

No. 22-166

IN THE
Supreme Court of the United States

GERALDINE TYLER, on behalf of herself and all
others similarly situated,

Petitioner,

v.

HENNEPIN COUNTY, AND
MARK V. CHAPIN, Auditor-Treasurer in his official
capacity,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit

**BRIEF OF NATIONAL LEGAL AID &
DEFENDER ASSOCIATION AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONER**

NEIL NANDI
CROWELL & MORING LLP
455 N. Cityfront Plaza
Dr., Ste. 3600
Chicago, IL 60611

*Additional counsel listed
at end signature block

ANUJ VOHRA
Counsel of Record
KYLE LYONS-BURKE
CROWELL & MORING LLP
1001 Pennsylvania Ave NW
Washington, DC 20004
(202) 624-2502
avohra@crowell.com

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INTEREST OF *AMICUS CURIAE*¹

Amicus Curiae National Legal Aid & Defender Association (“NLADA”) is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. For more than a century, NLADA has pioneered access to justice at the national, state, and local levels in multiple ways: helping create many of the first public defense systems in the country; supporting the Legal Services Corporation; developing nationally applicable standards for legal representation; and advocating for groundbreaking legislation. NLADA serves as the collective voice for our country’s civil legal aid and public defense providers and offers high-quality advocacy, training, and technical assistance. From its founding to the present, the organization’s mission has been the same: fulfilling the American promise of equal justice under the law.

NLADA’s commitment to our nation’s civil legal aid and public defense attorneys—and, therefore, to low-income people receiving their services—continues today through programs such as the Racial Equity Initiative and Racial Justice Action Plan, which commits NLADA and its members to (1) speak with clarity about poverty and racial equity; (2) improve our internal governance to reflect the racial equity we seek to secure in our communities; and (3) support a purpose-driven practice that employs strategic

¹ No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than *amicus curiae* and its counsel.

advocacy to advance racial justice in our communities.

Through its work, NLADA has developed a unique perspective on the challenges low-income individuals encounter when navigating the legal system, as well as the institutional barriers and harms that system can present. NLADA regularly files amicus briefs in federal and state courts across the country on issues affecting racial and income inequities, to provide important context and insight for judges in rendering their decisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental injustice resulting from tax foreclosure procedures which eliminate home equity is self-evident. The government seizes property valued far in excess of a *de minimis* tax liability, sells the property and recoups the monies owed, and then retains the excess value of the property. The limited ability of homeowners to reclaim their property requires knowledge of—and the ability to navigate—a unique set of local rules and procedures that may be complex, time-consuming, and expensive, rendering the task practically impossible for those without access to counsel. This is occurring at a time when 92% of low-income Americans cannot obtain adequate legal assistance for their civil legal problems. Legal Servs. Corp., *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans* 19 (2022), <https://justicegap.lsc.gov/the-report/> [https://lsc-live.app.box.com/s/xl2v2uraitbbrhuwtjlg10emp3myz1].

The process is exactly backwards—fairly maligned as “home equity theft.” The government is not merely collecting outstanding taxes; it is reaping an exponential, undeserved, windfall. According to Pacific Legal Foundation, from a sample of 5,600 homes where the state confiscated excess home equity as part of a tax foreclosure process, homeowners lost, on average, 86% of their equity in their homes. Pacific Legal Foundation, *Thousands Lose Their Wealth to Home Equity Theft*, <https://homeequitytheft.org/size-and-scope> (last visited Mar. 2, 2023).

And because home equity is “the most substantial source of wealth” for most households in the United States—the “primary savings mechanism” for much of the country’s population—the government’s seizure of excess home equity under these circumstances has lasting, damaging consequences.

Amicus writes to highlight subsections of the taxpaying population for which those consequences are especially severe: low-income communities and communities of color. Beyond their affront on fundamental notions of fairness, the tax foreclosure regimes at issue perpetuate and exacerbate the racial inequity that unfortunately pervades the United States’ history of home ownership.

Historical government practices intended to make home ownership more difficult for non-White citizens—e.g., redlining, discriminatory tax assessment and appeal processes—have resulted in rates of home ownership in low-income communities of color lagging far behind their White counterparts. For the same reason, in the homes they do own, non-White individuals on average hold far less equity than their White counterparts. Home ownership and home

equity have long served as the means by which families can build lasting, intergenerational wealth. For just as long, non-White families have been denied equal opportunities to begin that building process.

