No. _____

In The
Supreme Court of the United States

WALTER D. BARNETTE,
Petitioner,

v.

HBI, L.L.C., et al.,
Respondents.

On Petition for Writ of Certiorari to the Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

DEBORAH J. LA FETRA
JEREMY TALCOTT
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
dlafetra@pacificlegal.org
jtalcott@pacificlegal.org

CHRISTINA M. MARTIN
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
cmartin@pacificlegal.org

EDWARD F. NOETHE
McGinn, Springer & Noethe, PLC
20 North 16th Street
Council Bluffs, IA 51501
Telephone: (712) 328-1566
enoethe@mcginnlawfirm.com
Counsel for Petitioner

QUESTIONS PRESENTED

In *Jones v. Flowers*, 547 U.S. 220, 226 (2006), this Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so."

Here, Walter Barnette owed $1,180 in property taxes and interest on his undeveloped land valued at $25,000 in Sarpy County, Nebraska. Sarpy County sold that debt to a private investor. Nebraska law required the investor to send notice to Barnette, warning that if he failed to pay his debt, the County would administratively foreclose and transfer absolute title to the investor. The investor sent notice to Barnette's correct address in Council Bluffs, Iowa, by certified mail, which was returned unclaimed. The investor—who stood to profit more by taking title to the property than by receiving payment for the debt—published a notice in a Sarpy County newspaper and took no other steps to notify Barnette. The Nebraska Supreme Court held this satisfied due process. The questions presented are:

1. Did the Nebraska Supreme Court err in holding that the due process requirements announced in *Jones* apply only to land containing homes?

2. Does due process require a court to consider the potential windfall incentive of the party providing notice, and the magnitude of the owner's deprivation, when balancing "all the circumstances" to determine if attempts at notice are reasonable and what "one desirous of actually informing the absentee" would use? *Jones*, 547 U.S. at 225.

LIST OF ALL PARTIES

Petitioner Walter D. Barnette was the appellant in the Nebraska Supreme Court and defendant and counter-claimant in the trial court.

Respondent HBI, L.L.C., was the appellee in the Nebraska Supreme Court and plaintiff and counter-defendant in the trial court.

Respondents County of Sarpy, Nebraska, Jim L. Kuhn, and Edward Swaney were appellees in the Nebraska Supreme Court and defendants in the trial court.

RULE 14.1(b)(iii) STATEMENT

The proceedings in the Supreme Court of Nebraska and the District Court of Sarpy County, Nebraska, identified below are directly related to the above-captioned case in this Court.

HBI, L.L.C. v. Walter D. Barnette, Case No. S-19-147 (Neb.), Opinion filed April 10, 2020, affirming judgment of District Court.

HBI, L.L.C. v. Walter D. Barnette, Case No. A-19-0147 (Neb. Ct. App.), transferred to the Nebraska Supreme Court before decision.

HBI, L.L.C. v. Walter D. Barnette, Case No. D59CI170001038 (Neb. Dist. Ct. Sarpy County), Opinion and Order filed Jan. 15, 2019, Granting Plaintiff's Amended Second Motion for Summary Judgment.

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

United States Constitution

Rule of Court

Other Authorities

OPINIONS BELOW

The opinion of the Nebraska Supreme Court (Pet. App. A) is published at *HBI, L.L.C. v. Barnette*, 305 Neb. 457 (2020). The trial court's decision granting respondents' motions for summary judgment and denying petitioner's motion for summary judgment (Pet. App. B) is unpublished.

JURISDICTION

The judgment of the Nebraska Supreme Court was entered on April 10, 2020. Under this Court's March 19, 2020, order adjusting deadlines because of the coronavirus, this Petition is timely. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Nebraska allowed a private investor to take full title to Walter Barnette's property worth $25,000 by paying $1,200 to purchase the tax lien on Barnette's land and making half-hearted attempts to notify Barnette that his property ownership was in danger. Nebraska law requires the self-interested tax-lien purchaser to provide notice of what is at stake. Barnette could have saved his property, had he known his peril. But he received no notice that his property ownership was at risk, because Nebraska law authorized Sarpy County to administratively extinguish Barnette's interest after the investor's

unsuccessful attempt of notice by certified mail and publication. The Due Process Clause requires more. Yet the lower court permitted this insufficient process, contrary to this Court's decision in *Jones*.

The consequences of inadequate notice of tax foreclosure are often devastating in windfall states[1] (like Nebraska) where delinquent property owners lose both their title and "any equity he or she has accrued in the property, no matter how small the amount of taxes due or how large the amount of equity." *Tallage Lincoln, LLC v. Williams*, No. SJC-12847, 2020 WL 4811678 (Mass. Aug. 19, 2020). Examples include a suburban home taken for an $8 property tax delinquency;[2] a million-dollar farm taken from a widow in a nursing home for a $50,000 property tax debt;[3] and farmland worth $38,000 taken as payment for an $84 property tax debt.[4]

In non-windfall states, government sells property to the highest bidder, pays the property tax debts with the proceeds, and returns the remaining money to the former owners. *See Rafaeli, supra*, at *16. But even in those states, delinquent owners commonly suffer a steep financial loss, far exceeding the tax debt, because foreclosed property sells for significantly less than its market value. *See, e.g., id.* (property worth at least $60,000 auctioned for $24,500); *Ritter*, 558

---

[1] *See, e.g.*, Neb. Stat. 77-1837–38; Ariz. Rev. Stat. § 42-18205; Colorado Rev. Stat. § 39-11-115; Me. Rev. Stat. Ann. tit. 36 § 949; Minn. Stat. Ann. § 280.29; Ore. Rev. Stat. § 312.100.

[2] *Rafaeli, LLC v. Oakland County*, No. 156849, __N.W.2d__, 2020 WL 4037642, at *5 (Mich. July 17, 2020).

[3] *Wisner v. Vandelay Investments, L.L.C.*, 300 Neb. 825, 831 (2018); Response Brief, *Wisner v. Vandelay Investments, L.L.C.*, No. S-16-000451, 2018 WL 659770, at *30 (Neb. Jan. 4, 2018).

