No. 04-1477

In the Supreme Court of the United States

GARY KENT JONES, PETITIONER

v.

LINDA K. FLOWERS, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment required the State of Arkansas to search for an alternative address for a delinquent taxpayer when notices of the tax sale and right to redeem that were sent to his last known address by certified mail were returned "unclaimed."

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INTEREST OF THE UNITED STATES

This case presents the question whether the State of Arkansas satisfied constitutional due process standards for notice when it seized and sold property belonging to petitioner after he failed to pay his taxes on his real property. Because a number of federal agencies have the ability to seize property in certain situations upon giving adequate notice, the United States has a substantial interest in the question presented. Under the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*, for example, the federal government may enforce judgments through the seizure of property. Before a sale of property may be undertaken, the government must publish notice of the sale and "serve written notice of public sale by personal delivery, or certified or registered mail to each person whom the marshal has reasonable cause to believe * * * has an interest in property under

execution * * * to the last known address of each such person." 28 U.S.C. 3203(g)(1)(A)(i)(IV).

The Small Business Administration (SBA), see 15 U.S.C. 636(a)(6), and the Department of Agriculture make loans that may be secured by real property that may become subject to foreclosure proceedings. See 42 U.S.C. 1471 (loans by Secretary of Agriculture); see also 7 C.F.R. 3550.59(a)(1), 3550.108. Notices of delinquency and foreclosure frequently must be sent to the borrowers on such loans. The Secretary of Housing and Urban Development also has authority to foreclose on single-family property pursuant to 42 U.S.C. 3535(i) and 12 U.S.C. 3753. Notice of foreclosure proceedings pursuant to 12 U.S.C. 3753 must be provided by certified or registered mail, 12 U.S.C. 3758(2)(A), and notice "shall be deemed duly given upon mailing, whether or not received by the addressee and whether or not a return receipt is received or the notice is returned." 12 U.S.C. 3758(2)(C).

The government also forfeits property in a variety of circumstances. For example, the customs laws have long provided for the seizure and civil forfeiture of items imported in violation of law. See, e.g., 19 U.S.C. 1305, 1497, 1595a. Seizure and forfeiture is also authorized for property involved in a wide variety of criminal offenses. See, e.g., 18 U.S.C. 981; 21 U.S.C. 881. The government must provide constitutionally valid notice of such forfeitures, the procedures for which are generally supplied by the customs laws. See 18 U.S.C. 981(d); 21 U.SC. 881(d). Under 19 U.S.C. 1607(a), the government must provide notice by publication for three successive weeks and "[w]ritten notice * * * shall be sent to each party who appears to have an interest in the seized article." See generally *Dusenberry* v. *United States*, 534 U.S. 161, 163-166 (2002). If someone contests the forfeiture, the Government must commence a judicial forfeiture action, see 18 U.S.C. 983(a)(3) and 19 U.S.C. 1608, which requires the republication

of notice under Supplemental Rule for Admiralty and Maritime Claims C(4).[1]

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

STATEMENT

1. At the time of the events in this case, Arkansas law provided that "[s]ubsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs" and to "indicate that the tax-delinquent land will be sold if not redeemed prior to the date of sale." Ark. Code Ann. § 26-37-301 (1997).[2] Arkansas law fur-

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[1] The Judicial Conference has transmitted to this Court a proposed revision to the Supplemental Rules. That revision would provide for the first time that the Government must send direct written notice of the judicial forfeiture action and a copy of the complaint "to any person who reasonably appears to be a potential claimant." Proposed Supp. R. G(4)(b)(i). The revision would also provide that notice to a person who was arrested when the property was seized, but who is not incarcerated when notice is sent, "may be sent to the address that person last gave to the agency that arrested or released the person." Proposed Supp. R. G(4)(b)(iii)(D); see Proposed Supp. R. G(4)(b)(iii)(E) (notice to non-incarcerated person from whom property was seized "may be sent to the last address that person gave to the agency that seized the property").

[2] The statute was subsequently revised to provide that, "[i]f the Commissioner of State Lands fails to receive proof that the notice sent by certified mail * * * was received by the owner of a homestead," the Commissioner shall provide "actual notice to the owner * * * by personal service of process." Ark. Code Ann. § 26-37-301(e)(1) (Supp. 2005) (effective Jan. 1, 2004). If petitioner is correct that he had not lived at

ther provided that, "[i]n the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address." *Id.* § 26-35-705.

2. Petitioner purchased the property at issue in this case, located at 717 North Bryan Street, Little Rock, Arkansas, in 1967. He asserts that he resided there until 1993, when he moved to an apartment, but he continued to pay his property taxes through 1996. Petitioner's wife remained in the house. Petitioner did not notify the property tax collector of his new mailing address, as required by Ark. Code Ann. § 26-35-705 (1997). Pet. App. 2a.

Petitioner failed to pay his property taxes for the years 1997-2000. Pet. App. 2a. In 2000, the State mailed a certified letter to petitioner notifying him of the delinquency and stating that the property would be subject to a public sale on April 17, 2002. *Ibid.*; J.A. 12; see Supp. Add. before Ark. Sup. Ct. (Supp. Add.) 15-17. The return address on the envelope was "Commissioner of State Lands, 109 State Capitol, Little Rock, AR 72201-1012." Supp. Add. 18.

