No. 22-166

In The

Supreme Court of the United States

GERALDINE TYLER,

Petitioner,

v.

HENNEPIN COUNTY, MINNESOTA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* FRANK S. ALEXANDER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*

For almost five decades Professor Alexander's research, scholarship, and practice has focused on real estate finance, real property taxation, and community development, with a particular focus in recent years on vacant, abandoned, and deteriorated properties.

A myriad of delinquent property tax enforcement systems, evolving standards of Due Process, interwoven parallels with mortgage law, and the central issues of equity and redemption all come to bear on the issues raised explicitly and implicitly in these proceedings.

Professor Alexander is the Sam Nunn Professor of Law, *Emeritus*, Emory University School of Law. He is the co-founder of the Center for Community Progress, and founder and CEO of Vulnerable Communities Initiative, both of which are nonprofit organizations focused on addressing vacant, abandoned, and tax delinquent properties, and serving vulnerable communities.[1]

Professor Alexander offers this *amicus* brief to the Court in order to provide historical, legal, and policy clarity about the key issues at stake in this case.

[1] Counsel for Professor Alexander confirms that this brief is prepared and submitted without any compensation from the parties to these proceedings, or any other party, and that no party authored this brief in whole or in part nor made any monetary contribution to the submission of this brief.

SUMMARY OF ARGUMENT

The core issue in this case is the adequacy of a state statute governing the procedures for enforcement of delinquent property taxes. Delinquent property tax enforcement is the province of state and local governments, and hundreds of differing approaches are used.

For the first 150 years of this country there was little federal court review of state property tax enforcement procedures because it was not perceived to implicate federal constitutional law. As state laws began to evolve in the twentieth century so also did Due Process jurisprudence.

Equity and redemption are at the heart of this case. Equity, with its double meanings of fairness and of financial value, is central, as is redemption. Redemption is payment of the price to release property from a lien. Equity as fairness is grounded in the jurisprudence of the Due Process Clause, which provides the guardrails for notice and hearing requirements applicable to the key events of delinquent property tax enforcement. Redemption is the right of the owner to free the property from the tax lien by payment of the delinquent taxes, which is an obligation of every property owner for the common good and general welfare. This right of redemption is grounded in centuries of English Common Law and is present in every American jurisdiction.

Foreclosure is the termination of the right of redemption. There are two methods of foreclosure: strict foreclosure and foreclosure by public auction. In strict

foreclosure there is a statutorily defined date by which redemption must occur, or the property is transferred to the government. In foreclosure by public auction the property is transferred either to the highest bidder at the public auction or to the government if no bid is tendered equal to or greater than the minimum bid.

In both forms of foreclosure, the key date is the transfer of the property to a new owner. In both forms of foreclosure, it is by definition an involuntary transfer that occurs in the absence of redemption.

If excess funds are received at a public auction foreclosure, such excess funds are the property of the subordinate lienholders, if any, and the owner. If neither the owner, nor any interested party, redeems the property in a strict foreclosure proceeding it is an indication that there is no market value in excess of the tax lien.

The Minnesota statute in question in this case is a strict foreclosure statute. Upon nonpayment of property tax there is an initial date for transfer of the property to the government, followed by an extensive period of time for redemption. If there is no redemption by the final date of the redemption period, title is confirmed in the government and all redemption rights are terminated. As the owner of the property, the government may retain the property for public uses, maintain and improve the property, or transfer it to a third party. Any and all such subsequent actions have no bearing on the presence or absence of excess funds. Consistent with all forms of foreclosure the key date is

the date of transfer of the property. Similarly, the key event is the transfer of the property. Examining values, and the behavior of owners, interested parties, and market participants, on this key date is determinative of equity.

This is not a case involving a taking under the Fifth Amendment. No excess funds of the owner or any interested party were received or held by the government. The absence of redemption by the owner and all interested parties is a signal that the open market, in this instance of an involuntary transfer, finds no financial value in excess of the tax lien. A sale of the property by the government fifteen months after the termination of redemption is not a tax sale of the property and has no bearing on this case. The presence or absence of value is determined as of the date of termination of redemption rights and final transfer of the property.

This is a case involving Fourteenth Amendment Due Process and whether the Minnesota statute meets the requisite standards of notice and hearing. The Eighth Circuit held that the Minnesota statute complies with the requirements of Due Process through extensive notice and multiple opportunities to retain the property.

