FILED, Clerk of the Supreme Court, 18 Jun 2024, **088959**

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; MIDLAND FUNDING, LLC,

Defendants.

CIVIL ACTION

<u>On Petition from:</u>
Superior Court of New Jersey, Appellate Division, A-3315-21, and the Chancery Division, Passaic County, F-3349-21

Hon. Thomas Sumners, P.J.A.D.
Hon. Morris Smith, J.A.D.
Hon. Lisa Perez Friscia, J.A.D.

<u>Sat below</u>:
Hon. Randall C. Chiocca, P.J. Ch.

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FILED, Clerk of the Supreme Court, 18 Jun 2024, **088959**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

PRELIMINARY STATEMENT 2

STATEMENT OF FACTS AND PROCEDURAL HISTORY 6

LEGAL ARGUMENT 6

I. *TYLER* APPLIES IN NEW JERSEY 6

II. PRIVATE INVESTORS WHO FORECLOSE UNDER THE TAX SALE LAW ARE LIABLE AS STATE ACTORS BECAUSE THEY EXERCISE A SPECIAL PRIVILEGE CREATED BY THE STATE AND COOPERATE WITH THE STATE TO ACCOMPLISH THE CONFISCATION OF EQUITY 11

III. SUPREME COURT PRECEDENT AND THE JUST COMPENSATION CLAUSE REQUIRE COURTS TO GIVE *TYLER* FULL RETROACTIVE EFFECT 15

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 16

B. Just Compensation is a mandatory remedy in takings claims and operates retroactively 18

C. Full retroactivity for takings claims will not produce undue hardship because liability is limited by several practical considerations 21

CONCLUSION 23

FILED, Clerk of the Supreme Court, 18 Jun 2024, **088959**

TABLE OF AUTHORITIES

Page(s)

Cases

Atlantic City Nat'l Bank v. Wilson,
108 N.J. Eq. 213 (Ct. Err. & App. 1931)....................9

Balthazar v. Mari Ltd.,
301 F. Supp. 103 (N.D. Ill. 1969), *aff'd* 396 U.S. 114 (1969)....................14–15

Bonnet v. State,
141 N.J. Super. 177 (N.J. Super. Law Div. 1976)....................7

Bron v. Weintraub,
42 N.J. 87 (1964)....................14

Cedar Point Nursery v. Hassid,
594 U.S. 139 (2021)....................1

Cherokee Equities, LLC v. Garaventa,
382 N.J. Super. 201 (Ch. Div. 2005)....................14, 22

Danes v. Smith,
30 N.J. Super. 292 (App. Div. 1954)....................9, 12

Davis v. Michigan Department of Treasury,
489 U.S. 803 (1989)....................16–17, 19

Fair v. Cont'l Res.,
143 S. Ct. 2580 (2023)....................11

Fidelity Union Trust Co. v. City of Newark,
11 N.J. Super. 205 (Cnty. Ct. 1950)....................14

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987)....................19

Fox v. Saginaw Cnty.,
67 F.4th 284 (6th Cir. 2023)....................22

Freed v. Thomas,
976 F.3d 729 (6th Cir. 2020)....................2

Harper v. Virginia Dep't of Taxation,
18 Va. Cir. 463 (1990)....................16

FILED, Clerk of the Supreme Court, 18 Jun 2024, **088959**

Harper v. Virginia Dep't of Taxation,
509 U.S. 86 (1993)... *passim*

Harrison v. Montgomery Cnty.,
997 F.3d 643 (6th Cir. 2021) 2

Hawaii Hous. Auth. v. Midkiff,
467 U.S. 229 (1984)..14

Hopper v. Malleson's Ex'rs,
16 N.J. Eq. 382 (Ct. Ch. 1863) 12

Horne v. Dep't of Agric.,
576 U.S. 350 (2015)..10

Jacobs v. United States,
290 U.S. 13 (1933)..19

Jardine v. Borough of Rumson,
30 N.J. Super. 509 (App. Div. 1954) 7

Johnson v. City of East Orange,
No. ESX-C-16-23 (N.J. Super. Ct. Law Div. Mar. 19, 2024),
appeal pending, No. A-002486-23 (N.J. App. Div. 2024).......................2, 20–21

Kelo v. City of New London,
545 U.S. 469 (2005)..14

Keokuk Junction Ry. Co. v. IES Indus., Inc.,
618 N.W.2d 352 (Iowa 2000) 11

Klumpp v. Borough of Avalon,
202 N.J. 390 (2010) 19, 21

Knick v. Twp. of Scott,
598 U.S. 180 (2019)..1, 20

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. 595 (2013)..1, 10

Loretto v. Teleprompter Manhattan CATV Corp.,
58 N.Y.2d 143 (1983), *on remand from* 458 U.S. 419 (1982) 11

