**COMMONWEALTH OF MASSACHUSETTS**
**LAND COURT**
**DEPARTMENT OF THE TRIAL COURT**

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| TOWN OF TYNGSBOROUGH,<br>Plaintiff,<br>v.<br>PAULA RECCO,<br>Defendant | 2023 NOV 30 P 12:48<br><br>**18 TL 001223** |

# BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

New England Legal Foundation (NELF) herewith submits its brief in response to the Court's request for amicus briefing in this case.

## CORPORATE DISCLOSURE STATEMENT

NELF states that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities. NELF does not issue stock or any other form of securities and does not have any parent corporation.

## INTEREST OF AMICUS CURIAE[1]

NELF is a nonprofit, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's members and supporters include large and small businesses in New England, other business and non-profit organizations, law firms, and individuals, all of whom believe in NELF's mission of promoting economic liberty, protecting free enterprise, defending property rights, and advancing inclusive growth.

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[1] No party or party's counsel nor any other individual or entity, aside from Amicus and its counsel, authored this brief in whole or in part, or made any monetary contribution to its preparation or submission.

The question presented in this case is of interest to NELF because of our longtime commitment to the defense of the rights of private property. That is what drove us to file a brief defending those rights in both *Tyler v. Hennepin County*, 598 U.S. 631 (2023), the case whose holding places the Court in its present quandary, as well as in the companion case *Nieveen v. TAX 106,* 143 S.Ct. 2580 (2023). NELF therefore gladly accepts the Court's invitation to file this brief, so that it may assist the Court in reaching a sound decision concerning the implementation of *Tyler's* holding under current Massachusetts law.

## QUESTION PRESENTED

May the Land Court, consistently with both G. L. c. 60 and the ruling in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), foreclose the right of redemption while still preserving the homeowner's constitutional right to her equity?

## ARGUMENT

NELF believes that the answer to the question presented is yes, for reasons we explain below. We are acutely aware of two powerful interests at play here. On the one hand, local government needs tax revenues to fund critical public functions, such as police, fire fighting, and other forms of public safety, as well as to fund schools, etc. On the other hand there is the taxpayer's constitutional property rights, an area of law which is integral to NELF's own mission. We have filed an amicus brief not only in *Tyler*, but also in many other major property rights cases before the Supreme Court, e.g., *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019), in defense of those rights. We believe that the Court is correct in making an effort to find a way to do justice to both sides; as we explain, the legislature requires that an effort at least be made. If the legislature disagrees with the solution proposed here, or with any other the Court may decide to adopt (if any), it can always revise and

update c. 60, which is long overdue for revision.[2]

## I. When a Law is Unconstitutional, the Court Should Sever the Invalid Parts and Enforce the Remainder if the Result Would be Consistent with the Legislature's Intention.

"Where fairly possible, a statute must be construed so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Commonwealth v. Kelly*, 484 Mass. 53, 62 (2020) (cleaned up). *See also* Antonin Scalia and Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 247-48 (constitutional-doubt canon "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality") (2012).

Moreover, where a constitutional question is clearly raised, "[a] court will ordinarily not pass upon [the] constitutional question . . . if there is also present some other ground upon which the case may be disposed of." *Commonwealth v. Bartlett*, 374 Mass. 744, 749 (1978) (cleaned up).

However, where an otherwise governing statute is unconstitutional and all forms of avoidance prove unavailing, as here, a court's responsibility shifts to trying to limit the damage and to salvage the legislature's intentions. Courts do this principally by omitting the unconstitutional portions of the text if possible.

In *Ramirez v. Commonwealth*, the Supreme Judicial Court stated, "Where a provision of a statute is held unconstitutional, the valid portions of the statute should be preserved if the invalid provision is separable from the remainder of the statute." 479 Mass. 331, 341 (2018). Dilating on the point somewhat, the SJC has also stated:

> When part of a statute is held unconstitutional, "as far as possible, [we] will hold the remainder to be constitutional and valid, if the parts are capable of separation and are

[2] *See Tallage Lincoln, LLC v. Williams*, 485 Mass. 449, 450 n.2 (2020) ("archaic and arcane process of tax lien foreclosure").

