

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GARY KENT JONES, :

4                      Petitioner,                      :

5 v. : No. 04-1477

6 LINDA K. FLOWERS, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, January 17, 2006

10                   The above-entitled matter came on for oral  
11       argument before the Supreme Court of the United States  
12       at 11:12 a.m.

13      APPEARANCES:

14 MICHAEL T. KIRKPATRICK, ESQ., Washington, D.C.; on  
15 behalf of the Petitioner.

16 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf  
17 of the Respondent.

18 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor  
19 General, Department of Justice, Washington, D.C.;  
20 on behalf of the United States, as amicus curiae,  
21 supporting the Respondents.

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P R O C E E D I N G S

(11:12 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument  
next in Jones v. Flowers.

Mr. Kirkpatrick.

ORAL ARGUMENT OF MICHAEL T. KIRKPATRICK  
ON BEHALF OF THE PETITIONER

MR. KIRKPATRICK: Mr. Chief Justice, and may  
it please the Court:

In Mullane, this Court held that due process  
requires that notice efforts conform to what a person  
who actually desires to provide notice would do under  
the circumstances. Such a person would not turn a  
blind eye to the return of an initial mailed notice,  
but would consider reasonable follow-up steps to  
provide that notice.

Where valuable real property is at stake and  
the State learns that its initial effort has failed,  
the State should do two things. First, it should  
search readily available sources for a better mailing  
address and resend the notice, and second, if a better  
address cannot be readily ascertained or the second  
notice also fails, the State should post a notice on  
the property or contact the occupants.

JUSTICE SCALIA: Mr. Kirkpatrick, I don't

1 recall what -- what the rule is. Does notice have to  
2 be given by registered mail? Would it -- would it be  
3 adequate notice in the -- in the ordinary case to send  
4 notice by regular mail?

5 MR. KIRKPATRICK: Justice Scalia, in a case  
6 like this where there's valuable real property, regular  
7 mail would not be sufficient to comply with due  
8 process, and the reason why is this. A reasonable  
9 person who actually desires to give notice will use  
10 certified mail for the information that comes back to  
11 the sender. Then the sender either knows the notice  
12 has been received and they can stop with confidence, or  
13 they know that they have failed and there's still time  
14 to take reasonable follow-up steps.

15 JUSTICE SCALIA: Yes, but do we have a case  
16 that says that, you have to use registered mail?

17 MR. KIRKPATRICK: No, Your Honor.

18 JUSTICE SCALIA: I didn't think we did. And  
19 it would seem to me that especially when you have the  
20 taxpayer's name and address on file, I doubt whether it  
21 would be a denial of due process to send notice by  
22 regular mail to that address. And if -- if that  
23 satisfies due process, the State would never have known  
24 that it did not reach the individual.

25 MR. KIRKPATRICK: Justice Scalia --

1 JUSTICE SCALIA: And it seems -- it seems  
2 mean to punish the State for going the extra mile and  
3 sending the notice by registered mail because that  
4 informed them that it didn't reach him.

5 MR. KIRKPATRICK: Yes, but Justice Scalia,  
6 the State, once informed that the letter had never  
7 reached Mr. Jones, did nothing. The State was  
8 indifferent to the information that came back. So, in  
9 fact, what the State did here was no better than  
10 sending regular mail because they ignored the  
11 information that came back from the use of certified  
12 mail. And, in fact, had they used regular mail, it  
13 might have been better for Mr. Jones.

14 Now, we're here in this case to discuss what  
15 due process --

16 JUSTICE GINSBURG: Why?

17 MR. KIRKPATRICK: Well --

18 JUSTICE GINSBURG: In Mullane, it was regular  
19 mail. It wasn't certified mail. Right?

20 MR. KIRKPATRICK: Yes, that's correct.

21 JUSTICE GINSBURG: And isn't it 100 percent  
22 clear that there were a number of those addressees who  
23 didn't get the letter?

24 MR. KIRKPATRICK: Yes, Justice Ginsburg,  
25 that's correct, but --

1 JUSTICE GINSBURG: And yet, their interests  
2 were cut out by the decision, and the Court said that  
3 was okay.

4 MR. KIRKPATRICK: Well, the context was very  
5 different in Mullane because in Mullane there was a  
6 large number of interested parties with very small  
7 interests in a trust, and what they were being given  
8 notice of was an accounting to settle those trusts.  
9 And as long as some of the people who were similarly  
10 situated received notice, they could act in a way that  
11 would protect other members of the class.

