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Honorable Julia Jordan Weller
Clerk of the Court

Case No. 1200503

IN THE SUPREME COURT OF ALABAMA

JAMES L. DOUGLAS, JR. and SHILOH CREEK, LLC, individually and for a class of similarly-situated persons or entities,

Appellants,

v.

KAREN ROPER; J.D. HESS; CALHOUN COUNTY COMMISSION; DON ARMSTRONG; EDWARD CARTER; JON PARKER; SHELBY COUNTY COMMISSION,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
CASE NUMBER: CV-2016-900121

BRIEF OF AMICI CURIAE PACIFIC LEGAL FOUNDATION & LEGAL SERVICES ALABAMA IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) and Legal Services Alabama (LSA) respectfully submit this Brief of Amici Curiae in support of Appellants James L. Douglas, Jr., and Shiloh Creek, LLC, and reversal.

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded nearly 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several 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.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 844 (Nov. 13, 2020) (granting cert.); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (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. California Coastal Comm'n*, 483 U.S. 825 (1987).

PLF has extensive experience with the questions at issue in this case. PLF attorneys have represented dispossessed owners in cases that raise the question of whether the government effects a taking without

just compensation when it takes more than what it is owed in delinquent taxes. *See, e.g.*, *Rafaeli, LLC v. Oakland Cty.*, 952 N.W.2d 434, 437 (Mich. 2020) (county effected unconstitutional taking when, pursuant to statute, it kept surplus profits from auction). PLF has also participated as amicus in cases involving similar claims. *See, e.g.*, *Harrison v. Montgomery Cty., Ohio*, 997 F.3d 643 (6th Cir. 2021); *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020); *Polonsky v. Town of Bedford*, 238 A.3d 1102, 1104 (N.H. 2020). PLF believes this experience and its unique perspective will assist the Court in its adjudication of this appeal.

LSA is an independent, non-profit, state-wide law firm that provides free legal representation in civil cases to poor people in all 67 counties in Alabama. As the state's primary provider of legal assistance to low-income homeowners, LSA is deeply concerned by the implications that the trial court's ruling represents for its clients. Over the past decade (2010-2020), LSA has helped clients with over 8,000 cases involving homeownership each involving an inherent a risk of homelessness and the possibility of Alabamians unnecessarily becoming dependent on the state. For most of LSA's cases involving homeownership, that property is the only meaningful asset the family owns. In LSA's experience, every

time one of these properties is lost to a tax sale, it means the loss of a generation's wealth. LSA believes that the trial court's interpretation of the statutes and law involved in this case represent a policy which will unfairly burden low-income Alabamians and illegally deprive them of what limited property they have been able to accumulate.

INTRODUCTION AND SUMMARY OF ARGUMENT

When James L. Douglas, Jr., and Shiloh Creek, LLC ("Property Owners") fell behind on their property tax obligations, Calhoun and Shelby Counties ("Counties") sold each of their properties for more than what the Property Owners owed in taxes, penalties, interest, and fees. When the Property Owners requested the excess funds, after long delays the Counties eventually denied their requests, keeping the excess as a windfall for the public. C. 402, 432–33, 435.[1]

To justify keeping the Property Owners' money, the Counties used alternative and conflicting interpretations of Ala. Code § 40-10-28, which

[1] In the case of Property Owner James L. Douglas, Jr., he received a response from the Calhoun County Revenue Commissioner nearly eight months after submitting his initial request for the excess funds. *See* C. 382–83, 404.

governs the refund of excess funds.[2] That statute was amended in 2013, 2014, and 2017, and the parties disagree about which version applies here. *See* Ala. Act 2013-370; Ala. Act 2014-442; Ala. Act 2017-130; (C. 1004.)

The Property Owners filed suit to recover what was left of their former real estate—the excess funds. The Circuit Court, however, denied their claims and rendered a decision based on the incorrect view of the case as one pertaining merely to the "levy and collection of taxes," and concluded that any recovery by prior owners of surplus funds constituted "matters of legislative grace" which may be "modified, limited, conditioned, or removed." (C. 1005.) The Circuit Court held that the Property Owners lacked a vested right to the surplus funds from the tax sale and the court construed §40-10-28 and its various amendments to support a forfeiture in the instant case. (C. 1005–08, 1015–19.).

