SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LYNETTE JOHNSON,

Plaintiff-Appellant,

v.

CITY OF EAST ORANGE; ANNMARIE CORBITT, in her official capacity as Collector of Taxes, and TED R. GREEN, in his official capacity as Mayor of East Orange,

Defendants-Respondents.

DOCKET NO. A-002486-23T2

Civil Action

On Appeal From:
Superior Court of New Jersey
Chancery Division, Essex County
Docket No. ESX-C-16-23

Sat Below:
Hon. Lisa M. Adubato, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT LYNETTE JOHNSON

DAVID J. DEERSON*
California Bar No. 322947
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
(916) 419-7111
DDeerson@pacificlegal.org
**Pro Hac Vice*
On the Brief

JONATHAN M. HOUGHTON
New Jersey Bar No. 369652021
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(916) 503-9041
JHoughton@pacificlegal.org
On the Brief

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statute

Other Authorities

PRELIMINARY STATEMENT

The City of East Orange foreclosed on Lynette Johnson's property to recover a tax debt that was much lower than the property's value. It later sold the property to a third party for $101,000 and retained all proceeds. Even according to the City's most aggressive claim about the size of the debt (which conflicts with its own numbers elsewhere) this amounted to a $55,000 windfall at Ms. Johnson's expense. (Ja195, No. 36). Pursuant to the United States Supreme Court's unanimous holding in Tyler v. Hennepin County, 598 U.S. 631 (2023), that was a taking without just compensation.

The court below did not dispute that conclusion, but it held that *Tyler* does not apply retroactively to this case and that Ms. Johnson's claims are time-barred by laches. (Ja407, 415–16). These are errors. When the U.S. Supreme Court applies a rule of federal law to the parties before it, as it did in Tyler, that rule must be given full retroactive effect even with respect to all events that occurred prior to the Supreme Court's decision. Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993). Even were that not so, this Court decided in 257-261 20th Ave. Realty, LLC v. Roberto that Tyler should at least be given "pipeline" retroactivity, i.e., that it should apply to all cases filed and pending when Tyler was decided. 477 N.J. Super. 339, 366 (App. Div. 2023). This is such a case. Moreover, this case was brought well within the six-year statute of limitations

for takings claims and unjust enrichment claims in New Jersey and therefore is not time-barred. Klumpp v. Borough of Avalon, 202 N.J. 390, 409 (2010) (takings); Kopin v. Orange Prods., Inc., 297 N.J. Super. 353, 373–74 (App. Div. 1997) (unjust enrichment).

The opinion below was based in part on this Court's decision in 257-261 20th Ave. Realty, LLC v. Roberto, which is currently pending review at the New Jersey Supreme Court. Unlike Tyler and the present case, Roberto did not involve a takings claim but was instead an appeal from the vacatur of a foreclosure judgment under Rule 4:50-1(f). Tyler did not necessarily govern the outcome of that case because Tyler is not concerned with the appropriateness of foreclosure, but rather with the uncompensated takings that might result from a foreclosure. Because Roberto was a foreclosure case involving an equitable remedy—not a takings case involving just compensation—it was appropriate for this Court to hold that Tyler should only apply to set aside foreclosure judgments that were already in the pipeline. Regarding takings cases like the one at bar, however, full retroactive effect is mandatory.

Even so, the decision below was strange because this case *was* in the pipeline when Tyler was decided. The court concluded that, because this action was filed more than three years after the foreclosure judgment, "it was not in the pipeline, the way the Roberto court intended." (Ja413). Moreover, it reasoned

that this case was barred by "equitable principles, such as those embodied in the doctrine of laches[.]" (Ja416). Yet laches is an equitable doctrine which cannot bar an otherwise timely action governed by a statute of limitations. Fox v. Millman, 210 N.J. 401, 422 (2012). Because this legal action was filed within the statute of limitations, it is timely.

For these reasons, this Court should reverse the grant of summary judgment to Defendants and should remand the case with instructions to grant summary judgment to Ms. Johnson on the issue of the City's liability for an uncompensated taking. It should also instruct the lower court to proceed in determining the amount of just compensation owed.

PROCEDURAL HISTORY[1]

Ms. Johnson filed this action in the Superior Court of New Jersey, Essex County, Law Division, on December 1, 2021, alleging a taking without just compensation in violation of the New Jersey Constitution and unjust enrichment. (Ja8–11). In February 2021, Defendants filed a pre-Answer Motion to Transfer the matter to the Chancery Division, (Ja40), which Ms. Johnson opposed. The court granted the motion on December 8, 2022. (Ja72–73). In the Chancery

[1] Transcripts of the proceedings below include the following:
1T: Transcript of Hearing, Feb. 27, 2023;
2T: Transcript of Hearing, May 26, 2023;
3T: Transcript of Hearing, July 20, 2023;
4T: Transcript of Hearing, Dec. 7, 2023.

Division, the parties filed cross-motions for summary judgment: the City argued that it had not taken a property interest protected by the Constitution. (Ja74). Ms. Johnson moved for partial summary judgment, alleging that she was entitled to judgment as a matter of law that her property had been taken without just compensation.[2] (Ja. 308–10). After the parties had briefed the cross-motions, the United States Supreme Court issued its decision in Tyler v. Hennepin County. Multiple rounds of supplemental briefing followed. (Ja338–89). On March 19, 2024, the court granted summary judgment in favor of Defendants, holding that Tyler's retroactive effect does not reach this case, and that the case is barred by laches. (Ja405–17). This appeal was timely noticed on April 17, 2024. (Ja 419–24).

STATEMENT OF FACTS

In March, 2014, Lynette Johnson purchased commercially zoned property containing a vacant structure at 250 Tremont Avenue in East Orange, New Jersey (the Property) for $55,000. (Ja3, ¶6). Her plan was to renovate the Property and allow two of her adult children to operate their businesses on the premises. (Ja3, ¶9). Prior to closing on the purchase, Ms. Johnson signed a

[2] Ms. Johnson only sought partial summary judgment for the takings claim because the parties disputed how much money would be owed as just compensation. (Ja309). She did not seek summary judgment on her unjust enrichment claim, which requires further factual development. (Id.).

"Letter of Agreement" with the City providing that she would renovate the property and agreeing that she would not occupy the property until she obtained a certificate of conformity. (Ja3, ¶10; Ja210–11). On its first page, the Letter states in bold and italicized typeface that Ms. Johnson's mailing address is 68 S. Devine Street, Newark, N.J. 07106. (Id.). Despite being in possession of this Letter, the City never mailed any tax notices to that address. (Ja182, No. 5). Shortly thereafter, in 2015, Ms. Johnson's husband experienced deteriorating health conditions. (Ja4, ¶15; Ja159, No. 5). Distraught and distracted with her husband's health, and having not received any mailed notice of tax assessment or delinquency at her residential address, Ms. Johnson did not pay the 2015 taxes assessed on the Property.

On October 1, 2015, at an electronic auction of municipal property tax liens, Defendant Annmarie Corbitt sold a tax lien on the Property to the City for $4,787.76, which was the total amount of tax liability including interest, penalties, and costs, with interest at the legal maximum rate of 18%. (Ja4, ¶16; Ja21–22). No notice of the sale was sent to Ms. Johnson's residential mailing address. (Ja182, No. 5).

On October 15, 2015, Ms. Johnson obtained a Construction Permit issued by the City indicating the City's permission to proceed with roofing and siding work. (Ja5, ¶21; Ja26). She paid approximately $1,914.00 in fees to acquire the

permit. (Id.). At no point in the permitting process did the City or any of its officials inform Ms. Johnson of the Property's tax delinquency or the fact that a tax lien had been taken on it two weeks prior. (Ja202, No. 7). In September, 2017, the City instituted a foreclosure action against the Property by filing a complaint in the Chancery Division of Superior Court of New Jersey, Essex County, Docket No. F-020807-17. (Ja5, ¶23; Ja98–118). No notice relating to the action was ever sent to Ms. Johnson's residential mailing address. (Ja182, No. 5). The City instead sent notices to the Property itself, which were returned as undeliverable. (Ja6, ¶¶25–27; Ja31–32). On February 13, 2018, the Superior Court issued an Order for Final Judgment barring Ms. Johnson's right to redeem the Property. (Ja44–62). No notice of this judgment was mailed to Ms. Johnson's residential address. (Ja7, ¶34; Ja34–39).

Upon first receiving actual notice of the foreclosure, a relative of Ms. Johnson went directly and immediately to East Orange City Hall to offer to pay the outstanding taxes. (Ja7, ¶38; Ja169–70, No. 26). City officials refused to accept payment, saying that it was too late to redeem the Property and that the Property now belonged to the City. (Id.).

The City adopted Resolution No. I-91 on March 19, 2018, authorizing the sale of the Property at public auction. (Ja7, ¶39). The Resolution indicates that the Property is "surplus propert[y] and not needed for public use." (Ja7, ¶40).

The City ultimately sold the Property to private, third-party purchasers for $101,000. (Ja7, ¶41). Although this sale price exceeded the total tax liability by $55,000 to $75,000, the City retained the surplus proceeds and did not compensate Ms. Johnson for her lost equity. (Ja8, ¶43; Ja195, No. 36).

In 2021, Ms. Johnson filed this case alleging that the City violated her constitutional right to just compensation when it took more property than was necessary to satisfy its tax debt, and that the City was unjustly enriched by taking a windfall at her expense. (Ja1–13). The lower court dismissed the case, holding that she could not obtain the relief required by the Constitution because, although she was well within the relevant statutes of limitations, she waited "nearly four years" to file her lawsuit. (Ja416).

LEGAL ARGUMENT

POINT ONE

I. TYLER APPLIES RETROACTIVELY TO ALL TAKINGS CASES (Ja410–16)

This Court reviews a trial court's grant of a summary judgment de novo and must "consider whether the competent evidential materials presented" establish "that there is no genuine issue as to any material fact" and that "the moving party is entitled to a judgment or order as a matter of law." Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 133–34 (App. Div. 2018).

In Tyler, the Supreme Court of the United States unanimously held that taking a home worth more than its tax debt, without compensation for the excess value, violates the Constitution. 598 U.S. at 639. Minnesota's statutes authorized the confiscation of Geraldine Tyler's Minneapolis property to collect $15,000 in taxes, penalties, interest, and fees. Id. at 635–36. Hennepin County sold it for $40,000 and, consistent with state law, kept it all—a $25,000 windfall. But the Supreme Court held that this violated the Takings Clause. Id. at 638. The government "had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due." Id. at 639. Taking more was unconstitutional.