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982)...4, 12–13

FILED, Clerk of the Supreme Court, 18 Jun 2024, **088959**

Mancini v. EDS,
132 N.J. 330 (1993) 3

Mandel v. Bradley,
432 U.S. 173 (1977)..15

Montgomery v. Louisiana,
577 U.S. 190 (2016) (*as revised* Jan. 27, 2016) 17

Morse v. Republican Party of Va.,
517 U.S. 186 (1996)..15

Mucciaccio v. Town of Easton,
No. 2173cv00004B (Mass. Super. Ct. Mar. 8, 2021) 2

Nelson v. City of New York,
352 U.S. 103 (1956)..8

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987)..1

Palazzolo v. Rhode Island,
533 U.S. 606 (2001)..1

Rafaeli v. Oakland County,
952 N.W.2d 434 (Mich. 2020)..1, 21

San Diego Gas & Elec. Co. v. City of San Diego,
450 U.S. 621 (1981)..19

Schafer v. Kent Cnty.,
990 N.W.2d 876 (Mich. 2023)..1

Schafer v. Kent Cnty.,
997 N.W.2d 290 (Mich. Ct. App. 2022)...2

Sheetz v. County of El Dorado,
601 U.S. 267 (2024)..1

Tarrify Props., LLC v. Cuyahoga Cnty.,
37 F.4th 1101 (6th Cir. 2022) 22

Township of Montville v. Block 69, Lot 10,
74 N.J. 1 (1977) 7–8

Tyler v. Hennepin County,
598 U.S. 631 (2023)..*passim*

U.S. Bank Nat'l Ass'n v. Guillaume,
209 N.J. 449 (2012) 3

United States v. General Motors Corp.,
323 U.S. 373 (1945) 10

United States v. Lawton,
110 U.S. 146 (1884) 8

United States v. Taylor,
104 U.S. 216 (1881) 8

United States v. U.S. Coin & Currency,
401 U.S. 715 (1971) 20

Vanduyne v. Vanduyne,
16 N.J. Eq. 93 (Ct. Ch. 1863) 9, 12

Varsolona v. Breen Capital Services Corp.,
180 N.J. 605 (2004) 14

Wayside Church v. Van Buren County,
No. 1:14-cv-01274, 2015 WL 13308900 (W.D. Mich. 2015) 21

Constitutions

U.S. Const. amend. V 10, 19

U.S. Const. amend. XIV 7, 12–13

Statutes

28 U.S.C. § 2281 (1969) 15

42 U.S.C. § 1983 13

N.J.S.A. 12A:9-602(5) 10

N.J.S.A. 12A:9-602(8) 10

N.J.S.A. 12A:9-602(9) 10

N.J.S.A. 12A:9-608 10

N.J.S.A. 54:5-87 12

U.C.C. § 9-602 9

FILED, Clerk of the Supreme Court, 18 Jun 2024, **088959**

Rule

N.J. Court R. 4:50-1(f) 3, 23

Other Authorities

Guralnick, Mark S., N.J. Family Law Annotated (2024) 9

Order Granting Defendants' Motion for Summary Judgment, *Johnson v. City of East Orange*, No. ESX-C-16-23 (N.J. Super. Ct. Law Div. Mar. 19, 2024) 2, 20–21

Order Granting Motion to Reopen Proceeds, *Wayside Church v. Cnty. of Van Buren*, No. 1:14-CV-1274 (W.D. Mich. Mar. 26, 2019) 1–2

Declaration of Jeanne C. Finegan, *Wayside Church v. Cnty. of Van Buren*, No. 1:14-CV-1274, ECF No. 352-1 (W.D. Mich. July 21, 2023) 21–22

Transcript of Nov. 22, 2022, Fairness Hearing, ECF No. 111, *Bowles v. Sabree*, No. 2:20-cv-12838-LVP-KGA (E.D. Mich. Jan. 13, 2023) 22

FILED, Clerk of the Supreme Court, 18 Jun 2024, **088959**

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, economic freedom, and the separation of powers. Founded more than 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys represented petitioner Geraldine Tyler at the Eighth Circuit and in the Supreme Court in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), a case that is central to the Appellate Division's holding below. PLF attorneys have also participated as lead counsel in several other landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property and the corollary right to obtain just compensation when that right is infringed. *See, e.g., Sheetz v. County of El Dorado*, 601 U.S. 267 (2024); *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021); *Knick v. Twp. of Scott*, 598 U.S. 180 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

