No. 22-166

In The

Supreme Court of the United States

GERALDINE TYLER,

Petitioner,

v.

HENNEPIN COUNTY, MINNESOTA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF PROFESSOR JAMES J. KELLY, JR. IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

James J. Kelly, Jr. is a Clinical Professor of Law and the founding Director of the Notre Dame Community Development Clinic at Notre Dame Law School. Professor Kelly teaches, researches, and practices community development law, with a focus on land use and the community control of land in urban neighborhoods. For nearly thirty years, Professor Kelly has represented urban residents, nonprofits, and small businesses in a wide range of real estate, corporate, and tax matters. After ten years of full-time practice, he directed the Community Development Clinic for seven years at the University of Baltimore School of Law and, in Spring 2011, taught Property at Washington & Lee School of Law.

Since July 2011, Professor Kelly has led and taught the Community Development Clinic, as well as Real Estate Transactions and Land Use Planning. He has written more than a dozen works on eminent domain, community land trusts, land banks, code enforcement, and tax foreclosure. He is the author of Drafting Organizational Documents (West 2018), co-author of Legal Responses to Vacant Houses: An International Comparison (Springer 2020), and co-editor of the forthcoming sixth edition of Real Estate Transactions: Problems, Cases, and Materials (Aspen 2023).

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party, other than *amicus* and his counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT

Petitioner Geraldine Tyler forfeited her property through a properly noticed process in which statutes clearly defined the time limits on her ability to redeem. Minnesota's approach to delinquent tax collection forced transfer of title, but not a payout to her of any "surplus," i.e., proceeds that exceeded her tax debt. She claims this process was a taking of her surplus and demands compensation measured by the difference between the fair market value of her property and the tax debt. Petitioner and some *amici* claim that difference is not only the measure of compensation but also a property right that Hennepin County ("County") took from her. Although they concede her right to redeem is gone and lawfully so, they insist her "equity of redemption" continues in her entitlement to this mathematical difference, which they call her "equity."

Petitioner and her *amicus*, the New England Legal Foundation ("NELF"), argue that a tax debtor has a separate, distinct property right in her equity. They assert, but do not show, that the equity of redemption's supposed historical identification with penalty clause jurisprudence created a property right in the surplus at common law. And they claim the Minnesota Legislature could not abrogate this entitlement by its 1935 "strict foreclosure" approach to property tax collection, at least not without providing compensation to taxpayers for surplus. In their view, the constitutional protections afforded to even the smallest surplus require that every debt collection action by a government agency

collecting taxes guarantee return of the surplus in full to the former property owner.

SUMMARY OF ARGUMENT

Amicus offers two responses to Petitioner's and NELF's selective historical account of the equity of redemption and of foreclosure by sale, as well as their improper use of the word "equity" to refer to English and early American understandings of surplus.

First, the equity of redemption is a time-limited right that protects mortgagees against immediate forfeiture. Critically, this right preserves the *totality* of the owner's rights in the property. It does not carve out surplus for special treatment as a unique and separate property interest.

Second, the County is not Petitioner's mortgagee and so is not constrained by the Takings Clause to treat Petitioner as if she were a mortgagor. Rather, the County may take into account that Minnesota law regarding land contract purchasers does not offer any surplus protection to an equitable owner when a property is taken by eminent domain or when a defaulting purchaser fails to redeem after receiving notice of cancellation. Minnesota law regarding protection of surpluses for equitable owners does not create any owner property right in a surplus that warrants special protection from the Takings Clause.

ARGUMENT

I. Surplus is distinct from the equity of redemption, and it is not a unique property interest protected by the Takings Clause.

Petitioner and NELF incorrectly argue surplus is a unique "property" interest by treating surplus as identical to "equity of redemption." NELF Br. 13; Pet'r Br. 9-10. This surplus is not identical to the equity of redemption, which is the mortgagor's time-limited right to avoid immediate loss of *all* property rights on default.