In Roberto, this Court held that Tyler applies to foreclosures conducted under the New Jersey Tax Sale Law (TSL). Roberto, 477 N.J. Super. at 362 ("The TSL has permitted foreclosure of a property owner's equity and is thus a prohibited taking under Tyler."). As to retroactivity, it recognized "[w]hen the United States Supreme Court 'applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review.'" Id. (quoting Harper, 509 U.S. at 97); see also id. at 23 (the "retroactive pipeline application of the holding in Tyler to the TSL is mandated because the Court constitutionally recognized a property owner's interest in surplus equity."). The Tyler Court

unquestionably applied its ruling to the parties before it. Tyler, 598 U.S. at 647–48. Federal law therefore mandates that the same ruling apply to all pending takings cases. But Roberto was not a takings case; it was an appeal from the vacatur of a foreclosure judgment. Thus, this Court held Tyler "is accorded pipeline retroactivity to pending tax sale *foreclosures*[.]" Roberto, 477 N.J. Super. at 366 (emphasis added).

Roberto's pipeline retroactivity makes sense if limited to the foreclosure context. See Stone Wool 22, LLC v. Streater, No. A-2613-22, 2024 WL 3241363, at *6 (N.J. Super. App. Div. July 1, 2024) (Characterizing Roberto as holding "that relief under Rule 4:50-1(f) is appropriately granted where a property owner makes a timely application to vacate a final judgment of foreclosure . . . accompanied by a credible proffer to timely redeem the certificate[.]"). Tyler does not require foreclosures to be set aside, nor does the full retroactive effect of Tyler mean that completed foreclosures should be reopened. 598 U.S. at 639 ("The County had the power to sell Tyler's home to recover the unpaid property taxes.") Instead, Tyler stands for the simple proposition that where more is taken by foreclosure than was owed, just compensation must be paid. Id. ("But it could not use the toehold of the tax debt to confiscate more property than was due."). While courts have flexibility in how they apply Tyler's retroactive effect in foreclosure cases like Roberto, the

situation is different for takings claims that arise from foreclosure, like the case at bar. For these claims, just compensation is mandatory.

A. The ruling in Tyler must be given full retroactive effect regardless of whether cases pre-date or post-date the Supreme Court's decision

When the United States Supreme Court applies a rule of federal law to the parties before it, that rule must be given retroactive effect by all courts. Harper, 509 U.S. at 90. In Harper, the Supreme Court considered the retroactive effect of its previous ruling in Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989), which had invalidated certain taxes on federal retirement benefits. Harper, 509 U.S. at 89. After Davis was decided, the Harper petitioners brought claims seeking a refund of pre-Davis taxes. *Id.* at 91; see Harper v. Va. Dep't of Tax'n, 18 Va. Cir. 463 (1990). The Court held that when it "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review *and as to all events, regardless of whether such events predate or postdate*" the decision announcing the rule. Harper, 509 U.S. at 97 (emphasis added); see also Montgomery v. Louisiana, 577 U.S. 190, 198 (2016) (as revised Jan. 27, 2016) ("[C]ourts must give retroactive effect to new substantive rules of constitutional law."). Harper's reference to cases "still open on direct review" must not be read as an endorsement of pipeline retroactivity; rather, it is meant

to clarify that cases which have already reached a final judgment and exhausted all appeals are not to be reopened. In other words, full retroactivity does not overcome the doctrine of res judicata. The principle that retroactivity nevertheless applies to cases not yet filed is clear from the facts of Harper, as that case itself was not filed until after *Davis* was decided. See Harper, 18 Va. Cir. 463 (1990).

Consequently, because Tyler found a taking on the facts there alleged and applied its ruling to the parties in that case, its ruling must be given full retroactive effect. See Tyler, 598 U.S. at 647. This Court understood that principle in *Roberto*, observing that *Tyler* must be given "full retroactive effect" regardless of whether cases "predate or postdate the Supreme Court's decision." 477 N.J. Super. at 362. And the principle holds where, as here, the claim is under the New Jersey Constitution, since the state's Takings Clause provides protection "coextensive" with its federal counterpart. Klumpp, 202 N.J. at 405.

In foreclosure cases like Roberto which seek title to the property (not just compensation), Tyler's retroactive effect does not necessarily dictate the result. Thus it was appropriate for this Court to hold that only foreclosure cases in the pipeline should be reversed. For takings claims, however, just compensation is mandatory.

B. Just compensation is a mandatory remedy in takings claims and operates retroactively

This case is a paradigmatic Tyler case. Unlike Roberto, where foreclosure remained a live issue, the petitioner in Tyler did not seek to reopen or overturn that foreclosure. Tyler, 598 U.S. at 635. Rather, as here, she sought just compensation for the taking of equity interest which had already transpired. But while courts have discretion in providing equitable relief in foreclosure cases like Roberto, there is no such discretion in takings cases.

The Constitution itself requires just compensation for a taking. First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 315–16 (1987) (Supreme Court has "frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution."); Jacobs v. United States, 290 U.S. 13, 27 (1933) (the right to just compensation for property taken "rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the [Fifth] [A]mendment."). New Jersey law recognizes the same principle. Klumpp, 202 N.J. at 405 ("Regardless of the exact method employed, where a taking occurs, the Takings Clause requires the government to compensate the property owner.").

Unlike the defendant in Roberto, who obtained a reversal of the foreclosure judgment itself, takings claimants generally cannot get equitable relief. Knick v. Twp. of Scott, 588 U.S. 180, 199–200 (2019). The Takings Clause inherently contemplates retroactive monetary relief when property is taken without compensation. See id.; United States v. U.S. Coin & Currency, 401 U.S. 715, 722–24 (1971) ("No circumstances call more for the invocation of a rule of complete retroactivity" than where unconstitutional forfeitures are involved). State courts must order just compensation on a fully retroactive basis for Tyler-style takings. See Harper, 509 U.S. at 100 (state courts are bound by federal retroactivity doctrine when adjudicating issues of federal law).

This Court should clarify its holding in Roberto to explain that while foreclosures should only be overturned under Tyler for cases in the pipeline, the just compensation remedy is mandatory for all takings regardless of whether the case was filed before or after the Tyler decision.

C. New Jersey retroactivity doctrine also supports application of Tyler to this case

Even if Tyler's retroactive effect in this case were not mandated by Supreme Court precedent and the Constitution, New Jersey's retroactivity doctrine independently counsels that Tyler should control here. Where a new

principle of law[3] is concerned, retroactivity is the usual rule in New Jersey. Coons v. Am. Honda Motor Co., Inc., 96 N.J. 419, 425 (1984). In some circumstances, however, "sound policy reasons" may counsel for limited or no retroactivity. Id. Factors to be considered include: (1) the extent to which the parties and the public justifiably relied on prior decisions; (2) whether the purpose of the new rule would be advanced by retroactivity; and (3) the effect of retroactivity on the administration of justice. Id. Again, although this Court found pipeline retroactivity appropriate in Roberto, the posture and subject-matter of this case is different and therefore calls for a fresh analysis.

The first factor—reliance by the parties and the public—is inconclusive. While the City may have relied on longstanding statutory law in taking Ms. Johnson's equity, neither Ms. Johnson nor the public can be said to have relied on the rule that government can take everything over a small debt. On the contrary, most taxpayers and property owners like Ms. Johnson are shocked to

[3] Roberto incorrectly held that Tyler established a new principle of law. But as Tyler explained, "[t]he principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as . . . 1215 . . . in the Magna Carta[.]" Tyler, 598 U.S. at 639. This postulate "became rooted in English law" and "made its way across the Atlantic." Id. It similarly "held true through the passage of the Fourteenth Amendment." Id. at 641. Moreover, prior Supreme Court "precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed." Id. at 642 (citing United States v. Taylor, 104 U.S. 216 (1881); United States v. Lawton, 110 U.S. 146 (1884)).

learn that the government would take so much more than it is owed. See Horne v. Dep't of Agric., 576 U.S. 350, 361 (2015) ("[P]eople . . . do not expect their property . . . to be actually occupied or taken away."); see also, e.g., Noah Lanard, The Supreme Court Made Just About Everyone Happy for Once, Mother Jones (May 25, 2023)[4] (noting the wide range of support from progressives, liberals, conservatives, and libertarians for ending confiscatory tax foreclosure laws); Br. Amici Curiae of States of Utah, et al. at 9, Tyler v. Hennepin County, No. 22-166[5] (describing such laws as "shockingly unfair"); Br. Amici Curiae of AARP, et al. at 1, Tyler v. Hennepin County, No. 22-166[6] (noting "shocking result" under Minnesota's statute and "shock[]" that more states have similar laws).

The second factor, which considers the purpose of the rule in question, cuts plainly in favor of Ms. Johnson. The impetus for the rule is to uphold private property rights against government abuse. The guarantee of just compensation protects individual liberty because property rights are "indispensable to the

[4] https://www.motherjones.com/politics/2023/05/tyler-v-hennepin-supreme-court-roberts-jackson-gorsuch/.
[5] https://www.supremecourt.gov/DocketPDF/22/22-166/256332/20230306140902231_2023-03-06%20UT%20Brief%20of%20Amici%20Curiae%20in%20Supp%20of%20Pet%20Tyler%20v.%20Hennepin%2022-166%20FINAL.pdf.
[6] https://www.supremecourt.gov/DocketPDF/22/22-166/238523/20220922113207496_22-166%20Amici%20Brief%20AARP.pdf.

promotion of individual freedom." Cedar Point Nursery v. Hassid, 594 U.S. 139, 147 (2021). Withholding retroactive application of Tyler would only hinder this essential purpose, not further it.

The third factor relates to the administration of justice, and this too supports Ms. Johnson. The Takings Clause is designed to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). Taxpayers like Ms. Johnson, who lost a valuable property to cover a relatively small tax debt, have "made a far greater contribution to the public fisc than [they] owed." Tyler, 598 U.S. at 647. Justice therefore requires that the government pay Ms. Johnson for the excess property that it took. See id.; Hall v. Meisner, 51 F.4th 185, 196 (2022), cert. denied, 143 S. Ct. 2639 (2023) (Mem.) (Explaining that "the equities" require just compensation where the government "forcibly took property worth vastly more than the debts these plaintiffs owed, and failed to refund any of the difference."). Moreover, confiscatory tax foreclosures primarily harm society's most vulnerable members—the elderly, the ill, the impoverished, and the bereaved. See Cherokee Equities, L.L.C. v. Garaventa, 382 N.J. Super. 201, 211 (Ch. Div. 2005) (tax foreclosure defendants are often "among society's most

unfortunate[.]"). These vulnerable individuals should be protected by the government, not exploited.