PLF attorneys have extensive experience with the questions at issue in this case, and have represented former owners of tax-delinquent property lost to foreclosure in several jurisdictions across the country in addition to *Tyler v. Hennepin County*. *See, e.g., Rafaeli v. Oakland County*, 952 N.W.2d 434 (Mich. 2020); *Schafer v. Kent Cnty.*, 990 N.W.2d 876 (Mich. 2023); *Wayside Church v.*

Cnty. of Van Buren, No. 1:14-CV-1274, Order Granting Motion to Reopen Proceeds (W.D. Mich. Mar. 26, 2019); *Mucciaccio v. Town of Easton,* No. 2173cv00004B (Mass. Super. Ct. Mar. 8, 2021) (filed and dismissed in 2021 upon favorable settlement); *Johnson v. City of East Orange*, No. ESX-C-16-23, Order Granting Defendants' Motion for Summary Judgment (N.J. Super. Ct. Law Div. Mar. 19, 2024), *appeal pending*, No. A-002486-23 (N.J. App. Div. 2024).

PLF has also frequently participated as amicus curiae in cases alleging that government takes private property without just compensation when it confiscates more than is owed in property taxes, including in the proceedings below. *See also, e.g., Schafer v. Kent Cnty.*, 997 N.W.2d 290 (Mich. Ct. App. 2022); *Harrison v. Montgomery Cnty.*, 997 F.3d 643 (6th Cir. 2021); *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020).

This brief will assist the Court by providing a unique and experienced viewpoint on the question of the application of *Tyler v. Hennepin County* in New Jersey.

PRELIMINARY STATEMENT

In this case, 257-261 20th Avenue Realty ("the investor") purchased a $606 sewer tax lien, which then ballooned to a $42,000 debt, including interest and attorney fees. (Pa 146–47, 153). The investor used that debt to foreclose on Roberto and take his entire property worth between $475,000 and $535,000—a significant

and unconstitutional windfall for the investor. Roberto timely moved to vacate that foreclosure.

The trial court granted that motion based on N.J. Court R. 4:50-1(f), which permits relief from a final judgment for any justifiable reason. Application of R. 4:50-1(f) is within "the sound discretion of the trial court," *Mancini v. EDS*, 132 N.J. 330, 334 (1993). Roberto then paid his debt in full. Thus, Roberto does not owe 257-261 20th Avenue Realty ("the investor") or the City of Paterson anything. Yet on appeal, the investor is asking the Court to reverse the lower court's decision and give it the deed to Mr. Roberto's $500,000 property in exchange for the $42,000 Roberto paid to redeem his property. Br. of Appellant at 14.

On appeal, the issue is whether the trial court abused its discretion under N.J. Court R. 4:50-1(f) by vacating the foreclosure in the interest of justice. *U.S. Bank Nat'l Ass'n v. Guillaume*, 209 N.J. 449, 467 (2012). The Appellate Division could have decided the case on that ground and under that standard alone.

Instead, it made several holdings with respect to the application of the U.S. Supreme Court's decision in *Tyler*, 598 U.S. 631. That made for somewhat of an awkward fit, since *Tyler* is not concerned with the appropriateness of foreclosure itself, but rather with uncompensated takings that might result from a foreclosure. 598 U.S. at 639 ("The County 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.”). The plaintiff in *Tyler* did not seek to overturn or set aside the foreclosure of her property; she sought only just compensation for the taking of her equity interest. *Id.* at 635–36. This distinction is crucial for understanding the effect of *Tyler*. Nothing in that case suggests that tax-delinquent properties cannot be foreclosed merely because they have substantial equity. Rather, it holds that where property with equity value is foreclosed, the former owner is owed compensation for that equity.

Nevertheless, the Appellate Division’s holdings with respect to *Tyler* are largely correct. First, *Tyler*’s holding clearly does apply in New Jersey just as much as in Minnesota. (PPa 22). As in Minnesota, New Jersey recognizes a property interest in real estate equity “everywhere else,” and cannot “make[] an exception only for itself.” *See Tyler*, 598 U.S. at 645. Second, *Tyler* does apply even where, as here, the foreclosure is prosecuted by a private investor instead of a government entity. (PPa 26–27). A private party may be liable as a state actor for violating the Constitution where (1) it exercised a right or privilege created by the state and (2) it has acted together with or obtained significant aid from state officials. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Both elements are satisfied here.

