No Oral Argument Requested by Amicus

Court of Appeals No. APL-2022-00032
Appellate Division, Third Department Docket No. 531787
Saratoga County Clerk's Index No. 2019-3177

COURT OF APPEALS
OF THE STATE OF NEW YORK

JAMES B. NUTTER & COMPANY,

Plaintiff-Appellant,

-against-

COUNTY OF SARATOGA and STEPHEN M. DORSEY,
in his capacity as Tax Enforcement Officer of the County of Saratoga,

Defendants-Respondents.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT JAMES B. NUTTER & CO. AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), *amicus curiae* hereby discloses that it does not have any corporate parents, subsidiaries or affiliates. Pursuant to Rule 500.23(a)(4), *amicus curiae* states that no party nor party's counsel participated in preparation of or contributed funds for the brief, and that no person or entity aside from *amicus curiae* contributed funds for the brief.

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PRELIMINARY STATEMENT

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellant James B. Nutter & Co., and supporting reversal.

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded nearly 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property and the corollary right to obtain just compensation when government infringes that right. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Knick v. Twp. of Scott, Pa.*, 139 S.Ct. 2162 (2019); *Koontz v. St. Johns River Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

PLF attorneys have extensive experience with the questions at issue in this case through their representation of owners of tax-delinquent property lost to foreclosure. *See, e.g.*, *Fair v. Continental Resources, Inc.*, Supreme Court No. 22-160 (petition for writ of certiorari filed Aug. 18, 2022); *Tyler v. Hennepin County*, Supreme Court No. 22-166 (petition for writ of certiorari filed Aug. 19, 2022); *Nieveen v. TAX 106*, Supreme Court No. 22-237 (petition for writ of certiorari filed

Sept. 8, 2022); *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434 (Mich. 2020) (holding county effected unconstitutional taking when it took absolute title to properties without any compensation for property's extra value, which was later realized in county's sale of the property); *Hall v. Meisner*, No. 21-1700 (pending 6th Cir.) (arguing tax foreclosure violated procedural due process); *Mucciaccio v. Town of Easton, Mass.*, No. 2173cv00004B (Mass. Super. Ct. Mar. 8, 2021) (filed and dismissed in 2021 upon favorable outcome); *Johnson v. City of East Orange*, N.J. Super. No. LCV20212798775 (complaint filed Dec. 1, 2021, alleging taking when city took $80,000 surplus equity in commercial property after a tax foreclosure).

PLF frequently participates as amicus curiae in cases where courts must address claims asserting the property rights of individuals who owed the government money, including in this case. *See Heletekides v. Cnty. of Ontario*, No. APL-2021-00111 (filed Apr. 28, 2022); *Harrison v. Montgomery Cnty., Ohio*, 997 F.3d 643 (6th Cir. 2021); *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020); *Polonsky v. Town of Bedford*, 238 A.3d 1102, 1104 (N.H. 2020) (government violates state takings clause when it takes and sells property and fails to refund surplus profits to former owner). PLF believes this experience and its unique perspective will assist the Court in its adjudication of this appeal.

In this case, the County sent notices of foreclosure to James B. Nutter & Co. (JBNC), the senior lienholder of the subject property, by both certified mail and

ordinary first-class mail. Under the relevant statute, the notice is "deemed received unless both the certified mailing and the ordinary first-class mailing are returned by the United States postal service within forty-five days after being mailed." RPTL 1125(1)(b)(i). JBNC did not receive the notice and Postal Service tracking records show that the notice was not delivered to JBNC's address on file, but to an unknown post office box. *James B. Nutter & Co. v. Cnty. of Saratoga*, 195 A.D.3d 1359, 1360–61 (App. Div. 3d Dep't 2021). This brief illustrates that such statutory "deeming" cannot satisfy the requirements of the federal Constitution's Due Process clause, that it treats homeowners as second-class citizens relative to tenants' rights, and that courts' refusal to consider facts demonstrating nondelivery of notice primarily harms elderly, disabled, and indigent homeowners.

