COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

TOWN OF TYNGSBOROUGH,	)	
Plaintiff	)	
	)	
v.	)	**Case No. 18 TL 001223**
	)	
PAULA RECCO,	)	
Defendant.	)	

MEMORANDUM OF LAW OF *AMICUS CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF DEFENDANT PAULA RECCO

Interest of *Amicus Curiae*

National Taxpayers Union Foundation ("NTUF") is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. NTUF participated as *Amicus Curiae* in *Tyler v. Hennepin County*, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564 (2023), and its sister case, *Fair v. Continental Resources*, 598 U.S. ___, 143 S. Ct. 2580, L. Ed. 2d 1191 (2023), and at the state level, including in Massachusetts. *See*, *e.g.*, *U.S. Auto Parts Network, Inc. v. Comm'r of Revenue*, 491 Mass. 122, 199 N.E.3d 840 (Mass. 2022). NTUF answers this Court's call for input on how to apply *Tyler*.[1] *See* Notification to the Attorney General Pursuant to Mass. R. Civ. P. 24(d) and Request for Amici Submissions (Oct. 16, 2023).

[1] Counsel for *Amicus* certifies that counsel for *Amicus* authored the brief in whole, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *Amicus* contributed money that was intended to fund preparing or submitting the brief.

Summary of the Argument

Massachusetts's tax foreclosure system is materially indistinguishable from the Minnesota statute struck down in *Tyler v. Hennepin County*. Both systems purport to force the taxpayer to lose title to their land, and thus any subsequent sale's proceeds go to the government, not the citizen. In this case, a possible saving clause in G. L. c. 60, § 68 would not allow the system to continue to operate. *See, e.g.*, Notification to the Attorney General Pursuant to Mass. R. Civ. P. 24(d) and Request for Amici Submissions (Oct. 16, 2023). Additionally, recent precedent discussing the Commonwealth's tax sale system forecloses a judicial reinterpretation of the law as a means to comply with the U.S. Supreme Court decision. Only the legislature may amend it.

To be sure, this Court has the power to declare G. L. c. 60, § 64 as unconstitutional and enjoin its use since it violates the Fifth and Fourteenth Amendments, for the same reason Minnesota's statute was held invalid in the *Tyler* decision. This Court has made constitutional determinations before. But what this Court cannot do is rewrite a clear statute's plain language. That is a legislative function reserved to the General Court.

Moreover, mischaracterizing the Town's attempt to take Ms. Recco's home as an eminent domain action will not escape the consequences of the *Tyler* decision. Eminent domain is the government taking land for a public purpose—such as building a school, widening a road, or other public works. It is not a way to perpetuate an otherwise unconstitutional tax collection system. Indeed, the Commonwealth courts have consistently distinguished between tax foreclosure and eminent domain takings.

Therefore, this Court should find that given the plain language, judicial precedence, and legislative intent of Massachusetts's tax title foreclosure procedure, this procedure violates the Takings Clause of the Fifth Amendment. The Court does not have discretion to rewrite the statute to comply with the *Tyler* decision: That is a legislative function reserved to the General Court. Thus, this Court should deny the Town of Tyngsborough's (the "Town") request to sell Ms. Recco's property.

Argument

I. Massachusetts's Tax Title Foreclosure Procedure Violates *Tyler*.

In May 2023, the Supreme Court held that Hennepin County, Minnesota keeping the surplus of a tax sale—the extra money left over after satisfying the taxes, fees, and penalties—is a "taking" under the Fifth and Fourteenth Amendments. *Tyler*, 598 U.S. at 638. Massachusetts's statute, as enacted by the General Court and interpreted by the Supreme Judicial Court, is materially identical to the statute in *Tyler* and therefore also violates the federal Constitution. *Compare Tyler*, 598 U.S. at 635 ("But if at the end of three years the bill has not been paid, absolute title vests in the State, and the tax debt is extinguished. [Minn. Stat.] §§281.18, 282.07. . . . If the property is sold, any proceeds in excess of the tax debt and the costs of the sale remain with the County . . . The former owner has no opportunity to recover this surplus."); G. L. c. 60, § 64 ("The title conveyed by a tax collector's deed or by a taking of land for taxes shall be absolute after foreclosure of the right of redemption by decree of the land court . . . ."). Massachusetts's scheme, like Minnesota's scheme in *Tyler*, offers no "opportunity for the taxpayer to recover the excess value [from a tax title foreclosure sale]; once absolute title has transferred to the State, any excess value always remains with the State." *See Tyler*, 598 U.S. at 644.