Petitioner and NELF rely on this improper conflation of "equity" and "equity of redemption" to hide the weakness of their historical contention that protection of surplus alone prompted courts to implement the equity of redemption. They claim the equitable title that results when the equity of redemption is severed from legal title is the same as surplus. But that is mistaken. The equity of redemption, while it lasts, protects *every* right of the mortgagor, not just surplus. And the historical record refutes the claim that single-minded concern for surplus prompted courts to banish "strict foreclosure." Once Petitioner and NELF are deprived of any jurisprudential justification for the 20th century use of the word "equity" to refer to the owner's surplus, the authority they cite for the owner's surplus as a magic stick in the owner's bundle of rights actually supports the traditional Takings Clause protection of the whole of an owner's rights in real property. Indeed, the only precedent Petitioner cites as using "equity" to refer to surplus rejects that definition. That case,

Commissioner v. Crane, 331 U.S. 1 (1947), holds that a mortgagor's "property" is the totality of that owner's rights, not merely the surplus.

A. The historical development of the equity of redemption supports traditional Takings Clause protection for the totality of an owner's rights, not the introduction of a new and unique protection for surplus after failure to redeem.

Petitioner and NELF misstate the historical record in two critical ways. First, they gloss over the fact that the equity of redemption developed to protect the *totality* of the mortgagor's rights, not merely to save surplus. Second, they wrongly suggest both that courts "banned" strict foreclosure and that they did so solely to protect surplus. Both assertions are wrong. Indeed, the move from "strict foreclosure" to foreclosure by sale was not a judicial doubling-down on protection of surplus. Rather, it resulted from attempts by mortgagees' lawyers to move past a foreclosure system that refused to cut off the equity of redemption, even when no surplus existed.

1. The equity of redemption protects the totality of a mortgagor's ownership rights, not a separate right to surplus.

It is true courts originally developed the equity of redemption to avoid penalties for breach of contract

and forfeiture of rights in land. NELF Br. 6. But Petitioner and NELF improperly focus their account on protection of surplus. In reality, both historically and now, the equity of redemption protects the *totality* of a mortgagor's ownership rights. It has never depended on existence of surplus.

An owner maintains the equity of redemption even when the amount required for redemption exceeds either the owner's surplus accounting for all liens, the value of the property, or both. F.W. Maitland, *Equity: A Course of Lectures* 185 (A.H. Chaytor & W.J. Whittaker eds. 1936). While courts' hesitancy about penalizing debtors for breach played a significant role in the rise of redemption in equity, the foundational principle behind the equity of redemption is that failure to satisfy a secured obligation on the pre-arranged due date is not fatal to the debtor's ability to maintain or reclaim indefinite possession of the secured property. George E. Osborne, Handbook on the Law of Mortgages 14 (2d ed. 1970). This rule did not originate in 17th century England but instead has its roots in Roman law. *Id*. The Chancery Courts of the early 17th century in England stepped in to implement this principle when common law courts enforced strict foreclosure remedies freely assented to by the parties. *Id*.

Critically, an owner's ability to preserve her net investment in property was never the only justification for holding the mortgagee at bay. Historically, the equity of redemption was (and remains) available to owners with or without a surplus. In English courts, even when a foreclosure of the equity of redemption had

occurred, it was subject to reopening, but not only where the debt was far less than the value of the secured property. As described by Maitland:

> If the mortgaged property was far more valuable than the mortgage debt, if it had for the mortgagor a *pretium affectionis* being an old family estate, if the mortgagor was prevented from redeeming by some accident, if he has come speedily—these all are circumstances in favour of permitting him to redeem, though an absolute order for foreclosure has been made against him.

Maitland, *supra*, at 185; *accord* D.P. Waddilove, *Why the Equity of Redemption?*, *in* Land and Credit: Mortgages in the Medieval and Early Modern European Countryside 12-13 (Chris Briggs & Jaco Zuiderdujin eds. 2018). At no point after the rise of the equity of redemption has it been regularly denied to mortgagors whose outstanding debt exceeded the value of their mortgaged property.

