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
DANIEL P. ROGAN, Auditor-Treasurer,
in his official capacity,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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March 6, 2023

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

QUESTION PRESENTED

Does government violate the Takings Clause when it seizes and retains property value worth more than the delinquent tax debt it seeks to collect?

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INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of business corporations, foundations, law firms, and individuals who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. In fulfillment of its mission and as relevant here, over the years NELF has filed numerous amicus briefs in this Court and other courts on private property issues, especially those having constitutional dimensions.

NELF appears as an amicus in this case because it believes that the Petition raises serious constitutional questions about the manner in which delinquent taxes are collected in some states. As the Petition in this case, as well as those in 22-160 and 22-237, illustrates, certain traditional property rights having deep historical roots in our English heritage are being slighted or read out of existence by lower courts in tax collection cases. In order to demonstrate the historical existence of these rights, in its brief NELF calls to the Court's attention numerous historical authorities that affirm their existence, so that this Court may ensure that when government exerts its sovereign power to secure payment of delinquent taxes, it does so in a fair and

[1] Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and no person or entity other than NELF made any monetary contribution to its preparation or submission.

just manner that respects the taxpayer's property right in his home equity.

NELF has therefore filed this brief to assist the Court in deciding the merits of the Petition.

SUMMARY OF THE ARGUMENT

Home equity came to be recognized as a form of property in real estate by the early 18th century. It developed as English courts of equity sought to mitigate the harshness of the common law, under which fee title was conveyed to a mortgagee as security for a debtor mortgagor's repayment of a loan. Under the common law a mortgagor was frequently at grave risk of forfeiting his land completely for the slighted default, even when the land forfeited far exceeded in value the amount of the debt. Equity sought to avoid forfeitures generally and especially penal ones of the latter kind. The courts therefore enlarged greatly the time and circumstances within which the debtor mortgagor had a right to satisfy the debt without forfeit or penalty. This right was called the equity of redemption.

As courts of equity increasingly emphasized the debtor/creditor nature of the relationship over the grantor/grantee aspect of it, they protectively enlarged the debtor mortgagor's rights and curbed the creditor mortgagee's. For example, they declared the creditor mortgagee to be in effect a trustee to the debtor for any value in the property over and above the amount of the debt actually owed to the mortgagee. Eventually, in 1738 Lord Harwicke formally declared what had already been recognized in Chancery cases for some years prior: "An equity of redemption is considered as an estate in the land[.]"

This proprietary sense of "equity of redemption" is what we know as home equity, or simply the equity.

ARGUMENT

WHAT WE NOW CALL HOME EQUITY WAS RECOGNIZED AS PROPERTY IN ENGLISH LAW AT THE TIME THE CONSTITUTION WAS WRITTEN.

The Petitioner contends that home equity is property and that taxpayers have a Fifth Amendment right to just compensation when government confiscates property valued at more than the taxes that are the sole basis of the government's claim, i.e., when government takes home equity. The Petitioner is correct that home equity is property, and in this brief Amicus explains why.

Long before the Constitution was written, a body of law was developed by the English courts of equity to deal with the use of land as an asset to secure payment of a monetary debt. Recognition of a debtor's equity as *an estate of property* developed in this body of law, which was the law of mortgages. Mortgage law was an ideal place to establish this ownership right because mortgages lie at the intersection of the law of real property and creditor/debtor law. *See Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022) ("In Anglo-American legal history, the rules governing equitable interests in real property arose primarily in the context of what we now call mortgages.").

In shaping the law, the equity courts were concerned to protect financially vulnerable property owners, for at common law the slightest default resulted in a complete forfeiture of the property. As

if that were not a grievous enough loss, a forfeiture could assume a genuinely penal character when the debtor's land was worth more than the loan it secured. The equity courts, with their abhorrence of forfeitures and penalties, were ideally suited to mitigate the harshness of the common law.

As Amicus explains, it was out of these concerns for fairness and justice that the property right in home equity developed.