The letter was returned to the State marked "unclaimed" after three unsuccessful attempts by the Post Office to deliver it, on April 13, 19, and 29, 2000. J.A. 12; Supp. Add. 18. The State subsequently purchased a title report verifying petitioner's ownership of the property. J.A. 12; Supp. Add. 19. On April 1, 2002, a notice of the public sale, which also con-

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the property in question since 1993, see J.A. 10, the property would not have been his homestead when notice was given in 2000. See Ark. Ann. Code § 26-26-1122(a) (Supp. 2005) (defining "homestead" as a "dwelling of a person that is used as [the person's] principal place of residence"). In any event, the change in law would not suggest that the prior system was constitutionally deficient. See *Dusenbery* v. *United States*, 534 U.S. 161, 172 (2002) ("Even if one accepts that the * * * current procedures improve delivery to some degree, our cases have never held that improvements in the reliability of new procedures necessarily demonstrate the infirmity of those that were replaced.").

tained redemption information, was published in the newspaper. J.A. 12; Supp. Add. 22-24.

No bids were made at the time of the public sale, but on February 5, 2003, respondent Linda K. Flowers submitted a purchase offer to the State. Pet. App. 2a; J.A. 13; Supp. Add. 25. The State subsequently conducted additional research concerning the property, which showed that it remained titled to petitioner. J.A. 12; Supp. Add. 26. On February 19, 2003, the State sent another certified letter to petitioner at the property address, stating that the property would be sold on March 21, 2003, if the delinquent taxes and penalties were not paid.[3] Pet. App. 2a; J.A. 15-16. The return address on that envelope again read "Commissioner of State Lands" at the same address as the 2000 letter. Supp. Add. 28. The letter was returned to the State as "unclaimed" after the Postal Service apparently unsuccessfully sought to deliver it three times. Pet. App. 2a; J.A. 13; Supp. Add. 28. The State then sold the property to Flowers. Pet. App. 2a; J.A. 14.

An unlawful detainer notice was posted on the door of the property on or about July 2, 2003, after the expiration of the 30-day period in which petitioner could have redeemed the property. Pet. App. 2a. The notice stated that any occupants had three days to vacate the premises or a civil action could be brought against them, and ten days to vacate the premises before being subject to criminal prosecution. Petitioner's Add. before Ark. Sup. Ct. (Pet. Add.) 11.

3. Petitioner filed suit against Flowers and the Commissioner of State Lands on July 28, 2003, seeking to set aside the land sale and challenging the constitutionality of Ark.

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[3] A handwritten notation on the page showing the research that was conducted after Flowers made her offer indicates that instructions were given to send one notice by certified mail and one notice by "reg. mail," which could refer to "registered" or "regular" mail. See Supp Add. 26. The record, however, does not indicate whether such a duplicate notice was actually sent by either of those means.

Code Ann. § 26-37-301 (1997). See J.A. 4-6. Petitioner alleged that the sale of his property was invalid because he did not receive actual notice of the tax sale or of his right to redeem. Pet. App. 2a. He also claimed that due process required the State to conduct a search of public records in an attempt to ascertain his correct address before selling his property. *Id.* at 5a. Flowers filed a counterclaim for unlawful detainer. *Id.* at 3a. The trial court granted summary judgment for respondents, finding that the notice complied with constitutional due process requirements. Pet. Add. 87-88.

4. The Arkansas Supreme Court affirmed, relying in large part on its prior decision in *Tsann Kuen Enterprises Co.* v. *Campbell*, 129 S.W.3d 822 (Ark. 2003). Pet. App. 1a-11a. The court rejected petitioner's argument that the State was "required to search the public records or the phone book in order to ascertain the property owner's correct address," explaining that petitioner "ignores the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address." *Id.* at 10a. The court also reasoned that "there is no requirement that actual notice be given in order to comply with the requirements of due process," *id.* at 11a (citing *Dusenbery* v. *United States*, 534 U.S. 161 (2002)), and that "there is no dispute that the State attempted to provide [petitioner and his wife] with notice, both via certified mail and through publication in the newspaper." *Ibid.* In those circumstances, the court held, providing notice via certified mail did not violate the Due Process Clause. *Ibid.*

SUMMARY OF ARGUMENT

The Due Process Clause generally requires notice reasonably calculated to inform the intended recipient of an upcoming proceeding that could affect the recipient's property interests. *Mullane* v. *Central Hanover Bank Trust Co.*, 339 U.S. 306 (1950). Under that test, the fact that notice does not actually reach the recipient does not render it constitutionally inadequate. *Dusenbery*, 534 U.S. at 172. Moreover, the ade-

quacy of notice must be assessed *ex ante*, from the standpoint of the party giving notice, not *ex post*, when the intended recipient comes forward months or years later and explains how he could have been reached.

Based on those principles, this Court has repeatedly held that notice by mail to an address reasonably believed to be correct is constitutionally adequate under the Due Process Clause. The Court has found notice by mail to be inadequate in only two cases, in each of which the party responsible for giving notice already *knew*, even before the notice was sent, that notice by mail was not reasonably calculated to notify the recipient of the upcoming proceeding. While the Court has repeatedly emphasized that notice by mail to a readily ascertainable person and address is constitutionally sufficient, the Court has never held or suggested that such notice, if sent to an address and in a manner reasonably calculated to reach the intended recipient, is deficient.

In this case, moreover, the State had an exceptionally sound basis for believing that the notice by mail was reasonably calculated to reach petitioner. Among other factors, the notice was sent to an address provided by petitioner himself; the notice was sent via certified mail, return receipt requested; and petitioner was under a state-law obligation to update his address if it changed. Because the notice was thus reasonably calculated to apprise petitioner of the upcoming proceeding, it was constitutionally sufficient.

