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* THE BUCKEYE INSTITUTE, COMPETITIVE ENTERPRISE INSTITUTE, MANHATTAN INSTITUTE, PLATTE INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND ILLINOIS POLICY INSTITUTE IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

Amicus curiae The **Buckeye Institute** was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing them for implementation in Ohio and replication nationwide. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals. The Buckeye Institute has been vocal in its opposition to practices in Ohio allowing government entities to seize real property to satisfy a tax debt without compensating the property owners for the equity they have accrued.

The **Competitive Enterprise Institute** (CEI) is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, it has done so through policy analysis, commentary, and litigation. When governments seize the value of property beyond what

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[1] Respondents were given timely notice of the filing of this *amicus curiae* brief under USSC Rule 37.2. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

they are owed it disrupts the free-market system that depends on the stability of ownership.

The **Manhattan Institute for Policy Research** is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting economic freedom and property rights against government overreach.

The **National Federation of Independent Business Small Business Legal Center, Inc.** (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The Illinois Policy Institute is a nonpartisan, nonprofit public policy research and education organization that promotes personal and economic freedom through free markets and limited government. Headquartered in Illinois, the Institute's focus includes budget and tax, good government, jobs and economic growth and labor policy.

The Platte Institute is a nonpartisan, nonprofit public policy research and advocacy organization based in Omaha, Nebraska. It promotes free markets and economic freedom in Nebraska.

This case concerns *amici* because of our commitment to protecting individual liberties against government interference—including the private property rights that are foundational to our constitutional order.

SUMMARY OF THE ARGUMENT

The Takings Clause is unconditional. Its simple and unadorned language provides, "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Those words, which restrict and qualify the traditional government power of eminent domain, can more precisely be called the Just Compensation Clause. They carry the same meaning today that they did when they were written with quill and ink, affirming the equitable premise that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) (quoting *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 322 (2002)). Indeed, the Just Compensation Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)).

That original understanding of the Just Compensation Clause, rooted in Magna Carta and applied consistently to the present day, is that when the government takes an interest in property for public use, its duty to compensate the former owner is "categorical." *Tahoe–Sierra Preservation Council, Inc.,* 535 U.S. at 322 (2002) (citing *United States v. Pewee Coal Co.,* 341 U.S. 114, 115 (1951)). In drafting the Fifth Amendment, James Madison restated familiar and uncontroversial precepts of English law that had by then taken root in colonial statutes and common law. William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985). Colonial statutes, nascent state constitutions, and the Northwest Ordinance of 1787 all conditioned the sovereign's right to take property for the public good on just and contemporaneous compensation to the landowner.

Expressly included in this historical understanding of the Fifth Amendment is the principle that when the government takes property—particularly when the government takes real property to satisfy a debt—its power to take goes only so far as is necessary. A taking that leaves the government with a profit at the property owner's expense violates this principle. The Framers' generation and 19th century jurists rightly understood equity in real estate to be a form of personal property and thus protected from uncompensated or unwarranted takings.

The just-compensation requirement is "categorical" in the sense that a sovereign's proper

authority to take private property exists *only* to the extent that the taking is necessary for a public use and that applying this principle to satisfy a debt requires that the government compensate the property owner for his or her accrued equity in that property. Indeed, a "property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without *just* compensation." *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2168 (2019) (emphasis added).

Some state and local governments, however, have evaded this requirement by taking private property—in this case, a property owner's built-up equity in real property—in excess of the debt owed and without compensating the landowner for the full value of the property interest taken. Although these state and local governments may find this statutorily created equity-confiscation scheme acceptable—and financially beneficial—the U.S. Constitution does not.

The Fifth Amendment's plain language, as well as its well-established antecedents in England and colonial America highlight the primacy of the just-compensation requirement and the inherent limit of eminent domain in Anglo-American law. The historical record shows that the Framers and founding generation, as well as 19th century jurists who applied these principles, would have plainly understood equity in real estate as property subject to the Fifth Amendment's protections. *Amici* do not deny the government's power to take property to satisfy the owner's debts, subject to due process and

other protections, but no government has any proper business taking more than it is owed.

