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SUPREME COURT OF NEW JERSEY
DOCKET NO. 088959

257-261 20th AVENUE REALTY, LLC,

Plaintiff-Petitioner,

v.

ALESANDRO ROBERTO,

Defendant-Respondent,

and

FANNY ROBERTO, wife of Alesandro Roberto; KELLER DEPKEN FUEL OIL COMPANY INC. a/k/a HOP ENERGY LLC; and MIDLAND FUNDING LLC.,

Defendants.

Civil Action
ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-3315-21

SAT BELOW:
Hon. Thomas W. Sumners, Jr., P.J.A.D.
Hon. Morris G. Smith, J.A.D.
Hon Lisa Perez-Friscia, J.A.D.

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
PASSAIC COUNTY
CHANCERY DIVISION
DOCKET NO.: F-3349-21

SAT BELOW:
Hon. Randal Chiocca, P.J.Ch.

BRIEF OF *AMICUS CURIAE* LEGAL SERVICES OF NEW JERSEY

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Legal Services of New Jersey (LSNJ) adopts the procedural history and statement of facts as presented in the Respondent's brief.

INTRODUCTORY STATEMENT

It is critical that this Court uphold the unanimous decision of the Appellate Division, which correctly held New Jersey's Tax Sale Law violates the United States and New Jersey Constitutions because it permits takings of private owner surplus equity without just compensation through property tax foreclosure proceedings. LSNJ draws upon more than 20 years of experience in representing and advising New Jersey property owners before, during, and after property tax foreclosure through its Foreclosure Defense Project. In this brief, LSNJ first provides background for how this issue affects actual New Jersey residents and their heirs under the existing Tax Sale Law, and then presents its analysis in support of the Appellate Division's correct decision.

CONTEXT – NEW JERSEY'S TAX SALE LAW DEPRIVES PROPERTY OWNERS OF THEIR CONSTITUTIONAL RIGHTS

In 2002, LSNJ initiated its specialized statewide Anti-Predatory Lending Project, later renamed the Foreclosure Defense Project, to provide a focused and expert response to the increase in subprime residential lending and other financial abuses against consumers involving homeownership and home equity. During the last two decades, LSNJ received hundreds of requests for assistance from homeowners facing loss of their homes and home equity due to property tax foreclosure. Thus, LSNJ offers unique perspectives on property tax foreclosures, their impact on vulnerable New Jersey homeowners, and the related issues presented in this case. The financial harm of unconstitutional equity takings through property tax foreclosure disproportionately affects historically disenfranchised groups including low-income, elderly, and Black, Indigenous, and People of Color (BIPOC). (Michael Taddonio, The Common Law Remedy to the Tax Deed and Tax Lien's Disparate Impact on Communities, 46 Vt. L. Rev. 642, 648 (2022).)

A. New Jersey's Tax Sale Law is unconstitutional because it deprives property owners of their surplus equity.

New Jersey homeowners lose millions of dollars in home equity every year through property tax foreclosures under the New Jersey Tax Sale Law (TSL), N.J.S.A. 54:5-1 to -137, which permits prohibited takings of equity in

violation of both the Fifth Amendment to the United States Constitution (applicable to New Jersey through the Fourteenth Amendment) and Article 1, Paragraph 20 of the New Jersey Constitution. In a seven-year period, $115 million in home equity was taken from property owners through tax foreclosure for 661 properties in 31 towns. (Tracey Tully, She Lost Her Childhood Home Over Taxes. Then It Erupted in Flames, New York Times, February 1, 2023, at https://www.nytimes.com/2023/02/01/nyregion/nj-maplewood-home-arson.html.) This averages to $174,000 surplus equity taken per property by municipalities and third-party purchasers above the amount of tax debt. These takings occurred because the TSL unconstitutionally empowers municipal governments and third-party purchasers of tax liens (including individuals and private corporations as identified in the New Jersey Constitution Takings Clause) to take private property owners' equity without just compensation.

In May 2023, the United States Supreme Court unanimously held that the government's retention of surplus equity in property tax foreclosure without just compensation to the dispossessed property owner violated the Fifth Amendment to the United States Constitution. Tyler v. Hennepin County, 598 U.S. 631, 637 (2023).

In December 2024, the New Jersey Appellate Division unanimously held that the TSL "permitted foreclosure of a property owner's equity and is thus a prohibited taking after Tyler," and that Tyler applies to "a third-party purchaser proceeding [under the TSL] with an interest conveyed by the taxing authority." 257-261 20th Ave. Realty, LLC v. Roberto, 477 N.J. Super. 339, 362, 365 (App. Div. 2023).

The Tyler Court considered the taken surplus "equity" to be the sale price of Ms. Tyler's home minus the tax debt. The Court did not subtract other liens against the property because Ms. Tyler would still be personally liable for those debts and could have utilized her surplus equity to reduce such liability.