To be clear, none of the above considerations are necessary to resolve the question of retroactivity, since the rule from Harper and the constitutional mandate of just compensation are sufficient to command full retroactivity. But this Court need not be concerned, as it rightly was in the foreclosure context of Roberto, that retroactivity will create undue burdens on either government or bona fide purchasers of foreclosed property. The analysis is different here, where just compensation—not title—is concerned.

POINT TWO

II. THIS CASE IS NOT BARRED BY LACHES (Ja416)

This case was timely filed within New Jersey's statute of limitations for a takings claim. Yet the court below faulted Ms. Johnson for "wait[ing] nearly four years" to bring her claim, and held that "[a]t some point, equitable principles, such as those embodied in the doctrine of laches, apply" to bar the case. (Ja407, 416). That was error. A takings claim seeking just compensation is an action at law and is subject to a six-year statute of limitations. Klumpp, 202 N.J. at 407. An unjust enrichment claim seeking restitution is also subject to a six-year statute of limitations. Kopin, 297 N.J. Super. at 373–74. Where an action at law is governed by a statute of limitations, the equitable doctrine of

laches cannot apply to bar a suit commenced within the limitations period. Fox, 210 N.J. at 419–20. And where "a legal and an equitable remedy exist for the same cause of action, equity will generally follow the limitations statute." Id. at 421 (quoting Lavin v. Bd. of Educ. of City of Hackensack, 90 N.J. 145, 153 n.1 (1982)).

A. A claim filed within the statute of limitations is timely

In Fox, the New Jersey Supreme Court held that laches did not bar timely claims, including a claim for unjust enrichment. 210 N.J. at 408, 425. The Court observed that it had sometimes invoked equitable doctrines, including laches, to expand the rights of a plaintiff to commence or maintain an action governed by a statute of limitations, but had never invoked laches to limit those rights. Id. at 417. A suit based on a legal right to a monetary judgment and subject to an applicable statute of limitations is controlled by that statute. Id. at 419–20; see also, e.g., Lavin, 90 N.J. at 151 ("[L]aches [is] an equitable defense that may be interposed *in the absence of the statute of limitations*.") (emphasis added).

The New Jersey Supreme Court has never departed from this rule, although one Appellate Division case has. See Chance v. McCann, 405 N.J. Super. 547, 569 (App. Div. 2009). The Fox Court distinguished Chance on the basis of its "unique and compelling" circumstances, while being careful not to endorse the holding. Fox, 210 N.J. at 422 (noting that no party in Chance sought

review from the Supreme Court, and discussing the case in the context of a hypothetical argument: "[E]ven were we to agree in principle. . . ."). Chance concerned a breach of contract dispute between two partners brought by the heirs of one partner after his death. Fox, 210 N.J. at 422–23. Although the action was commenced within the statute of limitations for contract suits, three important witnesses had died such that the defendant "was largely precluded from raising defenses that otherwise would have been available." Id. at 423.

This case is not like Chance, where the passage of time had prejudiced the defendants by eroding evidence or rendering certain defenses impracticable to mount. Although a calculation of just compensation (or restitution, in the unjust enrichment claim) will have to look backward to determine how much money is owed, State v. Silver, 92 N.J. 507, 514 (1983), that is no different from any other takings case which courts routinely adjudicate. In this case, it is undisputed that the Property was worth more than the tax debt (Ja203, Nos. 8–9). That is enough to grant Ms. Johnson's Motion for Summary Judgment as to the City's liability for a taking.

The court below reasoned that it was unfair to order the City "to surrender $45,000 of equity, after retaining same for four years, without an inkling that the equity they legally received at the time was at risk." (Ja416). A similar—but stronger—line of argument was rejected by the Court in Fox. That case involved

an allegation that the defendant had improperly obtained and benefitted from a customer list belonging to the plaintiff. Fox, 210 N.J. at 409. The trial court reasoned that the delay in filing prejudiced defendants, who had "continued to reap the benefits of the customer list," and thereby unwittingly continued to accrue damages. Id. at 423–24. The New Jersey Supreme Court rejected that argument, finding that any failure to mitigate damages caused by the plaintiff's delay would go toward the size of the remedy, not to whether the claim was time-barred. Id. at 424. Here, the City's argument is even weaker: the City's continued retention of Ms. Johnson's equity does not increase its liability except for the amount of interest necessary to satisfy just compensation. See Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 353 (App. Div. 1982) ("[T]he allowance of interest on a condemnation award is a requirement of constitutional magnitude where the actual taking of the property is not contemporaneous with payment."). Again, this is no different from any other takings case which may be brought within six years from the date of a taking.

In short, the court below erred in applying the equitable doctrine of laches to bar timely claims that are governed by statutes of limitations. This action was filed less than four years after the taking and unjust enrichment claims accrued. As far as the law is concerned, Ms. Johnson would have been within her rights to wait another two years.

B. Even if this case were eligible for a laches analysis, the equities weigh in favor of Ms. Johnson

Laches is "an equitable doctrine, utilized to achieve fairness." Fox, 210 N.J. at 422. Even if laches were available here, the Court must consider "length of the delay; reasons for the delay; and 'changing conditions of either or both parties during the delay.'" Cnty. of Morris v. Fauver, 153 N.J. 80, 105 (1998) (quoting Lavin, 90 N.J. at 152).

Here, the "delay" was less than four years from when the City took title and sold Ms. Johnson's property, well within the applicable statutes of limitations. It is also readily explained. Ms. Johnson did not know of her tax delinquency until after the foreclosure judgment because the City never contacted her at her residential address, (Ja182, No. 5) despite having it on file in connection with her purchase of the property (Ja3, ¶10; Ja210–11), and despite the fact that mailings sent to the Property were returned undeliverable (Ja31–32). Neither did the City inform Ms. Johnson of her tax delinquency when it accepted nearly $2,000 from her in exchange for a construction permit on the Property. (Ja202, Nos. 6–7). During part of the relevant time, Ms. Johnson was caring for her terminally ill husband (Ja4; Ja159). Although she consulted with legal counsel, she was advised that there was a low likelihood of reversing the foreclosure. (Ja165–66, Nos. 17–18). She eventually found a nonprofit organization which had been successful in bringing takings claims in response

to foreclosures in other jurisdictions, and was willing to represent her pro bono. (Ja166, No. 18; Ja169, No. 25). She filed this action within three months of making contact with that organization. (Ja166, No. 18; Ja169, No. 25). And, as explained above, Defendants are not prejudiced by any change in conditions.

POINT III

III. THIS COURT SHOULD REVERSE AND REMAND WITH DIRECTIONS TO GRANT MS. JOHNSON'S CROSS-MOTION FOR SUMMARY JUDGMENT AND FURTHER FACT-FINDING TO DETERMINE THE AMOUNT OF JUST COMPENSATION OWED (Ja417)

Because the rule from Tyler applies retroactively to this case, as even Roberto held, and because the case cannot be barred by laches, Ms. Johnson is entitled to summary judgment on the question of the City's liability for a taking without just compensation. It is undisputed that the City foreclosed on Ms. Johnson's Property, that the Property was worth more than the tax debt owed, and that the City retained the surplus equity. Under Tyler, that is a taking. 598 U.S. at 647.

The parties dispute the exact amount of the total tax debt, although in any case this amount was less than the value of the Property and less than the $101,000 that the City kept after selling the Property. Defendants believe the tax debt owed on the Property, including the 18% interest, totaled approximately $44,300.08 (Ja288, ¶ 7). Ms. Johnson maintains that the total tax debt was closer

to $25,000 (Ja233) (listing the "amount" of the tax at $4,787.76 and the "Int[erest] to 8/31/17" at $19,860.83). This dispute will likely be resolved with further discovery on remand. But there is no question, and as a matter of law there can be no question, that the City is liable to pay just compensation of some amount. See Alloco, 456 N.J. Super. at 134 (standard of review for summary judgment).

CONCLUSION

For the reasons stated above, this Court should reverse the Order Granting Defendants' Motion for Summary Judgment and should remand the case with instructions to grant Ms. Johnson's Motion for Summary Judgment and to proceed in determining the amount of the just compensation award.

DATED: July 24, 2024.

Respectfully submitted,

s/ David J. Deerson
DAVID J. DEERSON*
California Bar No. 322947
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
(916) 419-7111
DDeerson@pacificlegal.org
**Pro hac vice*

s/ Jonathan M. Houghton
JONATHAN M. HOUGHTON
New Jersey Bar No. 369652021
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(916) 503-9041
JHoughton@pacificlegal.org

Counsel for Plaintiff-Appellant

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LYNETTE JOHNSON,	**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-2486-23T3**
Plaintiff/Appellant,	**CIVIL ACTION**
v.	
CITY OF EAST ORANGE, ANNMARIE CORBITT, in her official capacity as Collector of Taxes, and TED R. GREEN, in his official capacity as Mayor of East Orange,	**ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, ESSEX COUNTY, CH. DIV., DOCKET NO. C-16-23**
Defendants/Respondents.	**SAT BELOW: HON. LISA ADUBATO, J.S.C.**

BRIEF OF DEFENDANTS/RESPONDENTS CITY OF EAST ORANGE, ANNMARMIE CORBITT, AND TED R. GREEN

GOLDENBERG, MACKLER, SAYEGH, MINTZ, PFEFFER, BONCHI & GILL
660 New Road, Suite 1-A
Northfield, New Jersey 08225
(609) 646-0222/(609) 646-0887
Attorneys for Defendants
Email: kbonchi@gmslaw.com, ealmanza@gmslaw.com

Keith A. Bonchi, Esq.
Of counsel and on the brief
NJ Attorney ID #032321983

Elliott J. Almanza, Esq.
Of counsel and on the brief
NJ Attorney ID #017542012

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED[1]

1 Ja# refers to the joint appellate appendix and page number.

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, AND OTHER AUTHORITIES

PRELIMINARY STATEMENT

Plaintiff Lynette Johnson bought a commercial property and didn't pay a dime of property taxes. As a result, the City of East Orange issued a tax lien on the property, which it foreclosed through an *in rem* action that concluded in February 2018. Plaintiff did not challenge the tax foreclosure when it was pending. She never pursued an appeal. She did not file a motion to vacate the judgment. The tax foreclosure was over and done with upon the entry of final judgment in February 2018; it is not "in the pipeline." Almost four years after that, Plaintiff filed the present lawsuit under a separate docket number. She alleged that the City committed a taking and was unjustly enriched by foreclosing and retaining the surplus after it re-sold the property for more than the tax debt.