[4] *Ritter v. Ross*, 558 N.W.2d 909, 910 (Wis. App. 1996).

N.W.2d at 910 ($37,890 property sold for $17,345); *Jones*, 547 U.S. at 224 (house worth $80,000 sold for $21,042).

With such severe consequences at stake, the Constitution's Due Process Clause requires that the government make every reasonable effort to provide clear and effective notice. The Nebraska statute—providing a short, inflexible checklist of (1) certified mail and (2) publication—fails this requirement because it requires no reasonable alternatives when certified mail to a known address is unclaimed.[5] This Court explained in *Jones* that due process demands a more flexible approach that includes reasonable additional steps such as notice by first-class mail or other reasonable investigation to make it more likely that property owners receive actual notice that they are about to lose their land and investment. As this Court stated in *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950), the touchstone decision for notice cases, due process requires notice "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Moreover, due process requirements are at their apex where the state or agent providing notice of a foreclosure stands to gain a windfall profit if that notice is not received or understood. But the courts below improperly distinguished *Jones* and the bedrock due process principles it represents.

Here, the investor tasked by statute with providing notice knew Barnette's address in Iowa, sent certified mail to that address, and knew the mail

---

[5] Pet. App. A-10. The statute has since been amended to require an additional step of attempted personal or residence service to anyone occupying delinquent property.

was unclaimed. Pet. App. A-5. When that failed, the investor satisfied his duty under Nebraska law by publishing notice in an obscure Sarpy County newspaper that never circulates in Council Bluffs, Iowa. Pet. App. A-26. When that inevitably failed to notify Barnette, the investor gained a windfall by taking full title to the property. By holding that these actions satisfied due process, the Nebraska Supreme Court decided a vital federal question in conflict with the precedent of this Court and all other circuit courts and state courts of last resort that have considered the question.

The Nebraska Supreme Court's judgment also exposed an important federal question that has not been, but must be, settled by this Court. Its opinion highlights the failure of *many* lower courts to consider the heightened risk of an erroneous deprivation of property where the forfeiture results in a windfall to the party charged with sending notice. In other contexts, this Court recognizes the need to weigh government's pecuniary interest in a proceeding as an element of due process, but it has not yet explained how it should be weighed when deciding whether *notice* satisfies the due process balancing articulated in *Mullane*.

To resolve these important questions, this Court should grant the petition.

STATEMENT OF THE CASE

A. Factual Background

In 2002, Walter Barnette purchased about an acre of land zoned for residential use in Bellevue, Nebraska, in Sarpy County, recently assessed at $25,000. Pet. App. C-5; Exhibit 2 to Brief of Appellant

at 6, No. S-19-0147 (Neb. May 1, 2019). In 2010, Barnette fell on hard times and failed to pay his 2010 and 2011 property taxes for the land, totaling $986.50. On March 5, 2013, the county sold a certificate of tax sale for Barnette's property to Pontian Land Holdings LLC for $1,180.90, the amount of the delinquent 2010 and 2011 taxes plus interest and costs. Pet. App. B-2, D-4. This certificate gave Pontian the right to collect the debt with 14% annual interest from Barnette and the ability to take clear title to the entire property if the debt was not paid. Pet. App. D-4; *see also* Neb. Rev. Stat. § 77-207; Neb. Rev. Stat. § 45-104.01.[6]

In early 2016, Pontian sent the notice required by Nebraska law via certified mail, return receipt requested, to Barnette's home in Council Bluffs, Iowa, warning that Barnette would lose his property if he failed to pay his tax debt. Pet. App. A-27–28. The letter's return addressee was "Guardian Tax Partners, Inc.," a company Barnette did not know or have reason to know. Pet. App. A-5.[7] After three failed attempts at delivery, the certified letter was returned to Pontian as unclaimed. *Id.* Pontian's only other attempt at notice was by publication in a small Sarpy

---

[6] The investor steps into the shoes of the government for due process notice purposes. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 927 (1982).

[7] According to the Nebraska Secretary of State's corporate records, Pontian Land Holdings, LLC, Guardian Tax Partners Inc., and HBI, L.L.C., all share the same registered agent, Jared W. Hollinger, and address, 13575 Lynam Drive, Omaha, Nebraska 68138. Nebraska Secretary of State, https://www.nebraska.gov/sos/corp/corpsearch.cgi?nav=search (visited Sept. 1, 2020). Mr. Hollinger is the registered agent for hundreds of LLCs related to land holdings. Open Corporates, https://opencorporates.com/officers?q=JARED+W. +HOLLINGER&utf8=%E2%9C%93 (visited Sept. 1, 2020).

County newspaper that does not even circulate in the town of Bellevue where the property is located. Pet. App. A-26; *see Barnette*, Exhibit 2 to Brief of Appellant at 10, *supra*. As Pontian well knew, having mailed the certified letter to Barnette's correct address, Barnette lived in Iowa, and consequently would not see the publication notice in Nebraska.

Having complied with the statute and without taking any additional steps to reach Barnette, Pontian obtained a treasurer's deed to the property on August 29, 2016. *Id.* This deed extinguished Barnette's title and his equity interest in the property, giving both to Pontian. Neb. Rev. Stat. § 77-1837. Consequently, against its initial investment of $1,180, plus the minimal costs of unsuccessful attempts at notice, Pontian received Barnette's $25,000 asset. Successful notice would have given Pontian a profit of approximately $500 of interest. Unsuccessful notice gave Pontian a windfall nearly 50 times that amount.

B. Procedural Background

On June 13, 2017, Pontian filed a quiet title action against Barnette, Sarpy County, and other parties who at one time held an interest in the property. Pontian then transferred the property to its sister corporation, Respondent HBI, which substituted for Pontian in the quiet title action.