ARGUMENT

I. DUE PROCESS REQUIRES GOVERNMENT TO ACT ON TRACKING INFORMATION

The Due Process Clause of the United States Constitution provides that no state shall "deprive any person of . . . property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* N.Y. Const. art. I, § 6. The command's application is "flexible," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), but an "essential" element is that "deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Because "the protection of private property

is indispensable to the promotion of individual freedom," *Cedar Point*, 141 S.Ct. at 2071, courts contemplating the forced deprivation of private property rights must review them through a sharply critical lens. The constitutional provisions protecting private property rights, including due process notice requirements, exist to protect both property owners *and* the state by giving state actors notice of the fundamental limitations on their conduct. *Ontario Knitting Co. v. State*, 69 Misc. 145, 164–65 (N.Y. Ct. Cl. 1910).

Where the taking of property is concerned, due process "does not require that a property owner receive actual notice," but the notice must be "reasonably calculated to reach the intended recipient when sent," and "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Jones v. Flowers*, 547 U.S. 220, 226, 229 (2006) (citation omitted); *see also id*. at 239 (stating that, where "the State is exerting extraordinary power against a property owner—taking and selling a house he owns"—"[i]t is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed"). Reliance on the statutory scheme for notice requirements is not enough, even if it ensures notice in typical circumstances. *Id*. at 230; *see Matter of Skolnick*, 108 A.D.3d 720, 723 (App. Div. 2d Dep't 2013).

Under this framework to determine whether the County's attempts to provide notice were adequate, this Court must consider whether the County reasonably thought that JBNC had received notice, using an objective standard that "balances the interests of the State against the rights of the parties." *Kennedy v. Mossafa*, 100 N.Y.2d 1, 9 (2003); *Miner v. Clinton Cnty., N.Y.*, 541 F.3d 464, 472 (2d Cir. 2008). This includes consideration of unique information about the intended recipient to assess whether the notice was "reasonably calculated" to provide the necessary information. *See Mac Naughton v. Warren Cnty.*, 20 N.Y.3d 252, 257 (2012); *Matter of 149 Glen Street Corp. v. Jefferson*, 140 A.D.3d 742, 742–43 (App. Div. 2d Dep't 2016).

The notice statute requires the government to send notice by certified mail, which includes tracking. When a form of delivery includes tracking information, the sender *must* be responsible for reviewing the information to confirm that the notice was delivered to the proper address. When mailing notice by certified mail, the *sender* has proof that notice was mailed, and it has the ability to verify that the letter was delivered, or alternatively, that an attempt at delivery was made. *See Save a Lot Car Rental, Inc. v. Tri J. Co. Towing and Recovery, Inc.*, 325 So.3d 285, 289 (Fla. Dist. Ct. App. 2021). Courts rely on tracking information to prove that letters *are* delivered; it should be equally persuasive when tracking information proves that letters *are not* delivered. *See Kelber, LLC v. WVT, LLC*, 213 F.Supp.3d 789, 798

(N.D. W.V. 2016) ("It is untenable to hold that the duty to provide notice does not include a duty to determine whether a certified mailing was successful. That is after all the very purpose of requiring a return receipt."). The notice procedure in this case is designed to provide feedback regarding its effectiveness. This Court should presume that the County receives the feedback and require the County to act upon it in a rational way. Here, the County's notice was not returned to the County, but went astray. *Nutter*, 195 A.D.3d at 1360. Certified letter tracking would have revealed this to the County had it troubled to check.

Notice tracking requirements are equivalent to recording and indexing requirements. If they exist, they *must* be complied with. A clerk's errors in recording or indexing a mortgage cannot impute knowledge of the mortgage to a bona fide purchaser. *Baccari v. DeSanti*, 70 A.D.2d 198, 203 (App. Div. 2d Dep't 1979) ("[S]ince the index has, by statute, been made part of the record of filed instruments, an erroneous indexing by the clerk fails to give constructive notice of the existence and contents of the instrument."). *See also Coco v. Ranalletta*, 189 Misc.2d 535, 541 (2001), *aff'd*, 305 A.D.2d 1082 (App. Div. 4th Dep't 2003) (constructive notice may not be premised upon an incorrectly indexed instrument, whether the error was committed by the clerk or induced by one of the parties).[1]

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[1]This approach is consistent with other states. *See, e.g.*, *Dallas v. Farrington*, 490 So.2d 265, 269 (La. 1986) ("what is not recorded is not effective except between the parties, and a third party in purchasing immovable property is entitled to rely on the