> In Minnesota, a tax sale extinguishes all other liens on a property. . . That sale does not extinguish the taxpayer's debts. Instead, the borrower remains personally liable. . . . Had Tyler received the surplus from the tax sale, she could have at the very least used it to reduce any such liability.
>
> [Tyler, 598 U.S. at 637 (internal citations omitted).]

Property owners typically build home equity over time by paying down mortgages. (Anju Vajja, Homeowners' Equity Remains High, Federal Housing and Finance Agency, https://www.fhfa.gov/blog/statistics/homeowners-equity-remains-high (last visited June 4, 2024).) When those property owners lose their homes and home equity in tax foreclosure proceedings, they must find new housing but often lack the savings to do so. Presumably, if they had such

savings, then they would have paid the tax arrears to stop the foreclosure process.

The Appellate Division correctly held that "confiscation of a New Jersey property owner's equity, through a tax sale foreclosure, violates the Fifth Amendment Takings Clause" and that the Takings Clause applies to third-party purchasers of tax sale certificates. Roberto, 477 N.J. Super. at 350.

B. Property owners harmed by unconstitutionality of the TSL.

Below are some examples of real scenarios involving homeowners in property tax foreclosure who sought legal assistance from LSNJ and who were harmed by the TSL.

Client 1 (Ms. P.) is a retired 83-year old African American who lives in the home that her parents purchased in 1964. Ms. P.'s mother died in 2017, leaving the home to Ms. P. and her siblings. Due to limited social security retirement income of $2,600 per month and family financial emergencies, Ms. P. missed three quarters of property taxes in 2019. In December 2019, the municipal tax collector sold a tax sale certificate lien for her home to a third-party purchaser for $2,088.75. She contacted LSNJ after being served with foreclosure papers. Currently Ms. P.'s home has more than $200,000 in surplus equity and she continues paying current property taxes as they come due while the foreclosure case is pending. Under the current TSL that Petitioner asks this

Court to uphold, Ms. P. would be rendered homeless and without a penny of her inheritance due to a third-party purchaser taking the surplus equity at the end of its foreclosure proceeding.

Client 2 (Mr. C.) was 78-years old when he learned about a property tax foreclosure filed by a third-party purchaser who purchased a municipal tax lien. Mr. C. lived in the home with his wife, grandson, grandson's partner, and great-grandchild. Mr. C. paid off the mortgage that he used to purchase the home, so there were no other liens against the property. After his wife lost her job in 2019, they defaulted on property tax payments. When the foreclosure final judgment entered in October 2022, Mr. C.'s family lost their home and $130,000 in home equity that accrued during decades of homeownership and property tax payments for less than $20,000 in tax arrears.

Client 3 (Mr. A.) is a 66-year-old homeowner who is physically disabled and blind. Mr. A. inherited the home from an uncle for whom he provided care during the uncle's final years. After becoming legally disabled and blind at the age of 55, Mr. A. could no longer work and defaulted on property taxes. When he contacted LSNJ during property tax foreclosure proceedings, he owed approximately $16,000 in tax arrears on his home worth $340,000 at the time. With assistance, he was able to redeem the tax debt through mortgage financing, thus saving the home and more than $320,000 in equity. If Mr. A

was unable to redeem and if the foreclosure reached final judgment under the TSL, then the third-party purchaser would have taken Mr. A's home and all of the equity that his uncle left him as inheritance. Mr. A. could have ended up homeless and without any of his equity to help him in his search for stable housing.

As demonstrated in the client examples, under the TSL a dispossessed property owner could lose tens (or hundreds) of thousands of dollars in home equity, over and above the tax lien debt. The only silver lining a property owner could hope to seek after dispossession is the right to their surplus equity, but the TSL currently gives all of their equity as a windfall to the third-party purchaser who bought and foreclosed on the tax lien. Thus, the TSL deprives the dispossessed owner of the funds they could have otherwise used to find affordable housing.

Petitioner seeks to maintain this inequitable and unconstitutional deprivation of foreclosed property owners' surplus equity. Although Petitioner acknowledges the United States Supreme Court held it is unconstitutional for the government to take and retain property owner equity in excess of the tax lien, it argues that if a third-party purchaser takes and retains the equity then the taking is somehow constitutional. In essence, Petitioner asks this Court to elevate the interest of a third-party purchaser taking a property owner's equity

without just compensation over the constitutional rights of the dispossessed property owner to whom that surplus equity rightfully belongs.

LSNJ contends that this Court should uphold the Appellate Division's decision finding that the TSL violates the United States Constitution Fifth Amendment Takings Clause and the New Jersey Constitution, art. 1, ¶ 20.

LEGAL ARGUMENT

I. NEW JERSEY RECOGNIZES A PROPERTY RIGHT IN SURPLUS EQUITY.

Petitioner argues that the Appellate Division erred because it did not first make a finding that New Jersey recognizes a property right in surplus equity in a takings analysis and New Jersey does not recognize such a property right. However, it is clear that New Jersey recognizes an established property right in surplus equity for property owners, including former property owners dispossessed after tax foreclosures, and therefore the takings analysis applies.