I. In Fairness and Justice, the Courts of Equity Sought to Protect Vulnerable Debtors from Forfeits and Penalties.

Recognition of a debtor's equity as an estate of property developed in the law of mortgages. Historically, at common law a mortgage of land given as security for the payment of a debt conveyed actual fee simple title to the creditor mortgagee. 5 W.S. Holdsworth, *A History of English Law* 330 (3rd ed. 1945); 1 John Norton Pomeroy, *Treatise on Equity Jurisprudence* 185 (3rd ed. 1905); R. W. Turner, *The Equity of Redemption* 18 (1931); J. H. Baker, *An Introduction to English Legal History* 353 (3rd ed. 1990). The title, however, remained defeasible on condition subsequent, i.e., that the debtor mortgagor pay the debt in full on a stipulated day. 1 Pomeroy, *supra,* at 185; Turner, *supra*, at 18; Baker, *supra*, at 353. If the mortgagee defaulted in the least regard, the conveyance became absolute and the mortgagor lost everything. 1 Pomeroy, *supra*, at 185; Turner, *supra*, at 20; Baker, *supra*, at 355. For example, "[t]he date had to be adhered to strictly; if the money was not tendered in time to be counted out before sunset of the appointed day, the land was lost." Baker, *supra*, at 355.

Hence, the common law regulated the conditions of repayment with a strictness and harshness that opened the way to many injustices. 5 Holdsworth, *supra*, at 293, 330-31. *See* Richard Holmes Coote, *A Treatise on the Law of Mortgage* 17 (London 1821) (mortgages at common law attended with "ruinous consequences to the unfortunate debtor").

"[I]t is difficult to conceive on what ground the Courts of Common Law could have given relief, even had they been so inclined." Turner, *supra*, at 21. To mitigate the "harsh" consequences that the common law produced, equity courts became involved in mortgage cases "and by degrees built up a distinct theory of mortgages which is one of the most magnificent triumphs of equity jurisprudence." 3 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* 2337 (3rd ed. 1905). *See also* Turner, *supra*, at 26-42. Increasingly, courts of equity would come to view such cases as primarily debtor-creditor cases, rather than strictly property cases. In other words, "[t]he mortgage, viewed as a forfeited condition, arose out of the law of property; but, viewed as a debt with security attached, would be relievable [by equity] as an agreement for a sum of money." *Id*. at 40. *See also* 3 Pomeroy, *supra*, at 2337; 1 John Fonblanque, *A Treatise of Equity* 387-88 (London 1793) ("in all cases of penalty or forfeiture . . . equity will relieve . . . where they can make compensation" and "where the condition is for the payment of money at a certain time," such that "no harm is done").

There were several reasons for Chancery's extensive involvement in such cases. *See* F.W. Maitland, *Equity* 266 (1910) ("[Equity] drew almost every dispute about mortgages into the sphere of its jurisdiction and had the last word to say about

them."). First, "[m]ortgagors in early days were, and at the present day often are, needy persons." W.S. Holdsworth, *An Historical Introduction to the Land Law* 257 (1927). *See also* Gary Watt, *The Lie of the Land: Mortgage Law as Legal Fiction*, in Elizabeth Cooke, (ed.), 4 *Modern Studies in Property Law* 73, 81 (Elizabeth Cooke ed., 2007) ("doubtless there was a real concern to prevent a mortgagee from taking unconscionable advantage of a debtor's vulnerability"). *Compare* on this docket Brief for Petitioner at 38, 44-45; at cert. stage, Brief of Amici Curiae AARP and AARP Foundation at 11-19.

Second, and more specifically, "[t]he protection accorded to mortgagors was viewed as one aspect of a general policy of providing relief against penalties and forfeitures, and protecting persons from unconscionable enforcement of legal rights," A.W.B. Simpson, *A History of the Land Law* 244 (2d ed. 1986), for "[i]t is a universal rule, in Equity never to enforce either a penalty or a forfeiture," 2 Joseph Story, *Commentaries on Equity Jurisprudence* 551 (Boston 1836). *See also* Baker, *supra*, at 355 ("The equitable doctrine of mortgages grew from the same root as the doctrine of penalties."); Watt, *supra*, at 81; 1 Pomeroy, *supra*, at 185-6 (chancery court's relief founded on "the principle that equity can and will relieve against legal penalties and forfeitures" by award of money when possible).

