IN THE COURT OF APPEALS OF THE STATE OF OREGON
A184258

WESTERN STATES LAND RELIANCE TRUST,

Plaintiff-Appellant,

v.

LINN COUNTY, a political subdivision of the State of Oregon,

Defendant-Respondent.

Appeal from the Judgment of the Circuit Court for Linn County
No. 24CV06966
Honorable Thomas A. McHill, Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT

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Filed November 2024

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in constitutional rights including private property rights. Founded more than 50 years ago, PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases that defend individuals' constitutional rights under the Takings Clause, including *Tyler v. Hennepin County*, 598 US 631, 143 S Ct 1369, 215 L Ed 2d 564 (2023), a case that is central to the claims raised here. *See also, e.g.*, *Cedar Point Nursery v. Hassid*, 594 US 139, 141 S Ct 2063, 2071, 210 L Ed 2d 369 (2021); *Knick v. Twp. of Scott*, 588 US 180, 139 S Ct 2162, 204 L Ed 2d 558 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 US 595, 133 S Ct 2586, 186 L Ed 2d 697 (2013); *Palazzolo v. Rhode Island*, 533 US 606, 121 S Ct 2448, 150 L Ed 2d 592 (2001); *Nollan v. Cal. Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987).

PLF attorneys have extensive experience with the constitutional issues in this case, having represented more than two dozen former owners of tax-delinquent property lost to foreclosure. *See, e.g.*, *Fair v. Cont'l Res.*, 143 S Ct 2580, 216 L Ed 2d 1191 (2023); *Nieveen v. TAX 106*, 143 S Ct 2580, 216 L Ed 2d 1191 (2023); *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich 429, 952 NW2d 434 (2020); *Schafer v. Kent Cnty.*, __ NW3d __, No. 164975, 2024 WL 3573500 (Mich July 29, 2024);

Hall v. Meisner, 51 F4th 185 (6th Cir 2022). Moreover, PLF also frequently participates as amicus curiae in cases alleging that government takes private property without just compensation when it confiscates more than is owed in property taxes. *See, e.g.*, *Dorce v. City of New York*, 2 F4th 82 (2d Cir 2021); *Freed v. Thomas*, 976 F3d 729 (6th Cir 2020). PLF has also participated as amicus curiae in this state to support property owners against uncompensated takings. *See, e.g.*, *Walton v. Neskowin Reg'l Sanitary Auth.*, 372 Or 331, 550 P3d 1 (2024); *State ex rel. Dep't of Transp. v. Alderwoods (Oregon), Inc.*, 358 Or 501, 503, 366 P3d 316, 317 (2015); *Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry*, 339 Or 136, 117 P3d 990 (2005); *Dolan v. City of Tigard*, 319 Or 567, 877 P2d 1201 (Or 1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Supreme Court recently confirmed, the government commits an unconstitutional taking of private property when it retains more than is due from a tax foreclosure sale. *Tyler*, 598 US at 639. The unanimous Court's monumental decision in *Tyler* effectively invalidated confiscatory tax foreclosure schemes in over a dozen states, including Oregon. *See id*. at 642 (observing that thirty-six states and the Federal Government do not employ such confiscatory measures); Brief of Minnesota, New Jersey, and Oregon as Amici Curiae in Support of Respondents, *Tyler v. Hennepin County*, No. 22-166, 2023 WL 2825133 (filed Apr. 4, 2023)

(asking the U.S. Supreme Court to rule against Geraldine Tyler to protect these states' tax foreclosure laws).[1]

Here, in 2008, Linn County foreclosed upon 21 parcels owned by Western States Land Reliance Trust ("Western States") for an unpaid tax bill of $175,446.75. Western States did not appear in or otherwise challenge the proceedings. In 2022, Linn County sold three of the 21 parcels for $800,000, thus obtaining $624,553.25 in surplus proceeds. Western States filed suit in the Circuit Court against Linn County, claiming that the surplus proceeds from the sale were the property of Western States and that Linn County had taken them without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The court below determined that, although Oregon "does not call out a specific process to make claim on any surplus" from a foreclosure sale, property owners like Western States could have hypothetically "ma[de] such a claim by filing an answer in [the foreclosure] case." Opinion at 7. Accordingly, the court held that Western States "had the benefit of due process to challenge the foreclosure" and failed to state a claim under the federal Takings Clause. *Id.* at 6. In reaching this conclusion, the court relied on *Nelson v. City of New York*, 352 US 103, 77 S Ct 195, 1 L Ed 2d 171 (1956), rather than the Supreme Court's most recent precedent on

[1] https://www.supremecourt.gov/DocketPDF/22/22-166/262781/20230404170354263_Amici_Brief_MN_NJ_OR.pdf.

unconstitutional takings of surplus equity following tax foreclosures, *Tyler*, which recognizes that the government violates the Constitution when it uses a tax debt to take more than what is owed.