On summary judgment, the trial court dismissed Plaintiff's lawsuit. As this court already ruled in Roberto, a foreclosure under New Jersey's Tax Sale Law did not constitute a "taking" until the Supreme Court of the United States issued the Tyler decision in May 2023. For that reason and others, the Roberto court concluded that Tyler should be afforded pipeline retroactivity. Plaintiff's foreclosure, however, was not in the pipeline. It was completed more than five years before Tyler was issued. Plaintiff essentially asks this court to disagree with Roberto, and conclude that full retroactivity for Tyler is appropriate. So far as that issue is concerned, Roberto's analysis is sound and should not be disturbed. The

trial court here correctly applied Roberto and dismissed Plaintiff's lawsuit because her foreclosure was not in the pipeline. This is a separate, collateral matter that cannot place an already-completed case back in the pipeline. The order under review should be affirmed.

PROCEDURAL HISTORY[2]

In December 2021, Lynette Johnson ("Plaintiff") filed a complaint against the City of East Orange, Tax Collector Annmarie Corbitt, and Mayor Ted Green ("Defendants"). (Ja1-13).

In February 2022, Defendants moved to transfer the case to the Chancery Division, which the court granted in December 2022. (Ja40, Ja72-73).

In February 2023, Defendants moved for summary judgment. (Ja74). In April 2023, Plaintiff moved to hold the case in abeyance. (Ja300-302). In May 2023, Plaintiff cross-moved for partial summary judgment. (Ja308-310).

In March 2024, the court granted Defendants' motion for summary judgment and denied Plaintiff's cross-motion. (Ja405-417).

In April 2024, Plaintiff filed the present appeal. (Ja419-424).

2

Ja# refers to the joint appellate appendix and page number.
1T refers to the transcript of February 27, 2023.
2T refers to the transcript of May 26, 2023.
3T refers to the transcript of July 20, 2023.
4T refers to the transcript of December 7, 2023.

STATEMENT OF FACTS

A. Plaintiff's acquisition the property and the sale of the tax lien

In March 2014, Plaintiff purchased a commercial property in East Orange for $55,000. (Ja14-20). At the time, the property was in a state of disrepair and blight due to a fire. (Ja287¶4). Plaintiff did not remedy the condition of the property, causing code enforcement to issue her multiple summonses in 2016.[3] (Ja287¶4). Plaintiff also failed to pay taxes, causing the City of East Orange to auction a tax lien on the property in October 2015. (Ja21-24). Because there were no bidders, the City took back the certificate. (Ja21-24).

B. The tax foreclosure

The City filed a large *in rem* tax foreclosure complaint in September 2017. (Ja97-118). R. 4:64-7(c) requires the notice of foreclosure to be served on the owner at their address as appears on the last municipal tax duplicate, so the City: (a) reviewed the last municipal tax duplicate; (b) reviewed the vesting deed to the subject property; and (c) ran Lexis searches. (Ja76¶¶4-7, Ja80-86, Ja87-88, Ja89-91, Ja92-96). All of these documents and searches revealed that Plaintiff was located at the subject property. (Ja76¶¶4-7, Ja80-86, Ja87-88, Ja89-91, Ja92-96). The City thus sent the notice of foreclosure to Plaintiff at the subject property by simultaneous regular and certified mail on October 27, 2017. (Ja119-127, Ja27-

[3] Plaintiff failed to appear, and a bench warrant was issued in October 2016. (Ja287¶4).

29). Notice went not only to Plaintiff, but also to Plaintiff's attorney as appeared on the deed. (Ja76¶8, Ja28). The regular and certified mailings addressed to Plaintiff and sent to the subject property were returned marked "vac" for vacant.[4] (Ja77¶9, Ja30-32). The regular mailing sent to Plaintiff's attorney was not returned and was presumed delivered. (Ja77¶9). The certified mailing to Plaintiff's attorney was claimed and signed for. (Ja77¶9, Ja30-32). In addition, the notice of foreclosure was published and posted in accordance with the relevant Court Rules. (Ja128-131, Ja132-134, Ja135-140, Ja141-147). The notice of foreclosure was also physically posted on the subject property. (Ja148-153).

The schedule of the complaint affecting Plaintiff's property was uncontested. (Ja77¶13). The City applied for final judgment and provided the required proofs. (Ja77¶13). Final judgment entered on February 13, 2018, and was served thereafter. (Ja77¶13, Ja43-62). On March 16, 2018, and several times thereafter, Plaintiff's children asked the City whether Plaintiff could pay the back taxes and recover her property; the City declined. (Ja162#12, Ja167#19).

On June 7, 2018, the City sold the subject property at a public land sale for

---

[4] In discovery, Plaintiff admitted that: (a) she did not set up a mailbox at the property (Ja160#8), (b) she did not set up mail forwarding so that mail addressed to the subject property would be sent to her home address (Ja173#7), and (c) she did not identify her home address as the tax mailing address in the deed to the subject property (Ja174#10). In fact, Plaintiff never provided the City Tax Office with a tax mailing address different from what was on the vesting deed to the subject property. (Ja288¶8).

$101,000. (Ja288¶5, Ja290-296). The property was in such poor condition that the buyers had to demolish it; the property is currently a vacant lot. (Ja288¶6). At the time the final judgment entered, Plaintiff's delinquency included: $44,300.08 in property taxes, $1,435.03 in unpaid water bills, and $10,000 in vacant property registration fees. (Ja288¶7, Ja216-17).

C. Plaintiff's new lawsuit

On December 1, 2021, Plaintiff filed the present lawsuit against Defendants. (Ja1-39). It alleged that Defendants' retention of the "surplus proceeds"[5] following its resale of the property constituted a taking without just compensation under the New Jersey Constitution. (Ja7-9). Plaintiff also included a count for unjust enrichment. (Ja10-11).

In February 2022, Defendants filed an answer and a motion to transfer the case to the Chancery Division. (Ja40, Ja63-71). In December 2022, the court granted Defendants' transfer motion. (Ja72-73).

Following the exchange of discovery, Defendants moved for summary judgment in February 2023. (Ja74). In April 2023, Plaintiff cross-moved to hold the case in abeyance pending a decision from the United States Supreme Court in Tyler v. Hennepin County, Dkt. No. 22-166 (Tyler). (Ja300-301). In May 2023, Plaintiff cross-moved for partial summary judgment as to liability. (Ja308-09).

[5] Plaintiff defined this as the difference between the tax debt and the resale value of the property. (Ja9¶53).

The Supreme Court issued its decision in Tyler on May 25, 2023, and Plaintiff submitted a notice of supplemental authority with the trial court that same day. (Ja338-361). The next day, the court convened a management conference at which it requested supplemental briefing regarding Tyler's effect, if any, on this matter.[6] (2T11:1-13:12). Shortly thereafter, Defendants raised the issue of retroactivity, and the court permitted supplemental briefing on that as well. (Ja362). The cross-summary judgment motions were argued on July 20, 2023, and the court reserved. (3T66:10-11).

On December 4, 2023, this court published 257-261 20th Ave. Realty, LLC v. Roberto, 477 N.J. Super. 339 (App. Div. 2023) (Roberto), which concluded that Tyler did apply to New Jersey's Tax Sale Law (TSL). Based on Roberto's pronouncement that Tyler only applied to tax foreclosures with "pipeline retroactivity," the trial judge granted Defendant's motion for summary judgment, and denied Plaintiff's cross-motion by order and statement of reasons entered in March 2024. (Ja405-417). The court concluded that applying Tyler to Plaintiff's tax foreclosure – which had been completed nearly four years before she filed the present complaint – was tantamount to full retroactivity, in contravention of Roberto's mandate of pipeline retroactivity. (Ja413). Plaintiff appealed. (Ja419).

---

[6] The court also denied as moot Plaintiff's motion to hold the case in abeyance because Tyler had issued. (2T5:1-6).

LEGAL ARGUMENT

I: THE LOWER COURT CORRECTLY CONCLUDED THAT PROVIDING A CAUSE OF ACTION TO PLAINTIFF MEANS THAT TYLER IS GIVEN FULLY RETROACTIVE EFFECT, IN CONTRAVENTION OF ROBERTO. (Ja410-416).

A. Tyler and Roberto

In Tyler, the United States Supreme Court held that a former property owner stated a claim for an unconstitutional taking where a governmental entity had foreclosed on her property for delinquent taxes, re-sold the property for more than the tax debt, and retained the "surplus." 598 U.S. 631, 642-45 (2023).

Following Tyler's issuance, there was uncertainty whether the decision applied to New Jersey's TSL. That question was resolved about six months later by Roberto, in which a panel of this court held that Tyler did apply, rendering the TSL unconstitutional. 477 N.J. Super. 339, 359-362 (App. Div. 2023), certif. granted, 256 N.J. 522 (2024). Roberto held that, like the Minnesota statutory scheme at issue in Tyler, the TSL did not permit the former owner to recover any potential "surplus equity," and that its retention by the foreclosing entity was a prohibited taking. Id. at 362. The panel concluded that "The TSL has permitted foreclosure of a property owner's equity and is thus a prohibited taking ***after Tyler***." Id. at 362 (Emphasis added).

But that was not the end of the Roberto decision. The panel also confronted whether Tyler should be given prospective application, pipeline retroactivity, or

full retroactivity. Id. at 362-65. Employing a multi-factor test endorsed by our Supreme Court and the United States Supreme Court, the panel rejected the argument that purely prospective application was appropriate. Id. at 364. The court also rejected fully retroactive application, concluding it would be "unworkable and create substantial hardship for taxing authorities, as well as third-party purchasers." Id. at 363. The panel settled on pipeline retroactivity because it protected property owners' constitutional rights without visiting significant harm on those who had already foreclosed liens, including municipalities. Ibid. The court's election of pipeline retroactivity was bolstered by its conclusion that Tyler represented brand new law: "Unquestionably, Tyler establishes a new principle of law," because it upset a law that had existed substantially in its present form for more than a century. Id. at 363. The Appellate Division unequivocally held that Tyler "is accorded pipeline retroactivity **to pending tax sale foreclosures involving a property owner's surplus equity**[.]" Id. at 366 (Emphasis added).