This Court can declare G. L. c. 60, § 64 unconstitutional, but it cannot rewrite the statute or analogize it to a different takings framework on the promise that the government will behave properly. Since the Massachusetts law now clearly and directly violates federal constitutional law, only the General Court can fix the problem legislatively. Unless and until there is a legislative fix, Ms. Recco gets to keep her house.

A. The taxpayer is entitled to the surplus generated from a tax sale, but current statute forbids the Constitutionally-mandated result.

In *Tyler*, Hennepin County, Minnesota sold an elderly woman's house for $40,000 to pay $15,000 tax bill—and kept the remaining $25,000 for itself. *Id.* at 634. Ms. Tyler sued, claiming the County's keeping of the windfall profits violated the Takings Clause of the Fifth Amendment

and the Excessive Fines Clause of the Eighth Amendment. *Id.* at 635-36. The United States Supreme Court, in a unanimous decision, agreed that Minnesota's system violated the Takings Clause.[2] *Id*. at 647. The Court noted that, "in 1935, the State purported to extinguish that property interest by enacting a law providing that an owner forfeits her interest in her home when she falls behind on her property taxes." *Id.* at 639.

The Supreme Court rejected this extinguishment theory and explained how both in history and in case law, the principle remains that a "taxpayer is entitled to the surplus in excess of the debt owed." *Id.* at 642. Minnesota's scheme violated the Takings Clause because it provided "no opportunity for the taxpayer to recover the excess value; once absolute title has transferred to the State, any excess value always remains with the State." *Id.* at 644. Thus, according to the precedent set in *Tyler,* a foreclosure system which vests the Commonwealth with absolute title while depriving the owner of any opportunity to recover its excess value violates the Takings Clause of the Fifth Amendment.

Massachusetts's tax title foreclosure procedure violates *Tyler,* and there is little room for statutory interpretation to fix the unconstitutional result mandated by the statute's plain language. In Massachusetts, a statute is interpreted by ascertaining "from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Boston Police Patrolmen's Ass'n v. City of Boston*, 435 Mass. 718, 719-20, 761 N.E.2d 479 (2002) (quoting *Director of the Div. of Employment Sec.*, 393 Mass. 482, 487-88, 472 N.E.2d 253 (1984)). But "where the language of a statute is plain and unambiguous, it is conclusive as to the legislative intent." *Ryan v. Mary Ann Morse Healthcare Corp.*, 483 Mass. 612, 620, 135 N.E.3d 711 (2019) (quoting *Ciani v. MacGrath*, 481 Mass. 174, 178, 114 N.E.3d 52 (2019)). Courts also consider the interrelationship of

[2] Justices Gorsuch, joined by Justice Jackson, concurred with the holding on the Fifth Amendment, and wrote separately that Minnesota's system also violated the Eighth Amendment's Excessive Fines Clause. *Tyler*, 598 U.S. at 648 (Gorsuch, J., concurring).

neighboring statutes: "In the absence of explicit legislative commands to the contrary, we construe statutes to harmonize and not to undercut each other." *Ryan*, 483 Mass. at 620 (quoting *School Comm. of Newton* v. *Newton Sch. Custodians Ass'n, Local 454, SEIU*, 438 Mass. 739, 751, 784 N.E.2d 598 (2003)).