Barnette filed a counterclaim in the quiet title action alleging, among other things, that his right to redeem his property was not terminated because the notice did not satisfy due process under *Jones*, 547 U.S. at 223. Pet. App. C-7–8. In *Jones*, a government official sent nonresident property owner Gary Jones notice by certified mail warning of a tax foreclosure

and sale of his property containing his former home. The letters were sent to the indebted home and all were returned unclaimed. The government also published a notice in a local paper. Jones finally learned of the sale when the purchaser sent an unlawful detainer notice to the property, which was served on Jones's daughter. Jones sued, alleging that his property was taken without due process. This Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 226. The Court noted that no one who "actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed." *Id.* at 229. Here, as in *Jones*, the certified letters mailed to Barnette's home were returned as unclaimed. Nonetheless, the trial court granted summary judgment in favor of HBI, Pet. App. B-8, and the Nebraska Supreme Court elected to directly review Barnette's appeal.

The Nebraska Supreme Court distinguished *Jones*, holding that because Barnette's land did not contain a home, no additional reasonable notice beyond publication was necessary. Pet. App. A-22–23 (asserting *Jones* gave "special importance" to the fact that the landowner was in danger of losing a house). Because Barnette's land was undeveloped, the Court treated his interest as insignificant, and held that to prevail he had to prove that the "burden on the government" was small enough to justify requiring additional steps to deliver notice. Pet. App. A-24–25. The court conceded that sending a notice via regular mail was "little burden," Pet. App. A-29, but

nevertheless held that Barnette failed to prove that his interest in his land was enough to justify the burden of sending a first-class letter or other form of notice. *See id.*

The court further distinguished *Jones* because the certified letters were sent to Barnette's correct address, and the post office left a note indicating that he had a certified letter from Guardian Tax Partners, Inc.,[8] a company unknown to Barnette, waiting at the post office. Pet. App. A-5, A-30. According to the court, such notice that he had missed delivery of a certified letter from an unknown private entity demonstrated sufficient "desire" on the part of Pontian to actually inform Barnette that he was in danger of losing his land. Pet. App. A-29–30.

Justice Papik dissented, finding Pontian's notice constitutionally inadequate under *Jones*. Pet. App. A-32. He rejected the majority's assertion that *Jones* placed any "special importance" on the existence of a home on the property, especially since Jones did not reside in the house that was taken. Justice Papik argued that *Jones* requires the same reasonable, additional steps whether the property is "a building

---

[8] The record does not address the reason Mr. Hollinger chose to use one of his other LLCs in this transaction, stating only that Guardian Tax Partners was "erroneously" listed as an interested party. Pet. App. A-5. Tax debts frequently are sold to private companies that are then authorized to recover the debt or foreclose on the properties, and the notice sent to the property owner in such cases does not bear the name of the county or municipality that the owner would expect to alert him to a tax deficiency. *See* Michelle Z. Marchiony, Comment, *Making Debt Pay: Examining the Use of Property Tax Delinquency as a Revenue Source*, 62 Emory L.J. 217, 219 (2012) (the sale of property tax liens has evolved into a $20 billion market).

used for business purposes, farmland, or any other piece of real property, even 'a vacant lot.'" Pet. App. A-37–38. He noted that once "the government becomes aware prior to the taking that its attempt at notice has failed" it is obliged to take additional, reasonable steps to provide notice. Pet. App. A-33–34 (internal citation omitted). "*Jones* [did] not focus on the *reason* that certified mail went unclaimed . . . [but] on the *fact* that the certified mail went unclaimed." Pet. App. A-38.

The return of the unclaimed, unopened certified letters conferred actual knowledge to Pontian that attempts to notify the property owner had failed. *Id.* Therefore, due process requires "reasonable, additional steps" to ensure that a property owner receives notice, and "publication alone" is "constitutionally inadequate." Pet. App. A-34. Because Pontian took *no* other steps, Justice Papik would have reversed. Pet. App. A-36.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENT OF THIS COURT AND THE OVERWHELMING AUTHORITY OF CIRCUIT AND STATE HIGH COURTS THAT DUE PROCESS REQUIRES ADDITIONAL REASONABLE STEPS TO CURE FAILED NOTICE BY CERTIFIED MAIL

The Supreme Court of Nebraska fundamentally misapprehends this Court's Due Process notice jurisprudence. Before the government may deprive a person of their property, it must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the

action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Sending notice by certified mail is one generally acceptable method, *Dusenbery v. United States*, 534 U.S. 161, 162 (2002), but it comes with a caveat. If the sender *knows* that the intended recipient did not receive the certified mail, then the sender must take additional steps. *Jones*, 547 U.S. at 229. This Court has not specified those additional steps because the flexible nature of procedural due process demands consideration of the circumstances and a balancing between "the 'interest of the State' against 'the individual interest sought to be protected by the Fourteenth Amendment.'" *Id.*; *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). Whatever those additional steps may be, notice by publication (a form of substituted service) cannot be counted among them when, as here, the recipient's actual address is known or reasonably ascertainable to the sender. *Mullane*, 339 U.S. at 314, 319; *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.").[9]

---

[9] This Court and others have acknowledged the deficiencies of notice by publication for decades. *See Mennonite*, 462 U.S. at 799; *City of New York v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1953) ("Notice by publication is a poor and

In the tax sale context, such notice protects the owner's continued possession by warning the owner of an imminent tax foreclosure and giving him an opportunity to save his title by paying his debt or save his equity by selling the property. Indeed, one major reason that owners fail to pay their property taxes is because they do not realize that they will lose their property. *Slater v. Maxwell*, 73 U.S. 268, 276 (1867) ("The owner . . . is generally ignorant of the proceeding until too late to prevent it.").

In this case, the private investor who purchased the tax debt combined failed attempts to notify by certified mail with improper notice by publication (because Barnette's address was known). In all other jurisdictions, a sender's knowledge that mailed notice was undelivered plus other improper notice equals a violation of due process.[10] The Nebraska Supreme Court is a holdout—allowing government-sanctioned confiscation of property without proper notice. This Court should grant certiorari and reverse to protect Nebraskans from this outlier decision. *See* Justin Driver, *Constitutional Outliers*, 81 U. Chi. L.R. 929, 940 (2014) (Petitioners in *Gideon v. Wainwright* asked the Court to "bring into line with the consensus of the states and professional opinion the few 'stragglers'

---

sometimes a hopeless substitute for actual service of notice [,] . . . [i]ts justification is difficult at best."); *Walker v. City of Hutchinson*, 352 U.S. 112, 117 (1956) ("In too many instances notice by publication is no notice at all."); *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 715 (N.Y. Sup. Ct. 2015) (Service by publication "is essentially statutorily authorized non-service.").