B. Roberto as applied to this case

In this matter, the trial judge correctly applied the plain language and reasoning of Roberto. The judge recognized that Plaintiff's tax foreclosure was not "pending." It had reached final judgment in February 2018, almost four years before Plaintiff filed the present complaint, and more than five years before Tyler was decided. For those reasons, the case was not "in the pipeline." Pipeline

retroactivity refers to three types of cases: the one in which the rule is announced, those pending (including ones "still on direct appeal" from the final judgment), and all future cases. State v. Knight, 145 N.J. 233, 249 (1996). It does *not* include "collateral" matters, and there is no authority for the proposition that filing a separate lawsuit – such as this case – can place an already-finalized case "back in the pipeline." By way of example, a criminal defendant cannot use the "collateral review" of a PCR petition to benefit from a new principle of constitutional law if direct appeals of his conviction have been exhausted. See, e.g., State v. Dock, 205 N.J. 237, 254-59 (2011); State v. Rountree, 388 N.J. Super. 190, 203-06 (App. Div. 2006), certif. denied, 192 N.J. 66 (2007). By the same token, Plaintiff cannot use collateral review of the tax foreclosure here to benefit from the much later-decided Tyler case. That is what pipeline retroactivity means and mandates.

As the trial judge correctly realized, giving Plaintiff a cause of action under these circumstances is to afford Tyler full retroactivity, rather than the pipeline retroactivity called for by Roberto. (Ja413). That is, Defendants would be liable based on a lawsuit that was over and done with more than five years before Tyler was decided, at a time when the conduct at issue was unquestionably legal. And this – as the trial judge also correctly recognized – would run afoul of one animating principle underlying Roberto's election of pipeline retroactivity: to avoid "substantial hardship for taxing authorities[.]" Id. at 363. It offends basic

principles of fair notice to impose fully retroactive liability for conduct that was not only legal at the time, but whose distinguishing feature – strict foreclosure – had received the imprimatur of our highest Court nearly sixty years ago. See Bron v. Weintraub, 42 N.J. 87, 91-92 (1964) (explaining that "[i]t is therefore understandable that the Legislature found it fair to bar the right to redeem by a strict foreclosure, i.e. by a judgment that payment be made by a fixed date, in default of which the right to redeem shall end, rather than by a sale as in the case of the foreclosure of a mortgage.").

C. None of the cases Plaintiff relies on calls for a different result

Plaintiff's qualm is less with the trial court's application of Roberto, and more with Roberto itself. Roberto held that pipeline retroactivity was appropriate. However, point heading I(A) in Plaintiff's brief argues that Tyler "must be given full retroactive effect regardless of whether cases pre-date or post-date the Supreme Court's decision." Thus, Plaintiff asks this court to disagree with Roberto, and conclude that Tyler should apply to tax foreclosures which were fully finalized pre-Tyler.[7] Plaintiff believes this is required by Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993). Harper, however, does not dictate the result Plaintiff seeks. Rather, Plaintiff has excised a quote from Harper, divorced it of

[7] Plaintiff suggests that pipeline retroactivity may be appropriate in foreclosures (such as Roberto), but in takings suits (such as this case). There is no authority for the proposition that the same law should be afforded pipeline retroactivity in one circumstance, but full retroactivity in another circumstance.

context, and now offers an interpretation that is clearly at odds with established constitutional principles.

The issue in Harper was whether a prior decision of the Supreme Court[8] applied retroactively. The Court held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect **in all cases still open on direct review** and as to all events, regardless of whether such events predate or postdate the announcement of the rule.
>
> [Id. at 97 (Emphasis added).]

Plaintiff focuses on the final clause and unconvincingly attempts to explain away the bolded clause, arguing that it "must not be read as an endorsement of pipeline retroactivity; rather it is meant to clarify that cases which have already reached a final judgment and exhausted all appeals are not to be reopened." The problem is that *there was already a lawsuit that determined the parties' rights with respect to the property, that is, the tax foreclosure which was completed in early 2018.* The second clause – that rules of federal law apply "as to all events, regardless of whether such events predate or postdate the announcement of the rule" – must be read in light of the first clause. If there were no prior judicial process that had determined the parties' rights, then Plaintiff might have a good argument. But there *was* a prior judicial process, and concluding that retroactivity is measured by

[8] Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989).

something other than that judicial process runs afoul of a rule announced in Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758 (1995): "New legal principles, even when applied retroactively, **do not apply to cases already closed.**" (Emphasis added). That Tyler represents a "new legal principle" was an uncontroversial legal conclusion in Roberto.[9] And no one disputes that the tax foreclosure was "already closed" at the time Tyler came down. As the Appellate Division correctly recognized when deciding Roberto, a tax foreclosure under the TSL was not a taking *until* Tyler: "The TSL has permitted foreclosure of a property owner's equity and is thus a prohibited taking **after Tyler**." Roberto at 362 (Emphasis added). Roberto, in compliance with Harper, applied Tyler to all cases that had yet to reach judgment and those "still open on direct review." Id. at 362-64. If a judicial process has reached its conclusion, that is the end of the road. A party to a case that was fully and finally adjudicated does not gain rights with respect to the subject matter of that closed case based on a subsequently-announced change in the law, and cannot use a collateral lawsuit to obtain what they could not in the main case.

A good example is George v. McDonough, 596 U.S. 740 (2022), a case involving veterans' disability benefits. In George, a servicemember applied for disability benefits, which the regional VA office denied based on its interpretation

[9] "Unquestionably, Tyler establishes a new principle of law." Id. at 363.

of a particular regulation. Id. at 744-45. The servicemember appealed the decision, but the Board affirmed, and the servicemember took no further appeal. Id. at 745. Decades later in different case, the Federal Circuit Court of Appeals rejected the interpretation of the same regulation that led to the earlier denial of the servicemember's benefits. Ibid. In response, the servicemember sought collateral review of his denial. The Supreme Court explained that new interpretations of law do not allow collateral relief to parties' whose cases were already closed. Id. at 751-52. The same principle applies here. Plaintiff did not challenge the tax sale foreclosure of her home, which began in 2017 and was completed in early 2018. Instead, years later, she sought to collaterally attack that proceeding through this lawsuit based on a new law – Tyler. But just as in George, a new interpretation of law does not grant rights to people whose cases were fully and finally adjudicated before that new law. "New legal principles, even when applied retroactively, do not apply to cases already closed." George at 751 (quoting Hyde, supra, 514 U.S. at 758). If a party can simply file a new case that relates to the old one and avoid the foregoing principle, then it means nothing.

D. The New Jersey retroactivity doctrine does not support fully retroactive application of Tyler.

Plaintiff believes that this court should "clarify its holding in Roberto to explain" that just compensation is mandatory for all takings whether or not they predate Tyler. What Plaintiff really asks is for this court to disagree with Roberto,

not "clarify" it.

The Roberto panel already employed the New Jersey retroactivity analysis enunciated in Coons v. Am. Honda Motor Co., 96 N.J. 419 (1984) and concluded it should result in pipeline retroactivity. Roberto at 363. That conclusion is sound and should not be disturbed. The first factor – whether "a new principle of law has been established" – clearly cuts against full retroactive application. Tyler "unquestionably . . . establishes a new principle of law." Roberto at 363. The second factor looks at the "prior history of the rule in question, including its purpose and effect to determine whether retrospective application will further its operation." Ibid. The panel concluded that this factor tipped in favor of retroactivity because, though the TSL "promotes the worthy public interest goal of facilitating marketable titles to return properties to the paying tax rolls, there also exists the well-recognized public policy goal of protecting property owners' interests." Ibid. The third factor asks whether retroactive application of the new rule "would produce substantial inequitable results such as injustice or hardship." Ibid. In assessing this factor, the panel concluded – correctly – that "application of full retroactivity would be unworkable and create a substantial hardship for taxing authorities, as well as third-party purchasers." Ibid. The panel recognized that imposing untold millions of dollars in unexpected liability on municipalities and third-party purchasers based on conduct that was commonplace and

uncontroversially legal at the time is fundamentally inequitable. Based on its analysis of these three factors, Roberto settled on pipeline retroactivity. It appropriately balanced property owners' rights without imposing crippling liability on lienholders. That determination is sound.

It is important to understand, like the Roberto panel, the practical consequence of what Plaintiff asks this court to do. If full retroactivity of Tyler is permitted, that opens the floodgates of class action litigation against every tax sale certificate holder – whether public or private – that has foreclosed a tax lien in the past six years.[10] Given that courts are reluctant to grant retroactive relief in matters that seriously affect public finance, Town of Secaucus v. Hackensack Meadowlands Dev. Comm'n, 267 N.J. Super. 361, 378 (App. Div. 1993), the Roberto panel was right to elect pipeline retroactivity.

II: THE ENTIRE CONTROVERSY DOCTRINE SEPARATELY MANDATED DISMISSAL OF THIS LAWSUIT. (Raised Below, Not Addressed).

Defendants also believe that the entire controversy doctrine (ECD) independently mandates dismissal of this lawsuit.[11] The ECD, which is codified within R. 4:30A, requires litigants in a civil action to raise all affirmative claims arising from a single controversy that each party might have against another party.

---

[10] The statute of limitations for inverse condemnation is six years. N.J.S.A. 2A:14-1; Klumpp v. Borough of Avalon, 202 N.J. 390, 406-07 (2010).

[11] Though Defendants raised this argument below, the trial judge did not address it in her statement of reasons.

Oliver v. Ambrose, 152 N.J. 383, 394 (1998). It differs from collateral estoppel in that the issue sought to be precluded need not have been actually litigated: the ECD "applies not only to matters actually litigated, but to *all aspects of a controversy that might have been litigated and determined.*" Mori v. Hartz Mt. Dev. Corp., 193 N.J. Super. 47, 56 (App. Div. 1983). The ECD "encompasses virtually all causes, claims, and defenses relating to a controversy." Oliver, supra, 152 N.J. at 394. The ECD "requires that a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding." Wm. Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277, 292-93 (App. Div. 1977). The purpose of the ECD is to promote efficiency and discourage piecemeal litigation through mandatory joinder of all claims related to a single transaction. Oliver at 392.

The ECD required Plaintiff to raise her takings argument as either a counterclaim or an affirmative defense within the tax foreclosure. She should not be permitted to effectively ignore the tax foreclosure, wait almost four years, then file a separate lawsuit alleging that she has suffered a taking. There is no reasonable dispute that such a claim or defense is "germane" to a tax foreclosure. R. 4:64-5. The clearest evidence of this is that our Supreme Court issued a temporary rule change on July 12, 2023 that, among other things, "any allegation in a responsive pleading that a party has existing equity in the property shall be

treated as a contesting answer to the tax foreclosure complaint." Moreover, the purposes of the ECD – judicial economy and efficiency – are derogated by permitting this lawsuit to proceed.