> not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part." *Peterson v. Commissioner of Revenue,* 444 Mass. 128, 137–138, 825 N.E.2d 1029 (2005), quoting *Boston Gas Co. v. Department of Pub. Utils.*, 387 Mass. 531, 540, 441 N.E.2d 746 (1982).

*Commonwealth v. Cole*, 468 Mass. 294, 308 (2014).

Such judicial salvaging of the legislature's promulgated laws is precisely what the General Court *requires* courts to attempt to do in such circumstances.

> The provisions of any statute *shall* be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment *shall* not affect other valid parts thereof.

G.L. c. 4, §6 (Rules for construction of statutes) (emphasis added). *See also* 2A Sutherland Statutory Construction §45:11 ("Public policy generally favors severability of an unconstitutional statute.") (7th ed.).

To do so here would be particularly appropriate as it would reflect the practice of the very court that rendered the *Tyler* decision.

> Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, . . . or *to sever its problematic portions while leaving the remainder intact*[.] . . . First, we try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. . . . Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it. . . . Third, the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.

*Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328–30 (2006) (cleaned up and emphasis added).

If we err on the side of caution and consider the strictures of *Ayotte* and *Cole* together, severability must satisfy the following criteria: (i.) the legislature would not have regarded the

valid and invalid parts of the statute as "so entwined" as to preclude giving effect to the valid parts alone; (ii.) the amount of text severed must be no more than is strictly necessary; (iii.) the severance must not amount to a rewriting of the statute; and (iv.) the severance must adhere to legislature's intended remedy and not circumvent it.

## II. This Court Should Sever the First Sentence of G. L. c. 60, §64, so that the Town May Obtain a Title Subject to the Taxpayer's Enforceable Equitable Right to Surplus in Excess the Tax Debt.

As usual, the correct approach is to start with the text of the statutes. Here that means analysis should begin by identifying the portion of the text that is source of the unconstitutionality.

### A. "Absolute" Title is the Source of the Constitutional Problem.

The problem clearly stems from the "absolute" title the town would receive under the first sentence of G.L. c. 60, §64. "Absolute" title would abolish all of the taxpayer's remaining property interests; it would be winner-take-all. The Supreme Judicial Court has described the effect of a §64 foreclosure as follows:

> Strict foreclosure [under c. 60, §64] . . . extinguishes the taxpayer's remaining interest in the property — the right of redemption — and converts the municipality's or third party's tax title into absolute title. . . . [T]he foreclosing party takes title free and clear of all encumbrances, including mortgages and other liens. . . . Consequently, after a strict foreclosure, the taxpayer loses any equity he or she has accrued in the property, no matter how small the amount of taxes due or how large the amount of equity.

*Tallage*, 485 Mass. 449, 452–53 (2020). While the SJC noted that the passing of "absolute" title may be unconstitutional because it destroys the taxpayer's interest in the home equity, that court did not decide the question as it was not presented by the parties. *See id.* n. 4.

In this case Recco identifies "absolute" title as the constitutional obstacle. Memorandum of Law in Support of Defendant Paula Recco's Motion for Summary Judgment at 1 ("the Town

will take absolute title . . . This result . . . would violate Ms. Recco's constitutional rights."). We also note that a complaint filed in the SJC seeks a declaration that c. 60 is unconstitutional, *see Mills v. City of Springfield*, SJ-2023-0398, and its focus too appears to be on §64's "absolute" title, *see* Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunctive Relief at 10-11.

We need not speculate on the question left unanswered in *Tallage*, for *Tyler* tells us that for a taxing authority to take absolute title is unconstitutional whenever to do so would extinguish the taxpayer's right to home equity. 598 U.S. at 644 (finding unconstitutional Minnesota tax law whereby "once absolute title has transferred to the State, any excess value always remains with the State").

### B. Until the Legislature Addresses the Problem, a Legitimate Solution Would Be to Sever the First Sentence of §64, so that the Town May Take Title Subject to the Owner's Enforceable Equitable Interest.

This Court has the authority to sever and grant less than absolute title, despite the Land Court Department's belief that its hands appear to be tied under present c. 60. *See* Land Court Statement on *Tyler v. Hennepin County, Minnesota*, and its online Tax Lien Foreclosure Informational Outline.

