No. 22-237

IN THE

Supreme Court of the United States

SANDRA K. NIEVEEN,

Petitioner,

v.

TAX 106, a Nebraska general partnership, VINTAGE MANAGEMENT, LLC, a Nebraska limited liability company, RACHEL GARVER, Lancaster County Treasurer, in her official capacity, LANCASTER COUNTY, a political subdivision in the State of Nebraska, and DOUGLAS J. PETERSON, Attorney General of the State of Nebraska, in his official capacity,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nebraska

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

John Pagliaro, Staff Attorney
Counsel of Record
Daniel B. Winslow, President
New England Legal Foundation
333 Washington Street, Ste. 850
Boston, Massachusetts 02108
Telephone: (617) 695-3660
JPagliaro@newenglandlegal.org

October 13, 2022

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

As required by Supreme Court Rule 37.2(a), the New England Legal Foundation timely notified the parties of its intention to submit an amicus curiae brief in this case. *See* note 1 of attached brief. Respondents Lancaster County and the County Treasurer stated that they have "No objection," but the Petitioner and the other Respondents did not reply to the Rule 37 request for consent. Under Supreme Court Rule 37.2(b), NELF now respectfully moves this Court for leave to file the attached brief as amicus curiae.

Founded in Massachusetts in 1977, NELF is a nonprofit, nonpartisan, public-interest law firm. Its membership consists of corporations, law firms, and individuals who believe in NELF's mission of protecting constitutional rights of private property. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court on constitutional questions relating to property rights and the Takings Clause of the Fifth Amendment. Among the most recent of such cases are *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), and *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019).

As discussed in its brief, NELF believes that the Petition raises serious constitutional questions about the manner in which delinquent taxes are collected by some state and local governments. In particular, NELF believes that certain traditional property rights having deep historical roots in our heritage of English law are being slighted or read out of existence by lower courts. In its attached brief NELF cites some of the historical legal authorities

that confirm the existence of such traditional property rights.

Accordingly, NELF respectfully requests that this Court grant its motion to file the attached brief as amicus curiae.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

/s/ John Pagliaro

John Pagliaro, Staff Attorney
Counsel of Record
Daniel B. Winslow, President
New England Legal Foundation
333 Washington Street, Suite 850
Boston, Massachusetts 02108
Telephone: (617) 695-3660
JPagliaro@newenglandlegal.org

October 13, 2022

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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Historical Legal Authorities

Modern Legal Authorities

Other Authorities

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 by some state and local governments. As the Petition in this case and those in 22-160 and 22-166 illustrate, 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

---

[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.

Pursuant to Supreme Court Rule 37.2(a), on October 3, 2022, NELF gave timely 10 day notice to all counsel of record at the email addresses shown on the Petition's service list. In the same emails, NELF also requested consent to file this brief. Lancaster County and its Treasurer responded that they have "No objection." No other responses were received, and none of NELF's emails was returned as undeliverable.

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 and their role in assuring that when government exerts its sovereign power to secure payment of delinquent taxes, it does so in a fair and just manner.

NELF has therefore filed this brief to assist the Court in deciding whether to grant certiorari in this important property rights case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

By the late 18th century, two separate but not unrelated strains of English legal history established that a debtor possessed a legal interest in the surplus value of any real property seized to satisfy the debt. On the one hand, since Magna Carta, government had become limited in its power to seize and retain private property taken to pay delinquent taxes. If it took more than needed, it had to return the surplus as such or its equivalent in monetary form. On the other hand, the Chancery Court had established that when real property was used as security for a loan and then sold to pay the debt, the mortgagee creditor was accountable to the mortgagor for any surplus sale proceeds.

Also as a result of the decisions of English courts of equity, by the late 18th century it had been firmly established that owners of real property possessed an equity interest, or simply equity, in property used as security for money owed. The equity equaled the value of the property, less the money owed to the creditor. This property interest was considered in

every way an estate in the land, with all that that concept implied in English property law.

REASONS FOR GRANTING THE PETITION

This petition is one of several pending in this Court, all presenting substantially the same question. *See Fair v. Continental Resources*, No. 22-160, and *Tyler v. Hennepin County*, No. 22-166.