12 Here, we're talking about real property with  
13 just a single owner, and in this case, where we have an  
14 \$80,000 house that was lost and sold for only \$21,000,  
15 it would seem to me that due process would require more  
16 than just regular mail.

17 JUSTICE GINSBURG: But you have another  
18 factor here that wasn't present in Mullane; that is,  
19 the person who received notice has a statutory  
20 obligation to advise government of the current address.

21 The people involved in Mullane had no such obligation  
22 to notify anybody of their current address.

23 MR. KIRKPATRICK: That's correct, Justice  
24 Ginsburg. But what Mullane announced is that the  
25 government must use reasonable diligence to ascertain

1 an address where it can be found. In this case, we  
2 don't quarrel --

3 JUSTICE GINSBURG: It wasn't the government  
4 in -- in Mullane it wasn't the government.

5 MR. KIRKPATRICK: Well, that's right. The --  
6 the party charged with giving notice in Mullane had an  
7 obligation --

8 JUSTICE SOUTER: How do -- how do we -- I  
9 mean, this was the problem I -- I had with -- with your  
10 -- your brief here, and it's the same problem Justice  
11 Ginsburg has. What kind of weight, what significance  
12 do we give to this obligation to keep the government  
13 informed?

14 On the face of it, it seems like a -- an  
15 obligation that ought to get considerable weight.  
16 Everybody knows that if you own real estate, you've got  
17 to pay real estate taxes on it. You're going to have a  
18 hard time doing that if they don't know where to send  
19 the bill, and so on. So it seems like a very  
20 reasonable obligation for the government to put on you.

21 What weight do we give that in -- in the  
22 analysis?

23 MR. KIRKPATRICK: Justice Souter, I think it  
24 is given weight when we evaluate the reasonableness of  
25 the initial notice effort, and we do not quarrel with

1 the State first sending notice by certified mail to the  
2 last address in the State property records.

3 JUSTICE SOUTER: And then that would be so  
4 even if there were no affirmative obligation on the  
5 property owner.

6 MR. KIRKPATRICK: Yes.

7 JUSTICE SOUTER: You'd say, well, if they --  
8 if they send the -- the notice to the last address they  
9 had, or if they send it -- since we're talking about  
10 real estate, maybe if they send it to the -- to the  
11 property, nothing wrong with that. So that's kind of a  
12 wash.

13 MR. KIRKPATRICK: Justice Souter, I think  
14 that there are a couple of points that need to be made.

15 One is that Mr. Jones' failure to update his  
16 address did not relieve the State of its constitutional  
17 obligation.

18 JUSTICE SOUTER: No. But I want to know what  
19 Mr. -- I mean, it does not relieve it of some  
20 constitutional obligation, and we're trying to figure  
21 out what that is. And -- and the point of my question  
22 is in figuring out what it is, what significance do we  
23 give to the affirmative obligation on the part of the  
24 property owner to keep the government informed of the  
25 address?



1                   MR. KIRKPATRICK: The answer is once the  
2 State was informed that the first mailed notice had  
3 failed, it gets no significance.

4                   JUSTICE SOUTER: All right. Then -- then it  
5 has no significance ever because the -- the State has  
6 an obligation to use the best address it has, whether  
7 he's got an obligation to -- to keep the address  
8 updated or not. And -- and this is the -- the tough  
9 point for me with your case. It seems to me that your  
10 case depends on our saying the obligation to keep the  
11 -- the address current has absolutely no significance.

12                  MR. KIRKPATRICK: Justice Souter, it has no  
13 significance once the State is actually informed that  
14 the notice has failed because I think the significance  
15 of the statute is it increases the State's confidence  
16 in the address that it's initially using. But once the  
17 certified mail comes back unclaimed, at that point it  
18 knows that the address from 1967 in its records and the  
19 statutory obligation to update the address, that is  
20 outweighed by actual knowledge that in both 2000 and  
21 2003 the certified mail notices were not received.

22                  I'd like to go back to Justice Ginsburg's  
23 first question about why regular mail might actually  
24 have been better in this case. Had regular mail been  
25 sent, we don't know what would have happened. We might

1 not have had a due process challenge because the  
2 envelope would have ended up in the mailbox at Bryan  
3 Street. It would have been brought inside by the  
4 occupants, and they may very well have brought it to  
5 Mr. Jones' attention, the way they did when they  
6 received the eviction notice after the redemption  
7 period had closed.

