

**COMMONWEALTH OF MASSACHUSETTS  
LAND COURT**

**TOWN OF TYNGSBOROUGH,**

**Plaintiff,**

**v.**

**PAUL RECCO,**

**Defendant.**

**Case No. 18 TL 001223**

**Speicher, J.**

**BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION  
AND MASSACHUSETTS ASSOCIATION OF REALTORS**

**INTEREST OF AMICI CURIAE**

Established in 1973, Pacific Legal Foundation is the nation's oldest liberty-based public interest organization. PLF seeks to establish legal precedents that protect basic constitutional freedoms, such as the right to private property. To that end, the Foundation regularly represents individuals around the country, including in Massachusetts, in defense of the right to make reasonable use of one's property and the corollary right to obtain just compensation when that right is infringed. *See e.g., Tyler v. Hennepin County*, 598 U.S. 631 (2023); *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). PLF and its attorneys are currently representing property owners and have filed *amicus curiae* briefs in litigation concerning the taking of home equity through state tax foreclosure processes. *See, e.g., DiPietro v. Town of Bolton*, No. 23-cv-40004 (D. Mass. pending).

The Massachusetts Association of REALTORS® (“MAR”) is a trade association comprised of over 26,000 licensed real estate brokers and salespersons in the Commonwealth of Massachusetts. Members of MAR are authorized to use the term “REALTOR®,” which is a trademarked term of the National Association of REALTORS®. MAR is a leading voice in advocating for the interests of its members, property owners, and the real estate industry. MAR acts on behalf of its members, property owners and other real estate professionals to promote public policy initiatives that provide equal access to housing, property ownership, and opportunity for all.

The undersigned amici have no personal stake in the outcome of this litigation. No part of this brief was drafted by any party and none of the undersigned amici received compensation from any party to write or file this brief.

### **INTRODUCTION**

On October 16, 2023, this Court issued a request for amici submissions from interested third parties, soliciting guidance on how the U.S. Supreme Court’s opinion in *Tyler*, 598 U.S. 631, applies to the Massachusetts tax foreclosure system. The Court was particularly interested in whether it could continue enforcing the tax foreclosure provisions of G.L. c. 60, §§ 53–69A, after *Tyler* and whether there are alternative equitable remedies it could pursue in this case. The strict foreclosure procedures laid out in §§ 53–69A are plainly unconstitutional under both the federal and state constitutions. Further, there are several alternative remedies provided in Chapter 60 that would allow municipalities to collect outstanding tax debts without relying on

unconstitutional foreclosure procedures. Thus, the Court should dismiss this case and require municipalities to either utilize one of the alternatives provided in Chapter 60 or stay all proceedings until the legislature remedies the unconstitutional elements of the state tax foreclosure system.

## **ARGUMENT**

### **I. Provisions of Chapter 60 that transfer absolute title to the foreclosing party are void and unenforceable.**

#### **A. G.L. c. 60, §§ 53–69A, are unconstitutional under both the federal and state constitutions.**

Ultimately, reform of the tax foreclosure system “rests in the legislative domain.” *Kelly v. City of Boston*, 348 Mass. 385, 389 (1965). However, until that time, the courts may not continue to enforce patently unconstitutional foreclosure provisions. G.L. c. 60, §§ 64, 69A, are unconstitutional because they automatically transfer absolute title to the tax lienholder upon foreclosure regardless of the value of the property or the amount of the tax debt. This transfer extinguishes the property equity still held by the former owner without providing just compensation in violation of the Fifth Amendment and the Massachusetts Declaration of Rights.

A taxpayer’s equity in real property is a protected interest under the Fifth Amendment.<sup>1</sup> *Tyler*, 598 U.S. at 639. In *Tyler*, a Minnesota county took absolute title

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<sup>1</sup> Though not raised by the parties, the tax foreclosure system potentially imposes a number of other constitutional violations. For example, amici have argued in similar cases that taking vast amounts of equity over relatively small tax debts through foreclosure results in an excessive fine under the Eighth Amendment and Article XXVI of the Massachusetts Declaration of Rights. *See e.g.*, Complaint, *DiPietro v. Town of Bolton*, No. 4:23-cv-40004 (D. Mass. Jan. 1, 2023); *see also Tyler*, 598 U.S. at 649–50 (J. Gorsuch and J. Jackson concurring) (“Economic penalties imposed to deter

to Geraldine Tyler’s condo and sold it for \$40,000 to collect on a \$15,000 tax debt. *Id.* at 636–37. Like here, the statute did not require or authorize the government to return the value of the property in excess of the tax debt. *Id.* The Supreme Court unanimously held that this defect rendered tax foreclosures under the state statute unconstitutional. *Id.* at 639. (“[U]sing the toehold of the tax debt to confiscate more property than was due ... effected a classic taking in which the government directly appropriates private property for its own use”).