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[2] Shelby County asserted that the 2014 Amendment to the statute applied retroactively to Shiloh Creek's claim, and that it required redemption of the property, which did not occur here, to recover excess funds. (C. 595–99.) Shelby County asserted that even under the pre-2013 version of the statute, it had the discretion to keep the surplus funds. (C. 599–601.) Calhoun County asserted that the claim period provided in § 40-10-28 was modified by requirements in a different statute. (C. 635.)

This Court should reverse. The Counties took money that does not rightfully belong to them and violated the Constitution's requirement that the government must pay just compensation when it takes private property. *See* U.S. Const. amend. V. The property right at issue here is one of ancient vintage, not legislative grace. Rather than construing statutes against Property Owners, this Court should follow traditional rules of construction that counsel the Court to avoid construing the statute in a manner that would authorize an unconstitutional taking and that counsel against forfeiture.

The Court's decision will impact owners around the state and could have broad implications for Alabamians' property rights. The Counties seem to suggest that § 40-10-28 now grants them the discretion to keep the excess funds from tax sales whenever owners cannot redeem their property by paying the full purchase price upfront. In short, the government claims the power to take more than it is owed. Such a scheme would especially harm the elderly, sick, and poor, who are most likely to lose their property to tax foreclosure.

This Court should make clear that a tax-debtor maintains constitutionally protected property rights in the surplus value of their

property taken as payment for a debt. All statutes should be construed, wherever possible, to uphold property rights. The Court should reverse.

ARGUMENT

I. THE COMMISSION EFFECTED A TAKING BY RETAINING THE PROPERTY OWNERS' EXCESS FUNDS

The Counties seized private property without just compensation when they kept the excess proceeds from the sale of the Property Owners' land. *See, e.g.*, *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434, 437, (Mich. 2020); *Polonsky v. Town of Bedford*, 238 A.3d 1102 (N.H. 2020). The Property Owners' right to the excess funds is not merely a statutory creation. Rather, dispossessed tax-debtors have a traditional, deeply rooted property right to such funds.

A. Tax-Debtors maintain a traditional property right in the equity value of their property

The property right at issue here can be traced to the Magna Carta through the time of the founding of this nation and the state of Alabama. *See Rafaeli*, 952 N.W.2d at 454–55; *see, e.g.*, *McDuffee v. Collins*, 23 So. 45, 46 (Ala. 1898). Traditionally, tax collectors could seize property to collect a debt, but they had to sell the property, pay the debt with the proceeds, and refund the surplus profits to the former owner. *Rafaeli*, 952

N.W.2d at 464 (citing 2 William Blackstone, Commentaries on The Laws of England, p. 452); *McDuffee*, 23 So. at 46 (tax collector must follow "well-known general rule of law" by selling property and paying surplus proceeds to former owners/lienholders in order of priority). When the tax collector failed to refund the surplus, the former owner could bring an action to recover it. *See, e.g.*, *Cone v. Forest*, 126 Mass. 97, 101 (1879) (tax collector liable for unlawful conversion of private property). A debtor's right to the surplus value of his property exists regardless of whether state statutes recognize it. *Farnham v. Jones*, 19 N.W. 83, 85 (Minn. 1884) ("[T]he right to the surplus exists independently of such statutory provision.").

Early American law built on English law to protect tax-debtors' equity. *Martin v. Snowden*, 59 Va. 100, 137 (1868), *affirmed sub nom. on other grounds Bennett v. Hunter*, 76 U.S. 326 (1869); *Timbs v. Indiana*, 139 S. Ct. 682, 695 (2019) (recognizing that colonists had rights of Englishmen). Long after the founding, the states and their courts overwhelmingly protected that equity. *See, e.g.*, Thomas M. Cooley, *A Treatise on the Law of Taxation* 343–44 (1876) (noting all states protected former owner's equity); *McDuffee*, 23 So. 45; *People ex rel.*

Seaman v. Hammond, 1 Doug. 276, 280–81 (Mich. 1844); *Cone*, 126 Mass. at 101 (when a tax collector failed to refund the extra profits, dispossessed owner could bring an action in trespass or trover to recover it). Most states still protect equity by guaranteeing the surplus proceeds from the sale of tax-indebted property to the former owner.[3]

Likewise, Alabama traditionally has protected equity by requiring a sale of tax-delinquent property and a refund of surplus profits to the former owner. *McDuffee*, 23 So. at 46 (explaining the "well-known" common law and statutory rule that tax collector must pay over surplus funds to former interest-holders in order of priority). In other contexts, Alabama law regularly recognizes that a debtor is entitled to a return of any surplus proceeds produced from a sale of that property. *See, e.g., Davis v. Huntsville Prod. Credit Ass'n*, 481 So. 2d 1103, 1106 (Ala. 1985) ("When property is sold at a foreclosure sale, conducted under the power