[10] "[N]othing plus nothing is still nothing." *Northwest Eng'g Corp. v. Keystone Driller Co.*, 70 F.2d 13, 19 (7th Cir. 1934); *Walter Int'l Productions, Inc. v. Salinas*, 650 F.3d 1402, 1420 (11th Cir. 2011) (same).

who persist in denying fair treatment to the accused.").

A. The Decision Below Conflicts with Cases Applying *Jones* to Property Interests Beyond Residential Homes

In *Jones*, this Court held that when certified mail warning of an imminent tax sale is returned as unclaimed, government must make further reasonable attempts to provide notice prior to "forcing a citizen to satisfy his debt by forfeiting his property." 547 U.S. at 234. Senders know when they send a certified letter that they will be informed as to whether the delivery was successful. When the notice procedure is designed to provide feedback regarding its effectiveness, courts may presume that the sender receives the feedback and should act upon it in a rational way. *See id.* at 231; *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.").

As the Fourth Circuit held in *Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005), "when prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient." *See also Echavarria v. Pitt*s, 641 F.3d 92, 94–95 (5th Cir. 2011) ("When the government has knowledge that notice was not effected, it cannot 'simply ignore' that information."); *County of Sullivan v. Vaughan*, 25 Misc. 3d 960, 965, 885 N.Y.S.2d 575 (2009) (additional service required when party is

aware that mail was returned); *In re Tax Sale of Real Prop. Situated in Jefferson Twp. v. Beeghly*, 828 A.2d 475, 479 (Pa. Commw. Ct. 2003) ("Where notice is obviously not effectively reaching the owners of record, the taxing bureau must go beyond the mere ceremonial act of notice by certified mail.") (citations omitted).

The Nebraska Supreme Court majority opinion improperly limited *Jones* to its facts. *See Agostini v. Felton*, 521 U.S. 203, 225 (1997) (a precedent will not be limited to its facts unless there is a genuine basis upon which to confine the underlying rationale). The court below held that additional steps were required in *Jones* not because of the unclaimed certified mail and improper publication notice, but because the foreclosed property contained a residential home. Pet. App. A-20. Dissenting Justice Papik correctly pointed out that the owner in *Jones* did not reside in the house that was foreclosed and that nothing about the Due Process Clause itself suggests such a limitation. Pet. App. A-36.

The court's majority decision, therefore, stands alone among the Circuit courts and state courts of last resort. These other courts understand the Due Process Clause to require reasonable additional steps when mail is returned warning of a foreclosure 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 (2nd 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* required additional reasonable step like an internet

search before tax forfeiture of mineral rights when mail was returned as "not deliverable as addressed"); *Mac Naughton v. Warren Cty.*, 20 N.Y.3d 252, 258 (2012) (applying *Jones* to vacant land); *Lewis v. Succession of Johnson*, 925 So. 2d 1172, 1178 (La. 2006) (vacant land); *Wilson v. Blount Cty.*, 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); *Rafaeli, LLC v. Oakland Cty.*, No. 330696, 2017 WL 4803570, at *1 (Mich. Ct. App. Oct. 24, 2017) (one parcel included vacant land) *reversed on other grounds* No. 156849, 2020 WL 4037642 (Mich. July 17, 2020); *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 the property, which occurs 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 Cty. 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").

The legal irrelevance of the owner's use of the land—whether for a residential home, investment, or

some other purpose—explains why many courts apply *Jones* without even discussing the use of the real property at issue. *See, e.g., Hardy v. Phelps*, 165 Idaho 137, 146 (2019); *Schlereth v. Hardy*, 280 S.W.3d 47, 48 (Mo. 2009) (*Jones* applied to sale of property of unknown use and owned by someone who did not occupy it); *Crownover v. Keel*, 357 P.3d 470, 471, 476 (Okla. 2015) (applying *Jones* to hold service inadequate to nonresident owner of land of unidentified use). Outside of the real estate context, multiple Circuit courts rely on *Jones* to require additional steps after failed attempts at notice in cases involving property interests including $1,500 in cash, personal property, denial of government applications, and revocation of licenses.[11]

Petitioner has found no published decisions issued after *Jones*[12] that align with the Nebraska

---

[11] *See, e.g., Rodriguez v. Drug Enforcement Administration*, 219 Fed. App'x 22, 23-24 (1st Cir. 2007) (*Jones* required additional notice of administrative forfeiture of $1,905); *Echavarria*, 641 F.3d at 95 ("an irreversible loss of a person's home is a more significant deprivation than" forfeiture of bondsman's $1,500, but *Jones* still requires additional step); *Ming Kuo Yang v. City of Wyoming*, 793 F.3d 599, 601 (6th Cir. 2015) (*Jones* applies to notice of condemnation and razing of dilapidated commercial building); *Rendon v. Holder*, 400 Fed. App'x 218, 219 (9th Cir. 2010) ("additional reasonable steps" required to notify denial of application for legalization); *United States v. One Star Class Sloop Sailboat*, 458 F.3d 16, 23 n.7, 25 (1st Cir. 2006) (applying *Jones* to civil forfeiture of sailboat); *Crum v. Vincent*, 493 F.3d 988, 992–93 (8th Cir. 2007) (applying *Jones* to state's deprivation of physician's medical license without due process); *Yi Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941, 945–46 (9th Cir. 2006) (suspension of pilot's license).

[12] There are, of course, lower court cases decided prior to *Jones* that upheld notice that, after *Jones*, would be inadequate. *See,*

Supreme Court's crabbed view of due process.[13] As an extreme outlier refusing to apply the baseline level of notice required by *Jones* to transfer title in the tax sale of undeveloped land, the court below betrays the constitution and Nebraska property owners. *See* Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 Queen's L.J. 259, 260–61 (2005) (arguing that the sovereign owes fiduciary-like duties to its citizens).