The legislature insisted upon the two components of certified mail, proof of mailing and either delivery or attempted delivery, to ensure that owners are not deprived of property without notice. *See id.* Having the easy ability to determine that the certified letter was misdelivered in an apparently random way, the Court should not credit the County's unproven assumption that the first-class letter mailed at the same time to the same location arrived without incident.[2] Courts usually treat notice by regular mail as a rebuttable presumption of delivery; it is not "deemed" delivered in the face of contrary evidence. *Phoenix Ins. Co. v. Tasch*, 762 N.Y.S.2d 99, 100 (A.D. 2d Dep't 2003); *Hospital for Joint Diseases v. Lincoln Gen. Ins. Co.*, 55 A.D.3d 543, 544 (A.D. 2d Dep't 2008) (holding no notice where defendant offered evidence of non-receipt that plaintiff failed to rebut); *Zagari v. Gleason*, No. SP

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absence from the public records of any unrecorded interest in the property"); *Hochstein v. Romer*o, 219 Cal.App.3d 447, 453 (1990) (proper indexing remains an essential precondition to constructive notice; "because the purpose of proper indexing was to allow the document to be located, the failure properly to index the document rendered it unlocatable, and hence the document had to be treated as though never having been recorded."); *Dunlap Investors Ltd. v. Hogan*, 133 Ariz. 130, 132 (1982) (unindexed easement void as to third party buyer, even if the relevant document exists somewhere in the building); *Vicars v. Salyer*, 68 S.E. 988, 989 (Va. 1910) (if part of a recording and indexing statute is essential to be effective, then all of it must be because "the section cannot be mandatory as to the one and merely directory as to the other.").

[2] Misdelivered mail and misaddressed mail are equivalent because in neither case does the intended recipient actually receive the communication. *U.S. v. Coleman*, 196 F.3d 83, 86 (2d Cir. 1999). It is not uncommon for certified mail to be tracked as undelivered while simultaneously sent first-class mail is neither returned nor received. *See, e.g.*, *In re Millstone*, 88 A.D.3d 283, 284 (App. Div. 4th Dep't 2011); *Robinson v. State*, 65 Misc.3d 1212(A), *1 (N.Y. Ct. Cl. 2019).

03695/02, 2002 WL 31207215, at *2 (Nassau Cnty. Ct. Sept. 22, 2002) (evidence rebutted presumption of notice by regular mail and made this a disputed issue for trial); *Cooke v. United States*, 918 F.3d 77, 81 (2d Cir. 2019) (citation omitted). In this case, the first-class letter notifying JBNC of the unpaid tax lien was neither delivered nor returned. Quite possibly, it was misdelivered along with the certified mail. A misdelivered first-class letter will not be returned if the recipient fails to redeposit the letter with "return to sender" noted on the envelope. It is an unfortunate reality that mail is misdelivered all the time. The government cannot benefit from the omission of an unknown third party who fails to return a misdelivered letter to a postbox.

As a matter of policy, the government is the cheapest cost-avoider to prevent the harm caused by misdelivered notice. *See Neslin v. Wells*, 104 U.S. 428, 436 (1881) (where lack of notice occurs after failure to record, it would work an "injustice" to prefer the prior interest holder over "that of the innocent party, who otherwise would suffer loss"). Careful judicial scrutiny is required particularly because the same party—the government—stands to benefit if notice fails. *See Kelber, LLC v. WVT, LLC*, 213 F.Supp.3d 789, 798 (N.D. W.V. 2016) (noting conflict of interest). *Cf. Timbs v. Indiana*, 139 S.Ct. 682, 689 (2019) (noting danger to individual rights posed by fines because they are a source of revenue to the government); *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (opinion of

Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit").

The gross windfall the county obtained by its failure to deliver notice to the property owner counsels heavily in favor of equitable relief. *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 55–56 (1993) (the government's direct "pecuniary interest in the outcome" of forfeiture proceedings weighs in favor of a more protective process); *Matter of Foreclosure of Tax Liens*, 165 A.D.3d 1112, 1122 (App. Div. 2d Dep't 2018) ("Given the substantial property interests at stake, it is imperative for the courts to continue to safeguard the due process rights of those whose property is threatened by ensuring that notice is adequate…").