To the extent Plaintiff does not believe she could have asserted a takings claim in the tax foreclosure because it would not be "ripe" until the entry of final judgment of foreclosure, nothing prevented her from raising it as an affirmative defense. The ECD treats claims and affirmative defenses alike. Oliver, supra, 152 N.J. at 394. It is commonplace for a defendant to allege that a lawsuit will effect a constitutional injury, and assert that as an affirmative defense. See, e.g., State v. $3,000.00 in U.S. Currency, 292 N.J. Super. 205, 212-13 (App. Div. 1996), in which a defendant claimed that a forfeiture order, if entered, "would constitute an excessive fine in violation of the Eighth Amendment of the Constitution." Furthermore, it is well-established that a party capable of establishing imminent, concrete, and non-speculative harm is legally entitled to enjoin such harm before it occurs through the imposition of interim restraints. See, e.g., Subcarrier Commc'ns v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997); Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 519-21 (App. Div. 2008). In other words, a party does not need to suffer an injury before asserting its rights. Plaintiff could have done so in the tax foreclosure.

To the extent Plaintiff claims she could not have raised this in the tax

foreclosure because she lacked notice of the proceeding, caselaw and statutes clearly establish that the fault lies with her. Notice for *in rem* foreclosures is based on the municipal tax duplicate. R. 4:64-7(c). The municipal tax duplicate, in turn, is created, maintained, and updated by tax assessors.[12] When a property changes owners, there are two methods by which an assessor may update the municipal tax duplicate to reflect the new owner's information. The first is if the new owner "presents his deed . . . to the assessor," who will then update the assessment records according to the information within. N.J.S.A. 54:4-29; Prime Accounting Dep't v. Twp. of Carney's Point, 212 N.J. 493, 504 (2013). If the new owner does not do so, the county clerk in the county where the deed is recorded is directed to ascertain the grantee's identity and address from the face of the deed, prepare an abstract of the deed, and forward it to the municipal assessor. N.J.S.A. 54:4-30 and -31. Thus, owners' tax mailing addresses are taken directly from deeds.

Here, Plaintiff provided no address other than the subject property on the deed. She did not list any other address. It is important to recall the Supreme Court has dictated that notice must be achieved by mailings to the address on the most recent municipal tax duplicate, R. 4:64-7(c), which the City unquestionably

---

[12] The municipal tax duplicate is "a true copy of the assessor's assessment list," Farmingdale Realty Co. v. Farmingdale, 104 N.J. Super. 314, 318 (App. Div.), rev'd on other grounds, 55 N.J. 103 (1969), which includes the owner's name, the property address, the mailing address, the block/lot, the assessed value, and other information, N.J.S.A. 54:4-24.

complied with. Moreover, it is undisputed that Plaintiff (a) never filed a change-of-address form with the municipal tax collector, N.J.S.A. 54:4-104.48; (b) shirked her obligation to ascertain and pay her taxes, even though she never received a tax bill, N.J.S.A. 54:4-64(a)(3); (c) admitted she did not set up a mailbox at the property (Ja160#8); (d) did not have her mail forwarded from the subject property to her home address (Ja173#7); and (e) never provided the City Tax Office with a tax mailing address different from what was on the vesting deed to the subject property, (Ja288‖8). In these circumstances, the case of Brick v. Block 48-7, Lots 34, 35, 36, 202 N.J. Super. 246 (App. Div. 1985) controls. There, the property owner attempted to fault the municipality for failure of notice of *in rem* foreclosure, though the owner did not alert the municipality that his address had changed. A panel of this court held:

> Property owners' addresses are supplied to tax assessors, who are not expected to ferret them out. A new owner may present a deed to an assessor. If that is not done, the register of deeds or county clerk must ascertain and mark on the deed the new owner's post office address. . . . The names and addresses that result from this process are used for mailing of tax bills and for the tax duplicate. Those are the names and addresses which the municipality employs in serving notice of tax foreclosure suits. **If an owner wants the address on the tax duplicate changed, it is up to the owner to notify the assessor. If that is not done, the tax obligation is unaffected, and the owner is dutybound to ascertain the amount owed.**
>
> **Due process does not require tax collectors,**

> **municipalities and their staff to examine the tax rolls to search for outdated or incorrect addresses supplied by the property owners, or to communicate with property owners to ascertain whether their addresses remain correct. . . .**
>
> **The New Jersey Supreme Court has clearly ruled that municipalities are not constitutionally required to search out taxpayers in foreclosure suits to see if they have furnished up-to-date addresses.**
>
> [Id. at 252 (emphasis added) (citations and internal quotation marks omitted).]

In other words, the obligation to provide a correct, updated address is squarely upon the taxpayer, and not upon the municipality. See also Berkeley v. Berkeley Shore Water Co., 213 N.J. Super. 524, 533 (App. Div. 1986) ("Where the taxpayer makes reasonable efforts to notify the taxing authority of the correct address, and the taxing authority fails or neglects to change its records, the taxpayer has exercised reasonable compliance with its obligation to notify the taxing authority of the correct address."); N.J.S.A. 54:5-104.48 (permitting an owner or other interested party to file with the tax collector a notice advising of his name, residence, and post-office address for notice purposes). Plaintiff did not do so.

Plaintiff believes that Defendants should be charged with knowledge that her mailing address was not the subject property because she had sent the City a "Letter of Agreement" before buying the property, which letter contained her home address. Brick also disposes of this argument: "**It is not controlling that the**

municipality or counsel may have had unrelated communication with the taxpayer at an address different from that appearing on the tax rolls." Id. at 252 (Emphasis added). The "Letter of Agreement" is precisely the sort of "unrelated communication" contemplated by Brick. It is a document relating to Plaintiff's proposed scope of renovations to the subject property predating her acquisition of the property, which was in possession of the *Building Division.* (Ja288¶9). The Building Division did not transmit this letter to the Tax Office, and it had no reason to do so, since it has nothing to do with taxation. (Ja288¶9). A foundational principle from Brick is that a municipality, with its many different divisions, cannot be expected to scour cross-office for documents to update its tax records. That is one basis upon which Plaintiff attempts to fault Defendants here, and on which she seeks to impose liability. The argument must fail under Brick.

For these reasons, Plaintiff was obligated to raise a taking as an affirmative defense in the tax foreclosure, and this suit should have been barred by the ECD.

III: PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY DOES NOT SUPPORT REVERSAL AND IT IS NOT EVEN PERSUASIVE. (Not Raised Below).

Following the submission of her appellate brief, Plaintiff filed a notice of supplemental authority. It relates to two cases from the Michigan Supreme Court: Rafaeli, LLC v. Oakland Cnty., 505 Mich. 429 (2020) (Rafaeli) and Schafer v. Kent Cnty., 2024 Mich. LEXIS 1438 (July 24, 2024) (Schafer). In Rafaeli, the

Michigan Supreme Court concluded that Michigan's tax foreclosure law violated the Takings Clause of the Michigan Constitution because it did not permit the former owner to recover the surplus following foreclosure and resale by the foreclosing governmental unit. 505 Mich. at 474-79.

In response, the Michigan Legislature revised its law, part of which included a claims process by which foreclosed owners could obtain their surplus. Schafer, slip op. at *4-5. As part of that revision, the Legislature decreed that claims arising prior to the date of Rafaeli "may be made only if the Michigan Supreme Court orders that its decision in Rafaeli . . . applies retroactively." MCL 211.78t(1)(b)(i). Thus, the issue in Schafer was whether Rafaeli applied with full retroactivity. The appeals court concluded that Rafaeli was not new law, but instead "supported by long-established constitutional principles," and the Michigan Supreme Court agreed. Id. at *6. The owner's right to surplus proceeds in a tax foreclosure was one recognized by Michigan law *until* the Legislature abrogated the right in a 1999 amendment to its tax foreclosure laws. Id. at *19-21. "Because this common-law property right is constitutionally protected by our state's Takings Clause, no subsequent amendment of the GPTA can abrogate this basic right." Id. at *19-20. The Court also noted that Rafaeli did not overturn any caselaw, legal principles, or precedents. Id. at *21.

Unlike Michigan, New Jersey has historically *never* recognized a property

owner's right to surplus equity in a tax foreclosure.[13] Strict foreclosure[14] has been the state of the law since tax foreclosure came into existence in the 1800s. See Pamph. L. 1886, p. 161; Burgin v. Rutherford, 56 N.J. Eq. 666, 669 (Ch. 1898); L. 1903, c. 208, §§56,59; Mitsch v. Owens, 82 N.J. Eq. 404 (Ch. 1913); L. 1918, c. 237, §49; Atl. City v. Gardner, 124 N.J. Eq. 110, 112 (Ch. 1938); Varsolona v. Breen Capital Servs. Corp., 180 N.J. 605, 619 (2004) (observing that a final judgment vests fee title in the plaintiff "even if the property's value exceeds the amounts owed."). And unlike Rafaeli in Michigan, Tyler "unquestionably" unsettled prior law in New Jersey. Roberto at 363. Accordingly, the Schafer decision of the Michigan Supreme Court does not avail Plaintiff here.

CONCLUSION

For these reasons, Defendants respectfully ask the court to affirm.

Respectfully submitted,
GOLDENBERG, MACKLER, SAYEGH, MINTZ, PFEFFER, BONCHI & GILL,
Attorneys for Defendants

BY: _____
KEITH A. BONCHI, ESQ.

_____
ELLIOTT J. ALMANZA, ESQ.

DATED: August 23, 2024

[13] On July 10, 2024, Governor Murphy signed legislation that, for the first time, recognizes a property right to surplus equity in a tax foreclosure. P.L. 2024, c. 39.
[14] Vesting of title in the absence of a sheriff's sale is referred to as "strict foreclosure." See Landa v. Adams, 162 N.J. Super. 318, 323 (App. Div. 1978).

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LYNETTE JOHNSON,

Plaintiff-Appellant,

v.

CITY OF EAST ORANGE; ANNMARIE CORBITT, in her official capacity as Collector of Taxes, and TED R. GREEN, in his official capacity as Mayor of East Orange,

Defendants-Respondents.

DOCKET NO. A-002486-23T2

Civil Action

On Appeal From:
Superior Court of New Jersey
Chancery Division, Essex County
Docket No. ESX-C-16-23

Sat Below:
Hon. Lisa M. Adubato, J.S.C.