Moreover, data nationwide indicates that members of low-income communities of color who do achieve home ownership are saddled with a disproportionate amount of property tax debt, and face tax foreclosure proceedings at rates significantly higher than their White counterparts. And because these communities are less likely to have the resources necessary for legal representation, they must face alone the bespoke and complex state and local processes for the recovery of excess home equity seized. They are thus more susceptible to the adverse consequences resulting from home equity theft.

In other words, tax foreclosure regimes of the type before the Court, in addition to being regressive and punitive, perpetuate and exacerbate the longstanding racial imbalance in home ownership animated by inequitable government housing policies. These foreclosure regimes are no less damaging than the unjust policies that preceded them.

For these reasons, the Court should reverse the judgment of the U.S. Court of Appeals for the Eighth Circuit.

ARGUMENT

I. GOVERNMENT POLICIES HAVE HISTORICALLY CREATED INEQUITIES IN HOME OWNERSHIP.

Home equity is “the most substantial source of wealth” for most households in the United States and “remains the primary savings mechanism for a substantial percentage of the U.S. population.” Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. Banking Inst. 5, 18 (2009). Yet government policies have historically contributed to the inequitable distribution of that home equity across racial groups.

The most notorious twentieth century example is redlining: “the practice of denying borrowers access to credit based on the location of properties in minority or economically disadvantaged neighborhoods.” Bruce Mitchell & Juan Franco, *HOLC Redlining Maps: The persistent structure of segregation and economic inequality*, NCRC Research 5, (2018), https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf. Through the federal government’s racially discriminatory backing of residential mortgages, White residents were able to climb the property ladder while non-White residents were not. See McKay Cunningham & Latonia Haney Keith, *Redlining and Intergenerational Wealth*, Advocate, Dec. 2021, at 26. (“As housing values shot up during this period, the home equity that White homeowners realized assured them intergenerational wealth—an opportunity denied to communities of color.”); see also Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth*,

Racism, and the U.S. System of Taxation, 15 Nw. J. L. & Soc. Pol'y 265, 271 (2020) (“[L]ocally segregated neighborhoods and discrimination in access to housing were brought to national scale by redlining and federal mortgage policies beginning in the 1930.”). Although redlining was formally outlawed by the Fair Housing Act of 1968, “its enduring effect is still evident in the structure of U.S. cities.” Mitchell, *supra*, at 5.

Redlining was not the only practice that suppressed home ownership among historically disadvantaged communities. Discriminatory tax assessment and appeal practices, especially prevalent during the Jim Crow era, contributed to the persistent racial and ethnic gap in homeownership rates in America. See Andrew Kahrl, *More for Less: How Property Taxes Fuel Racial Inequality*, Tax Notes (Jan. 25, 2021), <https://www.taxnotes.com/special-reports/tax-history/more-less-how-property-taxes-fuel-racial-inequality/2021/01/21/2l6gq>; see also Andrew W. Kahrl, *Investing in Distress: Tax Delinquency and Predatory Tax Buying in Urban America*, 43 Critical Socio. 199, 219 (2017) (noting studies from the 1960s and 1970s showing that homes in neighborhoods in Boston and Chicago with the highest Black population densities were assessed taxes far higher than homes in the rest of the city).

Even today, home equity disproportionately accrues to White citizens through higher rates of home ownership. In 2018, the rate of White homeownership was 73.6%, while the rate of Black homeownership was only 42.9%. Strand, *supra*, at 272. And in 2016, on average, “Black homeowners

also had less than half the home equity of White homeowners—\$45,000 compared with \$92,000, respectively.” *Id.* (quotation omitted). Intergenerational disparities in wealth account for 25 percent of the racial gap in home ownership. Daria Roithmayr, *Them That Has, Gets*, 27 Miss. C. L. Rev. 373, 383 (2008). White homeowners are approximately four times more likely than Black homeowners to receive parental help with down payments that allow them to mount the property ladder. *Id.*

In sum, as compared to White individuals, non-White individuals are less likely to own homes, have less equity in the homes they own, and provide less support to subsequent generations to build home equity. These dynamics make non-White communities especially vulnerable to adverse consequences resulting from the erasure of home equity. Specifically, the loss of home equity will have devastating effects on these communities by eradicating the hard-fought equity gains they have made and furthering the disparity in intergenerational wealth that is so important to closing the racial wealth gap.