B. The Decision Below Conflicts with Cases Holding that the Government Must Comply with Due Process Regardless of the Recipient's Inaction

The lower court held that even if *Jones* applies to vacant land, it would not apply in this case because Barnette received stickers from the post office indicating that he missed mail from Guardian Tax Partners. Pet. App. A-29–30. Only one state's intermediate appellate court shares this view, and then only when "defendants could reasonably draw [a] strong inference that [the] intended recipients simply were attempting to avoid notice by ignoring certified mailings, and that attempts at alternative methods of giving notice were unnecessary and would prove futile." *Temple Bnai Shalom of Great Neck v. Vill. of*

---

e.g., *Kidder v. Cirelli*, 821 So. 2d 1106, 1107 (Fla. App. 2002) (upholding tax sale of vacant lot after certified notice was returned undelivered and county took no further steps).

[13] In an unpublished decision, one district court distinguished *Jones* in part by stating the absence of a home on tax delinquent property "significantly alters the balance of weighing state and individual interests involved in notice." *Keymarket of Ohio, LLC v. Keller*, No. 2:08–CV–325, 2013 WL 6000922, at *7 (S.D. Ohio Nov. 12, 2013).

Great Neck Estates, 32 A.D.3d 391, 391 (N.Y. App. Div. 2006). No such inference is present in this case.

Other courts correctly apply *Jones* in cases where certified mail was sent to the correct address but unclaimed. *Jones*, 547 U.S. at 232 (a party's ability to take steps to safeguard its own interests does not relieve the government of its constitutional obligation); *Sidun v. Wayne Cty. Treasurer*, 481 Mich. 503, 517 (2008) ("while plaintiff should have been more diligent regarding the tax liability on her property, the government may not take that property without providing due process of law."). *But see Tagaban v. City of Pelican*, 358 P.3d 571, 579–80 (Alaska 2015) (noting split of authority regarding notice to mortgagees and holding that due process demands less notice of delinquent taxes to "sophisticated" (as opposed to "average") interest-holders who are expected to submit a form to the government to ensure they receive notice of foreclosure).

The Nebraska Supreme Court's decision conflicts with the majority view, exemplified by *Schlereth*, 280 S.W.3d 47, in which the purchaser of tax delinquent property sent certified mail to the home of the owner advising her of imminent foreclosure. When the owner failed to pick it up, the county issued the tax deed to the investor. The Missouri Supreme Court unanimously held that, under *Jones*, the Due Process clause requires the sender to take additional reasonable steps to provide notice, such as regular mail. "As in *Jones*, there is nothing here to indicate that the addressee would know what the certified-mail notice contained." *Id.* at 53.

There are many legitimate reasons why someone might not go to the post office to retrieve certified mail of unknown provenance and a property owner who fails to do so should not be derided as a tax evader or scofflaw.[14] *See, e.g.*, *Covey v. Town of Somers*, 351 U.S. 141, 146–47 (1956) (incompetent); *In re Application of the County Collector for Judgment v. Lowe*, 867 N.E.2d 941, 951 (Ill. 2007) (hospitalized); *Jones* (moved due to marital separation); *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (imprisoned); *Plemons*, 396 F.3d at 571 (renting to tenants); *In re City of Rochester*, 939 N.Y.S.2d 214, 219 (N.Y. App. Div. 2012) (illiteracy); *In re E.R.*, 385 S.W.3d 552, 555 (Tex. 2012) (in the process of moving and lacked a permanent address). 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. Property owners of any age suffering cognitive decline or mental deficiencies may misunderstand the significance of the sticker advising them that certified mail awaits them at the post office or may be unable to find transportation to get there. *See, e.g.*, *DirecTV, Inc. v. Turk*, 282 Fed. App'x 382, 385 (6th Cir. 2008) (certified mail service to man suffering from mental disability was returned unexecuted and unclaimed); s*ee generally* Jennifer C.H. Francis, Comment, *Redeeming What is Lost: The Need to Improve Notice*

---

[14] Many people are rightfully wary of official-looking documents sent by unknown private parties, as this may be a mail fraud scheme. *See* U.S. Consumer Financial Protection Bureau, *Mail Fraud Alert*, https://files.consumerfinance.gov/f/documents/cfpb_placemat_mail-fraud-alert.pdf (warning against "[m]ail that looks personalized to you from someone you don't recognize.") (visited Sept. 1, 2020).

for Elderly Homeowners Before and After Tax Sales, 25 Geo. Mason U. Civ. Rts. L.J. 85 (2014). By limiting *Jones* with artificial, rigid distinctions, the Nebraska Supreme Court leaves Nebraska property owners with inadequate Due Process protection and potentially severe financial consequences.

C. The Decision Below Conflicts with Cases Requiring Regular Mail or Other Simple Inquiries When Certified Mail Fails

Jones did not "prescribe the form of service" or provide an exhaustive list of what "additional reasonable steps" are "practicable" to comply with due process, but it reiterated that the notice must be what "one desirous of actually informing the [property-owner] might adopt." 547 U.S. at 225, 229 (citing *Mullane*). While this Court has declined to specify the additional steps required when notice by certified mail fails, other courts have filled the void by holding that a wide array of options meets the constitutional minimum of due process.

Many courts (and state statutes) require simultaneous or serial service by both certified and regular mail. *See, e.g.*, *Griffin v. Bierman*, 941 A.2d 475, 483–84 (Md. 2008). Regular mail lacks the documentation of certified mail, but the longstanding "mailbox rule" is a "rebuttable, common-law presumption that a piece of mail, properly addressed and mailed in accordance with regular office procedures, has been received by the addressee." *Cooke v. United States*, 918 F.3d 77, 81 (2d Cir. 2019) (citation omitted); *Labor Comm'n v. Price*, 460 P.3d 137, 145 (Utah App. 2020). In *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988), this Court held that "mail service is an inexpensive and

efficient mechanism that is reasonably calculated to provide actual notice" and constitutionally required the alert creditors that a decedent's estate is in probate proceedings. *Id.* (notice by mail is not "so burdensome or impracticable as to warrant reliance on publication notice alone.").

