

**IN THE SUPREME COURT
OF THE STATE OF OREGON**

WESTERN STATES LAND RELIANCE TRUST,
Plaintiff – Appellant – Respondent on Review,

v.

LINN COUNTY, a political subdivision of the State of Oregon,
Defendant – Respondent – Petitioner on Review.

SC Case No. S072331
Court of Appeals Case No. A184258
Linn County Circuit Court Case No. 24CV06966

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PLAINTIFF-RESPONDENT
WESTERN STATES LAND RELIANCE TRUST**

Petition for Review of the Decision of the Court of Appeals
On Appeal from the Judgment of the Circuit Court of Linn County

Opinion Filed: September 4, 2025.
Reversed in part, Affirmed in part.
Opinion by Joyce, J.
Before Aoyagi, P.J., Egan & Joyce, JJ.

(Counsel Listed on Next Page)

Filed January 2026

Christina M. Martin, OSB # 084117
PACIFIC LEGAL FOUNDATION
1425 Broadway, #429
Seattle, WA 98122
T: (425) 576-0484
F: (916) 419-7747
E: CMartin@pacificlegal.org
*Counsel for Amicus Curiae
Pacific Legal Foundation*

Ross Day, OSB #002395
DAY LAW, P.C.
7831 St. Charles Street NE
Keizer, OR 97303
T: (503) 743-6460
F: (503) 207-6683
E: ross@daylawpc.com
*Counsel for Plaintiff-Appellant
Western States Land Reliance Trust*

Thomas M. Christ, OSB #834064
SUSSMAN SHANK LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205-3089
T: (503) 227-1111
F: (503) 248-0130
E: tchrist@sussmanshank.com
*Counsel for Defendant-Respondent
Linn County*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION	2
ARGUMENT	4
I. Oregon’s Tax Foreclosure System Unconstitutionally Took Western States Land Reliance Trust’s Property Without Just Compensation	4
A. <i>Nelson</i> Does Not Apply to This Case	6
B. Even If Oregon Had a Process, <i>Nelson</i> Is Distinguishable and Wrong.....	11
II. Laws Like Oregon’s Overwhelmingly Harm Society’s Most Vulnerable....	13
CONCLUSION	15
COMBINED CERTIFICATE OF COMPLIANCE AND CERTIFICATES OF FILING AND SERVICE	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Armstrong v. United States</i> , 364 US 40, 80 S Ct 1563, 4 L Ed 2d 1554 (1960).....	5
<i>Cherokee Equities, L.L.C. v. Garaventa</i> , 382 NJ Super 201, 887 A2d 1203 (Ch Div 2005)	14
<i>City of New York v. Chapman Docks Co.</i> , 1 App Div 2d 895 (1956).....	9
<i>Coleman through Bunn v. District of Columbia</i> , 70 F Supp 3d 58 (DDC 2014).....	10, 14
<i>Cont’l Res. v. Fair</i> , 311 Neb 184, 971 NW2d 313 (2022)	14
<i>Dorce v. City of New York</i> , 2 F4th 82 (2d Cir 2021)	2
<i>Fair v. Cont’l Res.</i> , 143 S Ct 2580, 216 L Ed 2d 1191 (2023).....	1
<i>First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles</i> , 482 US 304, 107 S Ct 2378 (1987).....	9
<i>Foss v. City of New Bedford</i> , 621 F Supp 3d 203 (D Mass 2022).....	14
<i>Freed v. Thomas</i> , 976 F3d 729 (6th Cir 2020)	2
<i>Hall v. Meisner</i> , 51 F4th 185 (6th Cir 2022).....	1
<i>Harrison v. Montgomery Cnty.</i> , 997 F3d 643 (6th Cir 2021)	10