The goal of delinquent property tax enforcement is solely the payment of the taxes, no more and no less. The government does not seek ownership of the property. Through multiple time frames and periods of redemption the government seeks payment not property.

It is only when neither the owner nor any other interested party is willing to exercise redemption, or no third party is willing to bid the minimum amount at a public auction, that the government becomes the owner by default. It does so because the property has negative net value in this involuntary transfer in the eyes of the market, the owner, and the interested parties. When property has such negative net value, the government becomes the owner of the property by default. The government does so in order to serve the common good by reducing the negative externalities of property that is likely to decline further in value, deteriorate, and impose costs on adjoining properties, neighborhoods, and the community at large if the government does not step in as the default owner.[2]

ARGUMENT

I. The System of Real Property Taxation

A. The Nature of Real Property Taxation

The property tax is the most difficult of all taxes to administer. With every form of property tax there are four key steps: 1) determining what property is subject to the tax; 2) determining the value of the property; 3) establishing the rate of taxation; and 4) collecting the tax. The fourth step of collecting the tax should be the easiest to administer, particularly because in

[2] This *amicus* brief does not address the second Question Presented, that of Eighth Amendment applicability to the facts of this case, as neither the law nor the facts point in that direction.

virtually every jurisdiction a property tax lien achieves priority over all other liens and encumbrances onto the property. The experience of our state and local governments, however, has been to the contrary.[3]

The property tax is predominantly a local tax. While the percentage of total revenues available to local governments that is derived from the property tax has declined in recent decades, it continues to be the primary source of revenues within the control of our cities, counties, and school districts.[4]

Collection of delinquent property taxes is not for the faint-hearted.[5] There are no uniform laws on enforcement of property tax liens, and few title insurance companies will insure title derived from a property tax proceeding. Federal courts have historically stayed away from issues involving the administration of property taxes, and state courts have routinely set aside tax sales, insisting on exact compliance with statutory procedures. Despite the unappealing nature of the subject matter, collection of delinquent property taxes must be accomplished. Failure to enforce payment of such taxes in an equitable, efficient, and effective manner can

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[3] Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 748 (2000).

[4] FRANK S. ALEXANDER, ET AL., GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW 277 (2022-2023 ed.).

[5] HENRY J. AARON, WHO PAYS THE PROPERTY TAX: A NEW VIEW 56 (1975).

have a devastating impact on property owners, on neighborhoods, and on local governments.[6]

B. The Evolution of Real Property Taxation

Property tax collection has its origins in the Roman Empire followed by variations in property tax syndications in the thirteenth century, in England in the seventeenth century,[7] and experiments in the sale and securitization of tax liens in the United States in the late twentieth and early twenty-first centuries.[8] During the colonial period and for much of the nineteenth century the responsibility to collect property taxes in the United States was placed either on private tax collectors, the county sheriff, or the county tax collector.[9]

If our federal system of government is intended, at least in part, to permit experimentation among our various states in achieving the best forms of governance, then there should be clear models of excellence and efficiency in the collection of this tax. Instead, there are a large number of different systems in the United States for collecting the property tax.[10] Most

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[6] Alexander, *supra* note 3, at 748.

[7] JOHN LOVE, ANTIQUITY AND CAPITALISM: MAX WEBER AND THE SOCIOLOGICAL FOUNDATIONS OF ROMAN CIVILIZATION 175-179 (1991).

[8] Alexander, *supra* note 3, at 758-759.

[9] JENS PETER JENSEN, PROPERTY TAXATION IN THE UNITED STATES 23 (1931); Alexander, *supra* note 3, at 759.

[10] Alexander, *supra* note 3, at 748, 770-777.

states have at least two entirely different approaches for enforcing payment of the property tax, with one procedure having its origins in the mid-nineteenth century and an alternative second procedure, equally available for use by local governments, having been developed in the middle of the twentieth century.[11] Other states leave the enforcement of the property tax to local governments, with little consistency in procedures as one moves from city to city and from county to county.[12]

The multiplicity of different approaches to the enforcement of property tax liens exceeds that of virtually any other aspect of state and local government law. Part of this is attributable to the origins of the property tax as one upon personal property (both tangible and intangible) as well as real property, giving rise to personal liability of the property owner in *in personam* actions. In the early twentieth century there was a gradual evolution towards a real property tax only, with a focus on *in rem* procedures.[13] It is also due to the fact that while in most states one or more procedures are authorized for statewide use, in other jurisdictions the procedures for enforcement of property tax liens differ according to the nature of the local government

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[11] *See, e.g.*, GA. CODE ANN. § 48-4-1 (West 2022) (judicial tax sales); *id.* § 48-4-76 (judicial foreclosures); ALEXANDER ET AL. *supra* note 4, at Chap. 12.