ARGUMENT

I. Magna Carta and Colonial Law Established the Just Compensation Requirement.

The requirement that "just compensation" must accompany any taking of private property predates the U.S. Constitution and has a pedigree stretching back nearly a millennium. This Court has observed that the roots of the Just Compensation Clause extend "back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). Specifically, Clause 28 of Magna Carta forbade any "constable or other bailiff" from taking "corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." *Id.* (internal citations omitted). And Chapter 31 placed an outright prohibition on "the king or his officers taking timber" from land without the owner's consent. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 564 (1972).

English jurists incorporated these protections into their decisions and commentaries on English common law. For example, Lord Coke read this limitation to imply that while the king could take certain "inheritances" from land, he could not take the land itself. *Id.* Blackstone later asserted Magna Carta's protections of property meant that "only the legislature could condemn land." *Id.* As Professor

Stoebuck explains, "eminent domain"—the physical taking of land—"arose in Anglo-American jurisprudence as a function of Parliament," rather than as a prerogative of the Crown. *Id.* at 566. This distinction was significant in English law; in America the distinction gradually blurred, and following ratification of the Constitution, disappeared entirely.

These principles of Magna Carta sailed with the first English colonists to the New World and established themselves firmly in American soil. For example, in 1641, Massachusetts adopted a provision in its Body of Liberties, prohibiting "mans Cattel or goods of what kinde soever" from being "pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far*," 49 Am. U. L. Rev. 181, 209 (1999).

Consistent with Blackstone's distinction between the powers of the king and the powers of Parliament, most colonial legislatures did not recognize a blanket governmental obligation to compensate a property owner for the public taking of his property. Treanor, *supra*, at 694. Rather, the duty to provide just compensation flowed from the specific statute authorizing the taking. Under these "purveyance statutes" legislatures often included payment as a matter of simple justice. Thus, "compensation became a feature [] through the American colonial period." Stoebuck, *supra*, at 575. According to Stoebuck, "purveyance statutes" were "in themselves examples

of the principle that government must pay for what it takes." *Id.* at 576. In other words, the colonial legislatures usually employed a "pay as you go" policy, with each statute that authorized a taking including an offsetting appropriation to compensate the land owner.

Takings by colonial governments for roads provide an interesting parallel to the practices at issue here. In the colonial period, governments often took unimproved wilderness to create highways that almost always benefitted the property and the landowner. *See* Stoebuck, *supra*, at 583 ("In a time when unimproved land was generally of little worth, a new road would give more value than it took."). Yet, despite significantly improving the value of the adjacent land, colonial legislatures still viewed compensation to landowners as a matter of fundamental fairness. For example, in 1639, the Massachusetts Bay colony amended its general highway act to provide that "'if any man suffer any extraordinary damage in his improved ground,' he would receive 'some reasonable satisfaction' from the town." John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 Am. J. Legal Hist. 253, 258 (1996).

As time passed, the legislative trend *toward* more liberal and universal compensation, even when the government action conferred a benefit to the property, took hold. For instance, the Massachusetts Bay colony amended its highway statute again in 1693 to require compensation not only when the government caused "extraordinary damage" but to guarantee "'reasonable satisfaction' to anyone

'thereby damaged' in his improved ground." *Id.* Similarly, the New York colonial legislature evolved from a position of leaving the question of compensation to local governments, to adopting a 1721 highway act that required the government to pay "the true and full Value of the Land" if a highway was "laid through 'Improv'd or Inclosed Lands.'" *Id.* at 261. Connecticut's statute largely mirrored New York's. *Id.* at 290. And in 1700, Pennsylvania revised its highway statute to provide that "where it was necessary to lay a road through 'improved lands . . . the value thereof' would be paid to the owner." *Id.* at 261.