A. New Jersey law has an established history of recognized property rights in surplus equity.

New Jersey has a long history of recognizing a property right in surplus equity, including after a foreclosure. The General Equity court stated almost 100 years ago "unadministered surplus retains its nature as real estate . . . ." Zelley v. Zelley, 101 N.J. Eq. 37, 40 (Ch. 1927). New Jersey property owners have an undisputed real property right in their real estate and in their surplus

equity. "It is generally acknowledged that surplus funds take on the character of the land, at least with respect to junior encumbrancers whose liens existed at the time of the foreclosure." Morsemere Fed. Sav. & Loan Ass'n v. Nicolaou, 206 N.J. Super. 637, 642 (App. Div. 1986).

> Surplus moneys arising on foreclosure stand in place of the land itself as to the liens thereon or vested rights therein. Servis v. Dorn, 76 N. J. Eq. 241, 76; Zelley v. Zelley, 101 N. J. Eq. 37. . . . The proceeds retain the character of real estate for the purposes of succession. Oberly v. Lerch, 18 N. J. Eq. 346. The theory upon which such surplus proceeds are held to be land is that the surplus usually arises because more land is sold than is necessary, in one case, to pay the debts of decedent; in another (foreclosure), than is necessary to satisfy the mortgage debt; and in partition, because the land is impossible of division and for practical purposes it has been converted into money. **But in each case the money stands for the land, and the rights therein are determined as though the court were dealing with the land itself.** Upon an application for distribution of such surplus moneys, the division amongst those entitled is, in effect, an equitable partition of the land for which the money stands. The excess, though in the form of money, remains, as before, impressed with the character of the land. Coke v. Dealey, 22 Beav. 196. Such money passes by succession on 'the principle, that money impressed with the character of land remains such until it is accepted as money by its absolute owner of sufficient capacity to make such election.' Oberly v. Lerch, supra.
>
> [Morris v. Glaser, 106 N.J. Eq. 585, 592–93 (Ch. 1930), aff'd, 110 N.J. Eq. 661 (1932) (emphasis added).]

In certain circumstances, New Jersey's TSL and Court Rules already recognize the property owner's property right in surplus equity after property tax foreclosure. If the United States has a lien against property subject to property tax foreclosure – for example, a lien from the Internal Revenue Service – then the foreclosing plaintiff does not automatically take title to the property or the surplus equity. Rather, the TSL requires that the property be sold at a foreclosure sheriff's sale. N.J.S.A. 54:5-87. If after the tax foreclosure sheriff's sale there is surplus equity, the property owner may file a motion for surplus funds under Rule 4:64 ("Foreclosure of Mortgages, Condominium Association Liens and Tax Sale Certificates.") Rule 4:64-3 ("Surplus Moneys") sets forth the procedures by which a former property owner or other interested party, including heirs, may apply for release of surplus equity funds after a property tax foreclosure sheriff's sale.

New Jersey law directs that after a foreclosure sheriff's sale "**the surplus, if any**, shall be deposited with the court and the same **shall be paid to the person or persons entitled thereto**, upon application therefor, as the court shall determine." N.J.S.A. 2A:50-37 ("Sale and conveyance of premises; estate conveyed; disposition of proceeds; application for surplus") (emphasis added). Notably, foreclosing lienholders are not deemed as persons entitled to apply for surplus funds.

> In light of the well-settled principle that a mortgage [lien] merges into the judgment of foreclosure, we are satisfied that in the normal course a fair construction of N.J.S.A. 2A:50–37 and R. 4:64–3 requires rejection of the claim of a foreclosing first mortgagee to any expenses incurred after the final judgment of foreclosure unless that judgment has been amended prior to the sheriff's sale.
>
> [Virginia Beach Fed. v. The Bank of New York/Nat'l Cmty. Div., 299 N.J. Super. 181, 188 (App. Div. 1997).]

Neither the TSL nor the New Jersey Court Rules direct payment of surplus funds to the third-party purchaser whose lien was paid off at the sheriff's sale that resulted in surplus funds. Instead, New Jersey recognizes that the dispossessed owner has a property right in the surplus funds.

The Appellate Division correctly applied the takings analysis because dispossessed private property owners have a recognizable property right in their surplus equity.

B. Tyler recognized inherent property rights in surplus equity through state law and traditional property law principles.

Petitioner argues that the Tyler decision relied on a determination that Minnesota's property tax law was unconstitutional only because Minnesota law recognized a property right in surplus equity. Petitioner is mistaken. When the Tyler Court decided that surplus equity after property tax foreclosure is a property right, it "[drew] on 'existing rules or understandings' about property

rights." Tyler, 598 U.S. at 638 (quoting Phillips v. Washington Legal Foundation, 524 U.S. 156, 164 (1998)). In its analysis, the Court looked to state law as only one important source, but noted prudently that "state law [could not] be the only source[, o]therwise a State could 'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate." Id. (quoting Phillips, 524 U.S. at 167). The other important source the Court looked to was "'traditional property law principles,' plus historical practice and [the] Court's precedents." Id. (quoting Phillips, 524 U.S. at 165-168).