[12] Alexander, *supra* note 3, at 778-779.

[13] *Id.* at 771.

or are largely within the authority of local governments.[14]

Judicial involvement in the delinquent property tax enforcement process also varies significantly across the country. Slightly fewer than half of the states permit enforcement of the lien, and sale of the property, without any judicial process. Roughly the same percentage have some form of judicial involvement, either at the sale itself (if there is only one sale), or at the termination of the redemption period.[15]

Over the past seventy years delinquent property tax enforcement systems have continued to evolve. One reason for these new and modified systems is the growing recognition of the broader adverse consequences of long term property tax delinquency. In authorizing a new judicial *in rem* property tax enforcement system in 1995, as yet another local government option, the Georgia General Assembly declared:

> The General Assembly finds that the nonpayment of ad valorem taxes by property owners effectively shifts a greater tax burden to property owners willing and able to pay their share of such taxes, that the failure to pay ad valorem taxes creates a significant barrier to neighborhood and urban revitalization, that significant tax delinquency creates barriers to marketability of the property, and that

[14] *Id.* at 771-772.

[15] *Id*. at 773.

> nonjudicial tax foreclosure procedures are inefficient, lengthy, and commonly result in title to real property which is neither marketable nor insurable. In addition, the General Assembly finds that tax delinquency in many instances results in properties which present health and safety hazards to the public.[16]

Across the country the overwhelming majority of property taxes are paid by the due date. Of the small percentage of property taxes that are not paid by the due date, the majority of these delinquent taxes are paid prior to the final enforcement event. For those parcels of property for which the taxes remain delinquent for years, the greatest costs are not the lost revenues themselves but the costs imposed on the neighborhood and community at large. Because neither the owner, nor any interested party, nor any third party purchaser acting in conjunction with the owner, is willing to claim the property, the local government steps in as the default owner of last resort. The essential goal of property taxes is the payment of the amounts due, but when that does not occur the local government acts to protect the community from greater losses and harm.

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[16] GA. CODE ANN. § 48-4-75 (West 2022).

II. The Evolving Due Process Guardrails for Property Tax Enforcement

A. The Early 20th Century: Adequacy of Notice by Publication

In the early twentieth century local governments began to seek more efficient and effective property tax collection procedures. In the face of massive tax delinquencies spawned by the Great Depression, in 1935 the National Municipal League adopted a Model Real Property Tax Collection Law ("Model Law").[17] This Model Law proposed a two-stage *in rem* process in which the property is first sold in a nonjudicial proceeding, followed by a statutory right of redemption. At both stages notice to interested parties is provided by publication, with additional notice mailed to the owner at the time of the initial sale if the owner's identity is known. This Model Law was based in part on four decisions at the turn of the nineteenth century which sustained the adequacy of notice by publication. *Longyear v. Toolan*, 209 U.S. 414 (1908); *Ballard v. Hunter*, 204 U.S. 241 (1907); *Leigh v. Green*, 193 U.S. 79 (1904); *Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526 (1895). Three overlapping justifications were given for this conclusion. The first rationale was that an *in rem* proceeding, which creates no personal liability, requires less notice to owners in order to meet the fairness standard of Due Process. The second rationale was the "caretaker" principle, a premise that each property owner knows, or should know, of obligations

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[17] Alexander, *supra* note 3, at 766.

related to its ownership and its responsibility to meet those obligations. The third rationale was derived from the special nature of property taxation. The imposition of taxes did not require personal service to the property owner and so long as some opportunity is given for the owner to contest the accuracy of the tax no further notice obligation exists.[18]

While state and local governments were moving to implement tax foreclosure procedures based upon the innovation of the *in rem* procedure of the Model Law, Due Process jurisprudence was moving in the opposite direction.

Jurisdiction over a dispute requires not just jurisdiction over the persons or the property, but also adequate notice to the parties for them to have an opportunity to be heard. While property tax officials assumed that physical jurisdiction was a sufficient condition for proceeding summarily, the Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), held that the distinction between *in personam* and *in rem* was not a basis for differences in the duty to provide notice of the proceeding to interested parties.