<i>Kidd v. Pappas</i> , No. 22-C-7061, 2025 WL 3507374 (ND Ill Dec 8, 2025)	10
<i>Kirtsaeng v. John Wiley & Sons, Inc.</i> , 568 US 519, 133 S Ct 1351, 185 L Ed 2d 392 (2013)	12
<i>Knick v. Township of Scott</i> , 588 US 180, 139 S Ct 2162, 204 L Ed 2d 558 (2019)	12–13
<i>Magruder v. Drury</i> , 235 US 106, 35 S Ct 77, 59 L Ed 151 (1914).....	12
<i>Nelson v. City of New York</i> , 352 US 103, 77 S Ct 195, 1 L Ed 2d 171 (1956).....	<i>passim</i>
<i>Nieveen v. TAX 106</i> , 143 S Ct 2580, 216 L Ed 2d 1191 (2023).....	1
<i>Pung v. Isabella County</i> , 146 S Ct 80, 222 L Ed 2d 1241 (Oct 3, 2025).....	1
<i>Rafaeli, LLC v. Oakland Cnty.</i> , 505 Mich 429, 952 NW2d 434 (2020).....	1, 14
<i>Reinmiller v. Marion Cnty.</i> , No. 05-1926-PK, 2006 WL 2987707 (D Or Oct 16, 2006).....	7
<i>Schafer v. Kent Cnty.</i> , ___ NW3d ___, No. 164975, 2024 WL 3573500 (Mich July 29, 2024)	1
<i>Searle v. Allen</i> , 148 F4th 1121 (9th Cir 2025)	10
<i>Sikorksy v. City of Newburgh</i> , 136 F4th 56 (2d Cir 2025)	10
<i>Tyler v. Hennepin Cnty.</i> , 505 F Supp 3d 879 (D Minn 2020).....	6–7
<i>Tyler v. Hennepin County</i> , 598 US 631, 143 S Ct 1369, 215 L Ed 2d 564 (2023)	<i>passim</i>

<i>United States v. Dow</i> , 357 US 17, 78 S Ct 1039, 2 L Ed 2d 1109 (1958).....	12
<i>United States v. Great Falls Mfg. Co.</i> , 112 US 645, 5 S Ct 306, 28 L Ed 846 (1884).....	13
<i>W. States Land Reliance Tr. v. Linn Cnty.</i> , 343 Or App 280, 578 P3d 1245 (2025), <i>rev allowed</i> , 374 Or 437, 580 P3d 280 (2025)	3–4, 11
<i>Williams v. United States</i> , 289 US 553, 53 S Ct 751, 77 L Ed 1372 (1933).....	12
<i>Wisner v. Vandelay Invs., L.L.C.</i> , No. A-16-451, 2017 WL 2399492 (Neb Ct App May 30, 2017), <i>rev'd</i> , 300 Neb 825 (2018).....	14
<i>Yearsley v. W.A. Ross Constr. Co.</i> , 309 US 18, 60 S Ct 413, 84 L Ed 554 (1940).....	13

Constitutional Provisions

US Const amend V	5
------------------------	---

Statutes

ORS 275.275	3, 7–9
-------------------	--------

Other Authorities

Oregon Laws 2025, ch 475 (HB 2089).....	4
Brief of Minnesota, New Jersey, and Oregon as Amici Curiae in Support of Respondents, <i>Tyler v. Hennepin County</i> , No. 22-166, 2023 WL 2825133 (Apr 4, 2023), https://www.supremecourt.gov/DocketPDF/22/22-166/262781/20230404170354263_Amici_Brief_MN_NJ_OR.pdf	2, 6
Cooley, Thomas M., <i>A Treatise on the Constitutional Limitations</i> (4th ed 1878).....	13

Francis, Jennifer C.H., Comment, <i>Redeeming What Is Lost: The Need to Improve Notice for Elderly Homeowners Before and After Tax Sales</i> , 25 Geo Mason U Civ Rts LJ 85 (2014)	14
HB 4056, § 3 (2024), https://olis.oregonlegislature.gov/liz/2024R1/Downloads/MeasureDocument/HB4056/Enrolled	8
Joint Appendix, <i>Tyler v. Hennepin Cnty.</i> , No. 22-166, 2023 WL 2558477 (US Feb 27, 2023)	15
Letter re HB 3440, from Gov. Tina Kotek to Oregon Senate President Wagner and House Speaker Rayfield (Aug 4, 2023), https://www.oregon.gov/gov/Documents/2023_Bill_Letters.pdf	7
Rao, John, <i>The Other Foreclosure Crisis</i> , Nat'l Consumer Law Ctr (July 2012)	14
Tyler v. Hennepin County: <i>Surplus Proceeds of Property Tax Foreclosure Sales</i> , Department of Revenue (Apr 17, 2024), https://www.oregon.gov/dor/programs/property/Documents/Tyler%20v.%20Hennepin%20County%204.17.24.pd	8
<i>Why Oregon Signed On to a Supreme Court Case to Defend Taking a 94-Year-Old Woman's Money</i> , 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/	6

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. PLF attorneys have participated as lead counsel in many United States Supreme Court cases that defend individuals' constitutional rights under the Takings Clause, including a case that is key to the dispute here, *Tyler v. Hennepin County*, 598 US 631, 143 S Ct 1369, 215 L Ed 2d 564 (2023). PLF attorneys are also co-counsel, representing the former owner in *Pung v. Isabella County*, 146 S Ct 80, 222 L Ed 2d 1241 (Oct 3, 2025) (granting cert), in which the Supreme Court will decide what constitutes “just compensation” in a confiscatory tax foreclosure case.

