No. 22-996

In The
Supreme Court of the United States

TAWANDA HALL, CURTIS LEE,
CORETHA LEE, and KRISTINA GOVAN,
Cross-Petitioners,

v.

ANDREW MEISNER, Treasurer,
in his official capacity, et al.,
Cross-Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

REPLY IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

As payment for property tax debts, Oakland County took absolute title to the homes belonging to Cross-Petitioners Tawanda Hall, Curtis and Coretha Lee, and Kristina Govan (Homeowners), all of which were free of other encumbrances and valued at many times more than their tax debts. Pet.App.5a–6a. The Homeowners were not paid by the County or any other party for the value that their homes exceeded their debts.

The Sixth Circuit correctly determined that this action violated the Constitution by taking private property without just compensation. But its decision dismissing the excessive fines claim deepens a split among the lower courts and departs from this Court's test for determining whether an economic sanction constitutes a "fine" within the meaning of the Eighth Amendment. The result is that individuals in some jurisdictions whose property is involved in non-criminal offenses are unprotected by the Excessive Fines Clause even though the fine goes beyond "compensating the Government for a loss" and may be grossly disproportionate to any harm that they have inflicted on the public. *See United States v. Bajakajian*, 524 U.S. 321, 329 (1998).

The County does not dispute the importance of the question presented. Instead, it argues that the lower court was correct on the merits. The County is incorrect. The exclusion of such sanctions from constitutional limitation is nonsensical and departs from *Austin v. United States*, 509 U.S. 602 (1993), creating a conflict that warrants resolution by this Court.

If this Court grants the County's petition to evaluate or remand the Homeowners' takings claims, then this Court also should evaluate or remand the Homeowners' excessive fines claim.

CROSS-STATEMENT OF THE CASE

Without any support in the record, the County alleges that the Homeowners' properties were "rehabbed" before they were sold. BIO at 4.[1] The Homeowners dispute this characterization: The Complaint alleges only that prior to selling their homes, a private party made "often needless repairs" on their homes. Cross-Pet.App.102. The County's contested and unsupported allegation that the homes were rehabilitated—casting baseless aspersions on the Homeowners' maintenance of their property—is inappropriate for consideration on a motion to dismiss. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 452 (2012).

ARGUMENT

I. This Court Should Resolve Whether Property Must Be Associated with Criminal Activity in Order for the Owner to Seek the Protection of the Excessive Fines Clause

The County confiscated the Homeowners' equity, worth hundreds of thousands of dollars more than the taxes, penalties, interest, and fees owed. The County argues that this cannot constitute a "fine" within the meaning of the Excessive Fines Clause because for the Clause to apply, the forfeiture must "reflect[] a

[1] The petition for writ of certiorari in *Meisner v. Hall*, No. 22-874, repeats this claim, citing Complaint ¶¶ 21, 25. Pet. at 3, 7. Neither paragraph makes any reference to repairs or rehabilitation whatsoever. Cross-Pet.App.97–98.

culpable mental state." BIO at 8. More particularly, the County asserts that the Excessive Fines Clause only applies where the fine is imposed for "criminal conduct or culpable, quasi-criminal intent." BIO at 12.

When deciding whether a forfeiture is a fine within the meaning of the Excessive Fines Clause, "the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *Austin*, 509 U.S. at 610. Even forfeitures imposed to punish the owner for mere "negligence" may still be "punishment." *See id.* at 615–18 (in rem forfeiture based "on the notion that the owner has been negligent . . . and that he is properly *punished* for that negligence") (emphasis added). Forfeiture of title and all value in real estate for failure to pay property taxes is "highly penal." *Bennett v. Hunter*, 76 U.S. 326, 336 (1869).

Nevertheless, the County asserts that lower courts agree that this cannot be a "fine" because the Clause only applies where the sanction is imposed as a result of criminal or "quasi-criminal" activity. BIO at 12. While some lower courts agree, other courts do not, creating a conflict that only this Court can resolve. *See* Cross-Pet. at 18. For example, although ignored by the County, in *Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020), the Ninth Circuit held that parking tickets and late fees for paying the fine after the 21-day deadline were subject to the Excessive Fines Clause even though such fines are plainly noncriminal. *See also Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 554 (Minn. 2003) (penalty on employers who fail to act by garnishing wages from tax-delinquent employees and paying them to the

state is punishment because it can only be explained by and "*must* be calculated to deter").