Today's statutes and common law governing foreclosure and the equity of redemption are clear that the presence or lack of a surplus is irrelevant to the protection afforded to every mortgagor against immediate forfeiture upon default. *See generally* Grant S. Nelson & Dale A. Whitman, 1 Real Estate Finance Law § 7.1 (6th ed.).

As with other equitable relief, the equity of redemption recognized interests in property (such as sentimental or family interests) that no amount of

money could replace. The right of redemption then and now was not denied to a delinquent mortgagor ready, willing, and able to cure the delinquency merely because the amount of the debt was higher than the value of the mortgaged property.

2. Courts did not ban "strict foreclosure" to protect surplus—it was abandoned by creditors' lawyers seeking clear titles and deficiency judgments.

In *Hall v. Meisner*, the Sixth Circuit based its Takings Clause analysis on a supposed longstanding judicial rejection of "strict foreclosure" inspired solely by protection of surplus. 51 F.4th 185, 192-93 (2022). NELF, while acknowledging that a mortgagee's "power of sale over the estate" was created by "the mortgage agreement," NELF Br. 16 (quotation omitted), nevertheless claims the surplus is a unique property right that emerged out of courts' abhorrence of "strict foreclosure," *id.* 13-16. As set forth below, that is not a correct reading of the historical record.

Strict foreclosure in England (where it is simply called "foreclosure") was not an appealing remedy for mortgagees. Sheldon Tefft, *The Myth of Strict Foreclosure*, 4 Univ. Chi. L. Rev. 575, 577 (1937). Foreclosure was a slow and costly process. *Id.* Moreover, as illustrated by the quote *supra* from Maitland, seemingly concluded foreclosure proceedings were often reopened by the same courts of equity that issued the

foreclosures. Maitland, *supra*, at 185. Only when lawyers for mortgagees began inserting sale remedy language into mortgages and asking for courts to proceed by this alternate path did titles begin to benefit from the finality of foreclosure. Tefft, *supra*, at 579-80. With some reluctance, courts in England began to allow sale, along with division of proceeds between mortgagor and mortgagee, as an alternative to the unattainable remedy of absolute title and final forfeiture by the mortgagor. 2 Jones on Mortgages § 1765 (1882) (discussing *Croft v. Powell*, 2 Comyn, 603 (1738)); *Robert v. Bozon*, 3 Law J. Ch. 113 (Feb. 1825); Robert H. Skilton, *Developments in Mortgage Law and Practice*, 17 Temp. U. L. Q. 315, 323 (1943) (citing a manuscript opinion in *Robert v. Bozan*, 3 Law J. Ch. 113 (Feb. 1825)).

Although foreclosure decrees in the United States were less likely to be reopened, the move to the sale remedy was no more an exclusively judicial initiative to protect owner surplus than it was in England. Tefft, *supra*, at 588-89. *Lansing v. Goelet*, 9 Cowen 346 (N.Y. 1827), illustrates mortgagees' preference for the foreclosure sale remedy over the strict foreclosure remedy. In that dispute over the proper way to conduct a mortgage, it was the mortgagor, not the mortgagee, who unsuccessfully insisted that the only remedy available to the mortgagee was strict foreclosure. *Id.* Even though the *Lansing* court acknowledges the importance of a mortgagor not losing surplus, it is just as motivated by the inequity of forcing a mortgagee to forgo a personal remedy against the mortgagor for any deficiency. *Id.* Nothing about the *Lansing* court's preference for the

availability of both a surplus award for the mortgagor and a deficiency judgment for the mortgagee wrote into the common law principles defining the mortgagor's property rights an entitlement to a surplus award, especially an entitlement that the actual mortgagor in *Lansing* sought to reject.

In the United States, all 13 original colonies had strict foreclosure as the only form of foreclosure. Andra Ghent, *How Do Case Law and Statutes Differ? Lessons from the Evolution of Mortgage Law*, 57 J. L. & Econ. 1085, 1094 (2014). Soon thereafter, courts and legislators moved to improve the remedies of secured creditors and the protections for mortgagors. Skilton, *supra*, at 318. By 1830, most states outside New England had a sale remedy available for foreclosure that provided the finality that mortgagees desperately wanted. *Id*. This flurry of activity resulted in statutes that structured judicially supervised auctions and others that eliminated strict foreclosure or limited its use to prevent loss of surplus. *Id*.