II. INDIVIDUALS FROM HISTORICALLY DISADVANTAGED COMMUNITIES WHO ACHIEVE HOME OWNERSHIP BEAR DISPROPORTIONATE PROPERTY TAX DEBT.

Homeowners in the United States carry approximately \$15 billion in delinquent property tax debt in a typical year. Cameron M. Baskett & Christopher G. Bradley, *Property Tax Privateers*, 41 Va. Tax Rev. 89, 93 (2021). This debt is

disproportionately concentrated low-income and marginalized communities. For example, a report of the New York City Comptroller found that the one- to three-family homes whose tax liens were sold in 2011 were highly concentrated in low-income community districts with large populations of Black or Hispanic New Yorkers. N.Y.C. Comptroller's Office, *The New York City Tax Lien Sale: History and Impact*, (2012), https://comptroller.nyc.gov/wp-content/uploads/documents/NYC_TaxLienReport_v8.pdf. The Comptroller's maps are telling, showing far more dots (representing tax lien sale properties) in Black, Hispanic, and lower income areas. See Appendix; see also Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 U.C. Irvine L. Rev. 847, 851 (2019) ("The City of Detroit has unconstitutionally assessed thousands of homes, leading to inflated property taxes, which homeowners like Mrs. C and Mr. B could not afford to pay, so the County confiscated the homes through tax foreclosure."); cf. Jason Grotto, *An Unfair Burden*, Chi. Trib. (June 10, 2017), <http://apps.chicagotribune.com/news/watchdog/cook-county-property-tax-divide/assessments.html> (showing that, due to tax assessment processes, "people living in poorer areas tended to pay more in taxes as a percentage of their home's value than residents in more affluent communities").

As property tax delinquency has fallen disproportionately on historically disadvantaged communities, so too has the weight of home equity theft. In Arizona, the impacts of the tax foreclosure scheme are concentrated in high-poverty neighborhoods. Emily L. Mahoney & Charles T.

Clark, *Arizona Owners Can Lose Homes over as Little as \$50 in Back Taxes*, Ariz. Republic, (June 16, 2017), <https://www.azcentral.com/story/money/real-estate/2017/06/12/tax-lien-foreclosures-arizona-maricopa-county/366328001/>. Other hard-hit areas in Arizona are those with large Latino and African-American populations. *Id.* One study in Washington, D.C. found that homeowners with a severely delinquent property subject to a tax lien are significantly more likely to be Black and significantly less likely to be either White or Asian. Cameron LaPoint, *Property Tax Sales, Private Capital, and Gentrification in the U.S.*, (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219360.

A *Washington Post* investigation in 2013 found that seventy-two percent of the homes pending tax foreclosures in the District of Columbia were in neighborhoods where less than twenty percent of the population was White. Michael Sallah et al., *Left with Nothing*, Wash. Post, (Sept. 8, 2013), <http://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing> [<https://perma.cc/W6FV-V2FB>]. The impact was focused in “the city’s two poorest wards,” where more than half of the foreclosures took place. *Id.* Between 2005 and 2008, thirty-three properties along a single street in a historically Black neighborhood of Washington, D.C. were foreclosed on and sold due to tax delinquency. *Id.* Indeed, among the over 1,200 properties that were foreclosed in D.C. in 2013 were many that had been “owned free and clear by families for generations.” *Id.*

Another recent investigation found that in Baltimore, each and every one of the 1,763 homes that changed hands through a tax sale was located in a

majority-Black neighborhood. Nick Thieme & Sophie Korsakov, *Tax sale nightmare: How an unpaid bill can cost Baltimore homeowners thousands, or even their homes*, Balt. Banner (Jan. 26, 2023), <https://www.thebaltimorebanner.com/community/using/baltimore-tax-sale-lien-auction-64APUHOPUFB6VJ4Z6IX6WC7NMU/>. Even accounting for other factors including median income, poverty rates, population and homes sale price, the rate of homes liened and then transferred in the census tract decreases as the percentage of White residents in the tract increases. *Id.*

Historical practices that have limited home ownership in disadvantaged communities, combined with taxation and foreclosure practices that disproportionately harm homeowners in those same communities, render these communities particularly vulnerable to home equity theft statutes.