Where Massachusetts Courts have undertaken a plain language and legislative intent analysis of the tax title foreclosure procedure in G. L. c. 60, they have concluded that the purpose of the statute is to provide the city with absolute title and not provide the owner with any surplus after the sale. *See e.g.*, *Kelly v. Boston*, 348 Mass. 385, 388, 204 N.E.2d 123 (1965) ("We think it is clear from the above history of the tax statutes that the Legislature intended the surplus from a sale of land taken for nonpayment of taxes[] . . . to belong to the municipality."). Additionally, the statute states that if a property owner fails to redeem the land within the prescribed time, the Court is required to enter a decree barring all rights of redemption:

> If a default is entered under section sixty-seven, or if redemption is not made within the time and upon the terms fixed by the court under the preceding section, or if at the time fixed for the hearing the person claiming the right to redeem does not appear to urge his claim, or if upon hearing the court determines that the facts shown do not entitle him to redeem, a decree *shall* be entered which shall forever bar all rights of redemption.

G. L. c. 60, § 69 (emphasis added). The use of the word "shall" above deprives this Court of any discretion to refuse to bar the owner's right of redemption. Moreover, there is no statute within chapter 60 which allows this Court to order compensation to the owner for the difference in value seized and taxes owed. Inserting a compensation provision into chapter 60 where none exists would be legislating. *Cf. Civitarese v. Middleborough,* 412 Mass. 695, 700, 591 N.E.2d 1091 (1992) (refusing to "read into the plain words of a statute a legislative intent that is not expressed by those words[]").

It is indisputable that the statute operates like Minnesota's in transferring absolute title to the city, with no requirement to return any surplus from the sale to the property owner. *See e.g.*, *Sandwich v. Quirk*, 409 Mass. 380, 384, 566 N.E.2d 614 (1991) ("The absolute title proclaimed

by § 64 clears the record title so that the municipality may sell the property or keep it for municipal purposes, free of the claims of the prior owner and other persons whose rights are extinguished."); *Johnson v. McMahon*, 344 Mass. 348, 353, 182 N.E.2d 507 (1962) ("If the Land Court enters a decree barring all rights of redemption (c. 60, § 69), the title of the town thereby becomes absolute (c. 60, § 64)."). In *Kelly v. Boston*, the Supreme Judicial Court held cities cannot be required to return any surplus from a tax title foreclosure sale to the owner. *See Kelly*, 348 Mass. at 385-86. There, the city seized the property and filed a petition to bar plaintiff's right of redemption, which the court granted. *See id.* at 386. "At that time the amount to redeem was $9,825.80[,]" and the city sold the land two years later for $33,000. *Id.* Plaintiff sought a judicial order to recover this difference. On appeal, the Supreme Judicial Court conducted an in-depth historical and legislative analysis into chapter 60's tax title foreclosure procedure:

> In 1862 municipalities were authorized to sell land which they had purchased at a tax sale and which had not been redeemed within the specified period of time. After deduction for the expenses of the sale and the amount paid at the tax sale with ten per cent interest per annum and all intervening taxes and necessary charges, the moneys received at this sale inured to the prior owner of the property. These provisions were made applicable to land taken by a municipality. The Legislature continued to provide for the surplus from the sale of unredeemed land until 1915. In 1915 the Legislature enacted the present system of foreclosing the right of redemption in the Land Court with notice of the proceeding being sent to all interested parties. After foreclosure of the rights of redemption under a tax title, the land was to be held and disposed of like any land belonging to the municipality. . . . The surplus provision was amended to apply only to land taken or purchased by a municipality prior to July 1, 1915, the effective date of St. 1915, c. 237.

Id. at p. 387-88 (internal citations omitted). Given this background, the Court concluded: "We think it is clear from the above history of the tax statutes that the Legislature intended the surplus from a sale of land taken for nonpayment of taxes, on which the right of redemption has been foreclosed in the Land Court, to belong to the municipality." *Id.* at 388.

In other words, the Court made clear in *Kelly* the legislature did not "intend that the proceeds from the sale would be returned to the . . . [landowner] after the various liens had been satisfied." *Id.* at 389. *Kelly* further rejected the argument that chapter 60 provides an opportunity

for property owners to recover any excess once a chapter 60 sale is finalized. *Id.* at 389 ("If there should be a remedy for someone in the plaintiff's position, the matter rests in the legislative domain.").