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[3] PLF research has found that 38 states ordinarily protect debtors' equity in tax-delinquent property. *See, e.g.*, Ark. Code § 26-37-209; Conn. Gen. Stat. § 12-157(h); Del. Code tit. 9 § 879; Fla. Stat §§ 197.522, 197.582; Ga. Code Ann. § 48-4-5; Idaho Code § 31-608(2)(b); Kan. Stat. § 79-2803; Ky. Rev. Stat. § 426.500; Mo. Rev. Stat. § 140.340; Nev. Rev. Stat. § 361.610.5; 72 Pa. Cons. Stat. Ann. § 1301.2, 1301.19; S.C. Code Ann. § 12-51-130; S.D. Code § 10-22-27; Tenn. Code Ann. § 67-5-2702; Va. Code Ann. § 58.1-3967; Wash. Rev. Code Ann. § 84.64.080; W. Va. Code § 11A-3-65; Wyo. Stat. § 39-13-108(d)(4).

of sale contained in a mortgage, at an amount greater than the indebtedness secured by the mortgage, the mortgagee is liable to the mortgagor for the surplus."); Ala. Code § 6-9-93 ("When, at an execution sale, the amount of the sale exceeds the judgment, interest and costs, the excess must be paid to the debtor . . . ."). Indeed, for many years Ala. Code § 40-10-28 unequivocally followed this tradition. *See, e.g.*, *First Union Nat'l Bank of Fla. v. Lee Cty. Comm'n*, 75 So. 3d 105, 113 (Ala. 2011) (although the statute did not define "owner," the statute plainly intended that the *former* owner—not the government—receive those funds).

In short, the Property Owners have a traditionally protected property right to the savings stored up in their former real estate—their equity. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (recognizing common law property rights are "private property" protected by Constitution); *Armstrong v. U.S.*, 364 U.S. 40 (1960)(a lien is "private property"). Although the government has a superior right to seize and sell the property to collect a valid debt, it is only entitled to collect as much as it is owed. *See supra*, Cooley 343–44. Therefore, regardless of which iteration of § 40-10-28 applies, and

regardless of whether the statute recognizes the Property Owners' right to the excess funds, the Takings Clause protects that property interest.

B. Government effects a taking without just compensation when it takes more than it is owed

The Takings Clause provides that government must pay just compensation when it takes private property for a public use. U.S. Const. amend. V. Because a tax-debtor's equity and its equivalent—excess funds—are a discrete private property interest, the government is liable for a *per se* taking when it seizes it for public use. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) ("direct appropriation" of property or the "functional equivalent" is a classic taking); *Cf. Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426–27 (2015) (Takings Clause protects property interests recognized by Magna Carta and Founders). The government may constitutionally take and sell foreclosed properties for the public purpose of collecting a valid tax debt. But to avoid violating the Takings Clause, the government must either pay for the equity at the time it takes the property, or it must sell and refund the surplus proceeds to the former owner. *See e.g.*, *Bogie v. Town of Barnet*, 129 Vt. 46, 46–47 (1970).

By confiscating money that rightfully belongs to the Property Owners, the Counties in this case effected a classic taking. This is true regardless of which provision or rules of statutory interpretation apply. Amici believe the pre-2013 statute applied, a position also supported by Calhoun County.[4] That version plainly required a refund to the former owner.[5] *See First Union*, 75 So. 3d at 113. The government effects a taking when it fails to comply with a statute requiring a refund of surplus proceeds. *United States v. Lawton*, 110 U.S. 146, 150 (1884).

The Counties would still effect an unconstitutional taking even if the applicable statute purported to extinguish the former owner's rights to excess funds. *See, e.g., Webb's*, 449 U.S. at 164 (Government cannot "by *ipse dixit* . . . transform private property into public property without compensation."); *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (confiscation of a privately owned interest is a taking). The high courts of Michigan, New Hampshire, Mississippi, Vermont, and Virginia, and several federal district courts have held that such attempts effect a

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[4] *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at p. 261 (2012) ("A statute presumptively has no retroactive application").