B. Due Process in Property Tax Foreclosures

After centuries of deference to state autonomy in the field of property tax collection, the Supreme Court

[18] *Id.* at 765.

addressed the deceptively simple question of the application of due process notice requirements to the enforcement of a property tax lien in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

Confirming what most title insurance companies had suspected for decades, *Mennonite* cast into doubt the majority of property tax sale procedures used throughout the United States. Reluctant to create bright lines of universally applicable rights and duties, *Mennonite* concluded that a party holding a "legally protected property interest" whose name and address are "reasonably ascertainable" based upon "reasonably diligent efforts" is entitled to notice "reasonably calculated" to inform it of the proceeding. *Id.* at 798 and n.4, 800.

In the four decades since *Mennonite*, the application of Due Process to the hundreds of different property tax enforcement systems of state and local governments has been an ongoing challenge of seeking clarity in the midst of complexity. Proof that the property owner actually received notice is not constitutionally required. *Dusenbery v. United States*, 534 U.S. 161 (2002). But a local government does have a duty to undertake additional steps to provide notice when certified mail notice is returned unclaimed. *Jones v. Flowers*, 547 U.S. 220 (2006). Notice and a meaningful opportunity to be heard are both necessary before the property interest is terminated. *Connecticut v. Doehr*, 501 U.S. 1 (1991). The provision of notice to unsecured creditors whose identity is not revealed in a normal title examination but may be revealed in an

examination of probate records has been clarified. *Tulsa Professional Collection Serv's, Inc. v. Pope*, 485 U.S. 478 (1988).

This open textured rule of law left four subsidiary questions: (1) What event or stages in a property tax enforcement proceeding give rise to the requirement of adequate notice? (2) What property interests are entitled to more than notice by publication? (3) How is the existence of the interests to be ascertained? (4) What efforts are required in order to identify accurate addresses of the interested parties?[19] Further, whether state action is present when a private third party purchases a tax lien from a local government and seeks to foreclose the lien has yet to be clarified.

Within the past century the United States has witnessed Due Process emerge as the constitutional guardrail on the exercise of state and local government enforcement of delinquent property taxes.

III. The Centrality of Equity and of Redemption

In applying Fourteenth Amendment Due Process to the Minnesota statute, the twin concepts of equity and redemption are key. Both concepts have histories reaching back well over a thousand years. Both have multiple meanings in ordinary discourse, in statutes, and in public policy.

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[19] *Id.* at 750.

A. The Equity of Redemption

In English Common Law the concept of equity is most poignant in the evolution of the law of mortgages and its treatment by the dual systems of courts of law and courts of chancery.[20]

Originating as the real property equivalence of a pledge of personal property, the mortgage derived from the twelfth century gage (or pledge) in which property was transferred to the possession of a creditor and the creditor was permitted to receive the rents and profits of the land in exchange for payment of the debt.[21] As disputes emerged over the rights of a debtor to redeem its property from the obligation and the rights of a creditor to terminate the debtor's interest in the property, two distinct approaches developed. The first approach stated that the security instrument constituted transfer of legal title in the property to the creditor (the "title" theory), while the second stated that the

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[20] 3 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 129-130 (3rd ed. 1923); 2 SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON 205a (C. Butler 19th ed. 1853).

[21] THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILLE 120-126 (G. D. G. Hall ed. and trans. 1965); 2 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF THE COMMON LAW 603-609 (1898 & photo. reprint 1968); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed. 1956); Frank S. Alexander, *Mortgage Prepayment: The Trial of Common Sense*, 72 CORNELL L. REV. 288, 293 (1987).

security instrument only constitutes a lien on the property, and not a transfer of title (the "lien") theory.[22]

The title theory of mortgages follows directly from the early development of the defeasible fee as a substitute for the gage. The security instrument was a fee simple conveyance with the condition that if the debtor repaid the indebtedness by a specified date, then the creditor would reconvey the property to the debtor. If the debtor failed to make such repayment by the specified date, the creditor would hold the property in fee simple absolute.

The lien theory of mortgages emerged when chancery courts began to protect debtors by permitting redemption of the property from the debt despite the passage of the due date in the security instrument. Such protection became known as the "equity of redemption" and is perhaps the sole feature common to the law of mortgages in every jurisdiction today.[23] Chancery court decisions held "where a mortgage is once redeemable it is always redeemable"[24] and "equity

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[22] Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 295, 300 (1993).

[23] *See* JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 128 (2nd ed. 1839) ("The triumph of common sense over professional prejudice has perhaps never been more strikingly illustrated than in the gradual manner in which courts of equity have been enabled to withdraw mortgages from the stern and unrelenting character of conditions at the Common Law.").