But the court below erred in its analysis of *Tyler*’s retroactive effect. Where 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 events

that occurred prior to the Supreme Court's decision. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). Unfortunately, the Appellate Division included misleading language suggesting that *Tyler* only applies to cases in the foreclosure docket pipeline and not to takings claims that are brought after a foreclosure judgment has been entered. (PPa 28). This Court should clarify that *Tyler* is fully retroactive in Takings Clause cases where an owner has lost full title to the property and seeks only just compensation for the excess value taken.

To be clear, *Tyler* does not necessarily bar foreclosure; it only requires just compensation for the confiscation of equity. In other words, while the rule from *Tyler* is fully retroactive in all cases, that does not mean courts must stop all foreclosures of tax-delinquent properties, let alone reverse foreclosures (clouding numerous titles) in cases decided before *Tyler*. Thus, consistent with *Tyler*, this Court may hold that the equitable remedy of returning title to a debtor like Roberto is only available in cases pending when *Tyler* was decided or filed thereafter.

In takings cases, however, the Constitution mandates just compensation as a remedy, regardless of whether the claim was filed before or after *Tyler*.

This Court may sidestep the *Tyler* questions and resolve the case under R. 4:50-1. Indeed, the trial court's decision to vacate the judgment was within its discretion, and at this point, the tax debt has already been paid and all parties are whole. (Opposition to Pet. 5). Reinstating the foreclosure judgment now would be

illogical and would effect a taking of property for no discernable purpose. However, the Court may wish to address the *Tyler* issues given that they are of statewide—indeed, national—concern, and they are sure to come before this Court sooner or later. If the Court does address *Tyler*, Amicus urges the Court to uphold the Appellate Division's rulings with respect to the validity of *Tyler* in New Jersey and its application to private investors, but to correct the lower court's error by affirming the full retroactive application of *Tyler* as mandated by the Just Compensation Clause of the Constitution.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus adopts the procedural history and statement of facts as presented in the Respondents' Brief in Opposition to the Petition for Certification.

LEGAL ARGUMENT

I. *TYLER* APPLIES IN NEW JERSEY

The holding in *Tyler* is clear: when valuable property is taken to satisfy a less valuable tax debt, the former owner is entitled to just compensation for her equity interest in that property. *Tyler*, 598 U.S. at 647. That holding governs New Jersey. Petitioner argues that it only applies in Minnesota—and not in New Jersey—observing that property rights have their source in state law. (Pet 9–10). Yet *Tyler* explicitly held that "state law cannot be the only source" of constitutionally protected property rights. 598 U.S. at 638. Rather, "we also look to 'traditional property law

principles,' plus historical practice and [U.S. Supreme Court] precedents." *Id.* These sources, in addition to New Jersey law, compel the conclusion that the Constitution protects real estate equity in New Jersey.

Regarding traditional property law principles and historical practice, the *Tyler* Court first affirmed the "principle that a government may not take more from a taxpayer than she owes[.]" *Id.* at 639. This axiom dates back at least as far as Magna Carta in the early 13th century, and it "held true through the passage of the Fourteenth Amendment." *Id.* at 639–41. It is also well represented in New Jersey law, which has long recognized that government exceeds its lawful taxing authority when it takes more from a person than she justly owes. *See Jardine v. Borough of Rumson*, 30 N.J. Super. 509, 518 (N.J. App. Div. 1954) (laws imposing an undue tax burden "would, to the extent that one man's property is appropriated by them, in excess of his just contribution, . . . take private property for public use, without just compensation."); *Bonnet v. State*, 141 N.J. Super. 177, 201 (N.J. Super. Law Div. 1976) ("When a property owner is asked to pay his or her fair share to defray the lawfully incurred expenses of the community, that is taxation. If an individual is asked to pay more and . . . the property may be sold to satisfy the charge, that is confiscation."). Indeed, as an historical matter, such "abuses of the tax power, more than any other factor, led to the adoption of constitutional guarantees to protect

against future government excesses." *Township of Montville v. Block 69, Lot 10*, 74 N.J. 1, 14 (1977).

Regarding U.S. Supreme Court precedent, *Tyler* next observed that "[o]ur precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed." *Tyler*, 598 U.S. at 642; *see United States v. Taylor*, 104 U.S. 216 (1881); *United States v. Lawton*, 110 U.S. 146 (1884). The Court distinguished *Nelson v. City of New York*, 352 U.S. 103 (1956), which Hennepin County had put forward to support its position. *Tyler*, 598 U.S. at 643–44. The New York City rule at issue in *Nelson* did provide an opportunity for the taxpayer to claim surplus proceeds after a foreclosure sale. *Id.*; *see Nelson*, 352 U.S. at 104–05, n.1. But just as in New Jersey—and unlike in *Nelson*—Minnesota law provided "no opportunity for the taxpayer to recover the excess value[.]" *Tyler*, 598 U.S. at 644.