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).

INTRODUCTION

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 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 (Apr 4, 2023) (asking the U.S. Supreme Court to rule against Geraldine Tyler to protect these states’ tax foreclosure laws).¹

In this case, Linn County foreclosed upon 21 parcels owned by Western States Land Reliance Trust (“Western States”) in 2008 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

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

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 trial court held 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.” Cir. Ct. Op. Granting Def.’s Mot. to Dismiss at 7. Accordingly, that 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 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 Court of Appeals rejected the hypothetical remedy posited by the County. The court correctly held that the tax law, as it existed at the relevant time, did “not provide a procedure for recovery of surplus funds and, similar to Minnesota’s statutes, ORS 275.275 preclude[d] a property owner from obtaining surplus proceeds.” *W. States Land Reliance Tr. v. Linn Cnty.*, 343 Or App 280, 290, 578 P3d

1245, 1251 (2025), *rev allowed*, 374 Or 437, 580 P3d 280 (2025).² Thus, *Nelson* did not apply; *Tyler* did. *Id.*

The County now urges this Court to hold that Oregon law allowed a remedy like the one allowed in *Nelson*. The Court should deny that request and affirm the decision of the Court of Appeals on this point. 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 had 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. Moreover, the County’s request would harm Oregon’s most vulnerable property owners like the elderly and poor who are more likely to lose property to tax foreclosure.

ARGUMENT

I. Oregon’s Tax Foreclosure System Unconstitutionally Took Western States Land Reliance Trust’s Property Without Just Compensation

The Fifth Amendment to the United States Constitution provides that, when the government takes private property for a public use, it must pay “just

² During the 2025 regular session, Oregon passed House Bill 2089, amending the tax law to allow former owners a path to claim surplus proceeds from the sale of tax-foreclosed properties. Oregon Laws 2025, ch 475 (HB 2089).

compensation” to the property owner. US 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 U.S. Supreme Court unanimously 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, until recent amendments in 2025, afforded 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.”). Indeed, Oregon’s own attorney general agreed with that reading of the statute in *Tyler*.³

But the County now argues that *Tyler* does not apply and that Western States’ claims should be instead 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.* at 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 belated argument, noting the New York

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., Tyler v. Hennepin Cnty.*, No. 22-166, 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/>.

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 uniformly had interpreted Oregon’s law as 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* Letter re HB 3440, from Gov. Tina Kotek to Oregon Senate President Wagner and House Speaker Rayfield, at 7⁴ (Aug 4, 2023) (“[O]n May 25, 2023, the United States Supreme Court

⁴ https://www.oregon.gov/gov/Documents/2023_Bill_Letters.pdf.

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.”); HB 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 “[n]o process exists” for recovery of surplus proceeds, in violation of *Tyler*).

Nevertheless, the County argues 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 provide relief that would avoid a future uncompensated taking. *See* Petitioner Linn County’s Brief on Review 20.

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 County describes is imaginary. The County has failed to cite even a single example of a foreclosure case awarding surplus proceeds to an owner. *See* Petitioner Linn County’s Brief on Review 16–21. And the statute clearly mandated that the money “must” go to various government entities. *See* ORS 275.275 (pre-2025). 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)).

Linn County argues that Oregon cases allow defenses to be raised in the foreclosure proceeding and that having equity in property could be characterized as a defense or objection. This is simply incorrect. The Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.” *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 US 304, 314, 107 S Ct 2378 (1987). Consequently, a future potential taking (upon the right to redeem expiring in the future and title transferring to the County) is not a defense against a foreclosure or grounds for an objection. Rather, demanding “just compensation” is a remedy available for a taking that has

happened. Until that time, there is no way to know what the property will be worth when that occurs. The market could collapse or the property could be destroyed, and the value of the property could drop to be less than the value of the total accrued debt with interest.