[24] *Anonymous*, 22 Eng. Rep. 1073 (Ch. 1681).

will permit redemption of a mortgage even unto the tenth generation."[25]

In response to the indeterminacy of this equitable right of redemption the concept of foreclosure emerged as the procedure for terminating the right of redemption.

Foreclosure is found in two forms. Strict foreclosure is the creation of a date certain for exercise of the right of redemption or its termination. Foreclosure by public auction is a sale of the property to the highest bidder.

In every jurisdiction today the only method by which a *mortgagee* can force a termination of the debtor's equity of redemption is foreclosure by public auction.[26]

There are two property tax enforcement systems. Strict foreclosure is followed in a minority of states[27] and is the essential structure of the Minnesota system. Minn. Stat. § 280.41. The remaining states have systems which involve some form of public auction in the enforcement process.

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[25] *Bacon v. Bacon*, 21 Eng. Rep. 146 (Ch. 1639); *see* WILLIAM S. HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 257 (1927).

[26] RICHARD WALTER TURNER, THE EQUITY OF REDEMPTION (1931); Alexander, *supra* note 21, at 297; Alexander, *supra* note 22, at 301, 303-304.

[27] Alexander, *supra* note 3, at 772.

In contrast to strict foreclosure as it originally evolved in mortgage law, the property tax strict foreclosure systems in Minnesota and in the other strict foreclosure states have been modified to incorporate two distinct features: 1) the application of Due Process notice and hearing requirements and 2) the creation of extensive pre- and post-transfer redemption periods.

Recognizing the severity of the consequences to the property owner from enforcement of a property tax lien, every jurisdiction in the country grants some period of time for redemption between the date of tax delinquency and the final date of transfer of the property to a new owner.[28]

Jurisdictions also take multiple approaches to redemption periods after the date of the transfer. Some jurisdictions provide for a redemption period prior to the final date of transfer; others provide for post-transfer redemption periods. Minnesota statutes do both. There is a period of redemption between the date of initial transfer to the government, Minn. Stat. § 280.41, and the date of final transfer to the government three years later. Minn. Stat. § 281.18. Minnesota statutes also provide for an additional six month right of redemption *after* the date of final transfer to the government. Minn. Stat. § 282.241.

[28] *Id.* at 774.

B. The Double Meaning of Equity: Mortgage Law and Property Tax Law

Grounded in the chancery courts as courts of equity, and their insistence on the right of redemption, this equity of redemption soon came to have a different, commercial, meaning. Because of the dominance of mortgage financing, equity became loosely understood as a financial concept: the value of the property less the lien amounts secured by the property.

In voluntary commercial transactions financial equity is key. The value of the property, less the amount of existing liens, is the "owner's equity" in the property. The equity can be a positive number, but it can become a negative number when the aggregate amount of existing liens exceeds the value of the property. When a mortgage foreclosure occurs, the opening bid (by the mortgagee) is usually the amount of the outstanding debt owed to the mortgagee. If there is no bid higher than the opening bid it is a strong market indication that the mortgage debt exceeds the value of the property. In parallel fashion, when a delinquent property tax enforcement action – whether by public auction or by strict foreclosure – does not result in payment of the tax lien there is a strong market indication that the tax debt exceeds the value of the property.

There are many parallels between the enforcement of a mortgage lien and the enforcement of a property tax lien. Both incorporate the vital importance placed on protecting the right of redemption up to the final point of transfer of the property. Both incorporate

the need to be able to quantify the precise redemption amount at any point in time. Both incorporate time frames between the date of default/delinquency and the final enforcement event. Both mortgage law and property tax law contain widely varying systems and approaches across state governments and across local governments within the states.

There are, however, key dissimilarities between mortgage law and property tax law. The first is the identity of the parties. In mortgage law the parties are most often private lenders and private owners seeking a financing transaction beneficial to both parties. In property tax enforcement it is the state or local government imposing a tax on private property to generate revenues to serve the common good.

The second point of dissimilarity is that in mortgage law the terms of the transaction are freely negotiated between the private parties. In property tax law the systems of valuation, millage rate, and collection are established by state statutes and state constitutions – representative democracies in promoting the general welfare.

The third point of dissimilarity is that in mortgage law notices of delinquency, default, and foreclosure are governed by the security instruments and minimal state statutory requirements. In property tax law state statutes and Due Process provide for extensive periods of redemption pre- and post-transfer of the property.