After holding that history, traditional property principles, and Supreme Court precedent all recognize a debtor's property interest in the surplus value of a foreclosure, the Court then noted that state law may provide an additional basis for a takings claim. It observed that "Minnesota law itself recognizes that in other contexts a property owner is entitled to the surplus in excess of her debt[,]" including executions on judgment, mortgage foreclosures, and collection of all other taxes. *Id.* at 645. The Court chastised Minnesota for making an exception to this general rule just for property taxes. *Id.* ("Minnesota may not extinguish a property interest that it

recognizes everywhere else to avoid paying just compensation when it is the one doing the taking.").

Just like Minnesota, New Jersey statutes and common law recognize a property interest in real estate equity in virtually all other debt collection contexts. After foreclosure, the "surplus beyond the mortgage debt" is "available for distribution according to the respective interests of the parties." *Danes v. Smith*, 30 N.J. Super. 292, 301–02 (App. Div. 1954); *see also Atlantic City Nat'l Bank v. Wilson*, 108 N.J. Eq. 213, 219 (Ct. Err. & App. 1931) (successor of mortgagor "is entitled to receive from the funds in court all surplus beyond the amount necessary to pay the incumbrances prior to the mortgage under which he first obtained title[.]"). New Jersey law affirmatively protects equity interest as property to be divided in a marital dissolution. Mark S. Guralnick, N.J. Family Law Annotated Ch. 3 III (2024) (Equitable distribution "applies to both real estate . . . and to legal as well as equity rights acquired in property during the course of a marriage."). Equity is also protected in executions on judgments. *Vanduyne v. Vanduyne*, 16 N.J. Eq. 93, 94 (Ct. 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). And New Jersey's implementation of the Uniform Commercial Code[1] requires the return

[1] A comment to U.C.C. Section 9-602 observes that "in the context of rights and duties after default, our legal system has traditionally looked with suspicion on

of surplus equity to the former owner after the foreclosure of a security interest, N.J.S.A. 12A:9-608, and makes this protection a mandatory term that cannot be waived by agreement. N.J.S.A. 12A:9-602(5), (8), (9).

Petitioners assert that New Jersey law has never recognized a property right to surplus equity in a tax foreclosure. This argument frames the issue far too narrowly, as the Takings Clause protects "every sort of interest [in property] the citizen may possess." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *see Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015) (the Takings Clause "protects 'private property' without any distinction between different types."). Such interests include "a right to receive money that is secured by a particular piece of property." *Koontz*, 570 U.S. at 613. Thus, the question is not whether New Jersey law has ever specifically and positively recognized the right to receive surplus equity *in a tax foreclosure*, but whether a property owner's equity interest in real estate is a property right recognized under New Jersey law and protected by the Fifth Amendment. It is. The U.S. Supreme Court unanimously recognized that the property interest at stake here is protected by the Takings Clause, and this Court should, too.

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agreements that limit the debtor's rights and free the secured party of its duties. . . . The context of default offers great opportunity for overreaching. The suspicious attitudes of the courts have been grounded in common sense[,]" and are "long-standing and deeply rooted.").

II. PRIVATE INVESTORS WHO FORECLOSE UNDER THE TAX SALE LAW ARE LIABLE AS STATE ACTORS BECAUSE THEY EXERCISE A SPECIAL PRIVILEGE CREATED BY THE STATE AND COOPERATE WITH THE STATE TO ACCOMPLISH THE CONFISCATION OF EQUITY

The government may not authorize an unconstitutional taking by outsourcing the confiscation to a private party. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp*., 58 N.Y.2d 143, 149 (1983), *on remand from* 458 U.S. 419 (1982) (cable company must pay property owners for taking caused by installation of cable boxes); *Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352, 362 (Iowa 2000) (private for-profit company acting as public utility was required to pay just compensation for an easement for power lines because the failure to require such payment would allow the utility "to get something for nothing."). Indeed, the U.S. Supreme Court has already indicated that private tax lien holders, in addition to government entities, may be liable under *Tyler*. Immediately following its decision in *Tyler*, the U.S. Supreme Court granted two petitions out of Nebraska, where private investors had taken title under a tax foreclosure statute like New Jersey's. The Court vacated both judgments and remanded the cases for reconsideration "in light of *Tyler*." *Fair v. Cont'l Res.*, 143 S. Ct. 2580 (2023); *Nieveen v. Tax 106*, 143 S. Ct. 2580 (2023).