The Massachusetts Court of Appeals recently applied the *Kelly* decision in *Butkus v. Charles L. Silton*, 18-P-72, 2019 Mass. App. Unpub. LEXIS 367 (Mass. App. Ct., May 13, 2019) (Memorandum of Law and Order). There, it held neither the property owner, nor an individual who had a mortgage through a judgment, were entitled "to the surplus from the town's sale of the property" because the town "held 'absolute' title to the property as of the date of the Land Court foreclosure judgment." *Butkus v. Charles L. Silton*, 18-P-72, 2019 Mass. App. Unpub. LEXIS 367, at *5 (Mass. App. Ct., May 13, 2019) (Memorandum of Law and Order). In short, the plain language of chapter 60 and the Supreme Judicial Court's holding in *Kelly* concretely established a tax title foreclosure proceeding vests absolute title of the land with the city and the owner is not entitled to any surplus arising from the sale thereof. To interpret the tax title foreclosure statutes in any other manner would directly violate the plain language of the statutes, the legislative intent behind the statutes, and judicial precedent established by *Kelly*.

Kelly and *Butkus* therefore reject that courts may find an interpretative solution around the plain statutory language.

B. This Court has the power to declare G. L. c. 60, § 64 unconstitutional, but not rewrite the statute.

This Court can exercise the power inherent in the American judiciary to refuse to enforce a statute on the grounds that it is unconstitutional. But what this Court cannot do is rewrite the plain language of the statute. The situation needs a legislative fix. Until that happens, Ms. Recco should keep her house and the government must rely on valid laws to collect any sums due.

Massachusetts law specifically provides that "the land court . . . may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby." G.L. c. 231A § 1; *see also* Mass. R. Civ. P. 57. And, in granting such declaratory relief,

the Land Court has further authority to enforce its decrees. G.L. c. 231A § 5. The Land Court has the power to issue injunctions as well. *See, e.g.*, Mass. R. Civ. P. 65.

This is not the first time this Court has addressed an unconstitutional statute. In *Ravech v. Town of Hanover,* property owners sought declaratory and injunctive relief from town zoning ordinances that restricted adult businesses. *See Ravech v. Town of Hanover*, 01MISC276445GHP, 2010 WL 58921, at *1 (Mass. Land Ct. Jan. 11, 2010). After applying the relevant First Amendment case law, this Court declared aspects of the town's ordinances unconstitutional. *See id*. at *17 ("I find and rule that the 2001 and 2002 Bylaws are invalid under state and federal law insofar as they purport to limit and to regulate the location of Plaintiffs' retail sales business as an adult use."). This Court accordingly issued a permanent injunction against the zoning ordinance. *See id.*

Here, this Court should declare the Commonwealth's tax sale system at issue to be unconstitutional under *Tyler* and enjoin the Town of Tyngsborough from taking the property. This Court cannot set aside the plain statutory language, despite the Town's invitation for it to do so. *See, e.g.*, *White v. City of Boston*, 428 Mass. 250, 253, 700 N.E.2d 526 (1998) ("[S]tatutory language is plain and unambiguous, and [courts] are constrained to follow it"). The Land Court cannot "add an additional requirement to the statute" because "it is the function of the judiciary to apply it, not amend it." *Comm'r of Revenue v. Cargill, Inc.*, 429 Mass. 79, 82, 706 N.E.2d 625 (1999). Since G. L. c. 60, § 64 is unconstitutional, it must be set aside.

II. Eminent Domain Statutes are not Applicable to Tax Foreclosure Proceedings as the Property is Not Taken for Public Purpose, but to Settle Tax Debt.

This Court cannot permit the Commonwealth to recharacterize this tax foreclosure as an eminent domain action in an attempt to circumvent their *Tyler* violation. Massachusetts's eminent domain statute is a distinct and separate action from the tax title foreclosure statutes. *See, e.g.*, *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 36 S. Ct. 58, 60 L. Ed. 266 (1915) ("[T]he power of taxation should not be confused with the power of eminent domain. Each is governed by

its own principles"). The statutory sources of authority are from completely separate provisions. *Compare* G. L. c. 60 ("Collection of Local Taxes" *with* G. L. c. 79 ("Eminent Domain"). This Court cannot graft the cuttings of one law onto another law and hope for a connotationally-sound result.