Even today, most states allow strict foreclosure primarily to remedy foreclosures by sale that failed to produce clear title because of defective notice to junior lienholders. Nelson & Whitman, *supra*, § 7.10 at 599-600. In these cases, the junior lienholder is notified and given a limited right to redeem by repaying the outstanding debt. But if there is no redemption, the foreclosure is strict, that is, there is no opportunity to reallocate already disbursed sale proceeds. On the whole, the theory that the common law—whether in 1791 at the time of the ratification of the Bill of Rights

or in 1858 at the time Minnesota was admitted as a state—uniformly prohibited foreclosure processes that did not give full value for defendant surplus does not hold up under scrutiny.

B. With a proper understanding of the equity of redemption's relationship with surplus, the authorities cited by Petitioner and NELF establish that the totality of an owner's rights, not surplus, is the protected property interest.

Both Petitioner and NELF improperly conflate "equity," as that term is used to denote surplus, with the equity of redemption. Petitioner quotes a 2019 version of Black's Law Dictionary as defining "equity" as "ownership in property" and "amount by which the value of or an interest in property exceed secured claims or liens," but she fails to clarify those are separate definitions of "equity." Pet'r Br. at 10. The supposed connection between these two definitions is no more apparent than that of either one to the meaning of "equity" in Black's Law Dictionary that Petitioner ignores: "1. Fairness. . . ." Black's Law Dictionary (11th ed. 2019). Nevertheless, Petitioner immediately follows with the conclusion: "Equity [surplus] bears all the hallmarks of a property interest." Pet'r Br. at 10.

NELF heavily relies on this improper conflation. *See* NELF Br. 13. NELF argues, for example:

> With Lord Hardwicke's answer [to the question of the nature of the equity of redemption],

> 'equity of redemption' was recognized explicitly not only as the right to redeem the land in equity, but also as itself as an estate in the land, i.e., what we now call 'home equity' or simply 'the equity.'

Id. (quoting 6 Holdsworth, W.S., *A History of English Law* 663 (1924)). Although the "i.e." clause follows the phrase "estate in land," it clearly relates to the phrase "equity of redemption," which Lord Hardwicke recognized as a transferable property interest. What Lord Hardwicke did not do, however, was recognize the surplus as an independent property interest; nor did he recognize "equity of redemption" as a synonym for surplus. *Casburne v. Scarfe*, 37 Eng. Rep. 600 (1738).

Prior to the late 1800s, "equity" meant "fairness" (so the equity of redemption referred to fairness rights associated with redemption) and did not refer to financial value. According to the 1993 draft additions to the Oxford English Dictionary online, The Century Dictionary, published in 1889, documents an early change in usage: "**Equity of redemption**. (a) The right of a mortgagor or a pledger by absolute deed to redeem the property by paying the debt, even after forfeiture, . . . (b) In conveyancing, in the United States, the ownership of or title to real property which is subject to a mortgage: sometimes simply called *equity*." The Century Dictionary: An Encyclopedic Lexicon of the English Language 1987 (1889). The first meaning of "equity of redemption" is in the juridical sense, and it refers only to the particular time-limited entitlement of the owner to preserve her relationship with the land.

The second meaning refers to the ownership itself, at least when that ownership is subject to a secured obligation. Only this second meaning is referred to as "equity."

The Oxford English Dictionary's first example of "equity" unmoored from its roots in fairness dates to 1904 in Political Science Quarterly: "the equity in the company is worth little." *Equity*, OED.com, https://www.oed.com/view/Entry/63838?redirectedFrom=equity#eid (last visited Mar. 29, 2023). Here, "equity" refers not to legal protection or redemption rights but to ownership, albeit in the corporate context.