Private tax-lien holders in New Jersey who confiscate equity are liable under *Tyler* by reason of their joint participation with the government. A private party may

be considered a state actor when the deprivation of a right is (1) "caused by the exercise of some right or privilege created by the State"; and (2) the private party acted "acted together with or has obtained significant aid from state officials," or where the conduct was "otherwise chargeable to the State." *Lugar*, 457 U.S. at 936–37. Both elements are satisfied with respect to private tax-lienholders in New Jersey.

First, the confiscation of equity by private lienholders is purportedly authorized by the Tax Sale Law. N.J.S.A. 54:5-87. Traditionally, the government cannot authorize the taking of more than what was owed. *See Tyler*, 598 U.S. at 639; *Hopper v. Malleson's Ex'rs*, 16 N.J. Eq. 382, 385 (Ct. Ch. 1863) (invalidating tax-sale of land for thirty cents more than the debt). This limitation on government dates back to Magna Carta and was accepted at the founding and past the adoption of the Fourteenth Amendment. *See Tyler*, 598 U.S. at 639. In New Jersey today, as in the past, ordinary lienholders are still only entitled to collect as much as they are owed. *See, e.g., Danes*, 30 N.J. Super. at 301–02 (debts paid in order of priority, remainder to former owner); *Vanduyne*, 16 N.J. Eq. at 94 (can sell "only so much" as necessary). The ability of investors to confiscate equity in a tax foreclosure sale is therefore a special and unique—though unconstitutional—privilege created by the state.

The second element—obtaining aid from the government—is also satisfied here. This case is similar to *Lugar*, in which a private debt collector used a state

statute to get a prejudgment attachment of certain property based solely on an *ex parte* petition stating a belief that the debtor might dispose of the property to defeat his creditors. 457 U.S. at 924. Based on that petition, a clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. *Id.* So long as the debt collector was following state law, he could be treated as a state actor; the "joint participation with state officials in the seizure" of the property qualified the debt collector as a "state actor for purposes of the Fourteenth Amendment" and 42 U.S.C. § 1983. *Lugar*, 457 U.S. at 941–42.

Petitioner tries to avoid this result by arguing that "[a]fter a municipality sells a tax lien to a private party, the municipality's involvement is over." (Pet. 15). Yet the question is not whether a private investor is a municipal actor but whether it is a state actor. Here, as in *Lugar*, we have a "procedural scheme created by [a] statute [that] obviously is the product of state action." 457 U.S. at 941. And here, as in *Lugar*, private parties participate jointly with government by "invoking the aid of state officials" in the unconstitutional seizure of private property. *Id.* Indeed, the case here is even stronger than in *Lugar*. There, joint participation was established by the cooperation of the state court clerk and the county sheriff in issuing and executing a writ of attachment. *Id.* at 924–25. Under the Tax Sale Law, government officials are involved not only in the foreclosure of property and transfer of title, but also in the creation and sale of the underlying tax lien.

Petitioner also avers that there is no public purpose in the foreclosure of a tax lien by a private lienholder. (Pet. 18). That is a strange argument; if this taking really was absent any public use, the remedy would be to void the transfer exactly as the trial court did. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (a taking with no legitimate public purpose is void). The argument is also incorrect, as it is well-understood that the foreclosure provisions of the Tax Sale Law are designed to promote "the marketability of tax titles, enabl[ing] municipalities to maximize the recovery of unpaid property taxes and return property to the tax rolls." *Cherokee Equities, LLC v. Garaventa*, 382 N.J. Super. 201 (Ch. Div. 2005); The entire "process is designed to enhance the collection of taxes," *Bron v. Weintraub*, 42 N.J. 87, 91 (1964), which is a quintessential public purpose. *See Kelo v. City of New London*, 545 U.S. 469, 483, 490 (2005) (finding that the aim of increasing tax revenue is a public purpose under the Takings Clause). Indeed, it is clear that the underlying reason why private investors are allowed to participate in the tax foreclosure process at all is so that the government does not have to. *Varsolona v. Breen Capital Services Corp*., 180 N.J. 605, 618 (2004) (citing *Fidelity Union Trust Co. v. City of Newark*, 11 N.J. Super. 205, 208 (Cnty. Ct. 1950)).