The fourth point of dissimilarity is that in mortgage law notice of foreclosure is provided to the owner,

and to the debtor, and rarely to other parties. In property tax law notice is provided to the owner and to all interested parties whose identity is revealed by comprehensive examination of public records.

The fifth point of dissimilarity is that in mortgage law private creditors seek to maximize their returns on an investment. In property tax law the government seeks only payment of the tax lien.

The evolution of mortgage law through the early forms of the English gage, to the chancery court insistence on the equitable right of redemption, to the emergence of strict foreclosure, is accurately summarized in the recent decision of the Sixth Circuit, *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022). This decision is also accurate in describing that foreclosure of *mortgages* by public auction became the consensus approach throughout the United States in the Nineteenth Century.

The logical fallacy in the reasoning and holding in *Hall v. Meisner*, however, is two-fold. First, it equates mortgage law with property tax law without acknowledging the key differences. Second, it equates financial equity with fair market value without acknowledging that involuntary transfers by public auctions – whether in mortgage foreclosures or in tax foreclosures – never yield fair market value as reflected in voluntary arm's length transactions. An involuntary transfer has none of the hallmarks of open market negotiated transactions.

There are parallels between mortgage law and property tax law, particularly in the historical

evolution of the rights of redemption, the nature of foreclosing the right of redemption, and the multiple uses of the term "equity." The parallels should not obscure or diminish the dissimilarities in the identity of the parties, the manner in which the lien arises, the nature of notice provided of the foreclosure event, the breadth of parties to whom notice is provided, or fundamental difference between private motives and governmental service.

IV. The Measurement of Financial Equity

In measuring the presence or absence of financial equity in property tax foreclosure proceedings the key is the relationship among the total amount of the property tax lien, all subordinate liens and encumbrances, and the value of the property. The property tax lien has senior priority over all other liens, but that does not mean that there is financial equity present that belongs to the owner. The owner's equity, if any, is the value of the property less the aggregate amount of all subordinate liens such as mortgages, homeowner association liens, other third party liens, and the liens of judgment creditors. If the value of the property exceeds the aggregate value of all these liens, there is equity present that belongs to the owner.

Fair market value of a parcel of property is most commonly determined by reference to recent sales of the specific property, and to sales of comparable property. The parties to such open market transactions entered into arm's length negotiated transactions based

upon inspections of the property, analysis of property conditions, comprehensive information revealed by title examinations, and other issues and concerns of the parties as set forth in the negotiated contracts.

A foreclosure, whether a mortgage foreclosure or a property tax foreclosure, never yields fair market value because it is never a voluntary transfer.

This point was in play in the decision *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). In interpreting the fraudulent conveyance text under Section 548 of the Bankruptcy Code – 11 U.S.C. § 548 – the decision evaluated the split in circuit court decisions on whether the statutory language of "reasonably equivalent value" equated to fair market value. The Court observed that:

> One must suspect the language means that fair market value cannot – or at least cannot *always* – be the benchmark. That suspicion becomes a certitude when one considers that market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value.[29]

BFP held that "reasonably equivalent value" as used in the Bankruptcy Code "is the price in fact received at the foreclosure sale, so long as all of the requirements of the State's foreclosure law have been

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[29] *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (emphasis in original).

complied with."[30] Grounded in bankruptcy law interpretation and not federal constitutional law, the decision expressly did not reach property tax foreclosure laws.[31]

If fair market value is never the same as the value at a foreclosure sale, the determination of financial equity in the context of delinquent property tax foreclosures lies in the statutory system of extensive redemption rights and the guardrails of Due Process notice protections.

Due Process notices (after the issuance of the tax bills) are sent at the time of public filing of the list of delinquent taxes and publication of notice, Minn. Stat. § 279.091, and notice is provided again sixty days prior to the end of the redemption period, Minn. Stat. § 281.21, both by publication and by mailing of notice. Minn. Stat. § 281.23.

Prior to the expiration of the redemption period the owner as well as any interested party may exercise the right of redemption. When no one has sought to pay the delinquent property taxes over a period of three years or longer it is a strong indication of the absence of financial equity.

The key date for evaluating the presence or absence of financial equity, whether equity of the owner or of another interested party, is the date of the transfer of title to a new owner and the end of the right of

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[30] *Id*. at 545.