[5] "Pre-2013" is intended to refer to §40-10-28 as it existed prior to the amendment that occurred in 2013.

taking without just compensation. *Rafaeli*, 952 N.W.2d at 459 (taking the historically rooted right to surplus proceeds from tax sale violates state Takings Clause); *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) (statute granting government surplus proceeds from tax sales violates state constitution's Takings Clause); *Griffin v. Mixon*, 38 Miss. 424, 436–37 (Miss. Err. & App. 1860); *Bogie*, 270 A.2d at 900, 903 (citing *Lawton*, 110 U.S. 146, and holding retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation"); *Martin*, 59 Va. at 142–43 (violates due process of law by taking more than owed) *aff'd on other grounds sub nom. Bennett*, 76 U.S. 326; *King v. Hatfield*, 130 F. 564, 579 (C.C.D.W. Va. 1900); *Fox v. Cty. of Saginaw*, No. 19-CV-11887, 2021 WL 120855, at *12 (E.D. Mich. Jan. 13, 2021); *see also Coleman through Bunn v. District of Columbia*, 70 F. Supp. 3d 58, 80 (2014) (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman*, No. 13-1456, 2016 WL 10721865 *2–3 (D.D.C. June 11, 2016) (recognizing District of Columbia law treats equity as a form of property in other contexts and thus Constitution protects equity as compensable property interest).

Similarly, the state supreme courts of Indiana, North Dakota, Texas, and Alaska have also criticized the idea that government could legitimately extinguish equity or liens on tax-delinquent properties and have interpreted tax sale statutes to avoid that result. *Lake Cty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004) (noting it would "produce severe unfairness" and likely violate the Takings Clause); *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191–92 (Tex. 1995), as amended (June 22, 1995) ("Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit"); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981) (refusing to interpret the law as confiscating the surplus); *Shattuck v. Smith*, 69 N.W. 5, 12 (N.D. 1896) (noting statute would likely be unconstitutional "if [it] contained no provision that the surplus should go to the landowner"). Similarly, the U.S. Supreme Court has repeatedly refused to interpret federal law as depriving property owners of the surplus value of their property when sold by the United States to satisfy a tax debt. *United States v. Taylor*, 104 U.S. 216, 221 (1881); *Bennett*, 76 U.S. at 335–36; *Lawton*, 110 U.S. at 147 (relying on *Bennett* and *Taylor*).

Moreover, Supreme Court takings cases demonstrate that the government violates the Fifth Amendment when it confiscates a traditional property interest by statutorily redefining private property as public property. In *Webb's*, 449 U.S. at 158–59, the Supreme Court held that government violated the Takings Clause by keeping the interest earned on private funds deposited with a court. The Court explained that the Takings Clause cannot be avoided by statutorily redefining private funds as public funds merely because they are held temporarily by the government: "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. Similarly, in *Phillips v. Washington Legal Found.*, 524 U.S. 164, 167 (1998), the Court rejected regulatory efforts to "sidestep the Takings Clause by disavowing traditional property interests."

The taking of the Property Owners' equity interest in their property bears analogy to the injustice considered by the Supreme Court in *Armstrong v. United States*, 364 U.S. 40 (1960). In that case, a shipbuilder contracted by the United States defaulted on its obligation to build ships, and the United States took title to the unfinished boats and

materials, pursuant to contractual and common law rights. *Id.* Material suppliers claimed the United States had unconstitutionally extinguished their liens on the unfinished boats and supplies. *Id.* The Supreme Court agreed, holding that property rights in liens do not simply disappear when the government takes title to property. *Id.* at 48. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id.* The government could only take the underlying property subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id.* at 49. Like in *Armstrong*, the County here claims it can extinguish the former owners' interest in the equity value of their property, without compensation. But it has a constitutional obligation to pay for that value.

II. STATUTES MUST BE STRICTLY CONSTRUED TO AVOID FORFEITURE

Given the robust history recognizing that the excess proceeds belong to the former property owner, this Court should not lightly assume the legislature intended to extinguish former owners' property rights to that money. Rather, this Court should, wherever possible, construe the statute to avoid forfeiture and to protect property rights. "Forfeitures are not favored in the law. Courts always incline against them. When either