8 But I think the most important factor, even  
9 if we don't agree on whether certified mail was  
10 required by the Constitution in the first instance, is  
11 that once the government used certified mail, it cannot  
12 then ignore the information that it gained as a result  
13 of that choice. This --

14 JUSTICE GINSBURG: And he also had a  
15 continuing obligation to inform the government of his  
16 address.

17 One fact about this case that -- perhaps it  
18 was in the record and I missed it. At the time the  
19 property was sold, how much did Mr. Jones owe, taking  
20 account of the back taxes, the interest, the penalties,  
21 all that?

22 MR. KIRKPATRICK: Approximately \$6,000  
23 because the property was sold for \$21,000. The minimum  
24 bid was the assessed value of the property, which in  
25 Arkansas is 20 percent of the fair market value. So

1     that was about \$14,000. Plus about \$4,000 in back  
2     taxes, another 10 percent in interest, and another 10  
3     percent in penalties, and some small, in this instance,  
4     costs of notice.

5             But that brings us to an important point, is  
6     that the cost of notice and the cost of a search to  
7     find a better address will not be borne by the State.  
8     It will be borne either by the owner as a cost of  
9     redeeming the property or it will be borne by the  
10    purchaser as a cost of acquiring the property. So  
11    certainly here where we have an \$80,000 house sold for  
12    \$21,000, there was sufficient margin to allow for some  
13    costs to find Mr. Jones so that he could be informed  
14    without making this property --

15            JUSTICE BREYER: How did they find him, by  
16    the way?

17            JUSTICE STEVENS: Would you tell me --

18            JUSTICE BREYER: -- how in your opinion?

19            JUSTICE STEVENS: Oh, excuse me.

20            JUSTICE BREYER: How did they find him?

21            MR. KIRKPATRICK: The purchaser served an  
22    eviction notice to the property --

23            JUSTICE BREYER: No. I'm not saying how did  
24    they? How in your opinion should the Post Office  
25    Department or the government have found him?

1           MR. KIRKPATRICK: They should have searched  
2     three categories of sources for a better address and  
3     then tried mail again. And those three categories are  
4     the State's own records, such as the driver's license  
5     records or voter registration rolls; second, public  
6     directories like the phone book or an Internet search  
7     engine; and third, they should have considered using  
8     commercial services such as those that are used by  
9     creditors.

10           JUSTICE STEVENS: May I ask --

11           JUSTICE BREYER: So they find 13 people  
12     called Gary Jones or G. Jones in Little Rock. Now,  
13     what do they do?

14           MR. KIRKPATRICK: Two things. One is they  
15     can look for the Gary Jones that has some tie to the  
16     Bryan Street address, and certainly --

17           JUSTICE STEVENS: May I interrupt with this  
18     question? Do you think all those steps were  
19     constitutionally mandated?

20           MR. KIRKPATRICK: No. I think what is  
21     constitutionally --

22           JUSTICE STEVENS: What was constitutionally  
23     mandated in your view?

24           MR. KIRKPATRICK: Reasonably diligent efforts  
25     to ascertain a correct address after the return of the

1 first certified mail and how far --

2 JUSTICE STEVENS: So you would not include  
3 posting on the -- posting a notice on the house as  
4 constitutionally mandated.

5 MR. KIRKPATRICK: Justice Stevens, I would.  
6 First, I think that the State can search for a better  
7 address by mail.

8 JUSTICE STEVENS: No, they can -- they can do --

9 MR. KIRKPATRICK: Yes.

10 JUSTICE STEVENS: -- a lot things.

11 MR. KIRKPATRICK: But --

12 JUSTICE STEVENS: I'm trying to decide what  
13 they must do.

14 MR. KIRKPATRICK: With real property, if the  
15 owner has not been notified by mail, absolutely I think  
16 they should post notice on the property. That is a  
17 traditional way --

18 JUSTICE STEVENS: Would that be  
19 constitutionally sufficient if they posted a notice?

20 MR. KIRKPATRICK: It would be  
21 constitutionally sufficient if they posted a notice  
22 because they could not ascertain a better address.

23 JUSTICE STEVENS: Well, now so it would not  
24 be constitutionally sufficient if that's all they did.

25 MR. KIRKPATRICK: That's correct. And I

1 think that's --

2 JUSTICE STEVENS: So what is the  
3 constitutional minimum that would be sufficient?

4 MR. KIRKPATRICK: Reasonably diligent efforts  
5 to find a better address and if a better address --

6 JUSTICE STEVENS: It would be decided on a  
7 case-by-case basis depending on the particular facts in  
8 the case.

9 MR. KIRKPATRICK: Well, this Court in  
10 *Schroeder v. City of New York*, I think, recognized that  
11 it's impossible to have a mechanical rule to apply in  
12 every circumstance. I do think, though, that the --

13 JUSTICE STEVENS: And your opponent argues  
14 very persuasively the mechanical rules are very  
15 important in this particular area of government  
16 business.