"The absolute forfeiture of the estate, whatever might be its value, on breach of the condition was, in the eye of equity a flagrant injustice and hardship, although perfectly accordant with the [common law] system on which the mortgage itself was grounded." Coote, *supra*, at 19. The penal nature of a forfeiture was felt especially sharply when the value of the property conveyed to the creditor exceeded the

amount of the debt, for "[i]t was obviously against conscience that a person should recover a sum of money wholly in excess of any loss incurred." 5 Holdsworth, *supra*, at 293. *See also* David Waddilove, *Why the Equity of Redemption?* at 11 ("The Chancery record bears out the logic that mortgaged properties were often more valuable than the debts that they secured.").[2]

Hence, "[b]y the end of the fifteenth century . . . Chancery had adopted the view that to recover more than a creditor had actually lost was unconscionable. If a creditor tried to extract more than the principal debt or actual damages, with reasonable costs, relief was available." Baker, *supra*, at 370. *See also* Ann M. Burkhart, *Lenders and Land*, 64 Mo. L. Rev., Spring 1999, at 249, 264 ("Such a forfeiture smacked of penalty."); Waddilove, *supra*, at 11 ("Forfeiture of excess value was tantamount to a contract penalty, something that equity disfavoured anyway.")

Even Blackstone acknowledged the "reasonable advantage" given to the debtor mortgagor by equity when otherwise "in strictness of law, an estate worth 1000*l*. might be forfeited for non-payment of 100*l*. or a less sum." 2 William Blackstone, *Commentaries* *159. *See* John Joseph Powell, *A Treatise upon the Law of Mortgages* 10 (London 1785) ("an estate of great value might be forfeited for a trifling consideration"); Thomas Walter Williams, "Equity of Redemption," *A Compendious and Comprehensive Law Dictionary* (London 1816) (same example as Blackstone's).

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[2] Available at https://ssrn.com/abstract= 3185429 (last accessed Feb. 1, 2023).

The chancery courts therefore began to shield the mortgagor against forfeiture by permitting him to redeem his property by late payment of principal, interest, and costs. This form of relief was known as the equity of redemption, and it was perhaps firmly "established early in the reign of Charles I as a definite right or power" possessed by the mortgagor. Turner, *supra*, at 48. *See* Simpson, *supra*, at 245; David Waddilove, *The "Mendacious" Common-Law Mortgage*, 107 KY. L.J. 425, 457 (2018-2019); 1 Pomeroy, *supra*, at 186.

II. The Courts of Equity Expanded the Debtor Mortgagor's Rights While Limiting the Rights of the Creditor Mortgagee in the Landed Security.

Courts of equity came to look upon the relationship between the mortgagor and mortgagee as the parties did, i.e., solely as a debtor/creditor relationship, not a grantor/grantee one, despite the conveyance of the fee to the creditor, and the courts increasingly drew the conclusions that follow from that premise. *See* 3 Pomeroy, *supra*, at 2337 ("equity looks at the intent, rather than the form"). *See also* Coote, *supra*, at 24 ("equity will admit even *parol* evidence to shew the conveyance was intended by way of security only").

The equity courts therefore treated the mortgagee as, in equity, holding his fee merely as security for a loan, while the mortgagor was regarded as, in equity, the real owner. Powell, *supra*, at 11-12, 156; 2 John Fonblanque, *A Treatise of Equity* 279-280 (London 4th ed. 1812) ("in natural justice and equity, the principal right of the mortgagee is to the mortgage-money, and his right to

the land is only as a collateral security for the payment of it"); 5 Holdsworth, *supra*, at 331; 6 W.S. Holdsworth, *A History of English Law* 663 (1924). So protective was Chancery that a mortgagor's covenant not to redeem was deemed unenforceable. *See* Bruce Wyman, *The Clog on the Equity of Redemption*, 21 Harv. L.R. 459, 460 (1908). Later developments would determine more precisely the nature of this right or power possessed by the debtor.