Regular mail adds another level of certainty when joined with certified mail. Unless the sender of regular mail receives the envelope back with a notation to "return to sender," the recipient is presumed to have received the notice. Unlike certified mail, regular mail will sit in the mailbox until the recipient picks it up. *See Greene v. Lindsey*, 456 U.S. 444, 455 (1982). The Nebraska court's refusal to require the simple additional step of notice via regular mail conflicts with these and other courts. *See M.A.K. Inv. Group, LLC v. City of Glendale*, 897 F.3d 1303, 1319 (10th Cir. 2018) (Notice sent by regular mail is "not so much to ask—merely a letter, an envelope, and a stamp."); *Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 146 (4th Cir. 2014) ("First-class mail was reasonably calculated to confer actual notice").

Regular mail may be the most popular "additional step," but there are others. Courts have also approved

telephonic notice[15] and e-mail.[16] *Nunley v. Dep't of Justice*, 425 F.3d 1132, 1138 (8th Cir. 2005) ("[A] few phone calls or e-mails" are not "heroic effort[s]"). Either method is far more effective than the "mere gesture" of publication. *See Mullane*, 339 U.S. at 315.

Indeed, many courts require the government to make at least *some* effort to search for additional information so that notice can be effectively delivered to the recipient. *See, e.g., In re E.R.*, 385 S.W.3d at 565–66 (due process requires making the "'obvious inquiries' a prudent investigator would have made," such as contacting a known relative). Some require

---

[15] *See, e.g., Haugen v. Fields*, 366 Fed. App'x 787, 788 (9th Cir. 2010) ("shelter care" hearing that may remove child from parents' home may be noticed by telephone, per statute); *Activator Supply Co., Inc. v. Wurth*, 722 P.2d 1081, 1084 (Kan. 1986) (notification by telephone that the commissioner was issuing a temporary order to halt the business); *Cox v. City of McAlester, Okla.*, No. CIV–12–100–KEW, 2013 WL 530578, at *3 (E.D. Okla. Feb. 11, 2013) (actual notice by telephone call satisfies due process).

[16] *See, e.g., Popular Enterprises, LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 562–63 (E.D. Tenn. 2004) (permitting service via e-mail where the e-mail did not "bounce back" and thus "presumably reached defendant"); *United States v. Twenty-Four Cryptocurrency Accounts*, No. 19-cv-3098 (DLF), 2020 WL 4049914, at *3–*4 (D.D.C. July 20, 2020) (same); *Bright Solutions for Dyslexia, Inc. v. Lee*, No. 15-cv-01618-JSC, 2017 WL 10398818, at *7 (N.D. Cal. Dec. 20, 2017) (service by e-mail proper where defendant could only be contacted by e-mail and the e-mail did not bounce back). *See also* Christine P. Bartholomew, *E-Notice*, 68 Duke L.J. 217, 219–20 (2018); Jessica Klander, Note, *Civil Procedure: Facebook Friend or Foe?: The Impact of Modern Communication on Historical Standards for Service of Process—Shamrock Development v. Smith*, 36 Wm. Mitchell L. Rev. 241, 257 (2009) (with use of the internet increasing exponentially, many individuals will soon have a more reliable online address than home address.).

government actors to search public records for alternative addresses, phone numbers, or e-mails. *See, e.g.*, *Linn Farms*, 661 F.3d at 360–61; *Plemons*, 396 F.3d at 577 (a reasonable step is an "examination (or re-examination) of all available public records"); *Kennedy v. Mossafa*, 100 N.Y.2d 1, 9 (2003) (same); *Echavarria*, 641 F.3d at 95 (government agency must review its own "readily accessible" files); *Kelber*, 213 F. Supp. 3d at 804 (requiring phone call to former mortgage holder for contact information about owner). Others hold that a simple internet search for contact information is a reasonable additional step. *Cf. Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544 (2016) ("a 'people search engine' . . . conducts a computerized search in a wide variety of databases and provides information about the subject of the search."); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 690 (2010) ("any student at [college] with access to Google—that is, all of them—could easily have found [a student organization].") (citation omitted) (alteration original); Stewart E. Sterk, *Tax Sale Foreclosures: What Notice is Due?*, 17 No. 6 N.Y. Real Est. L. Rep. 1 (2007) ("as computers and the Internet make it increasingly feasible to locate a property owner with a few clicks of a mouse," adequate notice "may require more than just a mailing to the address found in the public records."). Here, the lower court fell far short of the notice required in all these jurisdictions, allowing the "less reliable" notice of publication, *see Mennonite*, 462 U.S. 799, in a time when technology has made it easier than ever to provide more effective and inexpensive notice. *See New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81

(S.D.N.Y. 1980) (The legal system "cannot be blind to changes and advances in technology.").

"Constitutional rights are not general; they are specific. Such rights are not given only to some or even to most; they are granted to each and every individual. A statute designed to give notice to 95% of landowners effectively denies due process to the 5% who are ignored." *Kidder*, 821 So. 2d at 1110 (Harris, J., dissenting). The Nebraska Supreme Court's decision cavalierly disregards the due process requirements demanded by this Court and virtually all others presented with cases of unclaimed certified mail and publication. This Court should grant the petition to ensure that Nebraskans receive the due process protection to which all Americans are entitled.

II

WHETHER DUE PROCESS REQUIRES CONSIDERATION OF THE POTENTIAL WINDFALL AND THE MAGNITUDE OF AN ERRONEOUS DEPRIVATION OF PROPERTY IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT

Fundamentally, the Nebraska Supreme Court's decision rests upon a failure to properly weigh the interests at stake. "[A]ssessing the adequacy of a particular form of notice requires balancing the 'interest of the State' against 'the individual interest sought to be protected by the Fourteenth Amendment.'" *Jones*, 547 U.S. at 229 (quoting *Mullane*, 339 U.S. at 314–15). The court must consider whether notice is reasonable considering "all the circumstances." *Mullane*, 339 U.S. at 314–15; *Jones*,

547 U.S. at 230–31 (consider the "practicalities and peculiarities" of the case). Despite the mandate to view the question of notice holistically, the lower court failed to weigh the value of the property compared to the tax debt, and the potentially warping influence a potential windfall can have on an investor's desire to provide effective notice.

