No. 20-321

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

REPLY ON PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

Inadequate notice made by a party who stands to gain a windfall when notice fails is a nationwide problem that in this case arises from a foreclosure to collect a property tax debt.[1] When government takes or transfers property without ensuring meaningful notice, owners are deprived of their property without due process. This Court has previously held that the Constitution requires notifiers to take additional steps when they *know* that notice by certified mail is unclaimed. *Jones v. Flowers*, 547 U.S. 220, 237 (2006); *see also Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 315, 319 (1950) (publication is constitutionally inadequate when the recipient's address is known).

Here, Sarpy County, Nebraska, sold a $1,180 tax lien on Petitioner Walter Barnette's $25,000 property to a private investor, Pontian, L.L.C., that then transferred it to a sister organization, HBI, L.L.C. App. A-5; Reply App. A-6. Before HBI could foreclose and take title to Barnette's property, Nebraska law required HBI to provide notice to Barnette that his title was in danger. Neb. Rev. Stat. § 77-1831 (2009).

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[1] Pet. at 26. *See, e.g.,* Ralph D. Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274 (2018) (localities in Massachusetts alone took $56 million in equity from property owners in just one year); Christine MacDonald, *Wayne Co. foreclosures, Detroit evictions halted amid outbreak*, Detroit News (Mar. 16, 2020), https://www.detroitnews.com/story/news/local/detroitcity/2020/03/16/wayne-co-wont-foreclose-this-year-due-tocoronavirus/5060012002/ (10,000 Detroit owners faced tax foreclosure in 2016). Other types of ownership interests are lost through similarly poor notice sent by the party who benefits.

The requirements of the statute (certified mail followed by publication) did not meet the requirements of the Due Process clause in this case because the certified mail was returned unclaimed, *see* App. A-5, and publication never satisfies due process when the recipient's address is *known*. *Mullane*, 339 U.S. at 315, 319.

The Nebraska Supreme Court erroneously limited *Jones* to its facts, and failed to consider what process was reasonable in light of the windfall incentive for Respondent HBI and the magnitude of loss for Barnette. The court upheld HBI's meager attempts as reasonable and consistent with due process, even though *Jones* 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." *Jones,* 547 U.S. at 226. It instead deemed that publication was a sufficient "additional reasonable step," App. A-29–31, and despite *Mullane*'s holding that publication is reasonable *only* when a recipient's location is unknown. *Mullane*, 339 U.S. at 314, 319.

Moreover, there are no factual impediments to resolution of this case. For each of the alleged "misstatements" identified in HBI's brief in opposition, Petitioner provides citation to the record in this reply brief. *See infra,* 3–5 (providing record cites for all factual assertions).

This Court should grant the petition to decide whether the "additional reasonable steps" mandated by due process apply to owners of undeveloped real estate, and whether a severe loss for an owner like Barnette and gross windfall for the party sending

notice should be considered when determining what notice is due. Property owners nationwide desire resolution of these issues and owners in the dozen states like Nebraska where parties sending notice profit more when notice fails have a particularly keen interest. *See* Pet. at 2.

ARGUMENT

I
BARNETTE ACCURATELY STATED THE FACTS PRESENTED IN THIS CASE

HBI asserts that Barnette misstated facts relevant to his Petition.[2] Barnette's presentation of the facts is fully supported by the record. Specifically, Barnette purchased the property in 2002, Reply App. A-6; the property was assessed at $25,000, *id.*; the property taxes were typically $500 per year. Reply App. A-5. The taxes, interest, and fees for 2010 and 2011 combined totaled $1,170.90 when Pontian purchased the lien. Reply App. A-5. More than $500 interest had accrued on the $1,170 lien when HBI foreclosed. *See* Reply App. A-7.[3]

The Sarpy County Assessor's website also lists the assessed value of the property in 2010–2019 at $25,000 and presently at $37,500. The Assessor states that the taxes in 2010 and 2011 were $493.00 and $493.50, respectively, and provides links to receipts showing Barnette paid taxes for 2012–2015 prior to

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[2] Sarpy County's brief does not dispute Barnette's statement of the facts or the record.

