champion of the people, defending them from abusive government power that viewed the people as sources of revenue rather than subjects to be protected.

Today, when local governments seize the equity in a home after confiscating the home to pay for de minimis tax bills, one wonders what Robin Hood would have thought. These seizures of equity largely target poorer communities—and often the elderly—who own their homes but have no disposable income to pay their taxes. The government will take the home and sell it to pay off the tax debt, which can sometimes be a legitimate government taking. While most states return any surplus proceeds from the sale to the owner, some states allow the government to take the surplus funds above the tax deficiency, leaving these hard-up families destitute. This practice literally steals from the poor to fill the coffers of the rich, which is precisely what Robin Hood fought against.

This practice is not only unjust but unconstitutional. The Fifth Amendment guarantees that private property will not be taken except for public use and with just compensation. This protection applies not only to real property but also to intangible property interests, such as an owner's equity in his home. Since Magna Carta, English and American common law has

required authorities to return any surplus from property taken to pay tax debts.

But 14 states have gone astray from the common law to allow local authorities to seize the surplus and deposit it in state treasuries. Two states in particular, Nebraska and Minnesota, took legislative action to change the state's law and created a tax-debt recovery scheme that allows the state government to keep any surplus from the property taken to pay off the debt.[2]

In Nebraska, Kevin Fair owned his home free of any mortgage, worth around $60,000. Pet. at 5. When he was unable to pay his property taxes—amounting to $588.21—Scotts Bluff County sold the tax lien to Continental Resources without notifying Mr. Fair. *Id.* at 5–6. Continental quietly continued paying the taxes for three years. *Id.* at 6. Continental then informed Mr. Fair he would have to pay back the amount in taxes it had paid on his behalf to avoid foreclosure, along with interest and fees, totaling $5,268. *Id.* at 6–7. When he could not pay, Continental foreclosed, gaining full title to the property. *Id.* at 7.

Although the Nebraska Supreme Court had previously recognized surplus home equity as private property, *Lancaster Cnty. v. Trimble,* 52 N.W. 711, 712 (Neb. 1892); *Delatour v. Wendt*, 139 N.W. 1023, 1024 (Neb. 1913), Nebraska's legislature changed the rules and codified this predatory tax practice in Nebraska Revised Statutes Section 77-1837(1).

At common law, in Nebraska as well as in England and early America, there was a property right to

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[2] The case out of Minnesota is the subject of another cert petition that was docketed the day after this case, *Tyler v. Hennepin County*, No. 22-166. *Tyler* presents equally valid claims.

surplus equity. If that property interest was taken, the owner would be entitled to just compensation. And this Court's precedents affirm that any branch of government, including the legislature via statute, can commit a taking. When Nebraska's legislature decided that a delinquent taxpayer's remaining equity would go to a private corporation rather than back to the mulcted homeowner, the state committed a legislative taking.

As discussed in the petition, Pet. at 3, Nebraska is one of 14 states that allow the state to take title and "any equity [the owner] has accrued in the property, no matter how small the amount of taxes due or how large the amount of equity." *Tallage Lincoln, LLC v. Williams*, 485 Mass. 449, 453 (2020). Stories of clear injustices are becoming common. In Michigan, a family underpaid their property taxes by $144, spurring Wayne County to take two homes and sell them for $108,000, with the county pocketing $107,498.55. Dan McCaleb, *Michigan Woman Sues County Over "Home Equity Theft,"* The Center Square (July 9, 2019).[3]

All takings require just compensation under the Fifth Amendment. As this Court recently recognized in *Cedar Point v. Hassid*, 141 S. Ct. 2063 (2021), the takings analysis considers whether a property interest has been completely seized or merely restricted. Here, the state legislature seized all the remaining equity in Mr. Fair's home, leaving him nothing and giving the windfall to Continental. This taking without compensation is unconstitutional and contrary to the English and American common-law tradition. This Court should grant certiorari.

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[3] Available at https://bit.ly/3xFISpT.