In addition to analyzing Minnesota state law as one source, the Court examined traditional property law principles in existence since 1215 that continue to govern the United States and individual states through passage of the Fourteenth Amendment.

> The principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as Runnymeade in 1215, where King John swore in the Magna Carta that when his sheriff or bailiff came to collect any debts owed him from a dead man, they could remove property "until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased. . . .
>
> That doctrine became rooted in English law. Parliament gave the Crown the power to seize and sell a taxpayer's property to recover a tax debt, but

> dictated that any "Overplus" from the sale "be immediately restored to the Owner." . . .
>
> This principle made its way across the Atlantic. In collecting taxes, the new Government of the United States could seize and sell only "so much of [a] tract of land ... as may be necessary to satisfy the taxes due thereon." Act of July 14, 1798, § 13, 1 Stat. 601. . . .
>
> The consensus that a government could not take more property than it was owed held true through the passage of the Fourteenth Amendment.
>
> [Id. at 639-42 (internal citations omitted).]

The Court also looked to its own precedent noting that although an "1861 statute did not explicitly provide the right to the surplus" after seizing a taxpayer's property for unpaid tax debt, withholding "surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation." Id. at 643 (quoting United States v. Lawton, 110 U.S. 146, 150).

Here, as set forth above, it is clear that New Jersey state law and traditional property law principles recognize a dispossessed owner's property right in their surplus equity.

C. The Appellate Division correctly determined that a property right in surplus equity exists and the TSL violates this right.

As set forth above, New Jersey recognizes a property right in surplus equity that exists through state law, traditional property law principles, historical practice, and the United States Supreme Court's precedents. (See Tyler, 598 U.S. at 638.) "Generally, 'equity abhors a forfeiture,' . . . and that axiom perhaps has no greater force than when the forfeiture at issue is a home." Winberry Realty P'ship v. Borough of Rutherford, 247 N.J. 165, 187–88 (2021), (quoting Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 182 (1985)). Surplus equity in a third-party purchaser tax foreclosure certainly falls within this axiom when the forfeiture at issue is home equity.

Because New Jersey recognizes a property right in surplus equity, a property tax foreclosure of a property with equity constitutes a taking when the former owner becomes dispossessed of their equity. This dispossession of equity is a taking under the TSL, regardless of whether the taking occurs by a municipality or by a third-party purchaser.

II. EMINENT DOMAIN GOVERNS THE PUBLIC USE AND TAKINGS ANALYSES ACCURATELY EMPLOYED BY THE APPELLATE DIVISION.

Eminent domain is the correct framework for a Public Use and Takings analysis of New Jersey's TSL. Petitioner wrongly argues that the Appellate

Division mistakenly relied on the New Jersey Eminent Domain Clause (or Public Use Clause) at N.J. Const. art. 1, ¶ 20. (Petitioner Br. at 16.) Just as the United States Supreme Court applied an eminent domain analysis in Tyler, the Appellate Division correctly applied an eminent domain analysis in reviewing Tyler's applicability to New Jersey's TSL and third-party purchaser takings authorized thereunder, and in concluding that the TSL is unconstitutional.

Eminent domain is defined as "[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking." (See EMINENT DOMAIN, Black's Law Dictionary (11th ed. 2019).) Further, the Eminent Domain Clause is defined as "[t]he Fifth Amendment provision providing that private property cannot be taken for public use without just compensation. See TAKINGS CLAUSE." (See EMINENT DOMAIN CLAUSE, Black's, supra.) The Takings Clause is defined as "[t]he Fifth Amendment provision that prohibits the government from taking private property for public use without fairly compensating the owner. — Also termed Just Compensation Clause. See EMINENT DOMAIN." (See TAKINGS CLAUSE, Black's, supra.) Eminent domain is the inherent power of the government to engage in a taking of private property for public use only if just compensation is paid.

In deciding that Minnesota's tax sale laws violated Ms. Tyler's rights under the Eminent Domain Clause (i.e. the Fifth Amendment to the United States Constitution, applicable to Minnesota and to New Jersey through the Fourteenth Amendment, and also known as the Takings Clause), the United States Supreme Court stated:

> The Takings Clause 'was designed to bar 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.' . . . A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more.
>
> [Tyler, 598 U.S. at 647 (internal citation omitted).]