The lower court's holding is erroneous for two reasons: First, unlike Oregon's tax foreclosure statutes, the New York City ordinance at issue in *Nelson* included a clear process in foreclosure proceedings by which a property owner could secure their right to surplus funds. Second, even if the court were correct that Oregon has a sufficient process to claim surplus proceeds from a foreclosure sale, *Nelson* is inapplicable and wrong. Under the Takings Clause, the government has an affirmative obligation to pay just compensation.

The lower court's interpretation conflicts with how federal courts, this state's attorney general, governor, and legislature have all interpreted the statute. Moreover, the lower court's interpretation would harm Oregon's most vulnerable property owners like the elderly and poor who are more likely to fall victim to the state's confiscatory tax foreclosure law.

To establish the correct interpretation of prevailing Supreme Court precedent and ensure that *Tyler* is faithfully and correctly applied in the future, this Court should reverse the erroneous opinion below.[2]

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[2] Undersigned amicus curiae express no position on the other issues briefed by the parties and not resolved by the court below.

ARGUMENT

I. Oregon's Tax Foreclosure System Is Unconstitutional

The Fifth Amendment to the United States Constitution provides that, when the government takes private property for a public use, it must pay "just compensation" to the property owner. U.S. Const. amend. V. The purpose of this protection is 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." *Armstrong v. United States*, 364 US 40, 49, 80 S Ct 1563, 1569, 4 L Ed 2d 1554 (1960). With *Tyler*, the Supreme Court recognized that the government violates this constitutional guarantee when it takes more than is owed on a tax debt. 598 US at 639. Thus, while the government "ha[s] the power" to sell a property for the public purpose of recovering delinquent property taxes, it may not "use the toehold of the tax debt to confiscate more property than was due." *Id.* at 639.

In *Tyler*, a Minnesota county foreclosed upon 94-year-old Geraldine Tyler's home to satisfy a $15,000 tax debt, later selling it for $40,000 and retaining the $25,000 surplus. *Id.* at 634. At the time, Minnesota's tax foreclosure statutes included no mechanism by which a taxpayer could recover surplus value from a foreclosure sale. If a homeowner did not satisfy their tax debt within a three-year right of redemption period, absolute title vested in the state. *Id.* at 635. The Court

held that the county's retention of surplus funds without any procedure available for Tyler to claim them was a taking requiring just compensation. *Id.* at 639.

A. *Nelson* Does Not Apply to This Case

Like the Minnesota law held unconstitutional in *Tyler*, Oregon's tax foreclosure system affords no opportunity for property owners to assert their constitutional right over surplus proceeds after a foreclosure. *See Tyler v. Hennepin Cnty.*, 505 F Supp 3d 879, 892–93 (D Minn 2020) (noting that both the Oregon and Minnesota statutory schemes "give[] the property owner no right to the surplus.").[3] But the court below declined to apply *Tyler* here, instead concluding that Western States' claims should by analyzed under *Nelson*.

In *Nelson*, New York City foreclosed on liens against the appellants' properties for unpaid water charges, ultimately earning a windfall from the foreclosure sale. 352 US at 105–06. The property owners brought due process and equal protection claims, arguing that notices of the foreclosure and sale were deficient. *Id.* 106–07. The owners also raised a takings argument for the first time in their reply brief before the Supreme Court. *Id.* at 109. But the Court rejected that

[3] Oregon signed on to an amici curiae brief in *Tyler* defending Minnesota's tax foreclosure system because it is substantially like Oregon's. *See Br. of Minn., N.J. and Or.*, 2023 WL 2825133; *see also Why Oregon Signed On to a Supreme Court Case to Defend Taking a 94-Year-Old Woman's Money*, Willamette Week (May 14, 2023), https://www.wweek.com/news/2023/05/14/why-oregon-signed-onto-supreme-court-case-defending-taking-94-year-old-womans-money/.

belated argument, because the New York City ordinance did not "absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale," but instead simply defined the process through which the owner could claim the surplus. *Id.* at 110.

New York had established a clear process in foreclosure proceedings entitling owners to claim surplus proceeds: "A property owner had almost two months after the city filed for foreclosure to pay off the tax debt, and an additional 20 days to ask for the surplus from any tax sale." *Tyler*, 598 US at 644 (citing *Nelson*, 352 US at 104–05). The property owners in *Nelson* neglected to avail themselves of that process. *Id.* By contrast, Oregon recognized no similar entitlement. "Oregon law is clear that the former owner is not entitled to any proceeds from a tax lien foreclosure sale." *Reinmiller v. Marion Cnty.*, No. 05-1926-PK, 2006 WL 2987707, at *3 (D Or Oct. 16, 2006).

