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Supreme Court Clerk's Office
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P.O. Box 970
Trenton, NJ 08625-0970

RE: **257-261 20th Avenue Realty, LLC v. Alessandro Roberto, et al.**
Supreme Court Docket No. 088959
Appellate Docket No. A-3315-21
Lower Court Docket No. F-3349-21
Our File No. 60619-9

Dear Honorable Justices of the Supreme Court:

We represent Plaintiff/Petitioner 257-261 20th Avenue Realty, LLC ("Petitioner") in the above-captioned matter. Please accept this informal letter brief in reply to the supplemental submission of Defendant/Respondent Alessandro Roberto, which was filed on August 5, 2024.

I: RESPONDENT IGNORES THE PLAIN LANGUAGE OF THE STATUTORY AMENDMENT AND RELIES ON INAPPOSITE CASELAW THAT DOES NOT CONTROL.

Respondent suggests that, notwithstanding the Legislature's explicit expression that

P.L. 2024, c.39 "have no effect on any foreclosure action in which a final judgment has been entered prior to the effective date of this act," this Court is bound to apply the law to finalized cases by virtue of certain decisions of the United States Supreme Court. Respondent is mistaken.

Each and every case Respondent cites for this proposition involves a law – unlike the amendment here at issue – whose prospective or retrospective application was unclear. In Carpenter v. Wabash R. Co., 309 U.S. 23, 26 (1940), Congress passed an amendment to the Bankruptcy Act during the pendency of a creditor's appeal. The text of the amendment did not specify whether it would apply to pending matters, or only prospectively. Id. at 26. The Supreme Court, resorting to traditional common-law principles, determined that the amendment should be applied to pending matters, including those on appeal. Id. at 27-29. Both Linkletter v. Walker, 381 U.S. 618 (1965) and Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) resolved whether prior decisions of the Supreme Court – which were unclear as to their application – should be given prospective or retroactive effect. It is particularly puzzling that Respondent cites Linkletter for the proposition that a new law must be applied even to earlier-finalized cases. The holding in the case is just the opposite. There, the issue was whether the Court-made exclusionary rule of Mapp[1] "operates upon cases finally decided in the period prior to Mapp." Id. at 619-20. The Court answered that question in the negative, thus denying the petitioner

[1] 367 U.S. 643 (1961).

relief through collateral *habeas* review. Id. at 620.

Unlike any of the above cases cited by Respondent, the amendment here at issue unequivocally says that it shall not have an effect on any foreclosure action in which a final judgment was entered prior to its effective date. Well-worn canons of statutory interpretation counsel in favor of enforcing the plain language chosen by the Legislature. See, e.g, Savage v. Twp. of Neptune, 257 N.J. 204, 215 (2024) ("If the plain language of a statute is clear, our task is complete."). Even if this were not dispositive, the United States Supreme Court has explained that the federal Constitution has nothing to say about a State's decision as to prospective or retrospective application of a new State law, whether judge-made or statutory. In Great N.R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932), Justice Cardozo explained:

> We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . On the other hand, it may hold . . . that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. The alternative is the same whether the subject of the new decision is common law or statute.
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> [Id. at 354-65 (internal citations omitted).]

To the extent this Court intends to pass on the application of the amendment, the plain language should control. And in any event, prospective application accords with this Court's very recent pronouncement in Maia v. IEW Constr. Grp., 257 N.J. 330, 349

(2024): "New Jersey courts have long followed a general rule of statutory construction that *favors prospective application* of statutes." (Emphasis in original). The two-part test first asks whether the Legislature intended to give the statute retroactive application. Id. at 349. Because the answer is obvious given the plain statutory language, the inquiry is over.[2]

II: NEITHER OF THE FIRST TWO POINT HEADINGS IN THE PETITION ARE "RESOLVED" THROUGH PASSAGE OF THE AMENDMENT.