[3] These details are in Pontian's application to Sarpy County for a tax deed, submitted by HBI to support its motion for summary judgment and included in the record on appeal in the Bill of Exceptions (cited as "Exhibit 2" by both parties). Excerpts are appended to this Reply Brief.

HBI taking the tax deed).[4] *See* Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). Contrary to HBI's suggestion, therefore, the record is more than sufficient to support the question presented as to whether the extent of due process notification rests in part on the windfall received by the foreclosing entity.

With regard to the notice itself, HBI concedes that it took a tax lien to Barnette's property by paying his 2010 and 2011 property taxes and that it mailed a certified letter providing notice to Barnette's residence in Council Bluffs, Iowa, which was returned as unclaimed. HBI Opp. at 1–2. HBI further concedes it took no additional steps to provide notice other than publication in a Sarpy County community newspaper. HBI Opp. at 2. Specifically, the newspaper was the Papillion Times, *see* Reply App. A-3, with circulation in the Nebraska towns of Papillion, LaVista, and Springfield.[5]

Finally, HBI asks the Court to infer that Barnette intentionally avoided service of notice, and disputes Barnette's ignorance of Guardian Tax Partners, Inc., HBI Opp. at 10–11, which Pontian "erroneously" "listed . . . as the sender of the certified mail" that would have provided notice of foreclosure. App. A-5.

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[4] Sarpy County Assessor Website, "Property Search," https://apps.sarpy.com/sarpyproperty/pdisplay3?locid=011572191.

[5] *See e.g.*, Papillion Times Masthead (July 29, 2020) https://omaha.com/community/papillion/eedition/page-a01/page_45e0caf9-debe-5543-a8b9-c8f4dec2c228.html.

But any disputed fact must be resolved against HBI because the case was decided below on HBI's motion for summary judgment. *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). Moreover, HBI previously conceded that Barnette had no reason to recognize the private entity that purchased the tax lien. Reply App. B-7. During the hearing on summary judgment, when HBI similarly suggested that Barnette tried to avoid receiving notice of the imminent foreclosure, Reply App. B-3, Barnette (through his counsel) asserted he knew nothing about Guardian Tax Partners (the sender of the notice) and therefore would not have any reason to go to the post office to collect missed certified mail "from an entity that [Barnette] has never heard of." Reply App. B-5. HBI's counsel then acknowledged that Barnette was unfamiliar with Pontian (and by extension, Guardian Tax Partners, Inc.): "I would guarantee Mr. Barnette didn't know that the tax certificate was purchased by Pontian. If he knew that he would have done something about it I assume." Reply App. B-7.

II
BARNETTE'S DUE PROCESS CLAIMS PROPERLY LIE AGAINST BOTH RESPONDENTS

Sarpy County argues that Barnette has no due process rights to protect because the County outsourced its duty to provide notice to a third-party private investor. Sarpy County Opp. at 3. But the law on this point is clear: private tax collectors are treated as state actors when they are delegated a public function by the State. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001); *Lugar v. Edmondson Oil Co., Inc.*, 457

U.S. 922, 932–34 (1982). HBI *must* satisfy due process because the duty to provide constitutionally adequate notice has been delegated to tax certificate recipients by statute. *See* Neb. Rev. Stat. § 77-1831; *see also* App. A-14–19; *Wisner v. Vandelay Investments, L.L.C.*, 916 N.W.2d 698, 727 (Neb. 2018) (investor who mailed notice of tax foreclosure had duty to satisfy due process).

III
THE NEBRASKA SUPREME COURT'S DECISION CONFLICTS WITH *JONES* AND OTHER CIRCUIT AND STATE SUPREME COURTS

Like the Nebraska Supreme Court below, HBI and Sarpy County attempt to limit *Jones* and its progeny by misreading those cases.