REPLY BRIEF OF PLAINTIFF-APPELLANT LYNETTE JOHNSON

DAVID J. DEERSON*
California Bar No. 322947
CHRISTINA M. MARTIN*
Washington Bar No. 60377
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
(916) 419-7111
DDeerson@pacificlegal.org
CMartin@pacificlegal.org
**Pro Hac Vice*
On the Brief

JONATHAN M. HOUGHTON
New Jersey Bar No. 369652021
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(916) 503-9041
JHoughton@pacificlegal.org
On the Brief

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The City's entire argument rests on eliding the distinction between a foreclosure action and a takings claim. That is how, for example, it can argue that ruling for Ms. Johnson in this case would "afford Tyler full retroactivity, rather than the pipeline retroactivity called for by Roberto," (Resp. Br. 10), even though this action was indisputably filed before Tyler was issued—and therefore in the "pipeline." That is also how the City can argue that the takings claim here is barred by the entire controversy doctrine, even though the claim did not accrue until the City failed to compensate Ms. Johnson for her equity interest following the foreclosure judgment. These arguments all fail because they rest on the same flawed premise—the conflation of a foreclosure action with the failure to pay just compensation for a taking.

LEGAL ARGUMENT

I. Retroactivity

A. This case is a pipeline case

Tyler must be given full retroactive effect regardless of whether cases predate or postdate the issuance of that decision. That is the rule from Harper, which was acknowledged in Roberto. See 257-261 20th Ave. Realty v. Roberto, 477 N.J. Super. 339, 362 (2023); Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993). Roberto's discussion of pipeline retroactivity was limited to foreclosure actions, not takings

cases. Id. (discussing "pipeline retroactivity *to pending tax sale foreclosures*[.]") (emphasis added). Thus, even if this takings case had not been filed until *after* Tyler was decided, Tyler would still apply. But as it happens, this case was filed *before* Tyler was decided, and therefore it was in the pipeline anyway.

The City incorrectly claims that "providing a cause of action to plaintiff [here would] mean[] that Tyler is given fully retroactive effect." (Resp. Br. 8). But the only distinction between full retroactivity and pipeline retroactivity is whether an action was filed before or after the relevant decision. If an action was filed before the relevant decision, it needs only pipeline retroactivity. If it was filed after the relevant decision, it would require full retroactivity. The only way this case would require full retroactivity is if it had been filed after Tyler was decided. It was not. The City sidesteps this plain reality by casting this case as a "collateral" matter which seeks to place the "already-finalized" foreclosure action "back in the pipeline." (Resp. Br. 10). But Ms. Johnson does not challenge the legitimacy of the foreclosure and does not seek to reopen or reverse it. She merely seeks just compensation for her equity interest in the property that the City took. In this sense it is no different from Tyler itself, in which the plaintiff sought compensation for an already-finalized foreclosure. See Tyler v. Hennepin County, 598 U.S. 631, 635 (2023); see also Hall v. Meisner, 51 F.4th 185 (6th Cir. 2022) (cited approvingly in Tyler, 598 U.S. at 638) (ruling for plaintiff on a takings claim filed after a final foreclosure judgment).

Likewise, in Harrison v. Montgomery County, 997 F.3d 643 (6th Cir. 2021), the plaintiff filed a takings claim after her property had been foreclosed by the county's board of revision. Id. at 647. The county argued that the claim should be precluded because the plaintiff could have raised it as a defense in the board proceedings. Id. at 650. Although the foreclosure was a "state-court judgment" for purposes of Ohio claim preclusion law, id. at 648, the Sixth Circuit rejected the County's preclusion argument because the takings claim did not become ripe until the Board's final decision. Id. at 650. The Harrison court also rejected the county's arguments under the Tax Injunction Act (28 U.S.C. § 1341) and the doctrine of comity. Id. at 651–52. The case was distinct from the underlying foreclosure action because, as here, it challenged only the government's "extinguishment of [] surplus equity—not its foreclosure of tax-delinquent property[.]" Id. at 652.

The taking here occurred when the City failed to compensate Ms. Johnson for her equity interest following the judgment of foreclosure. See Knick v. Township of Scott, 588 U.S. 180, 189 (2019) (a takings claim exists "as soon as a government takes [] property for public use without paying for it."). This case was already filed and pending when Tyler was decided, and therefore requires only pipeline retroactivity to succeed.

B. Although this case is a pipeline case, Harper mandates full retroactivity

Full retroactive effect of Tyler is mandated by Harper, 509 U.S. 86, and the Takings Clause itself. See (Op. Br. 12–13). The City cannot dispute that Harper calls for full retroactivity (Resp. Br. 12). Harper itself involved retroactive application of a decision to a pre-decisional facts brought in a post-decisional claim.[1] Instead, the City's argument rests on the same improper conflation of a takings claim and a foreclosure action (Resp. Br. 12–14). It tries to distinguish Harper by characterizing this case as one in which a final judgment has been reached and all appeals exhausted. (Resp. Br. 12). That is obviously not true, as we are on initial appeal from the trial court's decision now.

The City's reliance on George v. McDonough, 596 U.S. 740 (2022), misses the mark. That case does not concern retroactivity doctrine at all, but rather the interpretation of a statutory provision which permits a claimant for veterans' disability benefits "to seek collateral review at any time on grounds of clear and unmistakable error." 596 U.S. at 742 (internal quotations omitted). The case therefore turned on whether a subsequent change in law constituted a "clear and unmistakable error" for purposes of the statute. Id. at 746. It is inapposite.

[1] Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) was decided on March 28, 1989. The Harper petitioners instituted their action in May of that year. Harper v. Va. Dep't of Tax'n, 241 Va. 232, 235 (1991).

Finally, in response to Ms. Johnson's argument that foreclosure cases can and should be treated differently from takings cases, the City argues that there "is no authority for the proposition that the same law should be afforded pipeline retroactivity in one circumstance, but full retroactivity in another[.]" (Resp. Br. 11, n.7). This misunderstands the argument. The rule from Tyler enjoys full retroactive effect in all cases, but it does not dictate an equitable remedy in foreclosure proceedings. (See Op. Br. 11–13); Cf. Harper, 509 U.S. at 100 (Davis v. Mich. Dep't of Treasury applied retroactively, but government "retains flexibility" in fashioning a remedy for the due process violation at issue). That is because the mere fact that a foreclosure will result in a taking does not mean that foreclosure must be enjoined. Knick, 588 U.S. at 201 (equitable relief generally unavailable for takings claims). Rather, it inflexibly means that the taker must pay just compensation. First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 315–16 (1987) ("[I]n the event of a taking, the compensation remedy is required by the Constitution.").

C. New Jersey's retroactivity doctrine requires full retroactivity

Harper and the Constitution definitively resolve the question of retroactivity. But even were that not so, the policy factors in Coons v. Am. Honda Motor Co., 96 N.J. 419, 425 (1984) command full retroactivity. (See Opening Br. 13–17).

1. Practical factors will limit public and private liability

Most notably, without support or citation, the City prophesies that catastrophic liability and a flood of cases will result from the full retroactive effect of Tyler and thus argues the administration of justice disfavors full retroactivity. (See Resp. Br. at 15–16). Of course, such consideration cannot override the Constitution's requirement of just compensation. (See Opening Br. 12–13). Regardless, "the equities run very much" in favor of owners whose constitutional rights have been violated. *See* Hall, 51 F.4th at 196. Losing all the equity saved up in property has life-altering consequences for owners like Ms. Johnson. The City has not disclosed to the Court or to Ms. Johnson how many confiscatory tax foreclosures it has engaged in during the last six years. But if its potential liability is large, that only reflects the magnitude of the gross injustice done to property owners. If the liability is small compared to its annual budget, then its fears are unjustified. Moreover, "[t]ime and again in Takings Clause cases, the [U.S. Supreme] Court has heard the prophecy that that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest." Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 36-37 (2012). And time and again, the Supreme Court has "rejected this argument." Id. This Court, too, should reject the City's similar projection and instead hold that justice favors full retroactivity.

On a more practical level, the City's forecast of "open floodgates" is unpersuasive. Only a fraction of individuals with valid claims are likely to bring them to court. For example, in Bowles v. Sabree, No. 2:20-cv-12838-LVP-KGA, 2022 WL 141666 (E.D. Mich. Jan. 14, 2022), only about 13% of eligible individuals submitted claims as of the fairness hearing. See Bowles, ECF No. 111, 14:25 (Transcript of Fairness Hearing). Low claims rates are unsurprising because confiscatory tax foreclosures primarily harm society's most vulnerable members—the elderly, the ill, the impoverished, and the bereaved. See Cherokee Equities, LLC v. Garaventa, 382 N.J. Super. 201, 211 (Ch. Div. 2005) (tax foreclosure defendants are often "among society's most unfortunate."). These individuals are unlikely to bring a Tyler-style claim for the very same reasons that made them unable to keep up with their tax burden or to redeem their property from foreclosure in the first place.

Moreover, recent opinions by the Sixth Circuit demonstrate that courts may ultimately deny class status to Tyler-style cases for a variety of reasons. See Fox v. Saginaw Cnty., 67 F.4th 284, 301 (6th Cir. 2023) (class action status in similar cases out of Michigan may not be appropriate); Tarrify Props, LLC v. Cuyahoga Cnty., 37 F.4th 1101, 1106–08 (6th Cir. 2022) (denying class status to a similar case in Ohio). When these practical limitations on liability are considered, the City's concerns about the ill effects of retroactivity on the administration of justice evaporate.

2. The Michigan Supreme Court's reasoning in Schafer is persuasive

As the Michigan Supreme Court recently found in a case concerning the retroactive application of Rafaeli, LLC v. Oakland County, 952 N.W.2d 434 (Mich. 2020), a state law case that prefigured Tyler, traditional Coons-style policy considerations strongly support retroactivity. Schafer v. Kent Cnty., No. 164975, 2024 WL 3573500, at *16 (Mich. July 29, 2024). The Schafer court held that, even *assuming arguendo*, that a new rule was announced, the reliance interests, purpose of the rule, and effect on administration of justice strongly support retroactivity. Schafer, 2024 WL 3573500, at *16.

The City attempts to distinguish Schafer on the grounds that "[u]nlike Michigan, New Jersey historically *never* recognized a property owner's right to surplus equity in a tax foreclosure." (Resp. Br. 23–24). This argument is relevant only to the threshold retroactivity question whether the decision at issue announced a new principle of law. Tyler held that it did not, although Roberto mistakenly concluded otherwise. (Op. Br. 14, n.3).