In deciding that New Jersey's TSL violated Mr. Roberto's rights under the Eminent Domain Clause of the United States Constitution and the corresponding Eminent Domain Clause (also known as the Takings Clause or Public Use Clause) of the New Jersey Constitution, art. 1, ¶ 20, the Appellate Division stated:

> The Takings Clause, applicable to [New Jersey] through the Fourteenth Amendment, provides that 'private property [shall not] be taken for public use, without just compensation.' [Tyler at 637 . . .] (quoting U.S. Const. amend. V). The New Jersey Constitution provides even greater protection and states that '[p]rivate property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take

> private property for public use without just compensation first made to the owners.' N.J. Const. art. 1, ¶ 20 (emphasis added); see Mansoldo v. State, 187 N.J. 50, 58, 898 A.2d 1018 (2006) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922))).
>
> [Roberto, 477 N.J. Super. at 361-362.]

The Appellate Division stated specifically "[t]he TSL has permitted foreclosure of a property owner's equity and is thus a prohibited taking after Tyler." Id.

> Similar to Minnesota's tax-forfeiture law, New Jersey's TSL provides for the forfeiture of a property owner's remaining equity, above the lien amount owed, after final judgment in a tax sale foreclosure is entered for the tax sale certificate holder. Indeed, the TSL does not contemplate compensation to a property owner where the property value exceeds the amount owed to a taxing authority or third-party purchaser after final judgment.
>
> [Id.]

New Jersey's Takings Clause protections are "coextensive with the Takings Clause of the Fifth Amendment of the United States Constitution" (Klumpp v. Borough of Avalon, 202 N.J. 390, 405 (2010) (quoting Mansoldo v. State, 178 N.J. 50, 58 (2006)). Further, the New Jersey Takings Clause protections are "in general conformity with the protections recognized under the United States Constitution" (OFP, L.L.C. v. State, 395 N.J. Super. 571, 581

(2007)) (quoting Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 205 (1991)). The New Jersey Takings Clause exists in conformity with and provides "greater protection[s]" than the United States Constitution Takings Clause. Roberto, 477 N.J. Super. at 361. Thus, the eminent domain framework governs a Public Use and Takings analysis of the TSL.

A. Third-party purchasers under the TSL are subject to New Jersey's Takings Clause.

New Jersey's Takings Clause unequivocally mandates that a private property owner is entitled to just compensation when their private property is taken for public use by an individual or a private corporation. N.J. Const. art. 1, ¶ 20. Petitioner argues that the history of private corporations paying just compensation relies on corporate charters that imbued those corporations with power of eminent domain. (Petitioner Br. at 17.). In support, Petitioner cites case law examining charter for a public corporation but omits relevant language from that decision reinforcing that a private corporation is subject to the Takings Clause and must pay just compensation when it takes private property for public use, specifically:

> By force of the constitution of this state, a *public* corporation, exercising lawfully the state's right of eminent domain, is not required, unless the legislature has so ordered, to pay for the land taken, before taking possession of it; *contra*, when so taken by a private corporation. . . .

> Individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners.
>
> [Wheeler v. Essex Pub. Rd. Bd., 39 N.J.L. 291, 291, 297 (Sup. Ct. 1877) (emphasis in original).]

In Wheeler, this Court distinguished the takings analysis for defendant which was a road board "specially incorporated to lay out or widen certain roads and avenues in the county of Essex" and that thereby existed as a public corporation from the takings analysis for private corporations. Id. at 293. This Court stated under "pl. 9, section 7 of article IV" to the New Jersey Constitution (of 1844), private corporations must pay just compensation to a property owner after a public use taking. Id. at 297.

B. Municipal tax lien sales and third-party purchaser takings under the TSL must serve a public use, otherwise the taking would be void.

The TSL indisputably serves an important public use. New Jersey's TSL is explicitly designed to accomplish a public purpose by "enhanc[ing] the tax-collecting ability of municipalities by encouraging tax sale foreclosures" through the mechanics of a property tax foreclosure proceeding under N.J.S.A. 54:5-2 and N.J.S.A. 54:5-87. Simon v. Cronecker, 189 N.J. 304, 315, 318 (2007). Therefore, any taking of property thereunder serves a public use and requires just compensation – including a taking effected by a third-party purchaser.

Petitioner argues that third-party purchaser takings under the TSL are not governed by the New Jersey Constitution Takings Clause, but this is inaccurate. Third-party purchasers must render just compensation to property owners under any reading of the TSL because the taking of private property must serve a public use or would otherwise be void and actionable. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (explaining that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). Black's Law Dictionary defines "public use" as:

> (18c) 1. *Property*. A legitimate public purpose for the condemnation of private property. • The Fifth Amendment provides that private property may be taken only for "public use." If property is taken for a legitimate public purpose — one that is within the scope of the government's police power — the public-use requirement is satisfied, regardless of who physically uses the property once it is taken.
>
> [See USE [Public Use], Black's, supra.]