Indeed, courts previously interpreted Oregon's law as uniformly confiscating the surplus proceeds to benefit the state. *See, e.g.*, *id.*; *Tyler*, 505 F Supp 3d at 892 (noting that "Oregon's tax-forfeiture scheme, like Minnesota's, gives the property owner no right to the surplus."). And both the governor and legislature read *Tyler* as rendering Oregon's ORS 275.275 statute unconstitutional. *See* Aug. 4, 2023, letter re H.B. 3440, from Gov. Tina Kotek to Oregon Senate President Wagner and House

Speaker Rayfield, at 7[4] ("[O]n May 25, 2023, the United States Supreme Court determined that a Minnesota law similar to ORS 275.275 is unconstitutional * * * House Bill 3440 amends a statute, ORS 275.275, that is subject to a constitutional challenge. Nothing in House Bill 3440 resolves the constitutional infirmity already in law in ORS 275.275."); H.B. 4056, § 3 (2024)[5] (enrolled March 7, 2024) ("The Department of Revenue shall coordinate with county tax officers and interested parties to determine a detailed uniform process by which the counties shall comply with * * * the ruling of the United States Supreme Court in Tyler v. Hennepin County, Minnesota, 598 U.S. 631 (2023)"); Tyler v. Hennepin County: *Surplus Proceeds of Property Tax Foreclosure Sales*, Department of Revenue (Apr. 17, 2024)[6] (explaining that "No process exists" for recovery of surplus proceeds, in violation of *Tyler*).

Nevertheless, the court below determined that Oregon's laws are like those at issue in *Nelson*, because a defendant property owner could, as with any other lawsuit, file an answer and defense to the foreclosure proceedings and "request that the court fashion a judgment which provided for the return of surplus to the defendant." Opinion at 5.

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[4] https://www.oregon.gov/gov/Documents/2023_Bill_Letters.pdf.
[5] https://olis.oregonlegislature.gov/liz/2024R1/Downloads/MeasureDocument/HB4056/Enrolled.
[6] https://www.oregon.gov/dor/programs/property/Documents/Tyler%20v.%20Hennepin%20County%204.17.24.pdf.

But the procedure and remedy the court describes is imaginary. Neither the parties nor the trial court were able to point to a single example of a foreclosure case awarding surplus proceeds to an owner. And the statute clearly mandates that the money "must" go to various government entities. *See* ORS 275.275. Thus, this uncertain procedure that has apparently never resulted in payment of just compensation to a debtor stands in stark contrast with the defined process for claiming surplus proceeds described in *Nelson*. New York's procedure was not hypothetical—courts had previously established that owners were entitled to surplus proceeds if they timely answered. *See Nelson*, 352 US at 110 (citing *City of New York v. Chapman Docks Co.*, 1 App Div 2d 895 (1956)).

This case is governed by *Tyler*, which held that a property owner plausibly alleges a taking when the government withholds the surplus from a tax foreclosure sale with "no specific procedure there for recovering the surplus." *Tyler*, 598 US at 644. Because no specific procedure exists under Oregon law for a property owner to recover the surplus from a tax foreclosure sale, Western States' takings claim is proper.

B. Even If Oregon Had a Process, *Nelson* Is Wrong

Even if Oregon's tax foreclosure laws were identical to the New York City ordinance in *Nelson*, the court's reliance on *Nelson* is misplaced. The takings

discussion in *Nelson* was noncontrolling dicta and unnecessary to the resolution of the case. Accordingly, it should not govern any case.

Although it has not expressly overruled it, the Supreme Court has cast doubt on *Nelson*, contradicting it in *Knick*, and leaving unanswered in *Tyler* the question of whether *Nelson*'s takings discussion is nonbinding dicta. *Tyler* called the takings argument in *Nelson* "belated" because it was only raised for the first time in the reply brief before the Supreme Court. *Tyler*, 598 US at 644. Claims "not brought forward" in the lower court "cannot be made" in the Supreme Court. *Magruder v. Drury*, 235 US 106, 113, 35 S Ct 77, 79, 59 L Ed 151 (1914). Accordingly, the takings discussion in *Nelson* was unnecessary to resolution of the case and therefore nonbinding dicta. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 US 519, 548, 133 S Ct 1351, 1368, 185 L Ed 2d 392 (2013) (court's "rebuttal to a counterargument" that went outside the issue before the court was dicta); *see also Williams v. United States*, 289 US 553, 568, 53 S Ct 751, 756, 77 L Ed 1372 (1933) (dicta should not "control the judgment in a subsequent suit, when the very point is presented for decision") (citation omitted).