II. HOMEOWNERS WARRANT EQUAL PROTECTION AGAINST FORFEITURE AS ENJOYED BY TENANTS

The nature of the property at stake in this case—a residential home and its equity—demands the highest level of due process protection. *Jones*, 547 U.S. at 229. The fact that JBNC is not the owner-occupant of the home makes no difference. *James Daniel Good Real Prop.*, 510 U.S. at 54 (the economic value of a rental home is a "significant" property interest that "weigh[s] heavily" in due process analysis). The Due Process Clause requires equal notice when the foreclosure is of vacant land, commercial property, and other types of real estate without homes. *See, e.g.*, *Luessenhop v. Clinton County*, 466 F.3d 259, 271–72 (2d Cir. 2006) (remanding for determination whether government knew its notice had not reached owners of vacant

land); *Linn Farms & Timber Ltd. P'ship v. Union Pac. R.R. Co*., 661 F.3d 354, 358 (8th Cir. 2011) (*Jones* notice requirements apply to tax forfeiture of mineral rights); *Mac Naughton*, 20 N.Y.3d at 258 (applying *Jones* to vacant land); *Lewis v. Succession of Johnso*n, 925 So.2d 1172, 1178 (La. 2006) (vacant land); *Wilson v. Blount Cnty.*, 207 S.W.3d 741, 745 (Tenn. 2006) (one vacant parcel and another containing owner's mobile home); *Delta Prop. Mgmt. v. Profile Investments, Inc*., 87 So.3d 765, 773 (Fla. 2012) (commercial property); *Rylwell, LLC v. Men Holdings 2, LLC*, 452 S.W.3d 96, 100 (Ark. 2014) (commercial property). Constitutional due process notice requirements also apply to those who hold liens on property, regardless of whether there is a residential home on the property. *See, e.g*., *Collector of Revenue by and through the Director of Collections for Jackson Cnty. v. Parcels of Land Encumbered with Delinquent Land Tax Liens*, 453 S.W.3d 746, 759 (Mo. 2015) (Applying *Jones* and concluding that "[a] mechanic's lien constitutes a substantial property interest . . . significantly affected by a tax sale, and is subject to due process protection."); *First NH Bank v. Town of Windham*, 138 N.H. 319, 327 (1994) ("for the same reasons that fundamental fairness requires actual notice of a tax sale to known owners and mortgagees, and actual notice of a tax deeding to known owners, it also requires actual notice of a tax deeding to known mortgagees").

Equality in the enjoyment of property rights was regarded by the framers of the Fourteenth Amendment as an essential pre-condition to the realization of other

basic civil rights and liberties which the Amendment was intended to guarantee. *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948). In New York, tenants are treated with far greater consideration than homeowners when it comes to forfeiture of housing. *Sharp v. Norwood*, 223 A.D.2d 6, 11 (App. Div. 1st Dep't 1996), *aff'd* 89 N.Y.2d 1068 (1997). Tenants receive expansive application of due process, and benefit from the state's established policy to prevent forfeiture of lease whenever possible. *57 E. 54 Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc.2d 353, 354 (App. 1972). Even a tenant who repeatedly refuses to pay timely rent will not be evicted. *Id.* In *57 E. 54 Realty Corp.*, the appellate department held that "the provision for three days' notice by mail of the termination of the lease, deemed given when mailed, is so lacking in equity and due process as to be ineffective as a predicate for cancellation of the lease." *Id.* (citing *98 Delancey Street Corp. v. Barocas*, 82 N.Y.S.2d 802, 804–05 (1948), *aff'd* 275 A.D. 651 (App. Div. 1st Dep't 1949)).

In fact, if a tenant breaches a lease by nonpayment of rent or noncompliance with other provisions, New York courts hold that it would "exploitive or even perhaps unconscionable" for a landlord to refuse to accept the tenant's effort to cure the deficiency. *Fifty States Management Corporation v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573, 578–79 (1979); *see also Fitzpatrick v. Am. Intern. Group, Inc.*, No. 10 Civ. 142(MHD), 2013 WL 709048, at *20 (S.D.N.Y. 2013) ("New York courts routinely hold that delays of days or even weeks in making required periodic

payments may constitute non-material breaches, thus precluding the payee from unilaterally terminating the contract.") (citing cases). Courts will invoke their equity powers "to prevent a forfeiture arising out of a tenant's neglect or inadvertence, especially where a landlord is not harmed by the delay and the tenant would be severely prejudiced." *56 MAC D. Inc. v. Andria*, 3 Misc.3d 1105(A), at *4 (2003), *aff'd* 3 Misc.3d 133(A) (App. 2004), citing *5700–5900 Arlington Ave. Assoc. v. Dogan*, 135 Misc.2d 338, 340, 515 N.Y.S.2d 174 (Civ. Ct. Bx. Cnty. 1987).