In 1668 Chief Baron Hale declared, "I conceive, that a mortgage is . . . a title in equity . . . . [A] power of redemption is an equitable right inherent in the land," and not a contractual right; the mortgagee, he said, held only a "chattel" interest in the land, not a proprietary one. *Pawlett v. Attorney General*, 145 Eng. Rep. 550, 551 (1668). *See* Turner, *supra*, at 51-55. Hale's view appears to have been that the equity of redemption was a right of the mortgagor to redeem an estate and that this right inhered in the mortgagor's title to the land as its owner in equity, despite the fee conveyance used to create the security interest for the mortgagee.

In 1676 Lord Nottingham reinforced the point, ruling that, "in natural Justice and Equity, the principal Right of the Mortgagee is to the *Money*, and his Right of the Land is only as a Security for the *Money* . . . [for] the Land was never more than a Security." *Thornbrough v. Baker*, 22 Eng. Rep. 802, 803 (1676).

> His Lordship declared that he had considered the various Precedents in this Case which had been urged, whereof not one did come to the very Point, there being a great Difference between a Mortgage and an absolute Conveyance, with a collateral

> Agreement to reconvey upon Repayment of the Purchase Money[.]

Id. at 804. Again, the mortgagee held only a chattel interest in the land. *Id*. ("Part of the personal Estate," not part of the devise of land). *See* Turner, *supra*, at 38-40, 157. *See also Howard v. Harris*, 23 Eng. Rep. 288 (1726) ("once a Mortgage always a Mortgage"); Powell, *supra*, at 14 ("Every contract for the *loan* of money, secured by the conveyance of a real estate to the lender, and not made in contemplation of an eventual arrangement of property, is in equity, deemed a mortgage[.]").

"From Nottingham's time onwards, the theory that in equity a mortgage was to be regarded primarily as a security was constantly employed as a leading principle upon which the decision of new or doubtful questions might be based[.]" Turner, *supra*, 62. *See* 2 Story, *supra*, at 284 ("In regard to the estate of the mortgagee; it being treated in Equity, as a mere security for the debt, it follows the nature of the debt."). *See also Sparrow v. Hardcastle*, 27 Eng. Rep. 148, 149 (1754) ("merely a security . . . chattel interest only"); *The King v. The Inhabitants of St. Michael's in Bath*, 99 Eng. Rep. 399, 400 (1781) (same).

True to his notion that the mortgagee's interest in the land extended no further than as security for the debt, Nottingham added that "after Payment of the Money, the Law keeps a Trust for the Mortgage." *Thornbrough,* 22 Eng. Rep. at 803. In other words, once the mortgagee creditor's monetary claim is satisfied, the security interest in the land dissolves and any remaining interests in the *res* belong to the mortgagor debtor and must be preserved and

restored to the latter if those interests are in the custody of the mortgagee.

Consistent with that view, in 1730 Lord Chancellor King ruled, "Now an estate, though mortgaged, continues still to be the estate of the mortgagor, subject to the payment of the pledge which is upon it; and the mortgagee's right is only to the money due upon the land, not to the land itself[.]" *Chester v. Chester*, 24 Eng. Rep. 967. 969 (1730). *See* 1 Pomeroy, *supra*, at 168 ("the ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is, as has been said, no more than the shadow").

By 1737 we find the following written in a treatise on equity:

> [W]ith Respect to the Surplus of the Estate over and above the Mortgage-Money, the Mortgagee is usually look'd upon in Equity, as a Trustee for the Mortgagor[.]