Contrary to petitioner's submission, a State need not continually and repeatedly find and employ new means of notification merely because it has reason to believe that its initial effort, though reasonably calculated to reach the recipient (and therefore constitutionally adequate in itself), in fact failed to do so. It would be particularly implausible to impose any such wide-ranging obligation on the State in the circumstances of this case, because here the State was never even informed that the address it was using was mistaken. Instead, when the notice was returned marked "unclaimed," the

State knew only that the addressee had abandoned or failed to call for the mail. Moreover, the additional steps taken by the State at that point—publishing notice and re-sending it by certified mail at a later date—reinforce the conclusion that the State did all that was necessary under the Due Process Clause.

Although petitioner argues that the State could easily have located him after the notice was returned, that argument is irrelevant, because the State had no obligation to do so. Moreover, petitioner's argument is implausible even on its own terms, as it rests largely on hindsight, not on the knowledge and means contemporaneously available to the State. Although petitioner argues that his new address could have been found in a telephone directory or on the Internet, those means would at best have identified numerous individuals with his name. Even assuming, contrary to fact, that the State had been informed that petitioner had moved, the State would not have known where in the United States (or indeed the world) to look for him, and it would not have known which, if any, of the many individuals it found under "Gary Jones" or "G. Jones" was the correct Gary Jones. Contacting the occupants of the house in person or posting a notice on the property would have provided no guarantee of notice to petitioner, and would have imposed a significant burden on the State. In any event, certified mail provided a reasonable substitute for those measures, because the Postal Service attempted delivery on six separate occasions, on each of which the occupant had the right to be—and most likely was—informed of the identity of the sender.

Accepting petitioner's submission that the Due Process Clause requires repeated rounds of notice, each designed to account for deficiencies implicitly revealed by earlier unsuccessful efforts, would have a destabilizing effect on property rights and would inject substantial uncertainty into processes designed to accomplish important state goals and to transfer the ownership of property with reliable finality. In adminis-

tering a system such as the State's property tax system, it is essential that the State know what steps it must take to transfer ownership of tax-delinquent property. This Court's traditional "reasonably calculated" test correctly balances the interests involved by requiring the State to undertake one reasonable effort to provide notice. This Court should reject petitioner's alternative requirement of an undetermined number of repeated rounds of notice that would all be subject to later challenge and litigation as inadequate.

ARGUMENT

I. DUE PROCESS IS SATISFIED WHEN NOTICE OF AN UPCOMING TAX SALE IS SENT BY CERTIFIED MAIL TO AN ADDRESS REASONABLY BELIEVED TO BE CORRECT

A. The Due Process Clause Requires Notice Reasonably Calculated, At The Time It Is Sent, To Inform The Recipient Of An Upcoming Proceeding

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.* 339 U.S. 306, 314 (1950). Accord, *e.g.*, *Dusenbery* v. *United States*, 534 U.S. at 168; *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 482 (1988); *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 795 (1983); *Greene* v. *Lindsey*, 456 U.S. 444, 449-450 (1982). As the Court explained in *Mullane*, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," and "[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is itself reasonably certain to inform those affected." 339 U.S. at 315.

Two related subsidiary principles have informed the Court's application of the *Mullane* "reasonably calculated" test. First, the fact that notice does not or may not *actually* reach the intended recipient does not render it constitutionally insufficient. In *Dusenbery*, for example, the prisoner argued that "due process generally requires 'actual notice' to interested parties prior to forfeiture, which [the prisoner] takes to mean actual receipt of notice." 534 U.S. at 169. The Court squarely rejected that proposition, holding that "our cases have never required actual notice." *Id.* at 172; see *id.* at 181 (Ginsburg, J., dissenting) ("The majority is surely correct that the Due Process Clause does not require 'heroic efforts' to ensure actual notice."). As the Court explained, rather than "requir[ing] actual notice in proceedings such as this," the Due Process Clause "requires only that the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action." *Id.* at 170. See *Mullane*, 339 U.S. at 315 ("The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements."). Indeed, requiring actual receipt of notice would give the intended recipient a ready means of delaying or preventing the government proceeding simply by making himself unavailable or difficult to reach.

Second, the question whether a method of notice is "reasonably calculated" to reach the intended recipient must be answered from the perspective of the party giving notice, and at the time it faces the obligation to provide such notice, not "with the 20/20 vision of hindsight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). That conclusion follows from the very formulation of the standard articulated in *Mullane*: "notice reasonably *calculated*" to inform necessarily implies calculation, *i.e.*, an assessment of the relative likelihood of potential future outcomes. The *Mullane* standard thus focuses not on what can be determined with the benefit of hindsight, but rather on what means a party seeking to give notice "might

reasonably adopt to accomplish it" before the attempt has been made. 339 U.S. at 315.

As the Court has held, moreover, notice by publication is generally insufficient—and notice by mail may be required—if the intended recipient's "name and address are known or very easily ascertainable." *Schroeder* v. *City of New York*, 371 U.S. 208, 212-213 (1962); see, *e.g.*, *Mennonite*, 462 U.S. at 800; *Robinson* v. *Hanrahan*, 409 U.S. 38, 40 (1972); *Mullane*, 339 U.S. at 318 (notice by mail required when "the names and post-office addresses of those affected * * * are at hand"). By making the operation of the notice requirement turn on whether the name and address are "easily ascertainable" or "at hand," the Court necessarily tied the due process inquiry to the knowledge available to the party giving notice at the time such notice is given. See *Tulsa Prof'l Collection Servs.*, 485 U.S. at 491 (remanding for determination whether identity of claimant was "known or reasonably ascertainable" by the party responsible for providing notice, with reference to facts of which that party "was aware" at the time notice was due).