This Court in *Jones*, 547 U.S. at 225, "h[e]ld 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." HBI insists that it satisfied that additional step when Barnette's certified letter was returned unclaimed by publishing notice in the Papillion Times. *See* HBI Opp. at 6. In *Jones*, the government sent two letters, both returned unclaimed, and the government "published a notice of public sale in the Arkansas Democrat Gazette," 547 U.S. at 224, a top Arkansas newspaper when newspapers were more relevant than today's increasingly online world. This Court rejected arguments that publication in a newspaper could serve as a reasonable added step when certified mail fails. *Id.* at 237. "Several decades ago, this Court observed that '[c]hance alone' brings a person's

attention to 'an advertisement in small type inserted in the back pages of a newspaper,' and that notice by publication is adequate *only* where 'it is not reasonably possible or practicable to give more adequate warning.'" *Id.* (quoting *Mullane*, 339 U.S. at 315, 317) (emphasis added); *see also Walker v. City of Hutchinson, Kan.*, 352 U.S. 112, 117 (1956) ("In too many instances notice by publication is no notice at all."). When the recipient's address is *known*, as in this case, notice by publication cannot satisfy due process. *Mullane*, 339 U.S. at 315, 319.

HBI argues further that the Nebraska Supreme Court opinion did not limit *Jones* notice requirements to property that contains a home.[6] Although the lower court stated that the presence of a home was one "factor," the totality of the decision reveals that the court considered the lack of a home to be the *dispositive* factor. *See* App. A-20, 22–25 (emphasizing that *Jones* gave special importance to the use of the property as a home); *see also* A-17 ("Because the letter concerned the 'important and irreversible' prospect of losing one's home, the [*Jones*] Court held that additional steps were required.").

The Nebraska Supreme Court majority's insistence that "we do not, as the dissent suggests, limit *Jones* to cases involving houses," App. A-23, rings hollow in light of the actual holding. The court dismissed Barnette's property as "nothing more than a vacant lot," App. A-24, and relied upon that characterization as a reason to hold that a deprivation

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[6] Sarpy County, in contrast, agrees with Barnette that the Nebraska Supreme Court distinguished *Jones* primarily because Barnette's undeveloped land did not contain a home. *See* Sarpy County Opp. at 2–3.

of such property is entitled to less due process than would be required for a home. Dissenting Justice Papik flatly rejected that understanding of this Court's *Jones* opinion. App. A-37 (citing instances in *Jones* that refer to property ownership in general, beyond developed real property).

The court's refusal to require an additional reasonable step because the land did not contain a home conflicts with all other state high courts and appellate courts that have considered the matter. *See* Pet. at 13–15; *see also* App. A-34–35 (Papik, J., dissenting) (*Jones* controls and HBI could have taken the reasonable additional step that "followed the normal practice in Nebraska of sending the published notice to those with an interest in a proceeding by regular mail at the same time the notice was published.").[7]

HBI seeks to distinguish these cases by repeating the truism that the nature of due process protection depends on the underlying facts of the case. HBI Opp. at 8–9. Barnette agrees with that general principle but HBI goes further, arguing that, so long as a court says it weighed the facts, due process is satisfied. Not so. The many cases cited by Barnette, *see* Pet. at 12–19, consistently hold that, under *Jones*, even minimal due process requires HBI to apply a 55-cent stamp to its failed certified notice and drop it in a mailbox.

HBI attempts to distinguish *Plemons v Gale*, 396 F.3d 569 (4th Cir. 2005), and *Delta Property Management v. Profile Investments, Inc.*, 87 So. 3d 765

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[7] Justice Cassel concurred with the majority but urged the Legislature to adopt precisely this requirement in the tax lien notice statute. App. A-32.