Respondent believes that the first two issues raised in the petition were "resolved" by the amendment. Again, Respondent is mistaken. Among other things, the decision under review constitutes precedent that distorts how takings claims must be analyzed. As already explained at length, the first step asks whether the property right exists in the first place. Because the opinion does not even address this issue, it is contrary to the method to analyze takings dictated by courts in New Jersey[3], as well as the Supreme Court of the

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[2] In a footnote, Respondent cites the recent unpublished bankruptcy case of Virella v. TLOA of NJ, LLC, which held that Tyler provides an avenue of relief for a debtor, notwithstanding that the entry of final judgment of tax foreclosure occurred pre-Tyler and was never appealed. The Virella decision is egregiously wrong and contrary to every other court to consider the issue, including: 1) the Appellate Division panel in this matter; 2) Lynette Johnson v. City of E. Orange, ESX-C-16-23 (N.J. Super. Ct. Ch. Div. Mar. 19, 2024), appeal pending under docket no. A-2486-23; 3) Stephanatos v. Wayne Twp., 2023 U.S. Dist. LEXIS 153086 (D.N.J. Aug. 30, 2023), including the denial of reconsideration, 2024 U.S. Dist. LEXIS 74470 (D.N.J. Apr. 24, 2024); 4) Mary Rose 22, LLC v. Block 270, Lot 14 et als., F-6378-22 (N.J. Super. Ct. Ch. Div. Nov. 15, 2023), appeal pending under docket no. A-1036-23; and 5) this Court, which denied the petition for certification in Ace Holding Partners, LLC v. Corr, 255 N.J. 489 (2023), which sought fully retroactive application of Tyler to a final judgment entered pre-Tyler.

[3] See, e.g., JWC Fitness, LLC v. Murphy, 469 N.J. Super. 414, 432 (App. Div. 2021) ("In the present case, plaintiff's takings claims fail for numerous reasons. First, and most

United States[4]. In the identical vein, the state actor test employed by the decision under review is contrary to established precedent. Manhattan Cmty. Access Corp. v. Halleck, 129 S. Ct. 1921, 1928 (2019); State v. Morrison, 227 N.J. 295, 315-18 (2016). If the decision is permitted to stand in its present form, anyone who obtains a property interest conveyed by a governmental entity becomes a state actor.

III: THE AMENDMENT IS CONSTITUTIONAL.

Respondent also believes that the amendment "neither resolves the due process infirmities recited in Tyler nor cures the TSL statutory framework held unconstitutional by the Appellate Division because it still allows confiscation of . . . equity[.]"

The constitutionality of the recent amendment is not before this Court. But even if it were, Respondent gets it wrong again. First, Tyler does not involve any "due process infirmities." It is a takings case, not a due process case. Second, the "opt-in" mechanism of the amendment is modeled off the tax foreclosure scheme deemed constitutional in Nelson v. City of N.Y., 352 U.S. 103 (1956). In fact, the amendment provides the property owner even more time to request a sheriff's sale than the law at issue in Nelson. We know that Nelson remains good law because: (1) it was favorably cited (and distinguished) in Tyler at 643-45; and (2) numerous federal Circuit Courts of Appeal, federal District

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fundamentally, plaintiff has not asserted a recognizable property right for purposes of a constitutional takings claim."), certif. denied, 251 N.J. 201 (2022).

[4] See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000 (1984) (indicating that the first step in a takings case is whether the claimant "ha[s] a property interest protected by the Fifth Amendment's Taking Clause[.]").

Courts, and State courts continue to treat it as good law post-Tyler. See Valancourt Books, LLC v. Garland, 82 F.4th 1222, 1235 (Ct. App. D.C. Cir. 2023); Clement v. U.S. Atty. Gen., 75 F.4th 1193, 1202 (11th Cir. 2023); Metro T. Props., LLC v. Cnty. of Wayne, 2024 U.S. Dist. LEXIS 26689 (E.D. Mich. 2024) (slip op. at *8); Hillsdale Cnty. Treasurer v. Carpter, 2023 Mich. App. LEXIS 9581 (Ct. App. Mich. 2024) (slip op. at *5); Biesenmeyer v. Mun. of Anchorage, 2024 U.S. Dist. LEXIS 63917 (D. Ak. March 13, 2024) (slip op. at *12-17); Ingham Cnty. Treasurer v. Andrews, 2024 Mich. App. LEXIS 4844 (Ct. App. Mich. 2024) (slip op. at *7-10); Osceola Cnty. Treasurer v. Frick, 2024 Mich. App. LEXIS 4824 (Ct. App. Mich. 2024) (slip op. at *9-10); Town of Tyngsborough v. Recco, 32 LCR 272, 274 (Mass. Land Ct. 2024); Mills v. City of Springfield, 2024 Mass. Super. LEXIS 51 (Sup. Ct. Mass. Apr. 18, 2024) (slip op. at *7-8, *12-13). Research does not reveal a single case construing the "opt-in" mechanism of Nelson – identically featured in the recent TSL amendment – as unconstitutional.

Respectfully yours,

KEITH A. BONCHI

ELLIOTT J. ALMANZA

KAB:EJA:amc