The next OED reference dates from 1928, a quarter century later. It reads: "received only 21.8 per cent. of the equity—that is the balance of profits remaining after the fixed dividends have been paid on the Preferred capital." *Id.* The author, likely aware "equity" could mean ownership interest or financial value of ownership interest, clarifies that the latter is closer to what is intended, marking it as an innovative usage at that time. Finally, by 1947, some dictionaries defined "equity" as "the value of a property . . . above the total of the liens. . . ." *Crane*, 331 U.S. at 6-7 (quoting unabridged second edition of Webster's New International Dictionary, Funk & Wagnalls' New Standard Dictionary, and Oxford English Dictionary).

Thus, the phrase "equity of redemption" refers only to the specific protection of ownership by fundamental principles of fairness. Later, shortened to "equity," the term took on distinct and different meanings,

denoting first the ownership itself and then the net financial worth of that ownership.

Petitioner and NELF do not explore this evolution of the meaning of "equity" and instead conflate "equity" and equitable title, and ask the Court to embed it into constitutional law. From the 17th through 19th centuries, when courts and lawyers used a term to identify the difference between the value of a collateral and the outstanding debt, they used the term "mortgagor's surplus," not "mortgagor's equity." *See generally Equity*, Black's Law Dictionary (2d ed. 1910). It was only in the 20th century that "equity" came to denote the separate and different concepts of "fairness" (as in equity of redemption) and surplus. *Cf. Equity*, Black's Law Dictionary (4th ed. 1951).

Petitioner cites *Crane* for its acknowledgment that, as of 1947, the word "equity" was defined in Webster's International Dictionary as "an owner's financial interest in the property after deducting encumbering liens." Pet'r Br. 10 (citing *Crane*, 331 U.S. at 7). But Petitioner neglects to mention that the Court rejected that understanding of "equity" as the definition of mortgagor's "property" applicable under federal tax law. *Crane*, 331 U.S. at 7. The Court noted that "property" as used in the Internal Revenue Code referred to "the two [dictionary definitions of 'property'] favored by the Commissioner, *i. e.* , either that 'property' is the physical thing which is a subject of ownership, or that it is the aggregate of the owner's rights to control and dispose of that thing." *Id.* at 6. Just as the Court already declared in *Crane*, the Court should reaffirm the

principle that the basis of analysis for takings purposes in this case is the whole of the owner's rights in the property.

II. Regardless whether equity of redemption constrains government mortgagees, it does not constrain Minnesota from determining the processes for and consequences of property tax collection.

The historical status of the equity of redemption as a property right and its protection of the totality of the mortgagor's rights may be relevant to takings constraints on a governmental agency when it chooses to become a mortgagee. This case, however, does not involve a governmental mortgagee. Government agencies bound to collect taxes should not be lumped in with public entities voluntarily entering into business relationships with private citizens. Federal law respects the fact the Minnesota elected representatives decide whether to tax, what to tax, and how to collect unpaid taxes. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 (1981).

The Court should not focus its inquiry on the private mortgage context when assessing if and how an owner's historic protections against immediate forfeiture upon default and unfair penalties constrain the Minnesota Legislature's authority to structure tax collection proceedings. Rather, the Court should also look to Minnesota law on eminent domain taking of equitable interests and the cancellation of land sale

contracts. This complete picture of Minnesota law will help the Court evaluate the effect of the Takings Clause on Minnesota tax collection procedures. The result of such an examination is clear: nothing in the broader historical understandings of equitable title that underlies Minnesota law constrains the Minnesota Legislature from adopting its well-considered, balanced approach to property tax enforcement.

A. Equitable title is not property for eminent domain purposes in Minnesota.

Under Minnesota eminent domain law, the holder of the fee interest is the only owner of the taken property for purposes of awarding compensation; both lienholders and equitable title holders find their claims transferred to the award proceeds. Minn. Stat. § 117.187 (2022) (defining "owner" as "the person or entity that holds fee title to the property").