Under United States Supreme Court opinions ruling on the boundaries of state Fifth Amendment eminent domain powers, takings under the TSL only pass Constitutional muster if the taking of private property serves a public rather than a private purpose. Kelo v. City of New London, 545 U.S. 469 (2005); Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

The United States Supreme Court "eschewed rigid formulas" for determining what constitutes public use and instead affords legislatures broad latitude to take private property, but only if the taking serves a legislatively determined "public need" or "public purpose." Kelo, 545 U.S. at 482-90. Importantly, the constitutional legitimacy of any governmental or authorized third-party purchaser taking is determined by whether "the taking's purpose, and not its mechanics . . . pass scrutiny under the Public Use Clause." Midkiff, 467 U.S. at 244.

Almost 100 years ago, this Court reviewed whether third-party purchaser takings serve a public use. This Court held that a third-party purchaser taking of private property may occur lawfully only if it serves a public use.

> The right of the individual to be secure in his person and his property has been guaranteed by the constitution of the state and the Constitution of the United States. In 1832 it was declared by the Chancellor of this state in the case of Scudder v. Trenton & Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756, that: 'Private property shall not be taken for private use. The legislature has no right to take the property of one man and give it to another, even upon compensation being made.' And since that time neither the Constitution of 1844 nor the present Constitution confer such power. That the power is thus limited is apparent from the recent decision of the Court of Errors and Appeals in Landell v. State, 101 N. J. Law, 297, 128 A. 380, in which the Scudder Case is cited. In 20 C. J. 546, it is said that: 'Independently of express authority given by the constitution private property can be taken only for a

> public use, and **the legislature cannot authorize a taking for strictly private use even upon making compensation.** The necessity that the use shall be public excludes the idea that property may be taken under semblance of public use and ultimately coveyed [sic] and appropriated to a private use,' citing numerous authorities.
>
> Such we conceive to be the law of our own state. The present Constitution provides in article 1, § 16, that 'private property shall not be taken for public use without just compensation.' This is a recognition of a legislative power to take private property for a public use, but is far from giving authority to take such property for other than public uses.
>
> [Frelinghuysen v. State Highway Comm'n, 107 N.J.L. 218, 221–22 (Sup. Ct. 1930), aff'd, 108 N.J.L. 403 (1932) (emphasis added).]

That a third-party purchaser gains direct financial benefit from the taking does not change the fact that the taking is for a public use.

> "[T]he fact that a private party may benefit from the taking does not render the taking private and not for 'public use.' " Twp. of W. Orange v. 769 Assocs., 172 N.J. 564, 571, 573, 800 A.2d 86 (2002); accord Wilson v. Long Branch, 27 N.J. 360, 376, 142 A.2d 837, cert. denied, 358 U.S. 873, 79 S.Ct. 113, 3 L.Ed.2d 104 (1958).
>
> [Vineland Const. Co. v. Twp. of Pennsauken, 395 N.J. Super. 230, 252–53 (App. Div. 2007).]

A taking may be accomplished:

> via physical taking, in which the government takes title to private property or "authorizes a physical occupation [or appropriation] of property" . . .

> [Klumpp v. Borough of Avalon, 202 N.J. 390, 405 (2010) (alteration in original) (citation omitted).]
>
> [Borough of Seaside Park v. Comm'r of New Jersey Dep't of Educ., 432 N.J. Super. 167, 218 (App. Div. 2013), certification denied, 216 N.J. 367 (2013).]

As set forth above, it is undisputed that third-party purchasers are authorized by the New Jersey government, via the TSL, to take private property through foreclosure due to the statutory lien that attaches to the property from unpaid tax arrears. N.J.S.A. 54:5-6 ("Unpaid taxes and payments in lieu of property taxes as a continuous lien; penalties and costs") and N.J.S.A. 54:5-86 ("Action to foreclose right to redeem; continuation of right until bar of judgment"). Petitioner acknowledges that third-party purchasers draw permissive authority to foreclose property tax liens from the TSL. "The TSL is permissive, not mandatory. N.J.S.A. 54:5-86(a) (explaining that an action to foreclose a tax lien '**may** be instituted' by the private lienholder.)" (Petitioner Br. at 14-15 (emphasis in original).) This Court stated that the TSL serves a government public use. Cronecker, 189 N.J. at 315.

> The purpose of the TSL is to enrich the municipal treasury by causing third-party investors to come to public tax sales and bid for municipal tax sale certificates. This procedure has third-party investors paying the delinquent taxes to the municipality, providing the needed revenue to run the municipality. The current TSL was enacted in 1918, and the public policy of New Jersey is to encourage tax sale

> foreclosure to assist municipalities in collecting delinquent taxes.
>
> [Keith Bonchi, Michael Pellegrino, Does Equity Follow the Law When Foreclosing on Unrecorded Interests?, N.J. Law., April 2017, at 44.]