III. IN EFFECT, THE COMPLEXITIES OF THE STATUTES AT ISSUE EXPLOIT INEQUITIES IN HOME INVESTMENT.

Despite the disparate impact that home equity theft has on low income and communities of color, cities and states have argued—and courts have agreed—that these takings are fair so long as the owner has the opportunity to redeem or reclaim their property rights. These redemption rights, however, are often illusory. In order to exercise them, a homeowner must wade through a complex regulatory scheme, navigate a maze of notices, and pay fees and costs that often dwarf the amount of the original tax delinquency. The so-called redemption rights in these property tax schemes offer little protection. Populations already burdened with debt do not have

the resources, time, or sophistication necessary to jump through the hoops required to keep their homes.

Indeed, the tax sale process is “exceedingly complicated and . . . understood only by investors who profit from the purchase of properties at tax sales.” John Rao, *The Other Foreclosure Crises*, Nat’l Consumer L. Ctr., 13 (2012), <https://www.nclc.org/wp-content/uploads/2022/09/tax-lien-sales-report.pdf>.

“Complexity, rather than clarity and simplicity, characterize property tax collection in most jurisdictions.” Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J., 747, 750 (2000). While most states have procedures in place to make certain that pre-sale notices satisfy minimum due process requirements, many states fail to inform homeowners of the right of redemption after the tax lien has been sold. Rao, *supra*, at 24. A right of redemption that homeowners are unaware of is no right at all. Individuals are often unaware of property tax collection policies and how a single delinquency could result in loss of property. Maryann Flanigan, Jacquelyn Griffen & Odette Williamson, *Preserving Homeownership Series, Part 1: Property Tax Lien Foreclosures*, National Center On Law & Elder Rights (Sept. 28, 2022), https://ncler.acl.gov/getattachment/Legal-Training/upcoming_event/Tax-Foreclosure-Slides.pdf.aspx?lang=en-US.

These complex schemes practically require attorney assistance, but cost is a significant barrier to both seeking and receiving legal support. Legal Servs. Corp., *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans* 19 (2022), <https://justicegap.lsc.gov/the-report/>. Nearly half (46%) of people with low income who did not seek legal

help to address a legal issue did not do so because of cost concerns. *Id.* And limited resources prevent legal services offices from fully meeting the need for their services—legal aid organizations are forced to turn away one-half to two-thirds of people eligible for assistance. Bos. Bar Ass’n Statewide Task Force to Expand Civ. Legal Aid in Mass., *Investing in Justice: A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts* 1–3 (2014), <https://www.bostonbar.org/app/uploads/2022/06/statewide-task-force-to-expand-civil-legal-aid-in-ma-investing-in-justice.pdf>.

A homeowner that successfully navigates the regulatory scheme for recovery still faces the Hobson’s choice of paying significant fines and fees (in addition to the original tax debt) to the government and/or lienholders or losing their home and all of the equity they have built up. And these are the lucky ones. A homeowner who cannot afford the fees and fines has no redemption right; they lose their home. *See, e.g.,* Sallah, *supra* (one homeowner in Washington D.C. was charged \$4,999 on a \$134 tax bill—\$317 with interest and penalties); *Reinmiller v. Marion County, Oregon*, No. CV. 05-1926-PK, 2006 WL 2987707 (D. Or. Oct. 16, 2006) (finding no taking when the owner could buy back property by “paying property tax arrearage, additional interim tax assessments, a 5% foreclosure proceedings penalty, and other costs.”). Many jurisdictions permit holders of tax lien certificates or tax deeds to pile on extra fees and high interest rates or penalties. *See* Colo. Rev. Stat. § 39-12-103 (2022) (“The annual rate of redemption interest shall be nine percentage points above the discount rate”); Tex. Tax. Code Ann. § 34.21 (2021) (requires owner to pay a redemption premium

of 25 percent of the aggregate total if the property is redeemed during the first year of the redemption period or 50 percent if redeemed during the second year); *see also* Baskett & Bradley, *supra*, at 92 (noting that as cities attempt to balance budgets, “legislatures have raised interest rates, added fines, and increased caps on allowable attorneys’ fees”). Tax lien sales add costs that put the tax bill even further out of reach. *See* Rao, *supra*, at 4 (“many states permit tax sale purchasers to recover interest at rates of 18 percent or more”).