Finally, petitioner's reliance on *Balthazar v. Mari Ltd.*, 301 F. Supp. 103 (N.D. Ill. 1969), is misplaced. *Balthazar* was primarily a due process case; the takings issue was mentioned only in a footnote. *Id.* at 105 n.6. Supreme Court review

was then mandatory under 28 U.S.C. § 2281 (1969), and the Court summarily affirmed. 396 U.S. 114 (1969). Summary affirmance is a "slender reed on which to rest future decisions." *Morse v. Republican Party of Va.*, 517 U.S. 186, 203 n.21 (1996) (internal quotations omitted); *see Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below."). Petitioner stretches to argue that *Balthazar*'s complete absence from the *Tyler* decision highlights its continuing validity (Pet. 21). On the contrary, this absence highlights only *Balthazar*'s irrelevance.

III. SUPREME COURT PRECEDENT AND THE JUST COMPENSATION CLAUSE REQUIRE COURTS TO GIVE *TYLER* FULL RETROACTIVE EFFECT

While the Appellate Division correctly held that *Tyler* applies with full force in New Jersey, its ruling with respect to *Tyler*'s retroactive effect falls short. The Appellate Division afforded *Tyler* only "pipeline" retroactivity, but both federal retroactivity doctrine and the Takings Clause itself require full retroactive effect be given to *Tyler*. The lower court's holding with respect to pipeline retroactivity may be understandable given the posture of this case as an appeal from the vacatur of a foreclosure judgment. *Tyler* does not require foreclosures to be set aside, nor does its retroactive effect mean that completed foreclosures should be reopened. It simply stands for the proposition that where more is taken by foreclosure than was owed,

just compensation must be paid. But this Court should clarify that, while courts may have flexibility in how they address *Tyler*'s effect in foreclosure cases like the one at bar, the situation is different regarding takings claims that result from foreclosures. For those 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 ruling in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), which had invalidated certain taxes on federal retirement. *Harper*, 509 U.S. at 89. After *Davis* was decided, the *Harper* petitioners had brought claims seeking a refund of pre-*Davis* taxes. *Id.* at 91; *see Harper v. Virginia Dep't of Taxation*, 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[2] *and as to all events,*

[2] The 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*. 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).

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.").

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 US at 647. In the context of a foreclosure case like the one at bar, *Tyler*'s retroactive effect does not necessarily dictate an equitable remedy. In *Harper*, although the Court held that its earlier decision in *Davis* applied retroactively, it declined to grant the particular remedy sought by the petitioners. The claims in that case were ultimately founded in due process, and "[u]nder the Due Process Clause, a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." *Harper*, 509 U.S. at 100 (internal citations omitted). For example, the existence of pre-deprivation hearings might have constituted a sufficient procedural safeguard to satisfy the Due Process Clause. *Id*. at 101. Similarly, the mere fact that foreclosures under the Tax Sale Law are subject to *Tyler* does not imply that such foreclosures must be set aside. Rather, to the extent they take more than is owed, they must simply be paid just compensation pursuant to *Tyler*.

This may explain the Appellate Division's apparently contradictory holding with respect to retroactivity. Its decision at one point recognizes that *Tyler* must be given "full retroactive effect" regardless of whether cases "predate or postdate the Supreme Court's decision." (PPa 22). Yet it later held that *Tyler* "is accorded pipeline retroactivity to pending tax sale foreclosures involving a property owner's surplus equity." (PPa 28). The court had before it a foreclosure case, and it was understandably concerned about clouding title to previously foreclosed properties, many of which are undoubtedly now owned by innocent third-party purchasers. (PPa 23–24). That much is permissible. But by limiting retroactivity to "pending tax sale foreclosures," the Appellate Division may have inadvertently implied that retroactivity is withheld from cases, pending or not, which occur outside of the foreclosure process. As explained further below, that is an error which this Court should correct.

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

The paradigmatic *Tyler* case is not like the case at bar, in which foreclosure remains a live issue. In *Tyler* itself, the foreclosure was already finalized. *Tyler*, 598 U.S. at 635. Neither did *Tyler* seek to reopen or overturn the foreclosure. Rather, *Tyler* sought only just compensation for a taking of equity interest which had already transpired. But while courts may have discretion in how to treat *foreclosure* cases, even given the unquestionably retroactive effect of *Tyler,* there is no such discretion

in *takings* cases. Unlike due process cases such as *Davis* and *Harper*—where courts have flexibility to fashion the appropriate remedy—in takings cases, just compensation is mandatory.

The Constitution itself requires just compensation for a taking. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 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] amendment."); *see also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) ("This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking," compensation must be awarded) (Brennan, J., dissenting).