If a third-party purchaser taking under the TSL does not serve a public use as Petitioner argues, then the taking serves a private use and is unlawful and void. The TSL "cannot authorize a taking for strictly private use even upon making compensation." Frelinghuysen, 107 N.J.L. at 222. The wrongful taking of another's personal property with the intent of depriving the true owner of it is theft. (See THEFT, Black's, supra). A third-party purchaser may not take the private property of another and not render just compensation without potentially running afoul of the law and thus becoming subject to numerous other claims.

There is no logical conclusion by which a third-party purchaser can avail itself of the TSL and not serve a public use at the same time. Because the third-party purchaser utilizes the TSL to effect its taking through an eminent domain foreclosure proceeding and thereby serve a public use, just compensation must be rendered to the dispossessed property owner under the United States and New Jersey Constitutions.

C. A "state actor" analysis does not govern and, if it did, Petitioner and other third-party purchasers would likely be deemed state actors.

Petitioner argues that the Appellate Division fashioned a new "state actor" test and did not apply a state actor test. (Petitioner Br. at 13-14.) However, because the applicability of Tyler to third-party purchaser property tax foreclosures in New Jersey falls squarely within eminent domain analysis under the New Jersey Constitution Takings Clause, the Appellate Division neither fashioned nor applied a "state actor" test as it was unnecessary to do so.

> Private property shall not be taken for public use without just compensation. **Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.**
>
> [N.J. Const. art. 1, ¶ 20 (emphasis added).]

Government or authorized third-party purchasers engage in public use takings by power of eminent domain, thus requiring compensation to the dispossessed property owner.

> Eminent domain is the power of the government to take property for public use without the consent of the owner. It can be exercised either by public officials or by private parties to whom the power has been delegated. And it can be exercised either through the initiation of legal proceedings or simply by taking possession up front, with compensation to follow. . . .

> For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties.
>
> [PennEast Pipeline Co., LLC v. New Jersey, 594 U.S. 482, 487–88, 495 (2021).]
>
> In government-mediated private takings, private actors seize property through eminent domain but rely upon the government's formal authority to do so. These types of takings do not involve any delegation of the power of eminent domain. Rather, the government exercises its own taking power to seize property from one private actor, and then grants it to another private actor. Such takings have also been designated "public-private takings."
>
> [Abraham Bell, Private Takings, 76 U. Chi. L. Rev. 517, 548 (2009).]

This Court has acknowledged the "ancient origin" of the right to just compensation, dating from Magna Carta. (Robert F. Williams, Magna Carta and the New Jersey Constitution Reflections of an Attitude, NEW JERSEY LAWYER, Jun. 2015, at 47, 49 (citing Borough of Saddle River v. 66 East Allendale, LLC, 216 N.J. 115 (2013) ("[t]his fundamental right is of ancient origin, predating the founding of our Republic, and is found even in the text of the Magna Carta.")).)

Seeking to evade the eminent domain analysis, Petitioner argues that it is not a state actor. Generally, the state actor test arises after assertion of a 42 U.S.C. § 1983 claim alleging deprivation of constitutional rights.

> The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'
>
> [West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).]

"A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government." Knick v. Twp. of Scott, Pennsylvania, 588 U.S. 180, 206 (2019). Petitioner seeks to employ a state actor analysis in its case despite the fact that no § 1983 claims were asserted by Respondent.

Notwithstanding the above, under a state actor test, TSL third-party purchasers are state actors. The test employed for a state actor analysis varies depending on the context.

> Action by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a "state actor." The Court suggested that that "something more" which would convert the private party into a state actor might vary with the circumstances of the case. This was simply a recognition that the Court has articulated a number of different factors or tests in different contexts: e.g., the "public function" test . . . ; the "state compulsion" test . . . ; the "nexus" test . . . ; and in the case of prejudgment attachments, a "joint action test," . . . Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be

> resolved here. ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance").
>
> [Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).]

Petitioner cites three options for a state actor finding as set forth in Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 809 (2019).

> Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances – including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity.
>
> [Petitioner Br. at 14 (quoted as in Petitioner's Brief that omitted internal citations).]

The state actor analyses in Lugar and Manhattan arose under § 1983 claims. If such claims were asserted in this matter, third-party purchasers "proceeding with an interest conveyed by the taxing authority" under the TSL would be deemed state actors because the government acts jointly with the private entity in effecting the taking. Roberto, 477 N.J. Super. at 365. The TSL enables the transfer of title of private property to private investors for a public use first through government auction and later through a government-authorized mechanism that permits taking of private property by the third-

party purchaser without just compensation. Thus, third-party purchasers would be deemed state actors.

D. Balthazar is inapplicable to this matter.

Petitioner relies on Balthazar v. Mari, Ltd., 396 U.S. 114 (1969), which is inapplicable to this matter. Balthazar was a United States Supreme Court summary affirmance of a District Court decision. A United States Supreme Court summary affirmance endorses only the result, and does not endorse the reasoning of a District Court decision. Mandel v. Bradley, 432 U.S. 173, 176 (1977). The Tyler Court neither referenced nor relied upon Balthazar is its decision; this suggests that Tyler is the governing law of the land, and Balthazar is not.