Even today, Governments are increasing the burdens homeowners must bear to keep their homes. In 2001, Washington, D.C. allowed tax buyers to file foreclosure cases, which enables tax lien investors to add unlimited legal and court fees to homeowners’ redemption cost, turning “minor delinquencies into insurmountable debts.” Sallah, *supra*. In 2003, Maryland removed a \$400 cap on legal fees and permitted tax buyers to charge homeowners “reasonable fees,” subject to court approval. Fred Schulte & June Arney, *Small Unpaid Bills Put Residents at Risk*, Balt. Sun (Mar. 25, 2007), http://articles.baltimoresun.com/2007-03-25/business/bal-taxsale-small-032507_1_fees-fromprivate-debt-ground-rent-unpaid-bills-put-residents [<https://perma.cc/N345-T3GW>]. And in 1995, Georgia amended its tax delinquency law to increase the penalty on delinquent property taxes. Instead of the previous ten percent penalty and one percent per month interest, the new law allows tax buyers to charge a twenty percent penalty at tax sale, another twenty percent after a year, and an additional twenty percent when a tax lien investor initiates legal proceedings to obtain title to the

property. Andrew W. Kahrl, *Unconscionable: Tax Delinquency Sales as a Form of Dignity Taking*, 92 Chi. Kent L. Rev. 905, 927 (2017) [hereinafter “Kahrl, *Unconscionable*”] (citing Richard Whitt, *Investors Can Reap 60 Percent Profit on Tax Liens: Predatory ‘A Very Kind Word’ for State Law*, Atlanta J. Const. (Apr. 1, 2002), at 1D). Under this scheme, a tax lien investor can generate a sixty percent profit in just thirteen months following a tax sale. *Id.*

Low-income Americans routinely forfeit or are unable to exercise their basic rights because they lack access to counsel. In the tax-foreclosure context, the statutes, processes, and legal rights implicated are likely to be inscrutable to a layperson. Absent legal assistance, the most vulnerable members of our community are also the most likely to be hurt by equity erasure laws like those in Minnesota.

IV. THE GOVERNMENT RECEIVES A WINDFALL FROM THESE INEQUITIES, AT THE EXPENSE OF DISADVANTAGED COMMUNITIES.

Governments enacting home equity theft statutes show little or no regard for the harm these statutes cause. Instead, the focus of these statutes is government convenience and increased government revenue. *See, e.g., McDuffee v. Collins*, 23 So. 45, 46 (Ala. 1898) (“The purpose was to relieve the collector of the duty of seeking the owner and paying him the balance, or of retaining it in his hands if the owner should refuse to receive it.”); *see also N.Y. Bill Jacket*, 2000 S.B. 4692, Ch. 203, July 6, 2000 letter from Edward Farrell, Exec. Dir. of N.Y. State Ass’n of Governors (“Enactment of this legislation would offer those local governments responsible for enforcement

of their own property taxes (and, in the case of many cities, the school and county property taxes they are responsible for enforcing) a means to stabilize their revenue flows and eliminate prolonged carrying of unpaid property taxes as receivables on municipal books.”).

Illinois provides a notable case study. *See* Kahrl, *Unconscionable, supra*, at 920–26. There, tax lien investors lobbied the General Assembly to “remove[] many of the legal hurdles tax buyers had to complete before being granted a tax deed” while “vastly narrow[ing] the range of legal options a tax delinquent property owner could employ in preventing loss of title” *Id.* at 920. The result was that tax lien investors “made a fortune” by “ruthlessly exploit[ing] various provisions of the law” to obtain tax deeds to property. *Id.* at 921. These enterprises “preyed on Cook County’s most vulnerable homeowners,” including persons with dementia, and non-English-speaking immigrants. *Id.* at 921–22.

In one instance, owners who had invested over \$16,000 in their home lost it over a \$500 tax delinquency. *Id.* at 925. When they challenged this as an unconstitutional taking, the Northern District of Illinois rejected their plea and deferred the matter to the legislature rather than the courts. *Id.* Supporters of the laws lobbied to preserve them, however, by expressly invoking the loss of equity as a punitive measure that would encourage taxpayer compliance. *Id.* at 926. Ultimately, the legislature kept the laws in place out of concern for “local governments’ fiscal needs” and the desire to preserve what “had increasingly become a vital source of annual revenue for local governments.” *Id.*

Revenues from these tax foreclosures have been a staggering windfall for the government. For example, in Massachusetts, a study for a one-year period from August 2013 through July 2014 revealed that “Massachusetts municipalities collected approximately \$56,600,000 more from their taxpayers than was owed.” Ralph D. Clifford, *Massachusetts has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274, 282-83 (2018). In other words, Massachusetts appropriated 43 dollars in value for every dollar owed. *Id.*