Like the statute at issue here, Minnesota’s law did not recognize that debtors have a property interest in the excess value of property taken to pay a delinquent property tax debt. *Id.* at 639. But the Supreme Court did not defer to state law, noting that “state law cannot be the only source” of property rights. *Id.* at 635. “Otherwise, a State could ‘sidestep the Takings Clause by disavowing traditional property interests’ in assets it wishes to appropriate.” *Id.* at 638 (*quoting Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998)); also quoting *Hall v. Meisner*, 51 F.4<sup>th</sup> 185, 190 (6<sup>th</sup> Cir. 2022) (“[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take.”). The Court looked to “traditional property law principles,’ plus historical practice and [the Supreme] Court’s precedents” which all indicated that the

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willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: They cannot be excessive.”). Further, some legal scholars have argued that the statute imposes due process violations that would be unremedied by an order to sell the property and return surplus proceeds to the original owner. *See e.g.*, Ralph D. Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274 (2018).

government had taken private property protected by the Constitution without just compensation. *Tyler*, 598 U.S. at 639–40. Because the Massachusetts tax foreclosure system suffers from the same constitutional defects as the Minnesota system in *Tyler*, it is likewise unconstitutional.

Further, the Massachusetts Declaration of Rights protects private property and provides an independent basis for determining that the state tax foreclosure system is unconstitutional. *Bromfield v. Treasurer & Receiver Gen.*, 390 Mass. 665, 668 (1983); *Cone v. Forest*, 126 Mass. 97 (1879) (holding that tax collector was required to return the surplus value of cows that were seized and sold to cover delinquent taxes). The government is only entitled to collect as much as it is owed; it has no lawful entitlement to anything more. See *Boston v. James*, 26 Mass. App. Ct. 625 (1988) (“The only legitimate interest of a town in seeking to foreclose rights of redemption is the collection of taxes due ... together with ... costs and interest”). When the government “chooses to exercise its powers of eminent domain, it incurs a corollary and inseparable obligation to make payment for the land seized.” *Bromfield*, 390 Mass. at 668-69 (“It has long been established that no citizen ought to be compelled to trust to the future justice of the Legislature to provide the compensation owning him.”). Because the foreclosure statute does not provide for reasonable compensation, it is unconstitutional under the Massachusetts Declaration of Rights.

Here, the Town filed a complaint pursuant to G.L. c. 60, §§ 53–69A, which, upon judgment, would allow it to obtain absolute title to Ms. Recco’s property. But this taking is impermissible because Chapter 60 does not provide any opportunity for

taxpayers to be compensated for their equity. *Kelly v. City of Boston*, 348 Mass. 385, 388–89 (1965) (holding that, under the statute, surplus from a post-foreclosure sale “belongs to the municipality” and that the taxpayer “is entitled to none of ... the surplus”). This runs afoul of *Tyler*, because it authorizes the government to take more property than it is due. A statute permitting a taking without compensation violates the constitution and is therefore void and unenforceable. See *Chicago, Indianapolis & Louisville Ry. v. Hackett*, 228 U.S. 559 (1912) (“That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law ...”); *Bromfield*, 390 Mass. at 665. Thus, the Court should decline to enforce the state tax foreclosure procedures despite the Town’s laudable efforts to make its requested judgment constitutional.

**B. Procedural protections do not satisfy the obligation to pay just compensation.**

Chapter 60 provides a number of pre-foreclosure protections to property owners, including a provision that allows the Land Court to impose conditions on redemption in the interest of justice and fairness. See *e.g.*, G.L. c. 60, §§ 62, 68 (allowing the Land Court to provide an opportunity to redeem property by refinancing or voluntary sale and extend the redemption period over any “time fixed by the court”). While amici encourage this Court to take advantage of this authority to provide equitable pre-foreclosure relief to tax debtors, it is important to note that these provisions do not rescue the Massachusetts tax foreclosure statute from *Tyler*’s holdings. *Christian v. Mooney*, 400 Mass. 753, 761 & n.10 (1987) (“A party’s ability to

take steps to safeguard its interests does not relieve the State of its constitutional obligation.”)

A statute authorizing a taking must provide for just compensation. And just compensation must restore the owner to “as good position pecuniarily as he would have occupied if his property had not been taken.” *United States v. Miller*, 317 U.S. 369, 373 (1943). Thus, the statute must authorize the payment of money—not simply additional steps that would help a person avoid a taking. *See id.*; *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (“Under this standard, the owner is entitled to receive ‘what a willing buyer would pay in case to a willing seller’ at the time of the taking.”). Giving an owner a redemption period in which she may recover her title by paying what she owes may be helpful for those who have sufficient resources to take advantage of it, but it is not just compensation. *See Miller*, 317 U.S. at 373.