It will always be possible, once an intended recipient has brought suit months or years later, for him to pinpoint precisely how the government could have ensured that he would receive actual notice. See *Smith* v. *Cliffs on the Bay Condominium Ass'n*, 617 N.W.2d 536, 542 (Mich. 2000) ("No matter what efforts are made to give notice, the owner who has not, in fact, been provided notice will always contend that something more could have been done. This will make the process of tax sales completely unpredictable, destroying the government's ability to recoup unpaid taxes by foreclosing and reselling."). But the "reasonably calculated" test necessarily views the notice question *ex ante*, from the government's standpoint at the time that notice is to be given, not *ex post*, from the intended recipient's standpoint after his actual whereabouts have been made clear. The government must be able to determine the adequacy of notice at the time it is provided, and the

fact that in hindsight some other means of notice would have been more successful is of no constitutional significance.

B. Notice By Mail To The Property Owner At An Address Reasonably Believed To Be Correct Satisfies Due Process

1. Applying those standards, the Court has recognized on a number of occasions that providing notice of a government action or proceeding through publication in a newspaper provides a constitutionally adequate means of notifying potentially interested persons whose identity or interests are not known or readily ascertainable. *E.g.*, *Tulsa*, 485 U.S. at 490; *Mennonite*, 462 U.S. at 798; *Mullane*, 339 U.S. at 317; *City of New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293, 296 (1953). The Court has ruled, however, that more specific notice is required when the identity and address of a potentially interested party are known. In a long series of decisions spanning more than half a century and a wide variety of proceedings, the Court has consistently endorsed ordinary mail as "a method * * * recognized as adequate for known addressees when [it] ha[s] found notice by publication insufficient." *Dusenbery*, 534 U.S. at 169.

Thus, in the seminal *Mullane* case, the Court, noting that the mails "are recognized as an efficient and inexpensive means of communication," 339 U.S. at 319, concluded that "ordinary mail to the record addresses" would be sufficient, because it constituted "a serious effort" to inform the beneficiaries of the proceeding. *Id.* at 318. Accord, *e.g.*, *Dusenbery*, 534 U.S. at 172 ("[T]he use of the mail addressed to petitioner at the penitentiary was clearly acceptable for much the same reason that [the Court] ha[s] approved mailed notice in the past."); *Tulsa*, 485 U.S. at 490 ("We have repeatedly recognized that mail service is an inexpensive and efficient mecha-

nism that is reasonably calculated to provide actual notice.");[4] *Mennonite*, 462 U.S. at 798 (where mortgagee is identified in public records, "constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service"); *Schroeder* v. *City of New York*, 371 U.S. 208, 214 (1962) (stating that the city in condemnation proceeding had failed to "make at least a good faith effort to give [the information] personally to the appellant—an obligation which the mailing of a single letter would have discharged"); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 116 (1956) (noting that "[e]ven a letter would have apprised [a homeowner] that his property was about to be taken").

2. In two cases, the Court has found that notice by mail was inadequate in a narrow set of circumstances. *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972); *Covey* v. *Town of Somers*, 351 U.S. 141 (1956). Contrary to petitioner's argument (Br. 10-11), those cases do not establish that "where the sender knows that an attempt to provide notice has failed, this Court has found the notice inadequate." Instead, in each of those cases, notice by mail was not "reasonably calculated" to inform because the party giving notice knew, *at the time of the initial obligation to provide notice*, that the mailed notice would likely fail.

In *Covey*, the Court held that a town's mailing of a notice of an upcoming tax lien foreclosure proceeding to a landowner who was "known by the officials and citizens of the Town * * * to be a person without mental capacity to handle her affairs or to understand the meaning of any notice served upon her"

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[4] In *Tulsa*, the Court referred to notice by mail as providing "actual notice," but that did not imply that such notice is ineffective unless actually received. See 485 U.S. at 489-490. Rather, the Court used that term to distinguish notice by mail from notice by publication, which is commonly described as a form of "constructive notice." *Mennonite*, 462 U.S. at 798; see *Dusenberry*, 534 U.S. at 169 n.5.

was insufficient. 351 U.S. at 145. Similarly, in *Robinson*, the State mailed notice of a forfeiture to an owner of an automobile at his home address, rather than at the jail where he was being held. The Court held that the notice was inadequate because "the State knew that [the owner] was not at the address to which the notice was mailed and, moreover, knew also that [the owner] could not get to that address since he was at that very time confined in Cook County jail." 409 U.S. at 40.

In both *Covey* and *Robinson*, therefore, the notice was constitutionally insufficient because the State knew in advance that the notice was highly unlikely to reach (or be understood by) its intended recipient, and thus "it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise [the owner] of the [pending] proceedings." *Robinson*, 409 U.S. at 40. The Court has consistently held, however, that notice *is* constitutionally sufficient if mailed, as it was here, to an address reasonably believed at the time of mailing to be that of the intended recipient.

3. The Court's recognition of the adequacy of notice by mail comports with common experience. Mailing to a known address or addresses reasonably believed to be those of the intended recipient is a means of communication "upon which prudent men will ordinarily rely in the conduct of important affairs." *Greene*, 456 U.S. at 455. It is a means of providing notice "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. And it imposes only a "relatively modest administrative burden." *Mennonite*, 462 U.S. at 800. For all those reasons, this Court should adhere to its precedents holding that a party required to give notice fully satisfies its constitutional obligations when it provides notice by mail to the address reasonably believed to be that of the party entitled to notice.

II. THE NOTICE IN THIS CASE WAS CONSTITUTIONALLY ADEQUATE

In this case, the State of Arkansas twice mailed notice that was reasonably calculated to reach petitioner. Having done so, the State satisfied its constitutional obligations. The return of the notice did not trigger a crescendo of increasingly demanding constitutional obligations. While return of the notice did inform the State that petitioner had never in fact opened it, it did not inform the State of any other fact about whether the address was correct, whether subsequent efforts might succeed, or whether some new address might be relevant. In any event, the State was not required, before enforcing its tax laws, to undertake a further highly speculative and burdensome investigation to determine whether there might be some other way to reach petitioner.