In Minnesota eminent domain proceedings, equitable title pursuant to contract for deed not only cannot assure full compensation from the taking authority of the equitable owner's surplus but also fails to qualify as a property right that is cognizable in condemnation proceedings. *City of Cloquet v. Crandall*, 824 N.W.2d 648, 652 (Minn. Ct. App. 2012) (citing Minn. Stat. § 117.187 (2008)). In *City of Cloquet*, the equitable title owners were weeks away from making their final payment on a years-long contract for deed when the eminent domain declaration was filed, leaving them with no ability to invoke the condemnation statute to

recover their net investment. *Id.* at 650. Not surprisingly, Petitioner and her *amici* make no mention of this obvious analogy, where the equitable title owners were less protected against loss of "equity" than Petitioner.

B. In Minnesota, outside the mortgage context, the equity of redemption does not protect a defaulting equitable owner's surplus.

Even though NELF fails to show that protection of surplus is the sole defining feature of the equity of redemption, it does acknowledge, at least in the context of legal mortgages, the existence of dual protections against property forfeiture and unfair penalties. NELF Br. 4-8. Outside the mortgage context, however, the law often holds parties to the bargain they made, even when that bargain can be enforced through equitable relief and thus produces equitable title. In Minnesota, a defaulting land contract purchaser is entitled to a redemption period set by statute, but there is no protection for the purchaser's surplus in the property. *See Olson v. N. Pac. R.R. Co.*, 148 N.W. 67, 69 (Minn. 1914); Minn. Stat. § 559.21 (2022); 25 Minn. Prac., Real Estate Law §§ 6:17, 6:21 (2022-2023 ed.). Over its entire 165-year history as a state, Minnesota has recognized the equitable estate that contract purchasers have when those contracts are specifically enforceable and, at the same time, denied a defaulting contract purchaser protection against the seller retaining payments made by the purchaser far in excess of any damage caused by the purchaser's default. *Id*.

Mortgagors have equitable title, even in title theory jurisdictions, but contract purchasers with resort to injunctive relief also have equitable title. Real Estate Law, *supra*, § 6:5 ("The seller's interest is the functional equivalent of the mortgagee's interest."). Doctrines related to mortgage law and central to the understanding of the strength of equitable title as a protected property interest complicate the picture. Just as it was with mortgage law prior to the early 17th century, courts' commitment to implement contractual conditions conflicted with principles disfavoring penalties and forfeiture.

Even today, however, a defaulting contract purchaser with equitable title who fails to redeem will be subjected to forfeiture of all monies paid over or in addition to loss of the property. *Olson*, 148 N.W. at 69; Minn. Stat. § 559.21; *see* Real Estate Law, *supra*, §§ 6:17, 6:21. Although strict foreclosure is rarely used to enforce legal mortgages, Minnesota has allowed (first by common law and now by statute) vendor cancellation of a contract for deed in which the purchaser has defaulted. Real Estate Law, *supra*, § 6:21. Furthermore, after cancellation, the purchaser has no right to recover amounts paid over to the vendor, no matter how large the payments made nor how small the actual damages incurred by the vendor due to the breach. *See Miller v. Snedeker*, 101 N.W.2d 213, 224 (Minn. 1960); *West v. Walker*, 231 N.W. 826, 827 (Minn. 1930); *Olson*, 148 N.W. at 69. A related body of law stretching back to the 19th century expresses the reluctance of courts to hold non-breaching parties liable to breaching

parties for the value of partial performance and continues to safeguard the freedom of sophisticated parties to include large nonrefundable deposits in real estate contracts today. *Uzan v. 845 UN Ltd. P'ship*, 778 N.Y.S.2d 171, 175 (N.Y. App. Div. 2004) (citing *Lawrence v. Miller*, 86 N.Y. 131, 140 (1881)).

Minnesota law also provides for post-default redemption to protect the ownership rights of contract purchasers. Both at common law and later by statute, equitable owners who fail to redeem within the period set by statute have no entitlement to reclaim their payments made nor to redeem years later as the mortgagors of old did. Thus, in Minnesota, the equity of redemption is, and always has been, compatible with a total loss of surplus.