Conditions imposed on redemption making it easier for a tax delinquent property owner to recover title do not satisfy the government’s obligations because alternative procedural remedies do not substitute for just compensation. *Knick*, 139 S. Ct. at 2172 (“[N]o matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it.”); *see also Haverhill Bridge Proprietors v. Essex Cnty. Comm’rs*, 103 Mass. 120, 124–25 (1869) (rejecting effort to make procedural opportunities a stand-in for reasonable compensation). A procedural remedy granting the “possibility of compensation in a

later proceeding” is not sufficient. *See id.*; *Dimino v. Secretary of Com.*, 427 Mass. 704, 711 (1998). Thus, the provisions of Chapter 60 that allow the transfer of absolute title to the foreclosing entity are unconstitutional and unenforceable by this Court.

### **C. The Massachusetts Tax Deed Law Threatens the Constitutional Rights of the Most Vulnerable Members of Society**

The Massachusetts Constitution and its “reasonable compensation” provisions were born of a demand for robust property rights protections. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 706 (1985). In fact, the initial failure to include property safeguards such as the “reasonable compensation” clause led Massachusetts citizens to reject an earlier proposed state constitution. Samuel Morison, *The Struggle over the Adoption of the Constitution of Massachusetts*, 1780, 50 Mass. Hist. Soc’y Proc. 353, 401 (1917).

Consistent with the hard-fought inclusion of these vigorous protections, the Supreme Judicial Court has repeatedly instructed that the compensation requirement be enforced with “fairness and justice” in mind. *See Giovanella v. Conservation Comm’n of Ashland*, 447 Mass. 720 (2006) (holding that the just compensation protection “was 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.”) (*quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960)). This instruction is particularly important here, where the Massachusetts tax foreclosure statute purports to authorize a transfer of an owner’s entire home equity to the



government regardless of how much is owed—a windfall that often vastly exceeds the owner’s debt. *See* Clifford, *Massachusetts Has a Problem*, 13 U. Mass. L. Rev. at 284.

Such confiscations impose especially severe burdens on the property rights of vulnerable and politically powerless people. The poor, elderly, sick, and minority groups are most likely to fall victim to such schemes. The elderly are usually hit the hardest by laws that compel a confiscation of surplus equity because they are significantly more likely to “own their homes free and clear of any encumbrances.” Jennifer C.H. Francis, *Redeeming What Is Lost: The Need to Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 Geo. Mason U. Civ. Rts. L.J. 85, 88–89 (2014). Unsurprisingly, the homeowners most at risk of losing their home through foreclosure include those who are sick or incompetent or are “suffering from Alzheimer’s, dementia, or other cognitive disorders.” John Rao, *The Other Foreclosure Crisis: Property Tax Lien Sales*, National Consumer Law Center (NCLC) at 5 (July 2012). For example, 76-year-old veteran Benjamin Coleman failed to pay the small \$317 remaining tax debt on his property because he suffered from “severe dementia.” *Coleman through Bunn v. D.C.*, 70 F.Supp.3d 58, 64 (D.D.C. 2014). In other cases, medical conditions leave hardworking individuals unable to pay.

Further, “property tax foreclosures are highly concentrated among low-income communities with large African American and Latino populations.” Rao, *The Other Foreclosure Crisis*, at 5; *see also* Richard Rothstein, *The Color of Law: The Forgotten History of How Our Government Segregated America* 171–72 (2017) (“African Americans are still more likely ... to lose homes through tax lien repossessions.”).

When government exercises “unchecked discretion in the use of eminent domain,” officials tend to use that power to displace “poor, politically powerless minorities.” This fails the “chief object of government”: the protection of individual liberties and property. *See* Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. Pub. Int. L.J. 335, 337 (2001). The Framers of the Constitution believed that protecting property rights “can prevent the government from arbitrarily imposing its will on disfavored minorities.” *Id.* The drafter of the Massachusetts Constitution, John Adams, put it directly, “Property must be secured, or liberty cannot exist.” *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (citing Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851)). When government denies property rights “to the politically disfavored,” it “effectively strips them of a political identity” because property “is an individual right” that allows citizens to “rely on themselves and plan their own lives.” *See* Werner, *The Public Use Clause*, at 337–38 (quoting James Bovard, *Lost Rights: The Destruction of American Liberty* 48 (1994)). Because the Massachusetts tax foreclosure system strips vulnerable people of their right to just compensation, it is void and unenforceable.