For the same reasons, the Court should reject the County's argument that this takings claim case amounts to a collateral attack. *See* Petitioner Linn County's Brief on Review at 33–35. A judgment that just compensation is owed does not disturb the underlying foreclosure judgment; it simply ensures just compensation is paid consistent with the Constitution. *Harrison v. Montgomery Cnty.*, 997 F3d 643, 650–62 (6th Cir 2021) (res judicata does not apply to bar claim seeking just compensation for surplus equity, but it does bar vacatur of the foreclosure judgment); *see Sikorksy v. City of Newburgh*, 136 F4th 56, 62–63 (2d Cir 2025) (takings claim would have been unripe when the owner had previously challenged the foreclosure judgment itself as invalid for other reasons); *Searle v. Allen*, 148 F4th 1121, 1130–32 (9th Cir 2025) (*Tyler*-style claim seeking just compensation would not disturb the foreclosure judgment and thus not barred by *Rooker-Feldman*, however a claim that the foreclosure judgment itself was invalid was barred); *Coleman through Bunn v. District of Columbia*, 70 F Supp 3d 58, 74–77 (DDC 2014) (just compensation claim would not disturb foreclosure judgment and was not barred by *Rooker-Feldman* or res judicata); *see also Kidd v. Pappas*, No. 22-C-7061, 2025 WL 3507374, at *7 (ND

Ill Dec 8, 2025) (*Tyler*-style takings claim not within Tax Injunction Act because it concerns actions arising after collection by foreclosure).

This case is governed by *Tyler*, which held that a property owner plausibly alleges a taking when the government confiscates title and equity and withholds the surplus with “no specific procedure there for recovering the surplus.” *Tyler*, 598 US at 644. Because no specific procedure existed 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 Distinguishable and Wrong

Even if Oregon’s tax foreclosure laws could be read as allowing a property owner to raise a claim in the foreclosure hearing, the County’s reliance on *Nelson* is misplaced. First, the judgment in *Nelson* either immediately—or within days—transferred title to the government. *See Nelson*, 352 US at 105–106, 77 S Ct 195, 197 (describing the very quick timeline). By contrast, in this case the taking did not occur until at least two years after the foreclosure judgment was entered—“in 2010, when the redemption period ended and plaintiff’s property was deeded to the County.” *W. States Land Reliance Tr.*, 343 Or App at 293. Thus, it is inconceivable that any court would require an owner to perceive that a taking will occur years after the judgment of foreclosure and to preserve his or her rights at that time.

Moreover, even if the statutes weren't so different, the takings discussion in *Nelson* was noncontrolling *dicta* and 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). 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).

The procedure in *Nelson* conflicts with the Supreme Court's recent takings decisions because it required 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 v. Township of Scott*, 588 US 180, 193, 139 S Ct 2162, 204 L Ed 2d 558 (2019) (quotations and citations omitted).

Put differently, the County’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 even title or 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.”). The Court should reject the County’s interpretation of *Nelson*.

II. Laws Like Oregon’s Overwhelmingly Harm Society’s Most Vulnerable

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 LJ 85, 86–87 (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*, 70 F Supp 3d at 64 (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 Feb 27, 2023) (district court noting “disproportionate impact on the poor, the elderly, the infirm”). The Court should decline adopting the County’s theory, which would impose a heavy burden on struggling property owners and potentially open the door to the government evading its just compensation duty in other takings contexts. The Court should ensure the Takings Clause continues to provide protection to this state’s vulnerable population, not merely those who are savvy enough to understand the legal system and who are able to predict problems long before an actual taking of private property occurs.

CONCLUSION

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

DATED: January 29, 2026.

Respectfully submitted,

/s/ Christina M. Martin

Christina M. Martin, OSB # 084117*

PACIFIC LEGAL FOUNDATION

1425 Broadway, #429

Seattle, WA 98122

T: (425) 576-0484

F: (916) 419-7747

E: CMartin@pacificlegal.org

Counsel for Amicus Curiae

Pacific Legal Foundation

**COMBINED CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS,
AND CERTIFICATES OF FILING AND SERVICE**

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 3,565.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and for footnotes.

I hereby certify that on January 29, 2026, I electronically filed the foregoing document with the Appellate Court Administrator via the Appellate Courts' eFiling system.

I further certify that service of the foregoing will be accomplished upon the following participants in this case, who are registered users of the Appellate Courts' eFiling system, by the Appellate Courts' eFiling system at the participants' email address as recorded this date in the Appellate Courts' eFiling system:

Ross Day, OSB #002395
DAY LAW, P.C.
7831 St. Charles Street NE
Keizer, OR 97303
T: (503) 743-6460
F: (503) 207-6683
E: ross@daylawpc.com
Counsel for Appellant

Thomas M. Christ, OSB #834064
SUSSMAN SHANK LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205-3089
T: (503) 227-1111
F: (503) 248-0130
E: tchrist@sussmanshank.com
Counsel for Respondent

DATED: January 30, 2026.

/s/ Christina M. Martin
Christina M. Martin, OSB #084117
PACIFIC LEGAL FOUNDATION
1425 Broadway, #429
Seattle, WA 98122
T: (425) 576-0484
E: CMartin@pacificlegal.org
Counsel for Amicus Curiae
Pacific Legal Foundation