In this case, Pontian purchased the tax lien for $1,180. Barnette's land was assessed at $25,000. With 14% interest on the original debt, the investor stood to earn $500 on that investment had Barnette received notice and paid his debt before his land was foreclosed. But when he failed to pay, Pontian gained Barnette's $25,000 property, resulting in a more than $23,000 windfall to the company and an equivalent loss in equity to Barnette. This extreme imbalance is highly relevant to due process, and an important factor when weighing what sort of notice is reasonable.

A. Due Process Requires Courts to Consider the Practicalities Involved, But the Lower Court Ignored the Risk That the Potential for a Windfall Would Cause Unconstitutional Deprivation

When the party sending notice stands to make a significant profit if notice fails, it has no incentive to pursue additional steps "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *See Jones*, 547 U.S. at 229. There is an "inherent conflict of interest present in a system that places the duty to provide notice on the very party that stands to profit most if the notice is unsuccessful." *Kelber*, 213 F. Supp. 3d at 798. When "the party charged with providing this constitutionally required notice is also the tax lien

purchaser, who has a countervailing interest in profiting from a property owner's failure to redeem . . . it [is] imperative that courts strictly scrutinize the efforts of a tax lien purchaser to ensure that they are 'such as one desirous of actually informing the absentee' might reasonably adopt.'" *Plemons v. Gale*, 382 F. Supp. 2d 826, 830 (S.D. W.V. 2005), *aff'd* 161 Fed. App'x 334, 335 (4th Cir. 2006).

Although this Court has provided little guidance about how the pecuniary interest of a notice sender should weigh when deciding whether the notice satisfies due process, the Court has held in other due process cases that it weighs in favor of more—not less—protection for the individual who stands to lose property. In *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 55–56 (1993), this Court held that the government's direct "pecuniary interest in the outcome" of forfeiture proceedings weighed in favor of more protective process under *Mathews v. Eldridge,* 424 U.S. 319 (1976). *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) ("judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement"); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (mayor serving as a judge violated due process "both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village."). As Justice Scalia noted, "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J. opinion) (citing cases involving Contract Clause and Excessive Fines Clause).

In an unclaimed property case, Justices Alito and Thomas expressed concern that financial self-interest might lead states to issue inadequate notice of a potential escheat. "Cash-strapped States undoubtedly have a real interest in taking advantage" of unclaimed property laws that boost public budgets with a windfall of private property. *Taylor v. Yee*, 136 S. Ct. 929, 930 (2016) (Alito, J., concurring in denial of certiorari). Even "[a]s advances in technology make it easier and easier to identify and locate property owners, many States appear to be doing less and less to meet their constitutional obligation to provide adequate notice before escheating private property." *Id.*

In the tax foreclosure context, the promise of a windfall undoubtedly creates a temptation for government or its agents to provide less notice than a disinterested party would provide. "Their investment becomes a winning lottery ticket when the owner fails to receive notice or when the owner is so destitute that even with notice he or she cannot pay the accumulated taxes and the investor is able to acquire title to property often worth many times the value of the delinquent taxes." *Kidder*, 821 So.2d at 1110 n.4 (Harris, J., dissenting). This potential windfall is not a necessary part of tax collection, since most states manage to collect taxes without it. Indeed, tax liens already enjoy higher-than-market interest rates, priority over all other debts, and include the costs of providing notice. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 755–56, 760, 767–77 (2000); *see* Neb. Rev. Stat. §§ 77-203, -208.

In Nebraska, the windfall can result in a stunning injustice. For example, 94-year-old Gladys Wisner,

suffering from cognitive decline, lost her farm worth $1,000,000 because she failed to pay $50,000 in taxes, penalties, interest, and costs. *Wisner*, 916 N.W.2d at 708. In other states, too, the windfall has produced outrageous results, with counties foreclosing and keeping the equity on homes over property tax debts as small as $8. *See, e.g., Rafaeli*, 2020 WL 4037642 at *5 (Michigan county foreclosed on home to collect $8 plus interest, penalties, and costs and kept profits from its sale); *Coleman through Bunn v. District of Columbia*, 70 F. Supp. 3d 58, 62 (D.D.C. 2014) (foreclosure of $200,000 home of elderly veteran with cognitive problems for $5,000 tax debt); *Reinmiller v. Marion Cty.*, No. CV–05–1926, 2006 WL 2987707, at *3 (D. Or. Oct. 16, 2006) (county took property to collect $14,216 property tax debt, sold it at auction for $167,000 and kept all proceeds); *In re Petition of Cass County Treasurer for Foreclosure v. Lands Described*, 2016 WL 901700, at *2 (Mich. App. 2016) (foreclosing on $3.5 million property to collect $14,743 property tax debt attempting only basic notice required by statute). Some counties use such proceeds to plug budget holes. *See* Joel Kurth, et al., *Sorry we foreclosed your home. But thanks for fixing our budget.*, Bridge Magazine (June 6, 2017).[17]

In this case, rather than weighing the corrupting influence of a potential $23,000 windfall from a $1,180 investment, the lower court focused on Barnette's failure to pick up the certified letter from "Guardian Tax Partners, Inc." at the post office—and effectively ignored entirely the question of *why* Pontian chose to do nothing more than send certified mail from an

---

[17] https://www.bridgemi.com/detroit-journalism-cooperative/sorry-we-foreclosed-your-home-thanks-fixing-our-budget.

entity that Barnette would have no reason to recognize. Pet. App. A-5, A-30. *Cf.* Bartholomew, *E-Notice*, 68 Duke L.J. at 237 ("Rather than embracing the Supreme Court's flexible standard and following its rationale, courts focus on the mode of notice in past cases."). When evaluating notice, "courts should follow the spirit and rules of *Mullane*, 339 U.S. at 314, not just the fact application." Bartholomew, *supra*, at 260. Ignoring the circumstances like the windfall at issue here permits avoidable injustices and the deprivation of property without due process. This is a question of great importance that this Court should settle.

B. Due Process Requires Considering All the Circumstances, But the Court Below Ignored the Value of Property When Deciding What Constitutional Due Process Requires

To determine whether notice satisfies due process, courts must consider all the circumstances, but the lower court failed to consider the magnitude of the loss imposed by the deprivation. Instead, it dismissed the importance of the loss based on the use of the property.