This Court has recognized that same principle. *Klumpp v. Borough of Avalon*, 202 N.J. 390, 405 (2010) ("Regardless of the exact method employed, where a taking occurs, the Takings Clause requires the government to compensate the property owner."). Unlike the remedy given below—a reversal of the foreclosure itself—most takings claimants cannot get equitable relief. They may only obtain compensation

for the taking. *Knick*, 588 U.S. at 199–200 (2019). The Takings Clause inherently contemplates retroactive 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). Thus, 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).

The Appellate Division's misleading reference to "pending tax foreclosures" has already had deleterious effects on property rights in New Jersey. Amicus represents Lynette Johnson in a separate matter, *Johnson v. City of East Orange,* No. ESX-C-16-23, *appeal pending*, No. A-002486-23. Like the plaintiff in *Tyler*, Ms. Johnson brought a takings claim against the government seeking just compensation for the equity interest in her property that was taken in foreclosure. Relying on the Appellate Division's decision below, the Superior Court for Essex County granted summary judgment against Ms. Johnson. (Exh. A at 1). In particular, the court faulted Ms. Johnson for waiting until after the foreclosure judgment became final before bringing her takings claim: "She did not file an answer to the foreclosure complaint, she did not oppose final judgment, and she did not appeal. . . . While her claim was literally open at the time *Tyler* was decided, it was not in the pipeline, the

way the *Roberto* court intended." (Exh. A at 9). This was an error that resulted from the Appellate Division's confused holding regarding pipeline retroactivity in the case below. Unless that language is clarified, it is likely to recur.

C. Full retroactivity for takings claims will not produce undue hardship because liability is limited by several practical considerations

Of course, even fully retroactive liability does have limits. The statute of limitations for takings claims in New Jersey, for example, provides a temporal backstop. *Klumpp*, 202 N.J. at 409. Recent experience, too, shows that full retroactivity will not lead to expansive liability because only a small fraction of individuals with valid claims will ever assert them in court. Recent filings in two related federal class action suits out of Michigan[3]—one in the Western District and one in the Eastern District—illustrate the point. In *Wayside Church v. Van Buren County*, No. 1:14-cv-01274-PLM, 2015 WL 13308900 (W.D. Mich. 2015), the claims administrator sent direct notice of settlement to 27,932 individuals, of which an estimated 22,255 actually received the notice. *See* Declaration of Jeanne C. Finegan in *Wayside Church*, ¶ 13, ECF No. 352-1, (July 21, 2023) (describing extensive notification efforts). Of these, only 1,961—representing seven percent of

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[3] Michigan provides a helpful example, since that state's tax foreclosure statutes failed to protect surplus equity in a tax foreclosure until 2021. *See Rafaeli*, 952 N.W.2d at 442–47 (2020) (describing the operation of Michigan's General Property Tax Act). The *Rafaeli* case invalidated this statutory regime on state constitutional grounds nearly three years before the *Tyler* decision. *See id.* at 484.

eligible claimants—actually submitted claims. *Id.* at ¶ 29. Another 352 individuals filed paperwork to opt out of the class action because they hired other counsel. *Id.* at ¶ 32. In *Bowles v. Sabree*, No. 2:20-cv-12838-LVP-KGA (E.D. Mich.), only about 13% of eligible individuals submitted claims as of the date of the fairness hearing. *See* Transcript of Nov. 22, 2022, 14–15, Fairness Hearing, ECF No. 111 (Jan. 13, 2023). The claims period closed March 1, 2023, but the final claim count was apparently not disclosed.

Low claim rates are unsurprising, because confiscatory tax foreclosures primarily affect 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 individuals are unlikely to bring a *Tyler*-style claim or to respond to class action notices 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.

Furthermore, 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) (explaining why class action status in such cases may not be appropriate); *Tarrify Props., LLC v. Cuyahoga Cnty.*, 37 F.4th 1101, 1106–08 (6th Cir. 2022) (denying class status to a case in Ohio). Such

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denials could similarly operate in New Jersey to limit the number of victims who ultimately obtain the just compensation guaranteed by the Constitution.

CONCLUSION

For the reasons stated above, Amicus respectfully asks this court to affirm the judgment of the Appellate Division on the grounds that the trial court's ruling with respect to R. 4:50-1(f) was fairly within its discretion. If this Court chooses to address *Tyler v. Hennepin County*, it should affirm the Appellate Division's holdings with respect to the application of that case in New Jersey and the liability of private investors, but it should correct the record regarding retroactivity.

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Respectfully submitted,

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