The County claims no court has found an excessive fines claim properly alleged in a tax forfeiture case.[2] Again the County ignores rather than addresses Homeowners' cited cases. For example, *Dorce v. City of New York* recognized that forfeitures of this nature "reflect[] a purpose that is deterrent in part, and therefore punitive, as opposed to furthering the sole goal of compensating for lost revenue." 608 F.Supp.3d 118, 143–44 & n.10 (S.D.N.Y. 2022) (citation omitted).

The paucity of federal opinions on the topic of excessive fines involving such foreclosures would be expected given that this Court only recently recognized that the Clause applies against the states. *Timbs*, 139 S.Ct. at 686–87.

An economic sanction is punishment when it "cannot fairly be said solely to serve a remedial

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[2] The County emphasizes comments by the Michigan Supreme Court in *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429 (2020), about whether the action involved was a punishment. But those comments were *not* made in the context of an excessive fines analysis because the plaintiffs abandoned their excessive fines claim in the intermediate appellate court; the question was not reviewed by the Michigan Supreme Court. *Rafaeli*, 505 Mich. at 484 n.134 (court agreed only to hear narrow takings question); *see also* Order, *Rafaeli, LLC v. Oakland Cnty.*, 503 Mich. 909 (2018) (granting review to answer only whether the government effected a taking "by retaining proceeds from the sale of tax foreclosed property that exceeded the amount of the tax delinquency."). Moreover, what constitutes a "fine" within the meaning of the Excessive Fines Clause is fundamentally a federal question based on the language and intent of the Clause. *See Timbs v. Indiana*, 139 S.Ct. 682, 689 (2019).

purpose, but rather can only be explained as also serving retributive or deterrent purposes." *Austin*, 509 U.S. at 610–11. Such is the case here. Ms. Hall, for example, lost her home worth approximately $308,000 to satisfy a debt of $22,642 in taxes, penalties, interest, and costs. The government confiscated property more than 13 times greater than her debt. The law places no cap whatsoever on the amount of the forfeiture. Had her property been worth twice as much with the same or lesser debt, the penalty would have been capriciously greater.[3] As in *Austin*, there is no relationship between the debt owed and the sanction imposed.

Because the punishment is imposed for an offense against the public, rather than an offense against an individual, this penal economic sanction is a "fine" within the meaning of the Excessive Fines Clause. *See Kokesh v. S.E.C.*, 581 U.S. 455, 461, 465 (2017); Am. Br. of Professor Beth A. Colgan, *Tyler v. Hennepin Cnty.*, No. 22-166 (filed Mar. 6, 2023) (discussing history of Excessive Fines Clause); *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492 U.S.

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[3] The County argues that it "did not benefit financially" from confiscating the Homeowners' home because it passed the property on to the City of Southfield for only the amount of taxes owed. BIO at 4. But that is irrelevant to the Excessive Fines analysis. What matters is that the financial sanction imposed was disproportionate to a public harm, not the government's subsequent choice to dispose of the property. Selling the property for only the taxes owed raises questions about the city's stewardship of public funds, *see, e.g.*, *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 425 (9th Cir. 1995) ("misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern"); it has no bearing on the fine imposed on the Homeowners.

257, 259 (1989) (declining to apply clause to punitive damage awards in dispute involving a harm to an individual rather than the public).

The County's preferred rule, used in some circuits like the court below, weakens the Excessive Fines Clause and leaves non-criminals less protected from grossly disproportionate economic sanctions than criminals.

II. History Supports the Homeowners' Excessive Fines Claim

The County claims there are "no historical sources showing that tax forfeitures were considered punishment." BIO at 7. Yet this Court in *Bennett* specifically noted such a forfeiture would be "highly penal." 76 U.S. at 336.

Similarly, in *Marshall v. McDaniel*, 75 Ky. 378, 385 (1876), Kentucky's highest court held that to take the whole estate—rather than just what was owed—could only be understood as making it criminal to fail to pay property taxes, and therefore held the forfeiture violated due process because the state failed to give the defendant all the protections afforded by the Constitution to a criminal:

> But when the commonwealth, instead of thus subjecting to sale the delinquent tax-payer's property, or so much as may be necessary to raise his proportion of the public burden, undertakes to treat his delinquency as a crime, and to punish him by forfeiting his estate, the constitutional guarantee which secures to the citizen the right to be heard before his freehold shall be seized or he be condemned, and to be proceeded against in

> accordance with "the law of the land," applies, and the courts can not, in deference to the legislative department of the government, hesitate to vindicate the constitutional rights of the individual.