Although foreclosure on the equity of redemption protects the surpluses of defaulting mortgagors, no such protection is afforded in Minnesota to surpluses of defaulting contract purchasers who fail to exercise their right of redemption. Since its admission as a state in 1858, Minnesota common law, like the English courts first grappling with mortgages, interpreted purchase contracts, even long-term ones, as written. *Olson*, 148 N.W. at 69. Then, as now in Minnesota, contract purchasers who had not waived specific performance remedies were equitable owners. *See*, *e.g.*, *Nichols v. L & O, Inc.*, 196 N.W.2d 465, 468 n.7 (Minn. 1972); *State ex rel. Blee v. City of Rochester*, 109 N.W.2d 44, 45 (Minn. 1961). Nevertheless, forfeitures were swift and did not involve return of payments to the would-be seller or even a showing by the seller that his

damages exceeded the value of his property. *See Olson*, 148 N.W. at 69; Minn. Stat. § 559.21; Real Estate Law, *supra*, § 6:21.

In 1897, the Minnesota Legislature sought to strengthen contract purchasers' hopes for housing stability by providing a clearly defined period of redemption. Real Estate Law, *supra*, § 6:17. The new statute did not confine this redemption opportunity to a contract purchaser who could show an investment in the property that would exceed any damages caused by his or her breach. *Id*. It was and is available to all contract purchasers, but the statute, like the common law it otherwise modified, did not and does not protect such a surplus from loss if the property is not redeemed within the statutory period. *Id*.

C. Subjecting tax collection in Minnesota to a requirement of repaying surplus in full would be a ruinous federal overreach.

Petitioner claims her surplus is calculated by subtracting the tax liability from the market value of the property. Leaving aside whether there are other, non-governmental liens on a property, it is not proper to use market value as the basis for takings analysis of a foreclosure action. Should the Court hold that, in all foreclosure actions in which the creditor is a public entity, the Takings Clause requires return of any difference between the market value of the property and the tax liability, the Court would constitutionally constrain tax collection proceedings far beyond those imposed to protect surplus in private foreclosures. Mortgage

foreclosure sales generally are not required to produce an auction price that is equivalent to fair market value of the property. Neither the foreclosure sale purchaser's title nor the mortgagee personally is subject to any claims for a lost surplus by the mortgagor in the event a properly noticed and conducted auction fails to yield a price substantially identical to the fair market value of the property. Courts have recognized that a distressed real estate auction is very unlikely to yield fair market value for an asset that by its nature calls for a purchase process that involves significant due diligence, diligent inquiries that are not possible for a purchaser buying at auction. *Polish Nat'l Alliance v. White Eagle Hall Co., Inc.*, 470 N.Y.S.2d 642, 648-49 (App. Div. 1983). If every governmental creditor is forced to be wary of the takings implications of even the smallest possible surplus, foreclosure by sale proceedings will be effectively unavailable for any property worth more than half of the outstanding tax liability.

Should Petitioner prevail on this point, upon remand, the court below would be compelled to grant takings relief even should the surplus established by the evidence turn out to be much smaller than her tax liability. Even without considering the implications for highly leveraged owners claiming takings of their "equity" by ordinary land use regulations, a ruling for Petitioner in this matter would flood the federal court system with § 1983 claims about tiny differences between debtors' tax liability and the alleged fair market values of forfeited or even auctioned property.

CONCLUSION

As demonstrated above and despite Petitioner's insistence to the contrary, the common law understanding of the equity of redemption does not elevate the mortgagor's surplus out of the bundle of sticks protected by the right to redeem. The Takings Clause protects the owner's rights in "the parcel as a whole," and nothing Petitioner has argued should lead the Court to abandon that principle. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944-45 (2017).

Minnesota law regarding protection of surpluses for equitable owners does not create any owner property right in a surplus that warrants special protection from the Takings Clause.

The Court should affirm the decision of the U.S. District Court for the District of Minnesota, as upheld by the Eighth Circuit.

Respectfully submitted,

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