A. The Notice Was Reasonably Calculated To Apprise Respondent Of The Tax Sale

At the time of the State's initial obligation to provide notice, the notice it sent by certified mail was reasonably calculated to apprise petitioner of the upcoming tax sale. Indeed, petitioner himself concedes (Pet. Br. 8) that "[i]t may have been reasonable for the State first to attempt to notify [petitioner] by certified mail sent to the Bryan Street address." That should end the constitutional inquiry. While such notice did not guarantee that petitioner would actually be apprised of the upcoming sale, this Court's cases, cited above, establish that notice by mail fully satisfied constitutional standards in the circumstances of this case.

As explained above, this Court has held that notice is not constitutionally adequate if at the time of the initial burden to provide notice the State sends it to an address or via a method that the State knows is unlikely to apprise the intended recipient of the upcoming legal proceeding. See pp. 13-14, *supra*. Conversely, however, the fact that the State has good reason

to believe that the address (or addresses) it is using is (or are) correct supports the conclusion that the method of notice is constitutionally valid.

First, the State sent the notice to an address that petitioner himself had supplied in connection with his ownership of the particular property for which the tax sale was to take place. See Pet. App. 8a. When a person has himself identified a particular address as the place to reach him, the State reasonably may rely on that address when it needs to apprise him of an upcoming proceeding. That is particularly true when, as here, the person has supplied the address precisely for purposes of the type of proceeding for which the State now must provide notice. Indeed, that appears to be the theory underlying the new Proposed Supplemental Rule for Admiralty and Maritime Claims G(4). See note 1, *supra*.

Second, although the address may have been first supplied when petitioner purchased the property in 1967, the State had good reason to believe that it was still accurate when notice was mailed in 2000, because Arkansas law provides that, "[i]n the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address." Ark. Code Ann. § 26-35-705 (1997); see Pet. App. 10a. Petitioner has not alleged that he provided any such notice to the State in this case. Accordingly, there was particularly strong support for the State's belief that the notice sent to petitioner at the most recent address on his property tax records was reasonably calculated to inform him of the upcoming tax sale.[5]

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[5] Although, as petitioner asserts (Pet. Br. 16), "a party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligations," *Mennonite*, 462 U.S. at 799, the obligation imposed by the Arkansas statute is highly relevant both to whether the State *reasonably* believed that the address on file was correct and to the question whether a burden should be imposed on the State to remedy petitioner's lack of compliance. See *Davis Oil Co.* v. *Mills*, 873 F.2d 774, 791 (5th Cir. 1989) (noting that requiring interested party to request notice would not run afoul of *Mennonite* because it

Finally, the State sent the notice via certified mail, return receipt requested. This Court has regularly held that notice by first-class mail is sufficient to satisfy constitutional standards. *Mullane*, 319 U.S. at 318. But certified mail, return receipt requested, is particularly likely not to be misdelivered, because the mail carrier must obtain a signature and because mail standards provide for repeated efforts to notify the recipient that mail has arrived.[6] Moreover, "the delivery and request for signature of a return receipt would alert [an individual] to the fact that the letter contains something of more than routine interest." *Weigner* v. *City of New York*, 852 F.2d 646, 650 (2d Cir. 1988).

The State thus sent notice to petitioner at the address that was reasonably calculated to apprise petitioner of the upcoming proceeding. Although there may be cases in which more than one such address is readily available to the State, petitioner does not assert, and the record in this case does not reveal, that there was any additional available address that the State could have used to apprise petitioner of the upcoming proceeding. Accordingly, the State's attempt to give notice was constitutionally sufficient.

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would not "impose a burden of constant vigilance on the property owner," but would allow "one * * * to protect his or her interest * * * through a single, simple act").

[6] The record does not reflect what actually happened upon attempted delivery of the notices in this case, although the Postal Service attempted three distinct deliveries of the initial notice, see J.A. 12, and it appears that it did the same with the second notice, see Supp. Add. 28. Generally, postal service regulations call for at least two attempts to notify the recipient if mail cannot be delivered, followed ultimately by return to the sender after 15 days. See *United States Postal Operations Manual* § 813.25 (2005) <http://www.nalc.org/ depart/cau/ pdf/manuals/pom/pomc8.pdf>.

B. The Fact That The Notice Was Returned "Unclaimed" Does Not Make The State's Effort To Provide Notice Constitutionally Inadequate Or Impose Additional Obligations

When, as in this case, a State's attempt at notice is directed to the address or addresses that are reasonably calculated to reach the intended recipient, the State has discharged its constitutional notice obligation. This Court's precedents provide no warrant for the imposition of *further* notice obligations on the basis of after-acquired information, and the Court should not create such a requirement for the first time in this case. Even if the Court were inclined to impose further obligations in unusual circumstances, moreover, there would be no basis for doing so here. Unless the State is actually informed of another address or readily available method of notice that is *more* likely to reach the recipient, the State's compliance with the ordinary constitutional standard in its initial attempt at notice should be deemed constitutionally sufficient. In this case, the return of the notice as "unclaimed" did not inform the State that there was some other address or method of notice that would be more likely to reach petitioner. Accordingly, the notice provided in this case satisfied due process standards.