**II. The Land Court does not have the authority to craft an equitable post-foreclosure remedy because there are alternative methods to collect property taxes that would not result in an unconstitutional taking.**

The Land Court should decline to issue foreclosure judgments under Chapter 60 until the state legislature renders the offending statutory provisions

constitutional.<sup>2</sup> The Land Court likely has no equitable jurisdiction to craft a remedy in conflict with explicit statutory law where there are constitutional legal alternatives. The foreclosure statute explicitly limits Land Court jurisdiction in the tax deed context to foreclosing the right of redemption on petition from the tax lienholder. G.L. c. 60, §§ 53, 64, 69A. It does not authorize the Court to impose conditions on the transfer of absolute title or otherwise craft a post-foreclosure remedy for the taking of equity. It is true, as the Town argues, that G.L. c. 185, § 1 provides that the Land Court is one of general equity jurisdiction where any right, title or interest in land is

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<sup>2</sup> If the Land Court determines, contrary to the arguments contained in this brief, that it has jurisdiction to craft an equitable remedy, it should allow Ms. Recco to pursue any option that will result in repayment to the town in a reasonable time, including by a reverse mortgage or an open-market sale.

The Court could order an open-market sale, giving the parties time to agree on a Massachusetts real estate broker or salesperson to list the property. If the parties are unable to agree, the Court could appoint a disinterested real estate licensee and establish a reasonable commission. The licensee would then offer the property for sale in a commercially reasonable manner in-line with fair market values. Only if the appointed licensee does not obtain a reasonable offer to purchase within a reasonable amount of time as determined by the Court, the Court could order either that the property continue to be offered for an additional time or that the property be sold by sealed bids or at an auction.

This process will assure that the Defendant maximize her home equity. Open-market sales continue to be the best way to sell a home. Selling a home at a court-ordered auction is akin to a fire-sale very likely resulting in a significant discount. Foreclosure sales, which are commonly completed through auction, have historically sold for 20 to 36% lower than the overall median home sale. Based on the estimated market value of the property at issue here, a 36% auction sale discount would mean a loss of \$254,664 for the defendant.

An open-market sale could add additional time to resolution of the pending tax debt, however, the interest of fairness and the potential preservation of generational wealth renders this solution worth it.

involved. And it may exercise its authority to issue injunctions and restraining orders “as justice and equity may require.” *Id.* § 25. However, this broad equitable authority is only available when the claimant has no adequate remedy at law. *See Prahl v. Prahl*, 335 Mass. 483, 484–85 (1957). And it would be improper for this Court to invent a detailed post-foreclosure remedy<sup>3</sup> in direct conflict with the statutory language of Chapter 60. *Kelly*, 348 Mass. at 389 (reform of the tax foreclosure system “rests in the legislative domain.”).

There are several adequate remedies at law for the collection of local taxes that make equitable intervention by the Court unnecessary. If the Land Court properly declines to enforce the unconstitutional tax foreclosure provisions, it would not bring a halt to tax collection efforts. Strict foreclosure is just one of several methods described in Chapter 60 to collect property taxes. *Tallage Lincoln, LLC v. Williams*, 485 Mass. 449, 461–62 (2020). Instead of bringing an action to foreclose the right to redemption, a town may take and sell “the smallest undivided part of the land which will bring [the amount of taxes].” G.L c. 60, § 37–43. It can sue the property owner and secure a personal judgment against her. *Id.* § 35 (“a tax ... may be recovered in an action of contract or in any other appropriate action ... against the person assessed ...”). It can seize and sell the owner’s personal property or livestock. *Id.* § 24–

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<sup>3</sup> The Town has suggested that the Land Court issue a “simple order” to pay the surplus proceeds in a subsequent sale of the property. However, the Court would need to provide an order detailing the timeline for a sale, notice provided to the public, a minimum sale price, and other important information to satisfy the due process and just compensation requirements of the Fifth Amendment and the state Declaration of Rights.

29. And it can withhold payment of money owed to the landowner. *Id.* § 35. The choice of which remedies to pursue belongs to the tax collector, and he may pursue multiple remedies simultaneously. *Boston v. Turner*, 201 Mass. 190, 197 (1909) (“The remedies which the statutes provide for the collection of a tax are cumulative. The tax collector is not bound at his peril to select and pursue a single one”). There is nothing stopping the Town from pursuing these remedies even after filing this action to foreclose the right to redemption.

Each of these remedies may be administered in a way that preserves the property owner’s equity. Accordingly, there is no need for the Court to craft an equitable remedy. Instead, the Land Court should dismiss this action and require the Town to pursue one of the alternative collection methods provided by Chapter 60. It should not continue to enforce the patently unconstitutional (and therefore unenforceable) foreclosure provisions.

### CONCLUSION

Based on the foregoing, the undersigned *amici* respectfully urge the Court to dismiss this case.

**Dated:** November 30, 2023.

Filed by email and by mail on behalf of undersigned amici,

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