These windfalls arise because when governments seize a home to offset a nominal tax liability, they wipe out any equity the homeowner had in the property. Among nearly 200 homeowners who lost their homes, “one in three had liens of less than \$1,000.” Sallah, *supra*. Some of these homes had “liens of less than \$300” but were “resold for nearly \$130,000.” Kahrl *Unconscionable, supra*, at 929. A woman in Baltimore lost her home after failing to pay a \$362 water bill. Fred Schulte et al., *The Other Foreclosure Menace*, Huffington Post (Dec. 6, 2017), https://www.huffpost.com/entry/the-other-foreclosure-men_n_579936. And a couple in Massachusetts lost their \$270,000 home for failing to pay a \$224.58 utility bill. *Tallage LLC v. Meaney*, 23 LCR 375, 375–76 (Mass. Land Ct. 2015).

In effect, these statutes deliberately transfer homeowner wealth into government hands on the pretext of a tax liability that is dwarfed by the government’s windfall. Unlike taxation, these transfers have no regard for income and value—and likely have an overwhelmingly regressive effect due

to the inability of the poorer and more marginalized portions of the population to navigate and afford the process required to hang onto their homes. *See supra*, Section III. Home equity theft only widens the racial wealth gap, continuing an unfortunate history of inequitable government housing policies.

CONCLUSION

For the reasons stated in this amicus curiae brief, this Court should reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

March 6, 2023

Respectfully submitted,

NEIL NANDI
FAN CHENG
CROWELL & MORING LLP
455 N. Cityfront Plaza Dr.
Suite 3600
Chicago, IL 60611

MEGAN BEAVER
CROWELL & MORING LLP
3 Embarcadero Center
San Francisco, CA 94111

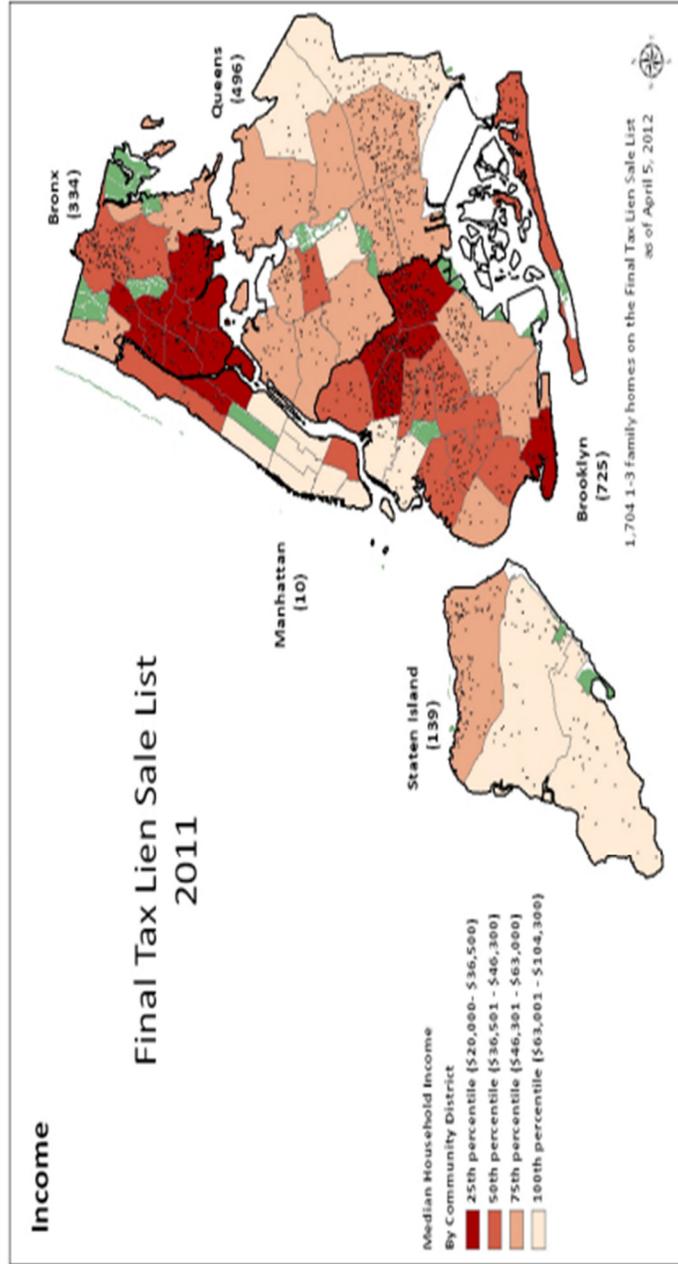
ANUJ VOHRA
Counsel of Record
CHARLES HWANG
KYLE LYONS-BURKE
SIYI SHEN
MICHAEL WILLIAMS
CROWELL & MORING LLP
1001 Pennsylvania Ave.,
N.W.
Washington, DC 20004
(202) 624-2502
avohra@crowell.com