[31] *Id*. at 538 n.4.

redemption. It makes little sense to compare the financial calculations of equity on one date to values of the same property on subsequent dates. The right of redemption ends on the date of transfer of the property to a new owner, whether a third party at a public auction or the local government through strict foreclosure. This is the key date for comparing all lien amounts to the value of the property. Acts and events subsequent to the date of transfer may increase or decrease the amount of the liens and the conditions of the property. A claim for a "surplus" attributable to an arm's length negotiated transaction fifteen months after the date of an involuntary forced transfer, which is the claim made in this case, is not a valid comparison. They have some things in common but comparing them reveals little.

In states where delinquent property tax enforcement requires a public auction as the event that marks the final transfer of the property, and the successful bid is greater than the minimum bid, there is indeed a surplus which should be distributed to the interested parties and to the owner. Such surplus should be distributed to the interested parties, including the owner, as their interests appear from public records and in the order of priority in which their interests exist.[32] The owner's right to receive any surplus is subordinate to payments to all other lienholders.

In one of its few decisions in the last two hundred years on the viability of a delinquent property tax enforcement system reliant upon strict foreclosure,

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[32] *See, e.g.*, GA. CODE ANN. § 48-4-81(f) (West 2022).

Nelson v. City of New York, 352 U.S. 103 (1956), the Court found no violation of the Fifth Amendment "when the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings." *Id.* at 110. This decision foreshadowed the decision of *Mennonite* twenty-seven years later and the placement of property tax foreclosure within the guardrails of Due Process. In the decision below the Eighth Circuit followed *Nelson* in upholding the Minnesota statutory system.

Property tax foreclosure is the final event in the collection of delinquent property taxes. The goal is to transfer the property to a new owner who is willing and able to meet the responsibilities for the common good of property ownership. The key is equity (in both its meanings) and redemption. The involuntary transfer can occur by public auction or by strict foreclosure and transfer to the government. Because it is an involuntary transfer, it will never yield fair market value as commonly understood in its financial sense.

V. The Costs of Abandonment

A. The Local Government as the Default Owner

In property tax foreclosures, local governments do not seek the property. They seek payment of the lien which is imposed on all privately owned property as part of the common obligation of living in community. Local governments become the owners of such properties by default. Statutes which provide for strict

foreclosure result in transfers to the local government because neither the owner nor any interested party is willing to pay the price to redeem, and retain, the property. Statutes which provide for public auctions of the property result in transfers to the local government because no third party purchaser is willing to pay the minimum bid, which is the property tax lien.

State statutes that require public auctions of tax delinquent properties establish a minimum opening bid in the amount of the outstanding tax lien on the property. If no bid is tendered equal to or greater than this minimum bid, there are two options available to the local government. One option is to deem the sale incomplete, or unsuccessful, and schedule the property for another auction in a subsequent year. The logical problem with this approach is that the amount of delinquent property taxes increases each year while property conditions deteriorate, making it less and less likely that a successful bid will be tendered for the property. The second option is to provide by statute that the minimum bid is deemed submitted by the local government and the property is transferred to it.

In both strict foreclosure and public auction enforcement systems, the local government becomes the owner by default because the property is functionally dead to the market.

B. The Cost of Doing Nothing

Multiple years of property tax delinquency are one of the strongest early warning signs of disinvestment,

deterioration, and abandonment.[33] The very small percentage of properties, as measured both by gross tax receivables and by parcel count, that are taken through to the final step of a transfer of ownership impose a disproportionate cost burden on the community. These are the properties that are not just several years delinquent in the payment of taxes; they are the properties characterized by housing and building code violations, environmental contamination, and unsafe conditions. A state system that creates a different pathway for occupied properties, such as properties classified with a homestead exemption to identify probable owner occupancy, could and should have statutorily prescribed outreach and support services to divert these properties from the foreclosure path. The bulk of properties, however, that reach the final stage of foreclosure are the very properties in which the open market has no interest. They are unoccupied, or not lawfully occupiable, properties that are dead to the market.

The cost of vacant, abandoned, and tax delinquent properties is far greater than just the lost tax revenues.[34] Every abandoned parcel pushes down the valuations of adjoining parcels,[35] reducing tax revenues

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[33] FRANK S. ALEXANDER, LAND BANKS AND LAND BANKING 14 (2nd ed. 2015).

[34] John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFF. 301 (2000).