Here the Court should sever the first sentence of §64, containing the impermissible characterization of post-foreclosure title as "absolute." The Court would then be able to rule that title passes to the town under §65, subject to the owner's enforceable equitable interest in the surplus cash value, as per *Tyler*.

These actions would be consistent with the Land Court's jurisdiction and powers. We need look no further than the foundational statute of the Land Court.

The land court department shall have exclusive original jurisdiction of the following

> matters:
> ***
> (b) Proceedings for foreclosure of and for redemption from tax titles under chapter sixty.
> ***
> (k) All cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved, including actions for specific performance of contracts.

G.L c. 185, §1. The Court's equitable powers are ample enough to adjust the parties' relations in a just and constitutional manner upon foreclosure of the right of redemption. *See* G. L. c. 185, §25 ("In all matters within its jurisdiction, the [land] court shall have all the powers which the superior court has . . . in accordance with the Massachusetts Rules of Civil Procedure as justice and equity may require[.]"). *See also Bask, Inc. v. Municipal Council of Taunton*, 490 Mass. 312, 317–18 (2022) (while not enjoying general equity jurisdiction, Land Court has "equitable powers necessarily tethered to the court's specific jurisdictional grant[s]").

The sentence admits of severing under the four criteria identified earlier.

(i.) The sentence is not "so entwined," *Cole*, 468 Mass. at 308, with the rest of the statute, or with c. 60 generally, that the legislature would prefer that collection of delinquent taxes come to a halt rather than see the sentence severed. Far from being "so entwined," the first sentence has a single, narrow purpose, i.e., to characterize the extent of post-foreclosure title gained under §65, while the second sentence deals with a completely distinct topic, i.e., aspects of the Land Court's jurisdiction. Neither sentence makes reference to the other or has any dependency on the other, and so in no substantive sense may they be said to be "entwined."

The first sentence of §64 can no more be said to be "so entwined" with c. 60, either. "The principal purpose of c. 60 is to ensure that the city will receive the taxes owed to it, with due observance of the provisions of the chapter made for the protection of the interests of taxpayers."

*Brown v. City of Boston*, 353 Mass. 740, 743 (1968). *See also Town of Lynnfield v. Owners Unknown*, 397 Mass. 470, 474 (1986) ("only legitimate interest of a town in seeking to foreclose rights of redemption is the collection of the taxes due on the property, together with other costs and interest"). Hence, "[t]he various methods set out in (G.L.) c. 60 of enforcing the tax or the (tax) lien . . . are all subsidiary to and in aid of the enforcement of the primary (tax) liability." *Brown*, 353 Mass. at 743 (cleaned up).

The severance of the first sentence would not impede the paramount goal of tax collection; the towns would still receive good and sufficient title and be able to satisfy the tax debt from proceeds of the sale of the property. At the same time, the equity interest of the taxpayer would be preserved and protected. Such a twofold result is perfectly in accord with the legislative goals of c. 60 as glossed in *Brown*.

Other aspects of *Brown*, a tax title case, are instructive too. The taxpayer, who lacked the means to redeem, sought to require the city, under G. L. c. 60, §52, to transfer tax title to her lender nominee, who, after paying the redemption amount, would ultimately transfer the fee interest back to her in return for a mortgage. *Id.* at 741. The city baulked, however. The SJC first found that the owner, who was a tenant by the entirety with her absent husband, had by herself a "sufficient interest in the locus to permit equitable protection." *Id.* at 743. The SJC then proceeded to rule as follows:

> We think that to require an assignment, where it will result not only in payment of the secured taxes but also in protecting a property interest in the land subject to the lien, necessarily promotes the statutory purpose[.] . . . Accordingly, we see no statutory obstacle to equitable relief requiring an assignment to be made under s 52, where the city's interest in collecting its taxes will be promoted, and where the whole amount secured by the tax title will be paid at the time of the assignment.

*Id.* at 744. *See also id.* (construing statute "in accordance with equitable considerations" to allow

equitable protection where not otherwise explicitly forbidden by statute).

In cases like the present, there can be no question whether taxpayers possess a property interest "sufficient . . . to permit equitable protection." *Tyler* settled that issue. So, too, use of this Court's equitable powers to protect the owner's property interest makes possible the continued collection of taxes, which is, as *Brown* says, the "principal purpose of c. 60."