Courts even excuse tenants' failure to timely renew a lease, holding that judicial discretion exists to avoid the forfeiture. *Id.* (citations omitted). In *ATM Two v. Ramos*, 189 Misc.2d 770 (N.Y. Dist. Ct. 2001), cited in *Great Am. Realty of Guy Lombardo Ave., LLC v. Jiminez*, 17 Misc.3d 1137(A), at *4 (Dist. Ct. Nassau Cnty. 2007), the court held that a tenant was entitled to a renewal lease when the landlord's certified letter went unclaimed and the tenant demonstrated an intent to renew the lease. Thus, in *Skek Associates v. Benenson*, the court held that a tenant's option to renew is "an equitable interest that is consistently recognized and protected by the Courts." 2 Misc.3d 757, 767 (2003), citing *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*, 42 N.Y.2d 392 (1977). Equity will not permit forfeiture "where a tenant's default is immaterial, inadvertent, or otherwise excusable, … the tenant has, in good faith, made substantial improvements based upon its intent to renew, and where there is no prejudice to the landlord resulting from the default or the grant of equitable

relief." *Id.* (citations omitted). Other courts extend this solicitude to property owners. *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875) ("Forfeitures are not favored in the law. Courts always incline against them."); *Loeser v. Gardiner*, 1 Alaska 641, 645 (Dist. Ct. 1902) ("Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them.") (quoting *Mt. Diablo Mill & Mining Co. v. Callison*, 17 F. Cas. 918, 925 (C.C.D. Nev. 1879)). The same approach should apply here, where JBNC clearly demonstrated an intent to retain the property by paying off all the liens that it knew existed.

The lower court's disregard for JBNC's good faith efforts to pay the tax debt also contrasts with the judicial solicitude extended to tenants' good faith efforts. In *Harvey 1390 LLC v. Bodenheim*, 96 A.D.3d 664 (App. Div. 1st Dep't 2012), the court emphasized the tenant's efforts in making partial payments and making "good faith efforts to secure emergency rental assistance to cover the arrears" in rent. *Id.* at 665–66. Under a fact-intensive review of the tenant's circumstances, and balancing the equities, the court held that a tenant is entitled to a stay of an eviction warrant to give him additional time to "receive enough charitable assistance to satisfy the arrears." *Id.* at 665. Such efforts are particularly compelling when the tenant is responding to events outside her own control. *2246 Holding Corp. v. Nolasco*, 52 A.D.3d 377, 378 (App. Div. 1st Dep't 2008) ("an indigent tenant who resides in an apartment for many years should not be evicted where she has made diligent efforts

to comply with the settlement agreement, only to be stymied by events beyond her control."); *Village Ctr. for Care v. Sligo Realty and Service Corp.*, 95 A.D.3d 219, 222 (App. Div. 1st Dep't 2012).

Courts apply all these equitable concerns to lease forfeitures to advance the policy of "promot[ing] the economy and business in our City." *Id.* In *Matos v. Hernandez*, 10 Misc.3d 1068(A), at *3, 814 N.Y.S.2d 562 (2005), certified mail was returned unclaimed, and the New York City Housing Authority's inability to prove successful first-class mailing resulted in finding of insufficient notice. The court held that "[i]t is entirely unreasonable for respondents to have certain mailing guidelines to ensure participants are given adequate notice, while at the same time bypassing those requirements and thus violating a clear state policy against forfeiture of a leasehold." *Id.* All the policies that support judicial consideration of equity for tenants facing foreclosure apply in equal if not greater measure to homeowners facing foreclosure.

Here, the Court should resolve any ambiguities in favor of the property owner and allow the government to confiscate property only by following the statutory procedures to the letter. The County provided information about some outstanding taxes, and JBNC paid them. But the County failed to disclose another, still-pending tax lien, in violation of RPTL § 1112(2)(a). JBNC paid all the outstanding tax liens of which it was aware. The County's error in delivering notice meant that JBNC

lacked the necessary information to pay the final, pending lien. Such an error would not allow landlords (public or private) to foreclose on a tenant's apartment; neither should homeowners lose their property when a mistake deprives them of constitutionally adequate notice.