1. This Court has "allowed the Government to defend the 'reasonableness and hence the constitutional validity of any chosen method * * * on the ground that it is in itself reasonably certain to inform those affected.'" *Dusenbery*, 534 U.S. at 170 (quoting *Mullane*, 339 U.S. at 315). For the reasons given above, the method of notice chosen by the State in this case was "in itself reasonably certain" to inform petitioner of the upcoming proceeding. That is all that the Constitution demands.

A State need not continually seek out and employ new means of notification and new addresses for recipients, merely because events have established—or even, as in this

case, suggested a possibility—that the means originally employed were unsuccessful. This Court has stated that "impractical and extended searches" are "not required in the name of due process." *Mullane*, 339 U.S. at 317-318; see *Mennonite*, 462 U.S. at 798 n.4, 799 (government required only to make "reasonably diligent efforts" and not required "to undertake extraordinary efforts"). Providing constitutionally valid notice "need not be inefficient or burdensome." *Tulsa*, 485 U.S. at 489.

Indeed, the Court has required mailed notice itself—as opposed to notice by publication—only in cases in which the intended recipient's "name and address are known or very easily ascertainable." *Schroeder*, 371 U.S. at 212-213; see p. 11, *supra*. In the event that the initial mailing to a "known or easily ascertain[ed]" address has not reached the recipient, there is no basis in this Court's cases to impose on the government an obligation to begin anew and undertake a further search for an additional method of notice. Any such requirement would in effect drastically tighten the "easily ascertainable" standard. Cf. *Mullane*, 339 U.S. at 318 (mailing necessary when name and address of recipient are "at hand"). Moreover, there is no logical basis for limiting such a requirement to a single iteration, and petitioner does not attempt to do so. See Pet. Br. 10-11. Each time a doubt is raised about whether the notice reached its intended recipient, or whether a more certain means of delivery might be available, petitioner's logic would dictate that the government must incorporate the new information into its calculus and return to the drawing board to find a new method of notice, at least so long as some additional method of notice can be hypothesized.

Such a requirement would impose substantial new burdens on the federal, state, and local governments. In Arkansas alone, for example, 18,000 parcels of real estate are certified to the Commission of State Lands as tax delinquent each year. See *Tsann Kuen Enters.*, 129 S.W.3d at 828. The federal government must provide notices of property-related

proceedings to thousands of property owners who are delinquent on various federal loans each year. See pp. 1-2, *supra*. In addition, several federal agencies that administer asset forfeiture programs provided notice of forfeiture for 25,110 items of property in the year ending September 30, 2004. See U.S. Department of Justice, *Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement Fiscal Year 2004* (*Asset Forefeiture 2004*), at 42.[7] Customs and Border Protection, which administers customs- and immigration-related forfeitures for the federal government, has informed us that it had to provide notices for 42,139 seizures for the year ending September 30, 2005. In a widespread and ongoing program that is essential to the continued operation of government, such as the recovery of delinquent property taxes, administering the customs laws, collection of government loans, or asset forfeiture, providing one round of notice reasonably calculated to inform the owner of an upcoming proceeding is a reasonable burden for the government to undertake; requiring repeated rounds, each of which is more burdensome and uncertain than the last and the adequacy of each of which could be challenged by a disappointed owner, could threaten to make the entire program unworkable.[8]

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[7] The number cited in text is the number of items of property forfeited under programs administered by several specified federal agencies. See *Asset Forfeiture 2004*, at 2. Because each item of property may require notice to several potential owners and/or several potential addresses and because a number of agencies are not included in that figure, the actual number of forfeiture-related notices that the federal government must provide each year is much greater than the number cited in text.

[8] Such a requirement could also provide perverse incentives. In order to avoid onerous administrative burdens to recalculate the sufficiency of notice based on information generated by an initial attempt to provide notice, governments may favor modes of providing notice that do not generate additional information, rather than picking the initial method of providing notice most likely to succeed. The

2. Even assuming *arguendo* that the Due Process Clause might be construed to impose on government the obligation to take additional steps to provide notice in limited circumstances, moreover, there would be no basis for doing so here. This case does not involve the only circumstances in which such a duty could be entertained, namely, when, as the result of a constitutionally adequate mailing, the government gains actual knowledge of a new address for the intended recipient. When, by contrast, the government is informed only that its constitutionally adequate effort at notice has been—or may have been—unsuccessful, this Court's cases cannot plausibly be read to impose a new burden on the government to start the process all over again, search for a new possible address, and send a new notice.

In this case, the State was justified in not undertaking new efforts to locate petitioner when its otherwise constitutionally adequate effort to provide notice was returned "unclaimed." Indeed, the fact that the mail was returned "unclaimed" did not even inform the State that the address supplied by petitioner had become obsolete.

"Unclaimed," which was stamped on both of the certified mail letters when they were returned to the State, is one of several terms the Postal Service uses for undeliverable mail. It is used when the "[a]ddressee abandoned or failed to call for mail." *United States Postal Service Domestic Mail Manual* (DMM), § 507, Exh. 1.4.1 <http://pe.usps.gov/text/dmm300/507.htm>. It thus means merely that the addressee did not actually accept and open the mail. The notation is accordingly used not only when the addressee has moved and

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choice between certified and first-class mail may be illustrative. While certified mail, return receipt requested, is more likely to provide actual notice, it is also more likely to inform the State of an unsuccessful delivery. If that information imposes a new round of obligations on the State, then a State may have incentives to adopt a method of initial notice less likely to provide actual notice.

no one has notified him that the letter was waiting (as is alleged here), but also when, for example, the addressee was informed of the sender's identity as provided for under postal regulations and simply decided not to sign for the letter or pick it up at the post office.[9] Thus, the "unclaimed" notation does not positively inform the sender that the address was wrong or that mail sent to that address would be unlikely to reach the addressee. The Postal Service uses other notations to indicate such more profound failures of address. See *ibid.*[10]