ARGUMENT

HOME EQUITY IS HISTORICALLY A PRIVATE PROPERTY RIGHT AT COMMON LAW, SO THIS COURT SHOULD CLARIFY HOW AND WHEN A LEGISLATURE CAN CHANGE LONG-STANDING RULES AND CONFISCATE VESTED EQUITY IN REAL PROPERTY

This Court's precedents have sent mixed signals about the relationship between legislatures and common law when a property right existed at common law. This case is a good vehicle for the Court to address and clarify this cloudy area of law.

A. Home Equity Is the Private Property of the Homeowner Under Common Law

The common law is the main source of traditional property rights, which this Court has reiterated. *See* Denise Johnson, *Reflections on the Bundle of Rights*, 32 Ver. L. Rev. 247, 248 (2007). Private property rights primarily flow from the English common law, including Magna Carta, and those rights ramified into American common law. *See Horne v. Dep't of Agric.*, 576 U.S. 351, 358 (2015); Johnson, *supra*, at 248. To determine whether a property right exists, courts look back to the common law and "background principles" of property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029–32 (1992). Common law is not the only source of property rights, but it is sufficient to create them. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 733 n.12 (2010) (Scalia, J.) (plurality) ("[W]hether the source of a property right is the common law or a statute makes no difference, so long as the property owner continues to have what he previously had.").

Since at least Magna Carta, there has been a long common-law tradition of the remaining value of the home or estate being treated as private property after a tax debt is satisfied. Magna Carta Clause 26 states that when selling a deceased man's estate to pay off his tax debt, the "residue shall be given over to the executors to carry out the dead man's will." *See also* Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 St. Mary's L.J. 1, 46–47 (2015). Later, Blackstone explained that creditors or officials who seize goods to pay a debt or tax must give the property back upon payment, or, if the debtor or taxpayer did not pay the debt, must "render back the overplus" after satisfying the debt from the property. 2 William Blackstone, Commentaries *453. And that principle carried over into the colonies, where land could not be taken to pay a tax until all other property had been sold to satisfy the tax. *Martin v. Snowden*, 59 Va. 100, 137–40 (1868). If the government could keep surplus property, there would be no purpose in forbidding the taking of land before satisfying the debt in the seizure of goods. *See id.*

Until recently, Nebraska generally followed this common-law rule. The Nebraska Supreme Court repeatedly held during the 19th and early 20th centuries that home equity is private property and the homeowner is entitled to any remaining surplus after the government satisfies a tax debt. *See Trimble,* 52 N.W. at 712 (homeowner is entitled to the surplus proceeds after a tax lien sale); *Hoy v. Anderson*, 58 N.W. 125, 126 (Neb. 1894) (general equity in the home is homeowner's property); *Delatour*, 139 N.W. at 1024 (the surplus paid in property taxes belong to the homeowner/taxpayer). While Nebraska's legislature

changed that rule—setting the stage for this case—it can't change centuries of common-law history.

B. This Case Is an Opportunity to Clarify When a Legislature Can Remove a Common-Law Property Right Without Just Compensation

Although this Court's precedents unambiguously provide that legislatures may commit Fifth Amendment takings, other precedents muddy the standards for determining when a legislature can change a common-law property right without paying compensation.

The Court has long held that it is up to the judiciary to protect property rights against legislative incursion: "If, therefore, a statute . . . is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). And when a legislature changes a property interest from private to public, it can commit a compensable taking. *Stop the Beach*, 560 U.S. at 715 (Scalia, J., writing for the plurality) ("If a legislature … declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) ("'[A] State by *ipse dixit*, may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule") (quoting *Webb's Fabulous Pharmacies, Inc., v. Beckwith*, 449 U.S. 155, 164 (1980)).

This Court recently affirmed the role of courts in protecting property against legislative action. In *Cedar Point Nursery v. Hassid*, the Court explained that

it does not ask which branch of government impinged the property interest but instead "whether the government has physically taken property for itself or someone else[.]" 141 S. Ct. at 2072. Members of this Court have similarly opined that there is no constitutional difference between a taking via legislative act and a particularized *ad hoc* administrative taking. *See*, *e.g.*, *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting). Thus, the legislature is just as capable of committing a taking as administrative agencies of the executive branch.

That said, legislatures aren't entirely foreclosed from altering common-law property interests. When and why such legislation may be permitted is unclear from this Court's precedents, and this case offers a good chance to clarify that question as well as remedy an obvious injustice.