Id. at 385–86. The court refused to enforce the forfeiture.

The County also relies on Virginia's 1790 tax forfeiture statute[4] to assert that our nation's history and traditions allow such forfeitures without constitutional limitation. *See* BIO at 14. But Virginia's history belies that claim. The forfeiture statute cited by the County was a "new and exceptional mode of proceeding," *Martin v. Snowden*, 59 Va. 100, 138 (1868), that allowed forfeiture of the whole property after three years "when no effects could be found in the county, or in any other county, to satisfy the tax." *Id.* at 141. The forfeiture provisions were later repealed and the legislature extended the deadline to redeem land forfeited under the statute almost half a century until July 1, 1838. *McClure*, 24 W. Va. at 565 (deadline extended to 1829, then to 1848). After that,

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[4] Virginia's forfeiture statute arose in reaction to the "emergency" caused by the state's reckless and poorly managed fire sale of unoccupied frontier lands, which left overlapping and conflicting claims, as well as vast swaths of unused vacant land. *McClure v. Maitland*, 24 W. Va. 561, 554–65, 575 (1884) (describing the "loose, cheap and unguarded system" and its results). Despite the severe consequences under the equity-forfeiture system, it "produced neither taxes nor the settlement of the country" desired by the legislature. *Id*. at 566. Kentucky separated from Virginia in 1792, presumably suffering from the same chaotic and conflicting title problems. *See* Library of Virginia, *Kentucky Records: Overview*, https://lva-virginia.libguides.com/kentucky (visited May 19, 2023).

so-called "forfeitures" were only forfeiture of title, because the statutes reserved surplus proceeds for the former owner. *See, e.g., id.* at 568–69 (describing entitlement to surplus proceeds in Virginia's acts of 1838, 1841, 1842, 1844, 1846).

As this Court explained, Virginia's highest court rejected forfeiture of land worth more than the debt as beyond the government's power:

> The court [in *Martin v. Snowden*] held . . . that congress had all the powers for enforcing the collection of its taxes that were in use by the crown in England, or were in use by the states at the time of the adoption of the constitution, but forfeiture of the land assessed with the tax was not then in use, either in England or the states, as a mode of collecting the tax.

King v. Mullins, 171 U.S. 404, 415 (1898).

The County claims that our Founders' treatment of Virginia's statute proves that they endorsed such forfeitures. BIO at 14 ("[T]he Founders did not see a constitutional problem with such regimes."). But the County only cites material by St. George Tucker, taken out of context, to support that proposition. For his part, as Virginia Supreme Court Justice, Tucker acknowledged that such a forfeiture "is in its nature . . . highly penal." *Yancey v. Hopkins*, 15 Va. 419, 428 (1810) (also calling it a "penalty"). In *Yancey*, Tucker, writing for the majority of Virginia's high court, held that the tax forfeiture was void because the tax collector failed to strictly comply with requirements for a forfeiture. *Id.* at 428 ("And *any* omission, or mistake, in the performance of those duties which the law prescribes, will vitiate the whole proceeding."); *see*

also id. at 436 (Fleming, J., concurring) ("the laws subjecting lands to be sold for the payment of taxes I consider as highly *penal*" and mistake by collector voided forfeiture).

The County claims "Tucker upheld Virginia's tax-foreclosure regime" in *Kinney v. Beverley*, 12 Va. 318, 334, 336 (1808). BIO at 15. But Tucker made no such endorsement in *Kinney*. The County quotes only the *dissent* in *Kinney*. *See* BIO at 15. The majority opinion, by contrast, notes only that at "the period of the revolution, the crown was entitled to a quit-rent . . . and if this quit-rent was not paid" that it was forfeited, and that "quit-rents were abolished" in 1779. *Id.* at 332–33. Tucker does not comment whether Virginia had such power of forfeiture. Rather, he asserts that Virginia must follow "due process of law" before depriving landowners of their property and that the state's failure to do so meant the property was not legitimately forfeited for failure to pay taxes. *Id.* at 333–42. The Court was not presented with the excessive fines question presented here, nor was it necessary for the court to reach it since it found the foreclosure void. *See id.* at 323–24 (presented only with questions about whether procedural safeguards were followed).

The weight of history supports the Homeowners' excessive fines claims.

CONCLUSION

If the County's petition is granted, so too should the Homeowners' Cross-Petition be granted.

DATED: May 2023.

Respectfully submitted,

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