Indeed, despite the fact that the State had no positive notification that the mail had not reached petitioner, the State in this case took at least two further steps to provide notice. First, the State published notice of the forthcoming tax sale. Second, when the State received Flowers' offer to purchase the property in 2003, three years after the original notice, it again sent notice to petitioner at his address of record. Espe-

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[9] Under Postal Service regulations, delivery procedures for certified mail are the same as for registered mail. See *United States Postal Operations Manual* § 813.21 (2005). The regulations provide that "[t]he addressee or a person representing the addressee may obtain the name and address of the sender and may look at registered mail while it is held by the Postal Service employee before accepting delivery and signing the delivery receipt. * * * The mail may not be given to the addressee until the delivery receipt is obtained by the Postal Service employee." *Ibid.* Similarly, even if no one is at home when delivery is attempted, "[t]he carrier must leave a notice of arrival on Form 3849 if the carrier cannot deliver the certified article for any reason." *Id.* § 813.25. That form has a space for the sender's name to be listed by the mail carrier.

[10] The Postal Service uses "Moved, Left No Address" to indicate that the "Addressee moved and filed no change-of-address order," and "Not Deliverable as Addressed—Unable to Forward" to indicate that the mail is "undeliverable at address given; no change-of-address order on file; forwarding order epired." DMM § 507, Exh. 1.4.1. The Postal Service also uses other terms to describe failures in delivery, such as "Attempted—Not Known," "Insufficient address," "No such number," or "No such street." *Ibid.*

cially in light of the additional fact that "[t]he well-known inevitability of taxes and the consequences of not paying them are themselves likely to alert a tax delinquent property owner to the possibility of foreclosure," *Weigner*, 852 F. 2d at 651, those additional steps support the constitutional adequacy of the notice provided by the State.

According to petitioner's affidavit, the State's additional steps were unsuccessful in informing him of the forthcoming sale. J.A. 9-10. But, although notice by publication may not be a first choice, this Court has held that it does provide a constitutionally adequate means of notice in some circumstances, see p. 12, *supra*, and it also provides a readily available "backstop" for any failure of actual notice by mailing. In addition, because the State had never been informed that petitioner no longer lived at the address that the State reasonably used for the original notice, the State acted reasonably in re-sending the notice to that address in 2003. The two additional steps taken by the State in this case reinforce the conclusion that the notice provided was "reasonably calculated, under all the circumstances, to apprise [petitioner] of the pendency of the action." *Mullane*, 339 U.S. at 314.

C. Petitioner's *Ex Post* Contentions That Notice Could Have Been Easily Provided To Him Are Irrelevant And Without Merit

Petitioner argues (Br. 11) that "the State could have easily provided effective notice to [petitioner]" after the notices it sent were returned unclaimed. Petitioner's suggested methods of notice, however, would not have been, in petitioner's terms, "easily provided." To the contrary, the weaknesses in petitioner's suggested modes of notice bolster the conclusion that, once the State had taken constitutionally reasonable steps to provide notice, the State was not required to go through further iterations of the process merely because some doubt about the effectiveness of the first notice had arisen.

1. Petitioner argues that he "was not missing" but "continued to live in the City of Little Rock" and that "the telephone directory and Internet searches that the State could have used to find [petitioner] would have been useful to satisfy due process." Br. 11, 12. To be sure, had the State been informed in 2000 or even in 2003 that the address it was using was not the correct one for petitioner, that petitioner had remained in Little Rock, and that an Internet or telephone directory search would have revealed his current address, the State would have been in a better position to find him. But the State was in fact informed of none of those facts. Indeed, even if the State had surmised from the return of the notice as "unclaimed" that petitioner had moved, the State would have had no particular reason to believe that he had moved to a new location in Little Rock, rather than to a suburb, another community in Arkansas, or a location in another State or abroad.

In any event, even if the State had attempted to find him through a directory search, the results would likely have been inconclusive, or at least overinclusive. The State would have been searching not merely for any person under a listing of "Gary Jones" or "G. Jones," but for a person with that name who was the owner of the property at 717 N. Bryan Street. It is likely that the *only* publicly available records connecting petitioner to the property in question were the public land records the State had already consulted. And it is highly likely that any standard search would have turned up numerous individuals with petitioner's name.[11] Absent the hindsight

[11] A search in a common Internet directory service, www.anywho.com, on December 1, 2005, returned eight listings of people named "Gary Jones" in Little Rock, Arkansas, at six different addresses, and 53 listings for "Gary Jones" in the State of Arkansas. Searches of nearby States returned 129 listings in Missouri and 27 listings in Louisiana, and, going farther afield, 241 listings in Texas and 147 in California. Searches on another Internet directory, the "People Search" function of www.yahoo.com,produced slightly fewer results in most of

that petitioner now provides, the State would have had no reason to believe that any of those individuals was more likely to be the owner of the property in question than any other. It is likely that the State's only option would have been to send a notice to each person with petitioner's name in the city, the State, or throughout the country. That could have been both expensive and needlessly alarming to the numerous individuals who had nothing to do with the property at 717 N. Bryan Street, and it could have caused further confusion when recipients of the notice attempted to find out what had occurred.

2. Petitioner's other suggestions present similar problems. For example, petitioner contends (Br. 12) that he "had notified his long-time employer of his new mailing address." Had the State known where petitioner worked, it presumably could have attempted to contact him at work. But there is no reason to believe that the State knew that fact. Thus, petitioner's action in informing his employer that he had moved has no bearing whatever on the difficulty that the State would have had in locating him.