Oregon's "procedure"—and the procedure in *Nelson*—conflict with the Supreme Court's recent takings decisions because they require an owner to stake a claim for just compensation before the taking occurs. "The act of taking" is the "event which gives rise to the claim for compensation." *United States v. Dow*, 357

US 17, 22, 78 S Ct 1039, 1044, 2 L Ed 2d 1109 (1958). "Compensation under the Takings Clause is a remedy for the constitutional violation that the landowner has already suffered at the time of the uncompensated taking." *Knick*, 588 US at 193 (quotations and citations omitted).

Put differently, the lower court's interpretation of *Nelson* transforms the government's burden to pay just compensation into the owner's burden to seek compensation before he has lost possession. Regardless of whether a legislatively enacted procedure exists, once the government has taken property, "[t]he law will imply a promise to make the required compensation * * * ." *United States v. Great Falls Mfg. Co.*, 112 US 645, 656–57, 5 S Ct 306, 311, 28 L Ed 846 (1884); *see also Yearsley v. W.A. Ross Constr. Co.*, 309 US 18, 21, 60 S Ct 413, 415, 84 L Ed 554 (1940) ("[I]f the authorized action * * * does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation * * * ."). Indeed, Thomas Cooley described a taking simply as a compelled sale of property to the government. Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 559 (4th ed. 1878) (A taking is "in the nature of a payment for a compulsory purchase.").

As Western States explained in its briefing before the court below, it is not challenging the tax foreclosure and transfer of title. The taken property in this case is the surplus proceeds, a property interest that was undefined, and may not even

exist, until after the sale of the foreclosed property. *See In re Financial Oversight and Mgmt. Bd.*, 41 F4th 29, 43 (1st Cir 2022) ("Recognizing that the 'right to full compensation arises at the time of the taking,' * * * does not imply that the subsequent denial of that compensation does not also raise Fifth Amendment concerns."); *Ettor v City of Tacoma*, 228 US 148, 158 (1913) (the right to just compensation is a "vested property right."). A property owner who experiences a taking cannot be required to seek just compensation by filing a claim in state court before the practical consequences of the taking have been realized. Thus, *Nelson* should not be treated as good law on the takings question.

II. Laws Like Oregon's Overwhelmingly Harm Society's Most Vulnerable People

Tax foreclosure laws that enable the government to retain a homeowner's surplus equity are most likely to harm owners who are elderly, sick, or poor. *See, e.g.*, John Rao, *The Other Foreclosure Crisis*, Nat'l Consumer Law Ctr. 5, 9, 33, 38 (July 2012); Jennifer C.H. Francis, Comment, *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. 85–87 (2014). Amicus Curiae Pacific Legal Foundation has represented more than two dozen property owners who lost homes and other real estate to confiscatory tax foreclosures. Most of these owners, like Geraldine Tyler herself, are elderly or otherwise struggling with severe medical issues that hinder their ability to keep up with debts and notices. *See, e.g.*, *Foss v. City of New Bedford*,

621 F Supp 3d 203, 206 (D Mass 2022) (confiscatory foreclosure law took an indigent senior's $240,000 home over a $9,626 tax debt); *Rafaeli, LLC*, 505 Mich at 437 (octogenarian owner lost home over $8.41 tax deficiency); *Cont'l Res. v. Fair*, 311 Neb 184, 188, 971 NW2d 313, 318 (2022) (owner was caring for wife who was dying of multiple sclerosis). Cases filed by other firms reveal the same trend. *See, e.g.*, *Coleman through Bunn v. District of Columbia*, 70 F Supp 3d 58, 64 (DDC 2014) (elderly veteran suffering from dementia); *Wisner v. Vandelay Invs., L.L.C.*, No. A-16-451, 2017 WL 2399492, at *1–2 (Neb Ct App May 30, 2017), *rev'd*, 300 Neb 825 (2018) (elderly widow in nursing home). Even trial judges who regularly hear tax foreclosure and related cases have noted that those who lose their homes this way are often from especially vulnerable populations. *See, e.g.*, *Cherokee Equities, L.L.C. v. Garaventa*, 382 NJ Super 201, 211, 887 A2d 1203, 1210 (Ch Div 2005) (tax foreclosure defendants are often "among society's most unfortunate."); Joint Appendix, *Tyler v. Hennepin Cnty.*, No. 22-166, 2023 WL 2558477, at *51–52 (US Sup Ct Feb. 27, 2023) (district court noting "disproportionate impact on the poor, the elderly, the infirm"). Correcting the erroneous analysis of the lower court and ending Oregon's unconstitutional confiscatory tax foreclosures will help to protect those vulnerable populations.

CONCLUSION

For the foregoing reasons, this Court should reverse the opinion below.

DATED: November 26, 2024.

Respectfully submitted,

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