On one hand, multiple cases explain that legislatures can change property interests while wrestling with the extent and nature of the permissible changes. In *Munn v. Illinois*, this Court looked at whether a statutory limit on the prices a warehouse could charge for grain storage represented a deprivation of property under the Due Process Clause. 94 U.S. 113, 123 (1876). The Court held that it did not, even though there was a general common-law right for sellers to price products and services at their own discretion. *Id.* at 133–34. The Court was clear that a legislature can be almost whimsical in its abrogation of common-law rights, as long as it comports with the Constitution: "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations."

Id. at 134. The unanswered question, of course, is what those constitutional limitations are.

The *Munn* Court described a law to "limit the rate of charge for services rendered in a public employment" as "only changing a regulation which existed before," whether at common law or via statute. *Id.* Such rate regulation is part of the common law, where the rule "requires the charge to be reasonable," which "is itself a regulation as to price." *Id.* Thus, the statute "establishe[d] no new principle in the law, but only [gave] a new effect to an old one." *Id.* The common law wasn't supplanted, only updated, because "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Id.* The Court thus didn't decide on the constitutionality of a statute that didn't merely update a long-standing common-law rule, but categorically terminated it, as the home equity rule does here.

One line in *Munn*—a "person has no property, no vested interest in any rule of the common law," *id.*—has also been quoted to hold that the legislative removal of common-law remedies is not taking. *See, e.g., N.Y. Central R. Co. v. White*, 243 U.S. 188, 201 (1917); *Silver v. Silver*, 280 U.S. 117, 122 (1929); *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 88 n.32 (1978). In these cases, again, the Court has looked to whether a common-law right was substituted for by a statute rather than terminated altogether. In *Duke Power*, this Court decided there was not a due process violation in the removal of a statutory remedy because a reasonable remedy was substituted. 438 U.S. at 88. But the Court noted that it was an open question whether "the Due Process Clause in fact requires that a legislatively enacted compensation scheme either

duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.*; *see also White*, 243 U.S. at 201 (questioning if all common-law liability rules could be set aside by statute if not replaced with a similarly suitable remedy).

In the takings context, the confusion over the *Munn* rule persists. In *Pruneyard Shopping Center. v. Robins*, Justice Marshall concurred and cited *Munn* in support of requiring a landowner to give up his right to exclude and allow leafleteers on his property. 447 U.S. 74, 91–94 (1980) (Marshall, J., concurring). Because that decision was based on state law, the federal constitutional issues were not resolved, but Justice Marshall pointed out that "[q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way." *Id.* at 93–94. Justice Marshall surmised that the common-law rights against trespass may be one of those rights that cannot be abolished by statute. *Id.* at 94.

Outside of the context of *Munn*'s rule, in another takings case, this Court explained that Congress could properly "take" certain common-law physical property rights. *United States v. Causby*, 328 U.S. 256, 260–61 (1946). Traditionally, the airspace—all the way up to heaven—had been viewed as the property of the owner of the physical land below it, but Congress declared that area to be a public highway. *Id.*[4]

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[4] Although this Court recognized that the common-law property right to the airspace no longer existed, the use of the airspace above the property could still be a compensable taking if the land itself became uninhabitable due to the nuisance of the flights. *Causby*, 328 U.S. at 261. This analysis separated the legislative

Thus, even among cases affirming that the legislature can change a property interest, there is a large gray area. From *Munn*, we know that the right to charge whatever price one wishes for one's goods is not within one of those "certain categories" of common-law rights. *See Munn*, 94 U.S. at 123. But, per Justice Marshall, common-law rights against trespass may not be abolished. *Pruneyard*, 447 U.S. at 94 (Marshall, J., concurring). At what point a property interest crosses the line on the continuum is still unclear.

At the other side of the property-rights spectrum, this Court has stated that legislatures "by *ipse dixit*, may not transform private property into public property without compensation[.]" *Webb's Fabulous Pharmacies*, 449 U.S. at 164. *Webb's* involved interest from a private trust fund operated temporarily by the county court registry that the court attempted to take as its own. *Id.* at 155. Per traditional, common-law trust rules, the interest follows the trust; therefore, because the trust was private property, the interest was as well. *Id.* at 162. The legislature or the court could not recharacterize private property as public property to fill its coffers. *Id.* at 164.