Henry Ballow, *A Treatise of Equity* 86 (London 1737). *See Richards v. Syms*, 27 Eng. Rep. 567, 568 (1740) ("Equity . . . in all Cases says, That where the Debt appears to be satisfied, there arises a Trust by Operation of Law for the Benefit of the Mortgagor."); Powell, *supra*, at 12, 49; 2 Fonblanque, *supra*, at 256; George Jeremy, *A Treatise on the Equity Jurisdiction* 181 (London 1828) (mortgagee "has been said to bear resemblance in regard to the surplus-rents, after payment of the interest due to him, to a trustee for the mortgagor, and after liquidation of the whole debt and interest, he not having any longer a right to the possession, to a mere naked trustee"); *Quarrell v. Beckford*, 56 Eng. Rep. 100, 104 (1816) (where creditor mortgagee "pay[s] himself first," he must "afterwards . . . .

account to the mortgagor"); *Cholmondeley v. Clinton*, 37 Eng. Rep. 527, 594 (1821) (creditor mortgagee "has no right . . . further than and as may be necessary to secure the repayment of the money due to him. . . . [W]hen paid off, . . . the implied trust, to surrender the estate to the person entitled to demand it, begins."); 5 Holdsworth, *supra*, at 331 (must account for any profits received "in excess of sum due"). *See also Conard v. Atlantic Ins. Co. of N.Y.*, 26 U.S. 386, 441 (1828) (in equity, "[w]hen the debt is discharged, there is a resulting trust for the mortgagor"); *United States v. Taylor*, 104 U.S. 216, 222 (1881).

Of the role of the mortgagee as trustee, Turner observes in his book on the equity of redemption:

> This is as far as the conception of the mortgagee as a trustee can strictly be carried; that, when the money is paid, he is a trustee of the legal estate for the mortgagor, who is then complete owner of the beneficial interest; for in equity he had the legal estate but as security for the debt, and, now that the debt has ceased to exist, the reason for his retention of the legal estate is at an end.

Supra, at 167; for the analogy of trusts and mortgages, *see id*. at 48, 51, 53, 55, 65, 106, 156ff.

Equity was absolutely clear, then, that the secured creditor had a claim to land limited to the money value of the debt; over and above that, any value inhering in the land belonged rightfully to the debtor. So imperious was the equitable principle that a creditor may take only what he is owed that "though there be a private agreement, between the mortgagee and the mortgagor, for an allowance for the mortgagee's trouble, in receiving the rents and

profits of the estate, yet the court will not carry it into execution; for, equity will not allow him any more than his principal and interest." Powell, *supra*, at 423-24. *See also* Coote, *supra*, at 26-27.

III. The Courts of Equity Recognized the Debtor's Equity of Redemption As Property.

The culmination of the development of the equity of redemption came in Lord Hardwicke's decision in *Casburne v. Scarfe*, 37 Eng. Rep. 600 (1738). The question posed was "what kind of interest an equity of redemption is in the eye of the Court." *Id*. at 600. With Lord Harwicke's answer, "equity of redemption" was recognized explicitly not only as the right to redeem the land in equity, but also as itself an estate in the land, i.e., what we now call "home equity" or simply "the equity." 6 Holdsworth, *supra*, at 663 (continuous enlarging of right to redeem created "right of property," wherein mortgagor held equitable estate in land). *See also* David Waddilove, Emmanuel College v. Evans (1626) *and the History of Mortgages*, 73 The Cambridge Law Journal, March 2014, at 142, 143 n.3 (dual meaning of "equity of redemption" as right to redeem land and as ownership of estate in land).

The report of the case says:

> First, as to the nature of the interest—An equity of redemption is considered as an estate in the land; it will descend, may be granted, devised, entailed, and that equitable estate may be barred by a common recovery. This proves that it is not considered as a mere right, but as such an estate whereof, in the consideration of this

> Court, there may be a seisin, for without such seisin, a devise could not be good.
>
> The person having the equity of redemption is considered as owner of the land, and the mortgagee as entitled only to retain it as a security or a pledge for a debt.
>
> ****
>
> It has also been objected that a mortgagee is not a bare trustee for the mortgagor. It is true that a mortgagee is not barely a trustee; but it is sufficient for this purpose that he is in fact a trustee.

Casburne, 37 Eng. Rep. at 600, 601. *See* Holdsworth (1927), *supra*, at 260 ("because the mortgagor had an estate or interest in the property, he had something which he could sell or mortgage; and so it became possible for the mortgagor to mortgage his property more than once").