It is a question that has been simmering in courts nationwide in recent years. In *Tallage Lincoln, LLC v. Williams*, 485 Mass. 449 (2020), the Massachusetts Supreme Judicial Court acknowledged the question without having to decide it.[2] In the same year the Michigan Supreme Court ruled that government's retention of the surplus proceeds of a tax-foreclosure sale is unconstitutional, but that court circumspectly limited its ruling to that state's constitution. *Rafaeli v. Oakland County*, 505 Mich. 429 (2020). By contrast, in this case and another, the Supreme Court of Nebraska ruled that such dispossessed owners do not have any property interest in their equity. *Continental Resources v. Fair*, 311 Neb. 184 (2022); *Nieveen v. TAX 106*, 311 Neb. 574 (2022) (adopting ruling in *Fair*). *See also* Petition at 16.

In addition, as explained in the Petition in this case and those in *Tyler* and *Fair*, the elderly and infirm are disproportionately affected by the denial of their right to the value of their home equity, whether in the form of surplus sale proceeds or

---

[2] *See* Ralph D. Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274 (2018).

otherwise. *See*, e.g., John Rao, *The Other Foreclosure Crisis*, Nat'l Consumer Law Ctr. (July 2012);[3] AARP, *Stopping Home Equity "Theft" in Arizona*.[4]

This Court should grant certiorari in all three cases and vindicate the long-established property rights discussed in this brief.

I. A DEBTOR'S RIGHT TO SURPLUS PROCEEDS WAS WELL-ESTABLISHED IN ENGLISH LAW AT THE TIME THE CONSTITUTION WAS WRITTEN.

Much of the earlier history of English law was one of mitigating the harshness and unfairness of the common law and of the government's exercise of its sovereign powers.

The *fons and origo* of the latter aspect of that history is Magna Carta (1215). Virtually at point of sword, King John was induced by rebellious barons to restrain the exercise of royal power over the church's rights, over the barons themselves, and over the manner of collecting feudal payments owed to the Crown. The Crown had grown accustomed to seizing and retaining private property that was in excess of the value of the delinquent taxes. As recounted in the standard work on the subject, Magna Carta was intended to end this confiscatory abuse of power.

> When a Crown tenant died it was almost certain that arrears of scutages, incidents, or

[3] https://www.nclc.org/images/pdf/foreclosure_ mortgage/ tax_ issues/tax-lien-sales-report.pdf (last accessed Sept. 21, 2022).

[4] https://states.aarp.org/arizona/stopping-home-equity-theft-in-arizona (last accessed October 12, 2022).

> other exactions remained unpaid. The sheriff and bailiffs of the district, where deceased's estates lay, were in the habit of seizing everything they could find on his manors, under excuse of securing the interests of their royal master. They attached and sold chattels out of all proportion to the sum actually due. A surplus would often remain in the sheriff's hands, which he refused to disgorge.
>
> Magna Carta sought to make such irregularities impossible, by defining the procedure to be followed. The officers of the law were allowed to attach only as many chattels as might reasonably be expected to satisfy the debt due to the exchequer; and everything so taken must be carefully inventoried. All this was to be done "at the sight of lawful men," respectable, if humble, neighbours specially summoned for that purpose, whose function it was to form a check on the actions of the sheriff's officers, to prevent them from appropriating anything not included in the inventory, to assist in valuing each article and to see that no more chattels were distrained than necessary.

William Sharp McKechnie, *Magna Carta* 322-23 (2d ed. 1914).

The abuse of sovereign power was not so easily restrained, however. As McKechnie observes, "[e]ven when the Crown's bailiffs obeyed Magna Carta, they might still inflict terrible hardship upon debtors. Sometimes they seized goods valuable out of all proportion to the debt; and an Act of 1266 forbade

this practice when the disproportion was 'outrageous.'" *Id*. at 223.

By the 18th century the principle of retaining only what is owed in taxes had made its way into Blackstone as a foundational principle of English law and as a curb on the sovereign's taxing power.

> And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainors, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale: or, when sold, to render back the overplus.