of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred." *Farmers' & Mechanic' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875) (omitting citation). Statutes which authorize condemnation and forfeiture of property are "highly penal" in nature and must be "strictly construed" in favor of preserving property rights. *Reeder v. State ex rel. Myers*, 294 Ala. 260, 265, 314 So. 2d 853, 857 (Ala. 1975).[6] Indeed, courts "favor individual property rights when interpreting forfeiture statutes." *Sogg v. Zurz*, 905 N.E.2d 187, 191 (Ohio 2009); *see also Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., plurality opinion) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit"). Moreover, regardless of what a statute says, "[e]quity often interferes to relieve against forfeitures, but never to divest estates by enforcing them." *Loeser v. Gardiner*, 1 Alaska 641, 645 (D. Alaska 1902); *Mt. Diablo Mill & Mining Co. v. Callison*, 17 F. Cas. 918, 925 (C.C.D. Nev. 1879); *see, e.g., Dean v. Michigan Dep't of Natural Resources*, 247 N.W.2d 876, 877 (Mich. 1976) (unjust enrichment claim properly raised where homeowner

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[6] *See also State ex rel. Williams v. One Glastron Boat*, 411 So. 2d 795, 796 (Ala. Civ. App. 1982); *Jackson v. Evans*, 379 So. 2d 1236 (Ala. 1979).

owed $146 in taxes but government sold property and kept excess proceeds pursuant to state law).

Given that the law disfavors forfeitures and inclines toward preserving property rights, the government has the burden of proving its forfeiture is valid. *See Loeser*, 1 Alaska at 645; *Mt. Diablo Mill & Mining Co.*, 17 F. Cas. at 925. Indeed, when Congress passed a statute partly aimed at "suppressing rebellion" in Confederate states and that appeared to forfeit title and all equity in tax-delinquent property, the U.S. Supreme Court twice chose a statutory interpretation to avoid that outcome. In *Bennett*, 76 U.S. at 335, 337, the Supreme Court interpreted a statute that appeared to forfeit owners' title and all equity in tax-delinquent property to avoid such an outcome. The Court construed "forfeit" as meaning the owner was merely in danger of a tax sale and could still redeem the property, because it is "proper" to avoid such a "highly penal" provision where milder construction is possible.

In *United States v. Taylor*, 104 U.S. 216, 219, 221–22 (1881), the Supreme Court relied partly on *Bennett*, noting the purpose of the statute was primarily tax collection, not "confiscation." Based on that purpose, the Court construed the same statute to allow the former owner

to claim $2,929.50 in surplus proceeds from the sale of his tax delinquent property. The Court refused arguments that the federal catch-all statute of limitations applied because "a construction consistent with good faith on the part of the United States should be given to these statutes." *Id. at* 221.

The Court here should likewise construe Alabama's statutes to avoid an unconstitutional or "highly penal" construction and to protect property rights. Courts should not assume the legislature intended forfeiture, so long as another construction can be given the statute.

Here, Amici agree the pre-amendments version of §40-10-28 applies. That pre-2013 version provided that after three years, if the former owner did not claim the money, the treasurer should place the funds in the general fund. *See* §40-10-28. The "rightful owner" could then claim those funds within 10 years: the relevant portion of the original version of provided: "At any time within 10 years after such excess has been passed to the credit of the general fund of the county, the county commission **may** on proof made by any person that he is the **rightful owner** of such excess of money order the payment thereof to such owner, his heir or legal representative, but if not so ordered and paid within such

time, the same shall become the property of the county." Ala. Code §40-10-28 (2012) (emphasis added). The Circuit Court held that the word "may" was permissive, i.e., that once deposited in the general fund, the Commission was free to keep it and therefore was allowed to deny the Property Owners' claims. (C. 1000–1019).

The pre-2013 version of the statute should be interpreted as acknowledging a continued property right for the former owner. First, "may" can mean "shall," as the Property Owners explain. Appellant Br. pp. 49-50. Indeed, "[w]here a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall.'" *Mason v Fearson*, 50 US 248, 259 (1850). Justice and the public good are benefited by the protection of property rights. *See* James Madison, Property, National Gazette, Mar. 29, 1792 ("Government is instituted to protect property of every sort . . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."). Second, the statute further conveys a continued property right of former owners like the Property Owners here, by calling them the "rightful owner." If the legislature intended to extinguish the former owner's property right to the surplus after three

years, it surely would have conveyed that by noting the owner's now expired interest. In other words, it could say the "once" or "former" "rightful owner." The rules favoring property rights and disfavoring forfeitures counsel that any ambiguity or silence should be weighed in favor of preserving property rights.