A New York appellate court considered the total loss faced by the property owner in *In the Matter of Foreclosure of Tax Liens*, 87 N.Y.S.3d 262, 271 (N.Y. App. Div. 2018), *leave to appeal dismissed sub nom.* 149 N.E.3d 434 (2020). In that case, the owner died shortly after his property taxes became delinquent. *Id.* at 265. The government sent notice of foreclosure to the deceased owner via certified mail and regular mail and posted notice at the property. *Id.* at 264–65, 272. Prior to foreclosure, an attorney acting on behalf of the

owner's family member alerted the court that the owner had died and that he had been retained to open estate proceedings. *Id.* at 265. The attorney later withdrew. *Id.* at 273 (Scheinkman, P.J., dissenting). After more than a year without any movement on the case, and a failed attempt to contact the family member, the government moved to foreclose. *Id.* The court denied the motion, holding that the attempted notice to possible heirs was inadequate. New York's appellate division agreed, noting that the interests of the government "must be balanced with the property rights of individuals which may be extinguished forever . . . ." *Id.* at 272. Specifically, the court recognized that in New York, "a tax foreclosure proceeding permits the County to take title to privately-held property for the nonpayment of property taxes even where the taxes owing represent *only a small fraction of the value of the land*." *Id.* (emphasis added). "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 . . . ." *Id.* At a minimum, the government had a duty to search for the deceased owner's estate. *Id.*

Similarly, the Pennsylvania Supreme Court admonished that, "it is a momentous event under the United States and the Pennsylvania Constitutions when a government subjects a citizen's property to forfeiture for the non-payment of taxes." *Tracy v. Chester County, Tax Claim Bureau*, 489 A.2d 1334, 1339 (1985) (property worth $9,000 sold at tax sale for $400 to collect a $9 tax debt). Accordingly, when notice via certified and regular mail failed, the government

should have looked at government records for contact information. *Id.* at 1339.

These decisions are consistent with *Jones*, 547 U.S. at 229, where Gary Jones's home worth $80,000 was sold at a tax sale for just 25% of its value. *Id.* at 224. Although Arkansas law allowed the State to collect only as much as it was owed from the sale of the property, the Court weighed heavily the "important and irreversible prospect" of losing the property. *Id.* at 230. Similarly, in *Mennonite*, 462 U.S. at 794, where the property owner owed $8,237 on her mortgage when the government sold her property in a tax sale auction for $1,167, this Court recognized "a mortgagee possesses a substantial property interest that is significantly affected by a tax sale." *Id.* at 798. This requires "[p]ersonal service or mailed notice" even where "sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated." *Id.* at 799.

The loss to delinquent owners is most extreme in states like Nebraska and Massachusetts where "the taxpayer loses any equity he or she has accrued in the property, no matter how small the amount of taxes due or how large the amount of equity." *Tallage Lincoln*, 2020 WL 4811678 at *2. Because property owners are "rarely represented in tax lien foreclosure proceedings" and the law is often difficult even for "experienced attorneys" the result for delinquent property owners is often "catastrophic." *Id.* at *1; *see also Lowe*, 867 N.E.2d at 942, 951 (hospitalized woman lost home over $110); *Hamilton v. Royal Int'l Petroleum Corp.*, 934 So.2d 25, 31, 2005-846 (La. 2006) (elderly man lost lifelong home over $71 debt).

The magnitude of a property owner's loss, or of the beneficiary's gain, is an important factor in determining what sort of notice is due in a tax foreclosure sale, but that factor was ignored by the court below.

III

THE DECISION BELOW MERITS SUMMARY REVERSAL

As described above, the Nebraska Supreme Court's misreading of *Jones* to permit foreclosure after unaccepted certified mail and publication is a constitutional outlier. Summary reversal could be an adequate correction to clarify that *Jones* applies to property generally, not just residential homes, and that states may not shift the burden of notice to the person who is supposed to receive it. Given the frequency with which lower courts grapple with this issue, and the significant financial interests at stake for owners like Barnette, the Court's attention to the outlier is critical to ensure that more Americans are not deprived of property without sufficient notice.

This Court has exercised its summary reversal procedure pursuant to Supreme Court Rule 16.1 to correct "clear misapprehension[s]" of this Court's decisions. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004); *Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016) (summary reversal in due process case). Summary reversal also is appropriate to correct a court that strays from the consensus without a "legal basis." *Davis v. United States*, 140 S. Ct. 1060, 1062 (2020) (per curiam) (correcting "outlier practice" with a summary reversal). For example, in *Thompson v. Louisiana*, 469 U.S. 17, 18 (1984), the Court granted

certiorari and summarily reversed because the state court decision was "in direct conflict" with a decision rendered more than six years earlier.

Here, the Nebraska Supreme Court strayed from all other Circuit Courts and state courts of last resort in its interpretation of *Jones* and the need for notice comporting with due process. Moreover, Nebraskans deprived of due process in the foreclosure process may be denied relief from federal courts, stuck with the Nebraska Supreme Court's cramped understanding of due process.[18] Only this Court, therefore, can settle this important question of federal law.

[18] Nebraskans who lose their property to a tax foreclosure cannot easily vindicate their due process rights by going to federal district court, due to potential jurisdictional bars under the Tax Injunction Act and comity. *See, e.g., Wayside Church v. Van Buren County*, 847 F.3d 812, 822 (6th Cir. 2017); *Dorce v. City of New York*, No. 19-cv-2216 (JGK), 2020 WL 2521320, at *10 (S.D.N.Y. May 17, 2020).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

DATED: September 2020.

DEBORAH J. LA FETRA
JEREMY TALCOTT
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
dlafetra@pacificlegal.org
jtalcott@pacificlegal.org

EDWARD F. NOETHE
McGinn, Springer & Noethe, PLC
20 North 16th Street
Council Bluffs, IA 51501
Telephone: (712) 328-1566
enoethe@mcginnlawfirm.com

CHRISTINA M. MARTIN
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
cmartin@pacificlegal.org

Counsel for Petitioners