2 Blackstone, Commentaries *452.[5]

Blackstone was later echoed in the former English colonies by Thomas Cooley in 1876:

> It has been said that in the absence of any statute limiting the officer's right to sell, to so much as would be requisite to pay the tax and charges, a restriction to this extent would be intended by the law. Whether this is so or not is perhaps not very material, as it is not for a moment to be supposed that any statute would be adopted without this or some equivalent provision for the owner's benefit. And such a provision must be strictly obeyed. A sale of the whole when less would pay the tax is void, and a sale of the remainder after the tax had been satisfied by

[5] The spelling, etc. of older legal authorities cited in this brief has been slightly modernized in a few places for the sake of readability.

> the sale of a part would also be void, for the very plain reason that the power to sell would be exhausted the moment the tax was collected.

A Treatise on the Law of Taxation 343-44 (Chicago 1876).

As relevant here, simultaneously a separate body of law developed to deal specifically with surplus proceeds obtained from the sale of real property used as security for the payment of money. Significantly, it arrived at the same legal principle: the creditor may retain only what the debtor owes.

The principle emerged out of the courts of equity. By the later half of the 15th century a mortgage was understood to convey fee simple to the mortgagee, and the fee would not be reconveyed to the mortgagor unless the debt was paid by a fixed date. 5 W.S. Holdsworth, *A History of English Law* 330 (3rd ed. 1945). The common law regulated the conditions of repayment with a strictness and harshness that opened the way to many injustices. *Id*. at 293, 330-31. *See also* Restatement (Third) of Property (Mortgages) §3.1 cmt. a (Am. Law Inst. 1997). The result was that, as a 1785 treatise remarked disapprovingly, "an estate of great value might be forfeited for a trifling consideration." John Joseph Powell, *A Treatise upon the Law of Mortgages* 10 (London 1785).

Because "[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, courts of equity intervened to mitigate the common law and forestall such wrongs. "[O]therwise, in strictness of law, an estate worth 1000£ might be forfeited for non-payment of 100£ or

a less sum[.]" "Equity of Redemption," Thomas Walter Williams, *A Compendious and Comprehensive Law Dictionary* [unpaginated] (London 1816).

These courts treated the mortgagee as, in equity, holding his estate in land merely as security for a loan, while the mortgagor was regarded as, in equity, the real owner. Powell, *supra*, at 11-12; 5 Holdsworth, *supra*, at 331; 6 W.S. Holdsworth, *A History of English Law* 663 (1924). As one treatise observed in 1785:

> [E]ven at law, the debt was considered as the principal and the land only the accident. Equity went farther, and in all cases said that, when the debt appeared to be satisfied, there arose a trust by operation of law for the benefit of the mortgagor.
>
> ….
>
> [W]henever the debt was discharged, the interest of the mortgagee in the land determined [i.e., terminated] of course, and he became in equity, as to any estate therein remaining in him, a trustee only for the mortgagor.

Powell, *supra*, at 49, 12. So, too, we find in a 1737 treatise:

> [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). *Accord* 2 John Fonblanque, *A Treatise of Equity* 256 (London 1812). *See* 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").

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.

A modern expression of these foundational principles of justice and fairness may be found in the Restatement, *supra*, §7.4 cmt. a: "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[.]" As the Restatement goes on to say, "[i]f 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.

Hence, the development of the law of real property itself strongly reinforces the curb placed by Magna Carta and by subsequent law on government's methods of collecting delinquent taxes by seizure of excess real property.

Unhappily, when government collects overdue taxes today, an unjust disproportion between what is owed and what is taken remains a serious constitutional problem in many jurisdictions, *see*,

e.g., Petition at 28-29 and the petitions in 22-160 and 22-166, and only this Court can reassert the constitutional norms that protect traditional private property rights nationwide.

II. TAXPAYERS HAVE A COMPENSABLE PROPERTY INTEREST IN THEIR EQUITY EVEN WHEN THERE IS NO SALE.

Taxpayers own more than a right to surplus proceeds of a sale of their real property, however; they own an underlying equity interest in the property too, as measured by the value of the property less the debt, fees, penalties, etc. They should be compensated for the loss of it if it is retained by the taxing authority and not sold. Too often lower courts fail to recognize that this interest is compensable or even that it exists. *See Rafaeli,* 952 N.W.2d at 466-487 (Viviano, J. concurring); Celene Chen, Note, *Homeowners' Rights: How Courts Can Prevent States from Stealing Home Equity During Property Tax Foreclosure*, 41 Rev. Banking & Fin. L. 385 (Fall 2021).