Actually, courts of equity had long been deciding cases on these principles. *See* 1 Pomeroy, *supra*, at 186 ("Hardwicke laid down the doctrine as already established"); Turner, *supra*, at vii n.1. For example, Samuel Carter had observed that, already by 1728, "There are several Cases in the Chancery Reports, which prove, That not only Mortgages but even Equities of Redemption may be assigned or devised for the Payment of Debts, &c. . . . . An Equity of Redemption is now of so great Esteem in Law, that it is assignable and devisable[.]" *Lex Vadiorum: The Law of Mortgages* 195-6, 210 ([London] 2d ed. 1728).

Looking back on this development, the author of a law dictionary observed in 1797, "As to the estate of the mortgagor, though formerly doubted whether he had more than a right of redemption, it is now

established, that he hath an actual estate in equity, which may be devised, granted, and entailed[.]" 2 Giles Jacob *The Law-Dictionary*, "Mortgage" (London 1797); *accord* 2 Fonblanque, *supra*, at 257 n.(d). *See also* 6 Holdsworth, *supra*, at 663 (Chancery "ma[d]e the mortgagor's equity to redeem a right of property"); 1 Pomeroy, *supra*, at 186 ("the very central notion of the equitable theory, that an equity of redemption is (in equity) *an estate in the land"*) (original emphasis): Restatement (Third) of Property (Mortgages) §3.1 cmt. a (Am. Law Inst. 1997).

In light of the all the foregoing compelling equitable principles and in light of the finality and harshness of common law foreclosure, English courts of equity would sometimes hesitate to grant a mortgagee's bill seeking to foreclose even after the right to redeem was lost. While, "except in special cases," foreclosure was "deemed . . . the exclusive and appropriate remedy," there grew up such a list of reasons to deny foreclosure and to order a sale instead that Story observed, "It is difficult to perceive any solid or distinct ground, upon which these exceptions stand, which would not justify the Courts of Equity in England in decreeing a sale at all times, when prayed for by the mortgagee, or beneficial to the mortgagor." 2 Story, *supra*, at 294, 295. *See also* Coote, *supra*, at 511. Indeed, sometimes, even after the decree of foreclosure had been signed and enrolled and the mortgagee put in possession, a court might afford the debtor mortgagor relief and open the decree. *Id*. at 515.

In his work on equity Story observed in 1836:

> The natural, and certainly the most convenient and beneficial course for the mortgagor, would seem to be . . . primarily

> and ordinarily to direct a sale of the mortgaged property, giving the debtor any surplus after discharging the mortgage debt[.] . . . This course has accordingly been adopted in many of the American Courts of Equity[.][3]

Supra, at 293-94.

Along much the same lines, in 1821 Coote had observed that in England, too, it had become "frequent in practice to give the mortgagee a power of sale over the estate" through the mortgage agreement. *Supra*, at 128. *See* 2 Story, *supra*, at 295 ("inconveniences of the existing practice of foreclosure in that country are so great, that it has become a common practice to insert in mortgages a power of sale upon default of payment"). *See also* on this docket Brief of *Amici Curiae* David C. Wilkes et al. at 12-13.

Hence, in fairness and justice, a home owner's equity in his house and land has long been recognized as property. As such, it fully warrants constitutional protection against government confiscation.

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[3] "Sometimes, however, the foreclosure will produce an amount in excess of the mortgage obligation. . . . [W]hen a surplus occurs, it represents what remains of the equity of redemption and is, as such, a substitute res. The surplus stands in the place of the foreclosed real estate[.]" Restatement, §7.4 cmt. a. The Restatement goes on to say, "If the land sells for more than the mortgage debt, the surplus will be paid to [the] mortgagor or others who derive their rights through the mortgagor[.]" *Id*. §3.1 cmt. a. *See also id*., §7.4 Reporter's Note.

CONCLUSION

For the reasons set forth above, this Court should rule that when government takes property for delinquent taxes, home equity must be treated as property under the Fifth Amendment.

Respectfully submitted,

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By its attorneys,

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Dated: March 6, 2023