Petitioner also asserts (Br. 12) that various government records contained his name, such as the state voting registration and income tax records. If those systems of records were available to the Commissioner of Lands, they would of course pose the same obstacles as a phone directory system; the State, had it been informed that the address it was using was wrong, would doubtless have found numerous individuals in those other systems named "Gary Jones." The Commissioner of Lands presumably did not know that petitioner had registered to vote in Arkansas or that he had been paying Arkansas income taxes (or that petitioner had remained in the State at all, for that matter). Accordingly, the State likely would have had no way of knowing which, if any, of the individuals

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those States. Under petitioner's theory, of course, a party could claim that the State's failure to find and use the most inclusive directory made the resulting notice constitutionally deficient.

it found in those records was the owner of 717 N. Bryan Street. In any event, systems of government records similar to those mentioned by petitioner are frequently unavailable, even to other government agencies, due to privacy and other concerns. Cf., *e.g.*, 26 U.S.C. 6103 (privacy of Internal Revenue Service taxpayer records and conditions under which they can be disclosed); 5 U.S.C. 552a(b)(2) (Privacy Act).[12]

3. Finally, petitioner contends (Br. 13) that "the State could have provided notice to [petitioner] by contacting the occupants of the house, either in person or by mail, or by posting a notice at the property." Petitioner points out that the house was in fact occupied by his wife, whom he asserts (Br. 14) "had a strong incentive to convey to [petitioner] any notice indicating that the property was about to be lost." Petitioner's claim, however, is based on hindsight, since the State, which had not even been informed that petitioner no longer lived at the property, certainly had no way of knowing that his wife did continue to occupy the property and had an incentive to notify petitioner. It is also belied by the facts, given that whoever occupied the house apparently declined on multiple occasions to retrieve correspondence directed to petitioner from the Commissioner of Lands. Moreover, the State's property tax records are organized by "legal description," not mailing address, and the burden of "physically locat[ing] and post[ing] thousands of tracts each year" could "have a devastating effect on tax sales and undermine the collection of delinquent real estate taxes." *Tsann*, 129 S.W.3d at 828.

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[12] Petitioner is mistaken (Br. 12) in claiming that finding him would not "have imposed an unreasonable burden" because his "correct address appeared in the State's own records." Aside from the difficulties discussed in text, it should not be assumed that, given the size of the state and federal governments, each agency would know of an individual's address merely because it is located in the files of some other agency.

This Court has found that posting notice at a property may be unlikely to apprise the owner of an upcoming proceeding, because such notices may be removed by children, vandals, or others before they are able to convey their message to the property's owner. See *Greene* v. *Lindsay*, 456 U.S. 444, 453-454 (1982). In any event, the State's method of sending the notice (twice) by certified mail, return receipt requested, provided an adequate substitute for contacting the occupants or posting a notice. As discussed, postal service regulations provide that a carrier delivering certified mail, return receipt requested, would either encounter a person at the addressee's home who could examine the letter and the identity of the sender or leave a Form 3845 at the addressee's home with information about the letter, including the identity of the sender.[13] In either event, individuals present at the property would have been informed that the Commissioner of Lands was trying to get in touch with petitioner. And, because delivery of the first letter (and, it appears, the second letter) was attempted three times, that information was likely repeatedly conveyed to those occupying the premises. Thus, the State *did* "contact[] the occupants of the house," Pet. Br. 13, by sending the notice by certified mail, return receipt requested.

4. In short, petitioner's claim (Br. 13) that various efforts to provide notice to him by other means "would have resulted in actual notice to [petitioner], as the facts of this case show,"

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[13] Petitioner is thus mistaken in contending (Br. 14) that "[n]othing in the record suggests that [his wife] had any knowledge of the contents of the letters or even who they were from." It is likely that the occupants did have knowledge of the identity of the sender of the letters, and with that knowledge they could reasonably have assumed that the subject matter was taxes. Under standard Postal Service procedures—and there is no basis for any assumption that they were not followed here—the occupants of the property would have been provided notice, either by the postal carrier directly or by reviewing the Form 3845 that was left for them on each delivery, that the Commissioner of Lands was the sender of the letter.

in the end reduces to the claim that an observer with the benefit of hindsight could easily have determined how to find petitioner and provide notice to him. The State, however, at the time that it was under the obligation to provide notice, did not have the benefit of such hindsight. Moreover, the salient question is not whether the State, if it devoted sufficient means to the matter, could have located petitioner, but whether the method used for this and thousands of other notices was reasonably calculated, *ex ante*, to provide notice. Providing further notice in this case, and in the countless other analogous cases that arise each year, would be both unduly burdensome and speculative.

Accepting petitioner's claim would also have a destabilizing effect on property rights. Under petitioner's view, a State's method of notice could regularly be challenged as inadequate whenever a doubt arose about whether it was in fact successful; whatever method the State used, it would not be difficult for an intended recipient to argue that some other method was available that would have resulted in successfully providing him notice. Especially in the context of claims to real property, the uncertainty that such a system could create would impose high costs on the government when it provided notice, would likely make the properties involved less marketable, and would impose costs as well on successor owners who had good reason to believe they had acquired good title. In administering a system such as the State's property tax system, it is essential that the State know what steps it must take to notify delinquent property owners of upcoming proceedings, and those steps must be "easily ascertainable." *Schroeder*, 371 U.S. at 212-213. Where the State has provided constitutionally adequate notice in the first instance, the fact that some doubt arises as to the success of that notice does not impose an obligation on the State to undertake a new search—or repeated new searches—of uncertain scope for a method of notice designed to reach the intended recipient.

CONCLUSION

The judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted.

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