Although compensation for highway takings was not universal—Virginia and Maryland, for example did not provide compensation for land taken for highways, and New York frequently amended its statute to provide more protection for highways in certain counties and less in others—the principle of no taking without compensation had taken root. *Id.* at 258-261 That the colonial legislatures typically limited those takings to "Improv'd or Inclosed Lands" rather than unimproved wilderness also shows that colonial legislators—like the Court in *Arkansas Game and Fish Commission*—understood and honored land-owners' "reasonable investment-backed decisions." See *Ark. Game & Fish Comm'n*, 568 U.S. at 38-39. In other words, land purchasers understood that land, like currency, was fungible and that they could recover their equity even if the land was sold to satisfy other debts. In ordering compensation for highway takings, colonial legislatures well understood that it was government action—in the form of royal grants, land purchases,

treaties (albeit often dishonored), and the implied government protection of paid-in equity that went with them—that made the land available for settlement in the first place.

But while pre-revolutionary colonists were largely content to trust their legislatures to provide compensation when fair, the experience of the Revolutionary War impressed on them the need for a broader and more consistent protection of property rights. Treanor, *supra*, at 700-701. The Revolutionary War brought with it the seizures of property by both the British Regulars and the Continental Army. St. George Tucker, the author of the first published treatise on the U.S. Constitution and editor of the 1803 edition of Blackstone's Commentaries, posited that the new nation's shift to the inclusion of compensation requirements in state constitutions, the Northwest Ordinance, and the Takings Clause was due to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever." 1 Blackstone's Commentaries, Editor's App. 305–06 (1803).

Similarly, during the war, many of the newly independent states enacted legislation allowing the confiscation of loyalist property. Some Founders, including Madison, were concerned that this confiscation threatened the long-term safety of property rights in general. See James W. Ely, Jr., *Property Rights in American History* 4 (1997); *see also* Treanor, *supra*, at 709 (noting Madison's opposition to the seizure of loyalist property).

Indeed, John Adams saw the protection of property and the larger cause of liberty as inextricably bound: "[p]roperty must be secured, or liberty cannot exist." John Adams, *Discourses on Davila, in* 6 Works of John Adams 223, 280 (Charles Adams ed., 1851). Yet the exigencies of war resulted in Americans being less "secure in their property rights between 1776 and 1787 as they had been during the Colonial period." Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 154 (1985). The Framers thus sought to restore that security, which would, in turn, both foster and fortify liberty, as it was broadly understood.

II. The Framers and Succeeding Generations Held the Just Compensation Requirement to be Categorical and Fundamental.

Not long after the Revolutionary War's conclusion, Madison voiced his concerns over the erosion of property rights that had attended the conflict, writing to Jefferson that "[t]he necessity of . . . guarding the rights of property was for obvious reasons unattended to in the commencement of the Revolution" and citing the need for positive steps to secure those rights in the new country. Treanor, *supra*, at 709.

While the colonial right to compensation for a taking of property often relied on a patchwork of purveyance statutes and general reliance on the common law, the Congress of the Confederation of the United States provided what was to be the first national statement on the matter when it enacted the Northwest Ordinance of 1787. In essence, the Northwest Ordinance provided the first national

"pre-constitutional codification of the eminent domain power." Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 54 (1999).[2] In language that prefigured the Fifth Amendment, the 1787 Northwest Ordinance provided that:

> No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and *should the public exigencies make it necessary, for the common preservation, to take any person's property*, or to demand his particular services, *full compensation shall be made for the same*.

An Ordinance for the Government of the Territory of the United States North-west of the River Ohio, Confed. Cong., art. 2 (1787) (emphasis added).

Significantly, the State of Minnesota and Appellee Hennepin County were carved out of the Northwest Territory. Limiting takings to those that are necessary and requiring full compensation for them is thus part of the Appellee's origin story. When they loaded their wagons and lit out for the West, the men and women who settled what would become Hennepin County would have relied—at least in part—on this national policy protecting them from uncompensated government takings.