A few years earlier, Justice Stewart had come to the same conclusion in *Hughes v. Washington*. "For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." 389 U.S. 290, 296–97 (1967) (Stewart, J, concurring). Although that case asked whether a state court opinion interpreting a state constitutional provision

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taking of the common-law right to possess airspace (no taking) from the nuisance-driven taking of the physical land (a taking).

was a taking, the analysis is nonetheless applicable to when any branch of government strips a prior held right. *See id.* Justice Stewart articulated the requisite test for determining if subsequent state action takes a property interest as whether the action created an "unpredictable change in state law." *Id.* at 297.

More recently, this Court looked at the relationship between common law and legislation in defining property rights in *Lucas v. S.C. Coastal Council*. *Lucas* asked whether a statute prohibiting new construction close to the tidal line on the beach "took" the Lucas's property since the property was left without any economic use. 505 U.S. at 1006. Justice Scalia, writing for the majority, discussed the constitutional restrictions on legislation taking a property right: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. Justice Scalia then reiterated that limitations on property rights, like the right to use, must be "identif[ied in the] background principles of nuisance and property law." *Id.* at 1031.

Justice Stevens dissented, raising concerns that the Court had cabined legislative freedom, binding legislatures to long-held common law rules. *Id.* at 1068–69 (Stevens, J., dissenting). He quoted *Munn*, arguing that the Court had abandoned the prior rule that legislatures couldn't change common-law rights. *Id.*

But the *Lucas* majority never addressed *Munn*, so the relationship between the two is unclear. Whether the requirement that legislative action be based in common law "background principles" applies to "rights

of property" or also to "rules of conduct" has not been explained. *See id.* at 1029–31; *Munn*, 94 U.S. at 134.

This overview of this Court's decisions about legislatures' taking property rights or changing remedies demonstrates the need for clarity. While some precedents trend towards protecting common-law property rights from legislative restrictions not based in traditional property principles, *see Lucas*, 505 U.S. at 1029, this Court should take this opportunity to clearly explain whether a legislative act that categorically removes a property right previously deeply rooted in the common law is a compensable taking under the Fifth Amendment.

This case tees up that issue nicely, as Mr. Fair had a common-law property right in the equity of his home, established both in the "background principles" of property law stemming from Magna Carta, as well as Nebraska common law. *See Lucas*, 505 U.S. at 1031; *Trimble,* 52 N.W. at 712 (remaining equity after a tax lien sale is the private property of the homeowner); *Delatour*, 139 N.W. at 1024 (surplus property tax is the property of the homeowner/taxpayer).

The forced transfer here also would likely be a taking under Justice Stewart's analysis, since the legislature created an "unpredictable change in state law" by giving the state the authority to seize the remaining equity when the common law established that as belonging to the homeowner. *See Hughes*, 389 U.S. at 296–97 (Stewart, J., concurring).

And as in *Webb's*, the property here is an intangible monetary asset, which the Court has recognized as property under the Fifth Amendment. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613–14 (2013). These similarities in facts and legal issues

to the Court's prior precedents provide an opportunity to clarify that legislative action that removes a property interest long held in "background principles," such that the statute creates an "unpredictable change in state law" takes the property.

Further, this is a complete, categorical legislative taking: Property is not just being limited or regulated—it is being completely taken. It would be no less a complete taking if the Nebraska legislature turned every fee simple into a life estate and transferred the future interests to the state. Mr. Fair owned $60,000 in equity and owed $5,268 in taxes, interest, and fees. The government gave his property to a private corporation because the homeowner did not pay his taxes. As a result, the only asset left to the homeowner—his surplus home equity—was completely taken by statute for a private corporation's benefit. The government should not be allowed to perpetrate this manifest injustice simply because it came from a legislatively enacted statute.

As discussed above, Magna Carta provided protections for tax-debt surplus, requiring it to be returned to the estate, and Magna Carta was introduced to curb the tyrannical abuses of King John. Robin Hood attempted to defend poor people from onerous taxes that filled royal coffers. It is not unreasonable to speculate that Robin Hood may have actually protected people from this very thing—people who were subjected to their home-value surplus being seized after the sheriff's tax was satisfied. But would Robin Hood have been any less justified if, instead of emanating from executive action (Sheriff of Nottingham via King John's instruction) the taking was effected via a statute enforced by the sheriff? That is what the state below claimed.