Additionally, Balthazar was not a case concerning the issue of whether the Illinois tax scheme enabled unconstitutional taking by a third-party purchaser. The Balthazar plaintiff only argued that the state scheme deprived them of due process rights under the Fourteenth Amendment to the United States Constitution. Balthazar can readily be distinguished as it concerned Fourteenth Amendment due process, and Fifth Amendment Takings was not an issue before the Court.

III. RETROACTIVITY

The Appellate Division correctly held that Tyler applies retroactively to government and third-party purchaser equity takings under the TSL, at minimum for cases within the pipeline. Roberto, 477 N.J. Super. at 25, 27 ("[W]e consider the [United States Supreme] Court's action in Fair[v. Cont'l Res., 143 S. Ct. 2580 (Mem) (2023)] as additional support for our conclusion that Tyler applies retroactively" and "we further conclude the new principle of law is accorded pipeline retroactivity to pending tax sale foreclosures . . . ."). LSNJ respectfully submits that this Court should affirm the holding that pipeline retroactive application of the new principle exists in conjunction with other available remedies at law.

In reviewing retroactivity with coterminous areas of law that afford relief to impacted litigants, this Court has held that a limited retroactivity finding does not deprive parties of claims, rights, or remedies that are otherwise available under other causes of action:

> We find it manifestly unjust to deprive plaintiffs of the right to notification merely because they suffer the misfortune of standing in the window of time between, on the one hand, cases resolved before the Disclosure Act was passed . . . and, on the other hand, cases brought after the Act's notification scheme was implemented. Accordingly, we hold that those plaintiffs who were barred from filing a [Disclosure Act] claim at the time they first became aware of the diminution of their property values may maintain their

> common law and Consumer Fraud Act causes of action notwithstanding the retroactivity provisions of the Disclosure Act.
>
> [Nobrega v. Edison Glen Assocs., 167 N.J. 520, 549–50 (2001).]

Here, after concluding that pipeline retroactivity applied to pending tax foreclosure cases involving surplus equity, the Appellate Division recognized interconnectedness of the pipeline retroactivity principle with Court Rules and state law, stating that "N.J.S.A. 54:5-87 prescribes a three-month strict time limitation to vacate final judgment, except for limited grounds, which must be read in conjunction with Rule 4:50-1." Roberto, 477 N.J. Super. at 368. In this specific case, Tyler constituted separate grounds to vacate judgment under Respondent's Rule 4:50-1(f) application.

> In sum, we conclude the retroactive application of Tyler **separately** mandates grounds to vacate final judgment and the motion judge did not abuse his discretion in vacating final judgment under Rule 4:50-1 (f) based on the substantial credible evidence presented.
>
> [Id. at 370 (emphasis added).]

Further, "even the three-month limit [under N.J.S.A. 54:5-87] must yield to the Court Rules which permit applications thereafter [under Rule 4:50-1 (f)]. M & D Assocs. v. Mandara, 366 N.J. Super. 341, 351 (App. Div. 2004)." BV001

REO Blocker, LLC v. 53 W. Somerset St. Properties, LLC, 467 N.J. Super. 117, 128 (App. Div. 2021).

Prior to Tyler, owners dispossessed under the TSL could pursue relief under R. 4:50-1(f) and N.J.S.A. 54:5-87. "Plaintiff's 'rights . . . under the law' were to yield to defendant's exceptional circumstances" under Rule 4:50-1(f). Roberto, 477 N.J. Super. at 370. "Although the [Rule 4:50-1(f)] movant bears the burden of demonstrating a right to relief . . . a court should resolve '[a]ll doubts ... in favor of the part[y] seeking relief,'" BV001 REO, 467 N.J. Super. at 123 (quoting Mancini v. EDS ex rel N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993)).

> Ultimately, 'equitable principles' 'should ... guide[]' a court's decision to vacate a default judgment." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994); see also 240 Pro. Stone, Stucco & Siding Applicators, Inc. v. Carter, 409 N.J. Super. 64, 68 (App. Div. 2009) (stating that "Rule 4:50 is instinct with equitable considerations").
>
> [Id. at 124.]

After the taxpayer has rendered unto Caesar what is Caesar's, the surplus equity belongs to the taxpayer under the United States and New Jersey Constitutions. It is critical for this Court to ensure that pipeline application of retroactivity does not preclude the ability for trial courts to review applications by dispossessed owners seeking relief under Rule 4:50-1(f) or under other

applicable law. Further, the issue of whether dispossessed property owners may pursue affirmative claims for taken equity under coterminous law is not currently before this Court. Therefore, a holding on retroactivity must not deprive dispossessed property owners of their ability to pursue affirmative claims at law under applicable statutes of limitations.

CONCLUSION

For the foregoing reasons, this Court should affirm the Appellate Division's decision.

Respectfully submitted,

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