III. THE ELDERLY AND INFIRM MOST OFTEN SUFFER FROM INADEQUATE NOTICE

The property owner in this case is a mortgage lender, but foreclosure notice issues most frequently harm individual property owners. The law established in this case will apply to owner-occupants, who are overwhelmingly disadvantaged by government failure to provide adequate notice of foreclosure. New York municipalities have discretion to take the windfall of a property owner's equity far in excess of the amount owed for tax debts, or to give the property to private investors, or to return the surplus to the owner. RPTL § 1104(2). *See, e.g.*, *Dorce v. City of New York*, No. 19-cv-2216, __ F.Supp.3d ___, 2022 WL 2286381, at *4, *12 (S.D.N.Y. June 24, 2022) (describing city's ordinance that sometimes protects debtors and sometimes benefits private parties). These windfall regimes have been called "unconscionable," *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 5831013, at *2 (E.D. Mich. Nov. 7, 2018), *rev'd and remanded*, 976 F.3d 729 (6th Cir. 2020), and a "manifest injustice that should find redress under the law," *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546, at *3 (E.D. Mich. June 4, 2015). Judge Kethledge bluntly commented that "[i]n some legal precincts that sort of

behavior is called theft." *Wayside Church v. Van Buren County*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting), *reopened under Rule 60*, No. 14-CV-01274, ECF No. 64.

The most vulnerable members of society are disproportionately harmed. *See Dorce*, 2022 WL 2286381, at *4, *12 (City systematically targeted properties with little tax debt relative to their property value within communities of color for seizure; notices were misaddressed or misdelivered); *In re City of Rochester*, 92 A.D.3d 1297, 1300 (App. Div. 4th Dep't 2012) (Fahey and Sconiers, JJ., dissenting) (foreclosure took home of 91-year-old illiterate widower with a limited income); John Rao, *The Other Foreclosure Crisis*, Nat'l Consumer Law Ctr. 5, 9, 33, 38 (July 2012).[3] Elderly property owners are particularly susceptible to missing notice because many move into senior living or medical facilities, or into their children's homes, or are otherwise displaced. *See* Jennifer C.H. Francis, Comment, *Redeeming What is Lost: The Need to Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 Geo. Mason U. Civ. Rts. L.J. 85, 86–87 (2014).

Home equity frequently is the most valuable financial asset among the elderly. *See* William C. Apgar and Zhu Xiao Di, *Housing Wealth and Retirement Savings: Enhancing Financial Security for Older Americans*, Joint Ctr. for Housing Studies,

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[3]https://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales-report.pdf.

Harvard Univ., W05-8-1, at 3 (Sept. 2005);[4] Kermit Baker, et al., *Housing America's Older Adults: Meeting the Needs of an Aging Population*, Joint Ctr. for Housing Studies, Harvard Univ., at 16 (2014) ("[H]ome equity contribute[s] two-thirds of the net wealth of the median older black homeowner and more than three-quarters of the net wealth of the median older Hispanic homeowners.").[5] As Justice Thomas wrote about other types of forfeitures, "These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture." *Leonard v. Texas*, 137 S.Ct. 847 (2017) (Thomas, J.) (concurring in denial of certiorari) (citations omitted). Losing a home to foreclosure is nothing short of devastating and therefore demands the highest level of due process.

CONCLUSION

A statutory "deeming" of notice cannot be reconciled with constitutional requirements of due process, and undermines long-standing state policy against forfeiture of homes, particularly for the most vulnerable members of society. For the reasons stated above, this Court should reverse the decision of the court below.

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[4] https://www.jchs.harvard.edu/sites/default/files/media/imp/w05-8.pdf.
[5] https://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing_americas_older_adults_2014.pdf.

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Respectfully submitted,

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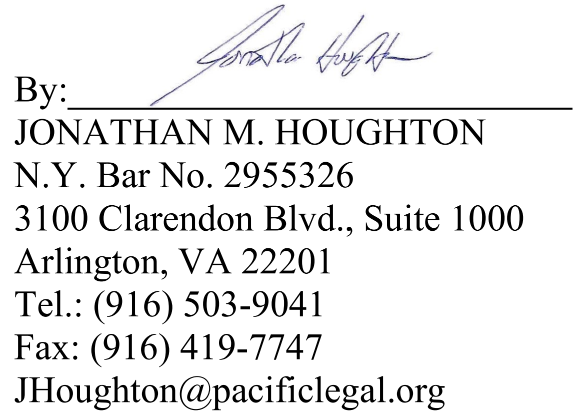

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CERTIFICATE OF COMPLIANCE

Under this Court's Rule 500.13 (c), I certify that:

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