The Framers' writings following ratification of the Fifth Amendment leave no doubt of the

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[2] While the Northwest Ordinance provided the first "national" statement of the Just Compensation requirement, the Vermont Constitution of 1777 and the Massachusetts Constitution of 1780 included similar categorical requirements. Treanor, *supra*, at 701.

importance that they assigned to the protection of private property. Madison, in particular, saw broad protection for property—both real and intangible—as the proper end of government. James Madison, *Property, in* 1 The Founders' Constitution, Chap. 16, Doc. 23 (University of Chicago Press, 1977), available at https://tinyurl.com/34cz994u. Indeed, Madison considered protection of property as a government responsibility commensurate with protection of individuals. *The Federalist No. 54* (James Madison) ("Government is instituted no less for protection of the property, than of the persons of individuals."). And after the experiences of the Revolutionary War, he believed it necessary "to erect strong safeguards for rights in general and for property rights in particular." Treanor, *supra*, at 694. The Just Compensation Clause—although intended to have relatively narrow legal consequences—was just such a safeguard. And although Madison viewed the Fifth Amendment as a restatement of what was already unquestionably the law, he believed that the codification of these pre-existing guarantees into the Bill of Rights would serve the hortatory purpose of encouraging respect for private property:

> Paper barriers have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community.

Id. at 710 (citing James Madison, *Speech Proposing the Bill of Rights, in* 12 The Papers of James Madison 204-05 (C. Hobson & R. Rutland eds. 1979)).

Following ratification, Madison's broader vision took hold in American jurisprudence. Professor

Treanor explains that "[i]n addition to limiting the national government's freedom of action, the just compensation clause served an educative role: It inculcated the belief that an uncompensated taking was a violation of a fundamental right. . . . the Fifth Amendment was a national declaration of respect for property rights." Treanor, *supra*, at 714. By the 1820s, the principle of just compensation had won general acceptance. *Id.*

In the landmark case of *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816), Chancellor Kent articulated the broad Madisonian view that had begun at Runnymede, crossed the ocean, survived a war, and firmly established its place as the fundamental law of the new nation:

> I may go further, and show that this inviolability of private property, even as it respects the acts and the wants of the state, *unless a just indemnity be afforded,* has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government. Such an article is to be seen in the bill of rights annexed to the constitutions of the states of *Pennsylvania, Delaware,* and *Ohio;* and it has been incorporated in some of the written constitutions adopted in *Europe,* (Constitutional charter of *Lewis* XVIII., and the ephemeral, but very elaborately drawn, constitution *de la Republique Française* of 1795.)

> But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the *United States,* "that private property shall not be taken for public use, without just compensation."

Id.

III. English and American Law Have Long Recognized That the Government—If It Takes At All—May Take No More Than Is Necessary.

Courts and commentators have explained that the sovereign's authority to take property is constrained by two equitable limitations: "'the public use requirement' and 'just compensation' rule." *Norwood v. Horney,* 853 N.E. 2d 1115, 1129-30 (Ohio 2006) (citing Charles E. Cohen, *Eminent Domain after Kelo v. City of New London: An argument for Banning Economic Development Takings*, 29 Harv. J. L. & Pub. Policy 491, 532 (2006)); Stoebuck, *supra*, at 595. But a significant component of the public use requirement is the government's duty to refrain from taking more property than is necessary for the public purpose. *Norwood*, 853 N.E. 2d at 1130.

The necessity limitation also boasts a long and respected pedigree in the historical development of takings jurisprudence. This principle of necessity, like the just compensation requirement, finds its roots in Magna Carta. Historians noted that before Magna Carta, seizure of property to fulfill debts to the Crown was a common practice: "The sheriff and bailiffs of the district, where [the] deceased's estates

lay, were in the habit of seizing everything" to secure the interests of the King" and "sold chattels out of all proportion to the sum actually due" and often refused to disgorge the surplus. Vincent R. Johnson, *The Ancient Magna Carta & the Modern Rule of Law: 1215 to 2015*, 47 St. Mary's L.J. 1, 47 (2015). Clause 26 of Magna Carta remedied that situation by requiring that when goods were seized to satisfy a debt, "the value of the goods seized had to approximate the value of the debt." *Id.* English law thus recognized "equity" in a person's real and personal property.

Indeed, Blackstone himself, in a passage undoubtedly known to the Founders, summarized the well-understood limitation on tax seizures, stating that "whenever the government seized property for delinquent taxes, it did so subject to an 'implied contract in law to . . . render back the overplus'" if the property was sold to satisfy the delinquency. 2 Blackstone, *Commentaries on the Laws of England* 452 (1893). The King was due what he was owed, but nothing more.