Fundamentally, eminent domain is for taking property for public use, not for satisfying tax debts. *See, e.g.*, *O'Malley v. Comm'r of Public Works*, 340 Mass. 542, 165 N.E.2d 113 (1960). In *O'Malley*, the Supreme Judicial Court examined the existence of a sewer easement, which Boston acquired by eminent domain, on a property which Boston later acquired by a tax title foreclosure sale. *O'Malley*, 340 Mass. at 543-44. The court observed that "[t]he city's acquisition and foreclosure of the tax title were only to collect unpaid taxes and not otherwise for any public purpose. . . . A method of disposing of such property acquired by eminent domain, different from that under St. 1943, c. 434, governing sales of tax title property . . . ." *Id.* at 546. Analyzing whether a deed conveying Boston's interest in the tax title and foreclosure extinguished the easement, the court stressed the distinction between a taking by eminent domain and a tax title foreclosure and concluded the easement was not lost because "[t]he sewer easements were acquired not by foreclosure but by eminent domain before the foreclosure." *Id.*

Applied to this case, *O'Malley*'s analysis illustrates an action under eminent domain is distinct from that under a tax title foreclosure in principle and functionality. Transforming this tax foreclosure proceeding into an eminent domain action would drastically rewrite and intermingle these statutes, invite complicated litigation, and disregard precedent categorizing eminent domain proceeding as distinct from tax title foreclosure. Of course, "[i]t is not [this Court's] function to rewrite a statute." *Com. v. Biagiotti*, 451 Mass. 599, 602-03, 888 N.E.2d 364 (2008).

Moreover, eminent domain's inapplicability to a tax title foreclosure is bolstered by the fact that courts do not *sua sponte* initiate eminent domain action. Rather, an action under eminent domain is brought by the city against the property owner. *See e.g.*, *Spadea v. Steward*, 350 Mass. 218, 220, 214 N.E.2d 72 (1966) ("On August 23, 1962, a petition was filed in the Land Court. On October 13, 1962, *the city council* commenced the necessary steps in furtherance of taking the

property by eminent domain under G. L. c. 79." (emphasis added)); *O'Malley*, 340 Mass. at 543-44 ("On February 16, 1935, *the city* acquired a tax title to the locus. . . . At some point in 1941 or 1942 . . . all rights to redeem from the tax title were foreclosed." (emphasis added)). Thus, it would be improper for a court to construe this case to be eminent domain. Applying eminent domain as a means to cure chapter 60's *Tyler* violation is not only improper, but also violates the Legislature's intent behind chapter 60.

The only way for the government to cure the *Tyler* violation is for the legislature to amend the law and statutorily provide an "opportunity for the taxpayer to recover the excess value" from the tax sale. *Tyler*, 598 U.S. at 644. But that will be a change to the *tax foreclosure system*, not the *eminent domain statutes*. In either event, this Court is not free to write the statute as it ought to be, only apply it as it is written.

Conclusion

The Massachusetts tax title foreclosure scheme violates the federal Constitution and cannot be enforced. Accordingly, the Court should deny the Town of Tyngsborough's request to issue a judgment requiring a chapter 60 sale of Defendant's property.

Respectfully submitted,

s/ Lindsey Carpenter

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Dated: November 30, 2023

CERTIFICATE OF SERVICE

I, Karen Pickett, hereby certify that on this 30th day of November, 2023, I served the foregoing by causing it to be delivered by eFileMA.com and first class mail to counsel for the Plaintiff, Ronald J. Berenson (rjberen@comcast.net) and Brian Hollander Kane (bk@jberensonlaw.com) to the Law Office of Ronald J. Berenson, 116 Pleasant St., Ste. 312, Easthampton, MA 01027-2785; and to counsel for Defendant Recco, Caroline M. Meade (cmeade@njc-ma.org) to Northeast Justice Center, 50 Island St., Ste. 203B, Lawrence, MA 01840; and to counsel for Defendant the Massachusetts Society for the Prevention of Cruelty to Animals, Stephen Williams Rider (Stephen.rider@swrpc.com) to Stephen W. Rider, PC, 350 Lincoln Place, Ste. 2400, Hingham, MA 02043. Signed under penalties of perjury.

Respectfully submitted,

s/ Karen A. Pickett

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