Recognition of equity as an estate of property emerged from Chancery. We have seen how protective courts of equity were to the mortgagor's rights. *Supra* pp.7-9. They were especially protective of the mortgagor's right to redeem the property by paying off the debt, even when to do so would have been tardy under the terms of the mortgage. From this so-called equity of redemption there developed over time a recognition of the underlying ownership interest the mortgagor enjoyed in the property apart from the mortgage. In effect, Chancery "ma[d]e the mortgagor's equity to redeem a right of property," 6 Holdsworth, *supra,* at 663, and from this developed the notion that what

we now call simply "the equity" is a distinct property interest.

> 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 Fonblanque, *supra*, at 257 n.(d). *See also* 1 George Spence, *The Equitable Jurisdiction of the Court of Chancery* 604 (London 1846) ("the equity of redemption is treated as an *estate in the land* and as having all the qualities and incidents of real estate") (original emphasis).

The Restatement summarizes this highly significant development in property law as follows:

> However, by the end of the 17th century, the mortgagor routinely was permitted, as a matter of right, to redeem the land by payment of the mortgage debt . . . within a reasonable time after the law day. The foregoing right to "pay late" became known as the mortgagor's equity of redemption or, less frequently, the equity of tardy redemption. Eventually, this concept evolved from simply a late payment rule to connote, in addition, the mortgagor's ownership interest in the land prior to the satisfaction of the mortgage [i.e., ownership of the value of the land minus the debt]. The term "equity" became and is today the pervasively used term to describe this interest.

Supra, §3.1 cmt. a. *See also* C. Cavanagh, *Law of Money Securities* 130 (London 1879) ("This equity of

redemption is not a mere right to re-acquire what has been forfeited, but is an actual estate in the land, subject to the rules and incidents which govern the devolution of other freehold estates[.]").

In the case of *Coleman v. Wince*, 24 E.R. 229 (7 Feb. 1718), the court said the following:

> So if a man possessed of a term for a term of years, mortgages it, and dies indebted to the mortgagee in a bond debt, if the executor brings a bill to redeem, he must pay both, because the equity of redemption of the term is assets in his hands; but if he alien the equity of redemption of this term, . . . he shall be answerable for its value[.]

Thomas Finch, *Precedents in Chancery* 511 (1786). *See Fosset v. Austin*, 24 E.R. 20 (B) (1 Jan. 1691), in Fitch, *supra*, at 39. *See also* 1 Giles Jacob, *The Law-Dictionary* [unpaginated] (London 1797) (defining "Assets" as "Real, or, Personal" and used to satisfy "Debts," and including as assets "Equity of redemption of an estate mortgaged"); 2 John Comyns, *A Digest of the Laws of England* 364 (4th ed. London 1793) ("the equity of redemption is equitable assets, and liable to all the debts equally") (1793).

It is this equity property interest that lower courts, such as the Nebraska Supreme Court here, fail to recognize. This case therefore, together with those in 22-160 and 22-166, is an ideal vehicle for resolving these property rights issues and clarifying takings law. The Court should now put to rest the important constitutional questions raised by taxpayer claims to surplus sales proceeds and the underlying equity they have in their property. As Chancellor Kent once wrote, "Severity towards fair,

but unfortunate debtors, is no part of the character or disposition of our countrymen." 2 James Kent, *Commentaries on American Law* 326-7 (New York 1827).

CONCLUSION

For the reasons given above, this Court should grant the Petition for Certiorari.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

/s/ *John Pagliaro*

John Pagliaro, Staff Attorney
Counsel of Record
Daniel B. Winslow, President
New England Legal Foundation
333 Washington Street, Suite 850
Boston, Massachusetts 02108
Telephone: (617) 695-3660
JPagliaro@newenglandlegal.org

Dated: October 13, 2022