Expounding on this principle, Thomas Cooley noted in his 1871 *Treatise on Constitutional Limits*—which surveyed the common law of the day—that any appropriations (takings) beyond necessity are illegitimate:

> The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a

> man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though compensation be made therefor.

Thomas M. Cooley, *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 1147 (2d ed. 1871).

IV. Subsequent Developments Establish That Equity in Land Is a Form of Personal Property.

Applying the twin principles that the government must pay for what it takes and can take no more than what it needs means that a government actor must compensate a landowner for his or equity in property when it seizes the property for a tax debt. History and experience teach that equity is a protected property interest.

"Property interests, of course, are not created by the Constitution." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Instead, as this Court has explained, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Here, the original understanding of the Takings Clause plainly encompasses a property right to recover the surplus from a tax sale—the right to equity in the property—that Ms. Tyler seeks to vindicate.

The Michigan Supreme Court recently addressed this question in *Rafaeli, LLC v. Oakland Cty.*, 952

N.W. 2d 434 (Mich. 2020). In holding unconstitutional a Michigan statute that allowed local governments to seize property to satisfy a tax debt without refunding the owner's equity, the court cited Cooley's *Treatise* for the proposition that the government is never justified in taking more than it needs and, by implication, more than it is owed. *Id.* at 454-55.

In other words, to the extent that a taking of Ms. Tyler's property is needed to make the government whole for its delinquent taxes, the net taking must be limited to only what is actually owed. In the alternative, if the government sees a need to appropriate *all* of her property without crediting back the equity, it must provide just compensation. The Fifth Amendment allows for no third option. The constitutional abuse comes into sharp relief when one considers that in this situation, Hennepin County is both creditor and sovereign. Clearly, no private creditor could receive in excess of what was owed to it in a foreclosure.

Like other English liberties, the colonists brought this common-sense limitation on the Crown with them to the New World. Cooley, this time in his treatise on the *Law of Taxation*, summarized the common law of the early Republic regarding tax sales thus:

> It is not for a moment to be supposed that any statute would be adopted without [payment of surplus equity] or some equivalent provision for the owner's benefit. And such a provision must be strictly obeyed. A sale of the whole when less would pay the tax is void, and a sale

> of the remainder after the tax had been satisfied by the sale of a part would also be void, for the very plain reason that the power to sell would be exhausted the moment the tax was collected.

Thomas M. Cooley, *A Treatise on the Law of Taxation including the Law of Local Assessments* 344 (1876) (collecting cases). Note that Cooley's conclusion that the power to sell is exhausted when the tax was collected is consistent with the principle that a taking is only constitutional when there is just compensation. Again, equity is property.

Finally, this Court has recognized an owner's right to surplus funds from a tax sale. *United States v. Lawton*, 110 U.S. 146, 147–51 (1884). There the Court recognized that when the United States bid-in its tax lien and took real property, "the surplus of that sum, beyond the [] tax, penalty, interest, and costs, must be regarded as being in the treasury of the United States, for the use of the owner, in like manner as if it were the surplus of purchase money received by the United States from a third person on a sale of the land to such person for the non-payment of the tax." *Id.* at 149-50. And in a similar case, this Court held that crediting the surplus back to the landowner rested on fundamental fairness, and should not be overcome by procedural wrangling:

> A construction consistent with good faith on the part of the United States should be given to these statutes. It would certainly not be fair dealing for the government to say to the owner that the surplus proceeds should be held in the treasury for an indefinite period for his use or

> that of his legal representatives, and then, upon suit brought to recover them, to plead in bar that the demand therefor had not been made within six years.

United States v. Taylor, 104 U.S. 216, 221–22 (1881).

Taken together, the original understanding of the Fifth Amendment and American common law—the understanding that Minnesota's settlers would have brought with them to the Western Reserve—was that private property was sacrosanct and a source of other fundamental rights. A corollary to that understanding is that equity in land was a form of private property. Accordingly, no government can take that property without just compensation.

CONCLUSION

For the reasons stated above and in the Petitioners' Brief, the Court should reverse the Eighth Circuit's decision.

Respectfully submitted,

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