To support its assertion that the rule is new, the City cites a string of authorities meant to establish that strict foreclosure has always been the practice in New Jersey, but none of these cases address a challenge under the Takings Clause. (Resp. Br. 24).

Moreover, New Jersey law has in all other contexts always treated equity[2] in real estate as a private property interest.[3] See, e.g., Cateret Sav. & Loan Ass'n F.A. v. Davis, 105 N.J. 344, 347 (1987) ("The value of the land above the loan" is "entitled to protection in equity."); N.J.S.A. 20:3-2(d) (under the Eminent Domain Act of 1971, "property" means "land, or any interest in land[.]"); N.J.S.A. 12A:9-608, 12A:9-602(5), (8), (9) (New Jersey's Uniform Commercial Code returns surplus equity to the former owner after the foreclosure of a security interest, and makes this protection a mandatory term that cannot be waived by agreement); cf. United States v. General Motors Corp., 323 U.S. 373, 377–78 (1945) (the term "property" in the Takings Clause refers not to just to "the physical thing" but to the "group of rights inhering in the citizens' relation to the physical thing."). New Jersey "may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when the State does the taking." See Tyler, 598 U.S. at 645.

---

[2] An equity interest, in New Jersey as elsewhere, is the value of one's land minus any encumbering debts. Crane v. Comm'r, 331 U.S. 1, 7 (1947) ("[E]quity is defined as the value of a property above the total of the liens.").

[3] Equity belongs to the owner of the land and survives a transfer of land for the payment of debt. Danes v. Smith, 30 N.J. Super. 292, 301–02 (App. Div. 1954). Equity is property to be divided in a marital dissolution. Mark S. Guralnick, N.J. Family Law Ann. A Ch. 3 III (equitable distribution "applies to both real estate . . . and to legal as well as equity rights acquired in property during the course of a marriage."). It is protected in executions on judgments and has been for over a century. Vanduyne v. Vanduyne, 16 N.J. Eq. 93, 94 (N.J. Ch. 1863) (irrespective of language in an execution, sheriff is authorized to sell "only so much of the premises as may be necessary" to satisfy the execution).

II. Entire Controversy Doctrine

The entire controversy doctrine compels litigants to "consolidate their claims arising from a single controversy whenever possible" to "encourage complete and final dispositions through the avoidance of piecemeal decisions and to promote judicial efficiency and the reduction of delay." Dimitrakopoulos v. Borrus, Goldin, Forely, Vignuolo, Hyman and Stahl, P.C., 237 N.J. 91, 98 (2019) (internal quotations omitted). But the doctrine is "constrained by principles of equity[,]" and its application is limited by "judicial discretion based on the factual circumstances of individual cases." *Id.* at 99, 114. It is "predicated upon the polestar of judicial fairness, and it may only be invoked in that spirit." Levchuk v. Jovich, 372 N.J. Super. 149, 155 (Law Div. 2004). Thus, the doctrine is inappropriate if its application "would be unfair in the totality of the circumstances and would not promote any of its objectives[.]" Dimitrakopoulos, 237 N.J. at 114.

Relevant here, the entire controversy doctrine "does not apply to claims that [were] unknown or unaccrued" during the earlier action. Id. at 115; L.J. Zucca, Inc. v. Allen Bros. Wholesale Distributors Inc., 434 N.J. Super. 60, 87 (App. Div. 2014). It also cannot apply where initial proceeding did not provide a "fair and reasonable opportunity to have fully litigated that claim in the original action." DiTrolio v. Antiles, 142 N.J. 253, 273 (1995) (internal quotations omitted). All of these exceptions to the entire controversy doctrine apply here.

A. The claims did not accrue until the City failed to compensate Ms. Johnson for her equity interest following foreclosure

A takings claim accrues when the government takes property without compensation—not before. See Knick, 588 U.S. at 194 ("[B]ecause a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time.") (emphasis added); Harrison, 997 F.3d at 650 ("The taking, so far as federal law is concerned, happened when the Board adjudicated the foreclosure of Harrison's property through the land bank process, not before."). Thus, the taking here did not occur until the City failed to pay compensation following the final judgment of foreclosure. Ms. Johnson could not have brought her takings claim before this event because no uncompensated taking had yet occurred. So too with unjust enrichment. Goldsmith v. Camden County Surrogate's Office, 408 N.J. Super. 376, 382 (2009).

The City attempts to avoid this truth by suggesting that Ms. Johnson could have raised a takings claim in the form of an affirmative defense. But its cited authority demonstrates the opposite. For example, it points to R. 4:64-5's instruction that "germane counterclaims and crossclaims may be pleaded in foreclosure actions without leave of court." Yet R. 4:64-5 specifically applies to *mortgage* foreclosures. By contrast, foreclosures of tax sale certificates are controlled by R. 4:64-6, which limits defenses to those of "the invalidity of the tax . . ., or the invalidity of the proceedings to sell, or the invalidity of the sale[.]" None of these issues are relevant

to the takings claim, which challenges not the legitimacy of foreclosure but the failure to pay for surplus equity after the fact. The City also points to the New Jersey Supreme Court's "temporary rule change" of July 12, 2023, that an allegation of surplus equity "shall be treated as a contesting answer to the tax foreclosure." Yet this "temporary rule change" only proves that prior to July 12, 2023, the rules did not treat an allegation of surplus equity as a contesting answer in a tax foreclosure proceeding. Otherwise, the Court's announcement would have been redundant and would not have been a rule "change" at all.

B. Ms. Johnson was not actually aware of the foreclosure proceeding, let alone that it might result in a taking or unjust enrichment

Moreover, Ms. Johnson could not have brought her takings or unjust enrichment claims during the initial foreclosure proceeding because she did not have actual knowledge of that proceeding until after it had concluded. (Ja6–7, ¶¶ 30, 37). The entire controversy doctrine cannot bar a claim unless it was actually known in an earlier proceeding. See Joel v. Morocco, 147 N.J. 546, 549 (1997) ("We have emphasized that the plaintiff must be actually aware of the actionable conduct when the original suit is brought.").

The City turns that principle on its head by suggesting that "the fault lies with" Ms. Johnson for her lack of notice. It relies on Brick Twp. v. Block 48-7, Lots 34, 35, 36, 202 N.J. Super. 246 (App. Div. 1985) for the proposition that "the obligation to provide a correct, updated address is squarely upon the taxpayer, and not upon the

municipality." (Resp. Br. 21). But Brick had nothing to do with the entire controversy doctrine; it concerned the sufficiency of notice for due process purposes. Unlike due process, which does not require actual notice, Jones v. Flowers, 547 U.S. 220, 226 (2006), the entire controversy doctrine cannot bar a claim unless the claimant was "actually aware of the actionable conduct" in the earlier proceeding. Joel, 147 N.J. at 549.

Regardless, the City fails to tell the entire story of Brick. That case does not stand for the proposition that a property owner's failure to notify the tax collector of a change in address is dispositive even of the due process issue. Indeed, although the Brick defendants had not advised the tax office of their change in address, this Court nevertheless remanded the case for a hearing to determine whether the Township had actual knowledge of the defendants' situation. Even though the Township "had no duty to investigate" the defendants' address beyond what appeared on the tax rolls, "it is something else altogether if someone involved ignored conscious awareness that the address was outdated . . . and that [the defendants] were available for service" at a different address. 202 N.J. Super. at 254. On remand from Brick, evidence was produced showing that the Township's prosecuting attorney knew that he was sending notice to the wrong address, and on subsequent appeal the Appellate Division ruled for the defendants. Brick v. Block 48-7, Lots 34, 35, 36, Kenlav, 210 N.J. Super. 481, 483, 485 (App. Div. 1986) (Brick II). See also Sourlis v. Borough

of Red Bank, 220 N.J. Super. 434, 439–40 (App. Div. 1987) (even without "actual awareness," municipality's constructive knowledge of a change in address entitles a property owner to be mailed notice at the correct address).

As relevant to Ms. Johnson's unjust enrichment claim, the City possessed a Letter of Agreement listing Ms. Johnson's residential mailing address in bold, italicized typeface. This fact alone may not be "controlling," Brick, 202 N.J. Super. at 252, but it raises the possibility that the tax collector had actual or constructive knowledge of where Ms. Johnson could be reached. That is one reason why Ms. Johnson's unjust enrichment claim is not appropriate for summary judgment at this stage. Further discovery, including depositions, are necessary to determine whether relevant City officials had such knowledge.

C. The foreclosure proceedings would not have provided a full and fair opportunity to litigate the takings claim

Even leaving aside that the takings claim in this case was unaccrued and unknown during the foreclosure case, the foreclosure proceedings would not have provided a fair and reasonable opportunity to litigate that claim in any instance. See Dimitrakopoulos, 237 N.J. at 120 (court must be assured that claimant had a fair and reasonable opportunity to litigate the challenged claim in the earlier action); id. at 117 (describing the requirement of a "full and fair opportunity to litigate the issues . . . with the same remedial opportunities as the second forum.") (internal quotations omitted). Prior to the N.J. Supreme Court's July 12, 2023, Order, an allegation of

surplus equity was not treated as a contesting answer in a tax foreclosure proceeding. Moreover, as described above, R. 4:64-6 only contemplates defenses of "invalidity of the tax . . ., or the invalidity of the proceedings to sell, or the invalidity of the sale[.]" Only if a tax foreclosure defendant raises one of these defenses in an answer will his or her individual case be severed from the proceedings to try those issues.

This case is a far cry from the archetypical scenario in which a litigant has purposely "withheld claims" from an earlier suit for "strategic reasons" or to obtain "two bites at the apple." Id. Ms. Johnson was not required to raise an unaccrued takings claim in an inappropriate forum during a foreclosure action that proceeded without her knowledge. The entire controversy doctrine "is not intended to be a trap for the unwary." Joel, 147 N.J. at 554.

CONCLUSION

For the reasons stated above and in the Opening Brief, Ms. Johnson respectfully asks this Court to reverse.

DATED: September 6, 2024.

Respectfully submitted,

s/ Jonathan M. Houghton

JONATHAN M. HOUGHTON
New Jersey Bar No. 369652021
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(916) 503-9041
JHoughton@pacificlegal.org

DAVID J. DEERSON*
California Bar No. 322947
CHRISTINA M. MARTIN*
Washington Bar No. 60377
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
(916) 419-7111
DDeerson@pacificlegal.org
CMartin@pacificlegal.org
**Pro hac vice*

Counsel for Plaintiff-Appellant