[35] NIGEL G. GRISWOLD & PATRICIA E. NORRIS, ECONOMIC IMPACTS OF RESIDENTIAL PROPERTY ABANDONMENT (Michigan State University Land Policy Institute, Report #2007-05) (2007).

more broadly. Each such parcel imposes additional external costs of a greater number of police calls and fire department calls.[36] Each such parcel presents challenges to childhood safety and to public health.[37]

When a parcel of property has multiple years of tax delinquency and neither the owner nor any of the interested parties elects to exercise their statutory rights of redemption after repeated notices in compliance with Due Process, the parcel is likely headed for abandonment and deterioration. If there is no third party purchaser at a public tax auction, or willingness to work with the current owner to buy the property during a statutory period of time even after the transfer to the government, *see* Minn. Stat. § 282.241, the local government is left with two choices. It can cease all attempts at property tax enforcement on the property, leave it in a deteriorating status imposing significant external costs, and hope that someday market conditions will change and values become greater than the liens. Alternatively, it can elect to become the new owner as a matter of default in order to protect the common good and general welfare of the neighborhoods and community.

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[36] Hye Sung Han, *The Impact of Abandoned Properties on Nearby Property Values*, 24 HOUSING POL'Y DEBATE 311 (2014); Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57 (2005).

[37] ALEXANDER, *supra* note 33, at 14-16.

C. The Role of Land Banks and Land Banking

In order to address the dilemma posed by the absence of owners willing to take on the challenges of vacant, abandoned, and tax delinquent properties, state and local governments have created land bank authorities. Over the past twenty-five years seventeen states have enacted land bank enabling legislation which has resulted in the creation of over 250 local land banks and land banking programs.

The story of land banks and land banking is essentially a parable of human frailty and hubris. Vacant, abandoned, and foreclosed properties that dot our neighborhoods and decimate our cities also define our core values. They are a reflection of the view that land is to be used and consumed, and then simply discarded, but they are also a refraction of the view that within each piece of property lies the possibility of renewal and renaissance.[38]

Land banks are special purpose governmental entities that focus on converting vacant, abandoned, and foreclosed properties into productive use. The primary purpose of all land banks is to acquire and maintain properties that have been rejected by the open market and left as growing liabilities for neighborhoods and communities.[39]

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[38] *Id*. at 10.

[39] *Id.*

Created entirely as creatures of state and local government law, land banks demonstrate the inherently local nature of the interplay of delinquent property tax enforcement transfers and new ownership of foreclosed property. In all land bank jurisdictions there are explicit ties to the property tax foreclosure process, with land banks acquiring the properties when there is no third party tendering the minimum bid.[40] Just as there are hundreds of different property tax systems across the country, the hundreds of different land banks all differ in some ways.

The rates of property tax delinquency and the rates of property tax foreclosures vary widely across neighborhoods, cities, counties, and states. Within this wide diversity the most common indicator of property tax foreclosures is the relative weakness of local market conditions. When local markets have declined over a period of three to five years or more, the rate of redemptions declines, and the number of property tax foreclosures rises. In the absence of redemptions, or public auction bids at or above the minimum bid, some new owner must be found. This new owner, by default, is either the local government or a locally created land bank.

CONCLUSION

Property taxation is state and local taxation. The system of delinquent property tax enforcement is a

[40] *Id.* at 36.

state, or state and local system. Over the past century, Due Process has evolved with increasing clarity in its application to delinquent property tax enforcement. The fairness inherent in Due Process is now designed to ensure that all parties with an interest in the property receive notice of each critical step in the proceedings and a right to be heard. Such notice is notice of redemption rights and of the final foreclosure event resulting in the transfer of ownership. This applies to systems of strict foreclosure as well as systems involving a public auction.

It is in the absence of redemption in a strict foreclosure system, or the absence of a successful bid in a public auction system, that the local government becomes the owner of the property by default. The local government did not seek the property and would prefer not to have the property. On behalf of the common good and common sense the local government steps into the position of the default owner in order to reduce the negative externalities of the property.

The Minnesota statute complies with the notice and hearing requirements of Due Process. The Minnesota statute, as a strict foreclosure statute, contains multiple periods of redemption pre- and post the final transfer event.

The argument that there is a "surplus" retained by the State fails to recognize that the key date for determination of values is the date of the final transfer of the property and termination of redemption rights. Comparing a tax lien amount to an open market sale

fifteen months later reveals nothing about the values, and the presence or absence of financial equity, at the key date of final transfer of the property.

Taking claims under the Fifth Amendment are not present in this case. This is an involuntary transfer resulting from nonpayment of a public obligation. The key question before the Court is whether the Minnesota statute complies with Due Process requirements for equity, in both meanings of that term. The Eighth Circuit held that it does and should be affirmed.

Respectfully submitted,

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