C. Nebraska's Supreme Court Needs Guidance, As Do the Courts of the 13 Other States That Have Abrogated of the Common-Law Right to Surplus Equity

Nebraska, like any state, is of course free to define the parameters and meaning of its laws within the confines of the federal Constitution and the laws of the United States. But here the state court drew a narrow distinction that jibes poorly this Court's takings jurisprudence. The Nebraska Supreme Court here defined the property interest according to the mechanism by which it was taken—not the actual interest the owner had. The court attempted to narrowly define the property interest at issue as the equity proceeds after a tax certificate sale to a private party, rather than the entire equity itself. *Cont'l Res. v. Fair*, 971 N.W.2d 313, 325–26 (2022).

But when Mr. Fair is evicted from his home and loses all the value of his biggest asset—again, due to his initial inability to pay $588.21 in property taxes—it seems a cynical rhetorical ploy to describe the property as anything but "taken." As this Court recently explained, there is a *per se* aspect for takings when it comes to the physical occupation of property. *Cedar Point*, 141 S. Ct. at 2072 ("The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property.").

Whatever the method (statute, ordinance, etc.), if a "physical appropriation of property" occurs, it is a *per*

se taking. *Id.* While it is conceptually incoherent for home equity to be "physically" occupied, the result here is analogous: Mr. Fair has lost his right to occupy his home via a statute that takes his equity due to the inability to pay taxes that were initially less than one one-hundredth the value of his home. While not directly on point, *Cedar Point* offers an important corrective to past takings jurisprudence that hinged on often irrelevant distinctions to ignore the basic fact that a property right established at common law has either been physically occupied or fully appropriated. *See* Sam Spiegelman & Gregory C. Sisk, Cedar Point*: Lockean Property and the Search for Lost Liberalism*, 2020–2021 Cato Sup. Ct. Rev. 165, 178–187 (2021).

In Nebraska, multiple court decisions determined that the homeowner was entitled to the proceeds of his home after paying off his tax debt. While these decisions are more than 100 years old, they comport with centuries-old common law in both the United States and England. *See supra* I.A. In *Trimble*, the Nebraska Supreme Court said that when "the land may be sold as upon foreclosure of a mortgage, the surplus in excess of taxes due going to [the homeowner], while the purchaser acquires a good title." *Trimble,* 52 N.W. at 712. Another decision explained that for homesteads—which statutorily protected the homeowner from bankruptcy actions—if the homeowner had a mortgage she was still protected from bankruptcy up to the amount of her equity. *Hoy*, 58 N.W. at 126. The *Hoy* court treated the equity as a property interest just like the home would be treated. *See id.* Finally, a 20th-century decision explained that the property owner was entitled to the surplus paid at the sheriff's sale after the tax bill was satisfied. *Delatour*, 139 N.W. at 1024.

Against these background cases, in 2022 the Nebraska Supreme Court nevertheless opined in this case that no prior case law granted a common-law right to the proceeds of a tax foreclosure sale. *Fair*, 971 N.W.2d at 325–26. The *Fair* decision said that the prior cases are immaterial since none of them involved the sale of the property to a private party as a tax certificate after the government took it to satisfy the tax deficiency and the homeowner did not redeem it. *Id.* at 324–25. But *Trimble* addressed a nearly identical situation, except *Trimble* directed property to be sold via a tax lien. *Trimble*, 52. N.W. at 712.

Although *Fair* references *Trimble*, it is in the section discussing the excessive fines claim, differentiating between tax certificates and foreclosures, *Fair*, 971 N.W.2d at 327. But even if there is a legitimate distinction between a tax certificate sale and a tax lien sale, the distinction is the process of taking the property and not the property interest. And, as in *Cedar Point*, the end result is the same: a previous owner losing substantial assets and the ability to occupy the property. In common parlance—and as a legal term of art—that property has been "taken."

The decision below upheld a legislative taking, allowing the legislature to take vested property interests through generally applicable statutes. This case offers a good vehicle for this court to clarify the law in this increasingly important area.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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