(Fla. 2012), because the recipients' addresses in those cases were unknown, whereas the certified letter in this case was sent to Barnette's correct address. HBI Opp. at 7. HBI misses the point. The holdings in those cases did not depend on the reason *why* the original notice failed; the fact that notice *did* fail required the sender to take additional steps. That is, the holdings of *Plemons* and *Delta* would require HBI to take more action to provide notice, not less. The additional step differs when the notifier knows the recipient's address—e.g., send a notice by regular mail—a step less burdensome than requiring the notifier to find correct contact information. *Plemons*, 396 F.3d at 572–73; *Delta Property Management*, 87 So. 3d at 771–73.

Sarpy County concedes that the Nebraska Supreme Court conflicts with other courts and even suggests that two courts have "decline[d] to extend the holding in *Jones*" to cases like this one. *See* Sarpy County Opp. at 3–5. Petitioner Barnette thinks Sarpy County's interpretation misses the mark and that the decision below is a constitutional outlier, but if the County were correct, that would weigh in favor of granting review and holding oral argument, since it would constitute an additional split of authority.

Lastly, both respondents insist that the court below properly permitted the reduced level of notice because Barnette did not offer evidence proving that he was ignorant of his peril and that he was not avoiding delivery of certified mail. HBI Opp. at 11; Sarpy County Opp. at 3. As shown above, *supra* at 5, HBI previously conceded that Barnette had no reason to know the name of the private entity that purchased the tax lien. HBI presented no evidence that Barnette

attempted to avoid service and disclaimed that theory during oral argument of the summary judgment motion, acknowledging it was irrelevant. Reply App. B-7.

As described in the Petition, there are many reasons why a person would not collect mail from an unknown private entity with no legal interest in the property. Pet. at 18. And far from evading his duty to pay taxes or abandoning his land, when Barnette learned about HBI's quiet title action for his property, he tried to pay his full tax debt but was turned away by the county treasurer. App. C-3. Ultimately, the question is not what more a property owner could do to avoid the peril of tax foreclosure, but what the foreclosing party must do to provide notice prior to depriving the owner of undeveloped land of their property. The question is particularly urgent where the foreclosing party stands to gain a windfall when effective notice fails.

The Nebraska Supreme Court conflicts with all other Circuit Courts and state courts of last resort in its interpretation of *Jones* and what "additional steps" are needed to comply with due process in the context of a foreclosure action. Only this Court can settle this important question of federal law and determine how the promise of a windfall and a large magnitude of loss should weigh in the sort of notice provided.

IV

THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER DUE PROCESS REQUIRES A COURT TO CONSIDER THE WINDFALL INCENTIVE AND MAGNITUDE OF DEPRIVATION

The prospect of a windfall exists whenever a lienholder can take an entire property by paying only a year or two's property taxes. This situation arises repeatedly in Nebraska, generating two other such cases in the Nebraska Supreme Court in just the past three years. *See Wisner*, 300 Neb. at 862; *Adair Holdings, LLC v. Johnson*, 936 N.W.2d 517, 521 (Neb. 2020).

The Petition asks whether due process requires a court to consider the potential windfall incentive of the party providing notice, and the magnitude of the owner's deprivation, when determining whether an attempt at notifying a property owner of a prospective loss is reasonable. Here, Petitioner suffered a roughly $23,000 loss of equity in the name of collecting an overdue tax debt of $1,180 plus interest. The remainder was pocketed by Respondent HBI. *See* Pet. at 2. Many courts in addition to the Nebraska Supreme Court fail to consider that loss or the windfall to government or parties like HBI when determining what steps might be "reasonable." Pet. at 27, 30.

Although HBI does not dispute the importance of this question, HBI Opp. at 14, Sarpy County argues that *Jones* and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), already require courts to weigh the magnitude of loss to someone like Barnette and consider how a

windfall incentive could perversely impact notice and lead to erroneous deprivations of property. Sarpy County Opp. at 5–6. This argument is not clearly supported by the holding of those cases, but if this Court agrees that such matters already must be considered by existing precedent, the Court should grant the petition, reverse the Nebraska Supreme Court for failure to weigh these factors, and remand with explicit instructions to the lower court to consider the windfall as a factor in determining what process is due.

CONCLUSION

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

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