In short, nothing in the sentence is "so entwined" as to preclude severance.

(ii.) Moreover, by severing a single, self-contained sentence, the Court would sever only that text which is strictly necessary, as just explained.

(iii.) So discrete and insular an excision of text could not reasonably be called a re-writing of the law "even as we strive to salvage it." *Ayotte*, 546 U.S. at 329. Nothing novel would be introduced into the law; no new remedy would be fashioned by the Court. Local governments would lose no rights that they ever constitutionally possessed, as *Tyler* makes clear. Rather, a single, self-contained, thirty-seven word sentence would be severed in c. 60, in order to remove the constitutional logjam now blocking the legislative's intended remedy for delinquent local taxes. The remedy of granting title to the town would remain intact, as the legislature would wish; the Court would merely adjust the rights of the parties so that the foreclosure proceeds in a constitutionally sound manner.

(iv.) For the reasons given above in (i.), (ii.), (iii.), severance would lawfully accomplish the remedial ends sought by the legislature for delinquent, otherwise uncollectible taxes. The proposed solution preserves; it does not innovate. The minimalist approach taken here does justice without doing offense to the Constitution or to the parties, and it abides by the Supreme Court's ruling in *Tyler*.

The proposed solution accords with the historical development of the concept of home

equity as it emerged, under the name "equity of redemption," in 18th century English equity courts. Originally, when real property was mortgaged as security for a money debt and the value of the land exceeded the amount of the debt, the creditor was entitled to take the entire value of the land, if recourse to the security became necessary to settle the debt. Perceiving the gross injustices produced, over time the courts developed equitable principles to protect the owner's interest in the surplus.

As early as 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" for any surplus.); John Joseph Powell, *A Treatise upon the Law of Mortgages* 12, 49 (London 1785); 2 John Fonblanque, *A Treatise of Equity* 256 (London 4th ed. 1812). *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" for any surplus).

**III. Further Remarks.**

We agree with Prof. Clifford that G. L. c. 79 does not provide a viable path for the Court to follow. *See, e.g.,* Lowell *v. City of Boston*, 111 Mass. 454, 462 (1873) (taxation and eminent domain "so unlike"); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 617 (2013) ( "the power of taxation should not be confused with the power of eminent domain").

We disagree with Prof. Clifford on another point, however. We do not believe a solution is precluded because "the claimant" may have an adequate remedy at law elsewhere in the General

Laws. *See* Clifford Br. at 5. The claimant here is the town, but the equitable element of our proposed solution is not the basis of the town's claim for relief. The solution we propose has the town obtaining its relief as normally under §65, minus absolute title. Under our solution the Court's equitable powers would then be extended to protect the property interest of the vulnerable party *against whom "the claimant" seeks relief.*

We disagree with Recco on several points. The *Knick* Court acknowledged that while a "right" or "entitlement" to just compensation arises at the time of the taking, 139 S.Ct. at 2170, 1272, "[t]hat does not as a practical matter mean that government action or regulation may not proceed in the absence of contemporaneous compensation. Given the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate." *Id.* at 2177. But the larger point is that her reasoning rests on the assumption that foreclosure must, at present, mean absolute title and the extinction of her home equity, and hence a taking. If the title that passes were not absolute, however, as we propose, and the judgment were to recognize her continuing interest in the equity, her property rights will not have been lost and there would be no Fifth Amendment violation.

Finally, we note that even under *Kelly v. City of Boston*, a municipality may voluntarily agree to tender the surplus. 348 Mass. 385, 389 (1965). *Tyler* has made it absolutely clear that the surplus must be surrendered, and so municipal resistance is now futile. Sensible parties may therefore wish to simply agree to terms based on the tendering of any surplus to the taxpayer. They should then ask the Court to enter the appropriate consent order or agreed-upon judgment, thereby making all rights unambiguously enforceable by the Court.

## CONCLUSION

The Court may foreclose consistently with *Tyler*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

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## CERTIFICATE OF SERVICE

I certify that on the date subscribed below I mailed two true and complete copies of this brief by first-class mail, post paid, on counsel as follows:

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