*Counsel for Amicus Curiae National Legal Aid &
Defender Association*

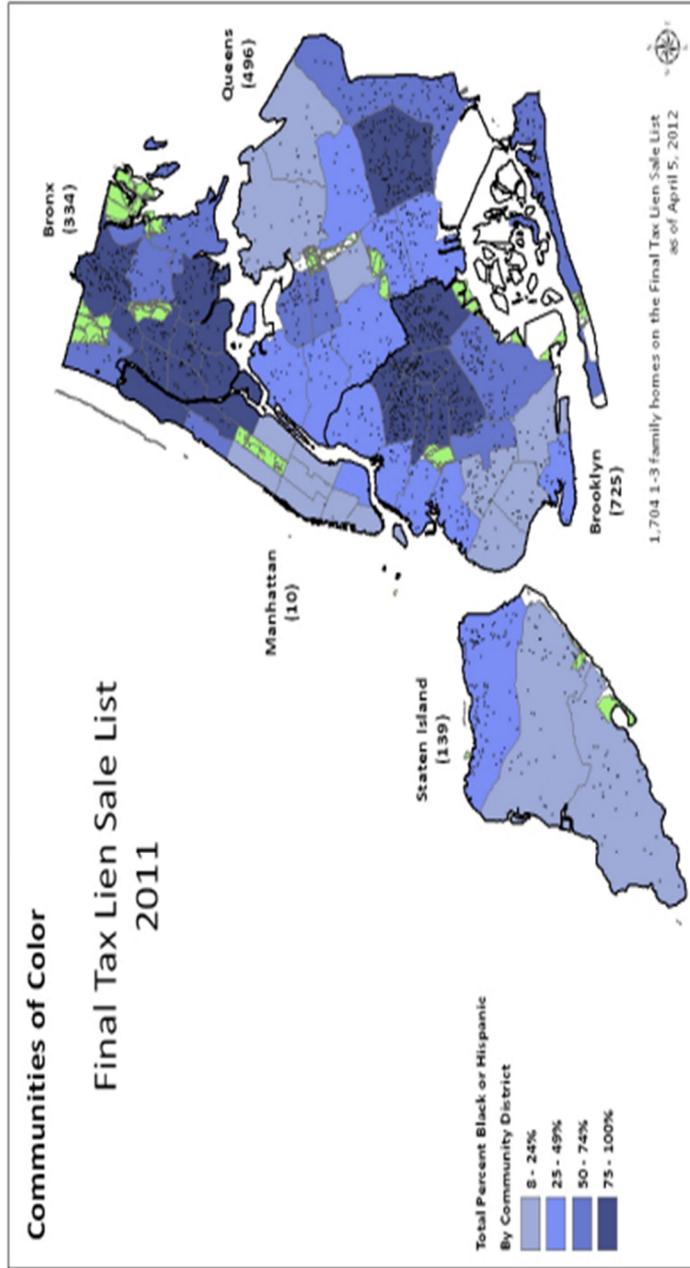
APPENDIX

APPENDIX

Maps from N.Y.C. Comptroller's Office
*The New York City Tax Lien Sale: History and
Impact*, (2012), [https://comptroller.nyc.gov/wp-
content/uploads/documents/NYC_TaxLienReport
_v8](https://comptroller.nyc.gov/wp-content/uploads/documents/NYC_TaxLienReport_v8).....1a



Sources: American Community Survey Demographic and Housing Estimates, American Community Survey 2007-2009 3-Year Estimates; and Department of Finance. Email message to author, April 6, 2012.



Sources: American Community Survey Demographic and Housing Estimates, American Community Survey 2007-2009 3-Year Estimates, and Department of Finance. Email message to author, April 6, 2012.