Indeed, courts and the Counties have long thought that former owners had thirteen years to claim the funds before the County could extinguish their rights. *See, e.g., Winston v. Jefferson Cty., Alabama*, No. 2:05-CV-0497-RDP, 2007 WL 9712006, at *6 (N.D. Ala. June 25, 2007) (". . . the forfeit may not be permanent as the County gives taxpayers a thirteen-year grace period and mechanism by which to reclaim their property even after a tax sale has taken place."). The Appellees previously recognized former owners were entitled to claim the excess within thirteen years after a tax sale. *See e.g.,* (C. 454–55, 476–477) (Shelby County's property tax commissioner affirmed that the surplus funds belonged to the owners of the property sold, not to the County, for at least thirteen years after sale, even after the funds are transferred to the county's general fund.); (C. 496–97, 558–60) (Calhoun County representatives made similar concessions). Thus the Counties

themselves have acknowledged that the statute is reasonably capable of the construction given to it by the Property Owners. And since that is the rule that better protects property rights and promotes justice, this Court should hold that the Property Owners rights had not expired.

If a later amendment of the claim statute applies, the Court should also construe the statute to avoid causing an unconstitutional taking of debtors' equity in their property (realized in the form of excess funds). *See State v. Lupo*, 984 So. 2d 395, 403 (Ala. 2007) ("The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.") (quoting *Alabama State Fed'n of Labor v. McAdory*, 18 So. 2d 810, 815 (Ala. 1944)). Extinguishing debtors' right to claim the excess funds would violate the Takings Clause. *See supra*, Section I.B. The Court should not assume that the legislature intended to destroy the right, merely because later version of the statutes are silent about debtors' rights to claim the surplus funds if they do not redeem the property. As this Court recently noted, this state's tax sale and redemption process "is not designed as a

punitive cudgel to extort from homeowners more than they owe." *Ex parte Milne*, 308 So. 3d 914, 915 (Ala. 2020) (C.J. Parker specially concurring). Nor is it designed to "to create a pot-o'-gold windfall" at former owners' and mortgagors' expense. *See id.* (discussing most recent amendments).

III. THE COUNTIES' INTERPRETRATION OF THE STATUTE HERE WILL IMPACT THE STATE'S MOST VULNERABLE RESIDENTS

This case will impact the rights of property owners around the state. Often property owners who lose their property to tax-related foreclosures suffer from illness, cognitive problems, simple poverty, or do not understand the consequences of allowing their property to be foreclosed on for delinquent taxes, which are dramatically worse than other types of liens. *See, e.g., Tallage Lincoln, LLC v. Williams,* 151 N.E.3d 344, 350 (Mass. 2020) (delinquent property owners typically cannot afford counsel and the law is difficult even for "experienced attorneys" to understand). Elderly property owners are especially susceptible to losing their property to a tax foreclosure because as they move into senior living or medical facilities, children's homes, or are otherwise displaced they often miss notices. *See* Jennifer C.H. Francis,

Comment*, Redeeming What is Lost: The Need To Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 Geo. Mason U. Civ. Rts. L.J. 85 (2014).

In *Coleman*, an elderly veteran with dementia lost his $200,000 home over a $133 deficiency, plus approximately $5,200 in penalties, interest, fees, and costs. *Coleman*, 70 F. Supp. 3d at 64. Failure to protect struggling Alabamans' property rights would create a perverse incentive for counties to provide poor notice, or to increase obstacles for property owners to redeem their property or claim the excess funds. *See Harmelin*, 501 U.S. at 978 n.9 (Scalia, J., plurality opinion) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."). In fact, poor notice is already often a problem. For example, according to Thomasyne Eldridge, he did not learn about his peril "[u]ntil the holder of the tax deed contacted" him. Had he received notice, he "could have easily paid the $2,000 in taxes to keep the home from being sold." Unfortunately, Jefferson County failed to warn him about the sale, or about the $19,000 in surplus proceeds from the sale. (Supp.C. 500-501.) This account underscores the need for this Court to protect debtors' rights and prevent counties from seizing windfalls at their expense.

CONCLUSION

For these reasons, this Court should reverse and remand.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Ala. R. App. P. 32. This brief was typed using Century Schoolbook 14 font and contains a total of 4,886 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on June 22, 2021, I e-filed the foregoing brief through ACIS. Ten copies of the brief will be mailed to the Clerk. I will serve an electronic copy on counsel for the appellants and the appellees by email and a hard copy by U.S. Mail.

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