17 MR. KIRKPATRICK: Well, they are, but in this  
18 case, the State knew within 2 weeks of sending the  
19 initial mailed notice that it had not been received.  
20 That was 3 years before the taking. So there was  
21 sufficient time for the State to take some very minimal  
22 efforts to provide notice.

23 And remember, with regard to posting, in this  
24 case the State actually visited the Bryan Street  
25 property and they did not post a notice or contact the

1 occupants at that time, although they could have done  
2 so for virtually no cost at all, no additional effort.

3 And we know from what happened with the eviction  
4 notice that had they taken that very minimal effort to  
5 post the notice, it would have worked.

6 JUSTICE SOUTER: But I take it in -- in this  
7 case -- I mean, I -- you're probably right that it  
8 would have -- it would have worked here, but I -- I  
9 take it that in the absence of that -- that hindsight,  
10 you would say that in -- in the regular case that  
11 simply posting notice on the house, after the letter is  
12 returned, would not be enough, that the -- that the  
13 posting on the house would be sufficient only if they  
14 had exhausted other efforts to get a better address so  
15 that in this case, going back to Justice Breyer's  
16 example, they -- they'd have to follow up whatever it  
17 is, the 18 G. Joneses or Gary Joneses that they could  
18 find in the phone book before they could then fall back  
19 and resort to posting on the house. Is -- do I  
20 understand you correctly?

21 MR. KIRKPATRICK: Justice Souter, you do.  
22 That -- that is our -- our point, but I would like to  
23 qualify that slightly.

24 In -- if the search does not, with reasonably  
25 diligent efforts, turn up a better address or if

1     there's a better address and the letter comes back, I  
2     think at that point it's perfectly reasonable to stop  
3     searching for an address, to give up on mailed notice,  
4     and at that point post the property because getting --

5             CHIEF JUSTICE ROBERTS: Well, the search of  
6     -- the search of what? Just Little Rock or the State  
7     of Arkansas? What if this guy had moved to Chicago?  
8     They -- he'd be out of luck under your approach then.

9             MR. KIRKPATRICK: Well, if they contracted  
10    with a credit bureau, for example, or a skip tracer, it  
11    is quite easy to find people that have moved across the  
12    country, much easier today than it was, you know, years  
13    ago because technology has really expanded the amount  
14    of information that is readily ascertainable.

15            JUSTICE GINSBURG: How many people --

16            JUSTICE KENNEDY: Does -- does it follow from  
17    your argument that someone who purchases at a tax sale,  
18    before they conclude the purchase, should find out what  
19    the State has done?

20            MR. KIRKPATRICK: Justice Kennedy, that would  
21    be a reasonable way to have a statutory scheme.

22            JUSTICE KENNEDY: And the purchaser from that  
23    purchaser the same. In other words, if Flowers had  
24    sold to X, then X has to make the same inquiry because  
25    he sees I guess what, a quit claim deed or a tax sale.



1       So before a purchaser can purchase from Flowers, that  
2       purchaser too must see whether or not they hired an  
3       outside agency and so forth.

4               MR. KIRKPATRICK: It might be prudent to do  
5       that. I think that one --

6               JUSTICE KENNEDY: Well, isn't it required to  
7       do that under your title, if you're going to have your  
8       title set aside by Jones?

9               MR. KIRKPATRICK: Yes, although if the title  
10      is set aside, Ms. Flowers will receive a full refund of  
11      all the money that she's paid, and that's under the  
12      Arkansas statutory scheme.

13              JUSTICE KENNEDY: Well, what about the  
14      purchaser from Jones? If -- pardon me -- from Flowers.  
15      If Flowers has spent the money, then that purchaser is  
16      out of luck.

17              MR. KIRKPATRICK: That may be correct and I  
18      think when somebody goes to purchase property and they  
19      find out that title insurance is not available because  
20      of the tax sale deed, they have to consider the  
21      potential exposure.

22              JUSTICE KENNEDY: So one of the consequences  
23      of your rule is to devalue any property sold by the  
24      government because it is open to this kind of challenge  
25      for deficiency in title. So you've now devalued the

1 property in the hands of the State.

2 MR. KIRKPATRICK: I think only for a  
3 temporary period of time because there's a 2-year  
4 statute of limitations to challenge the sale and that's  
5 why the State tells tax sale purchasers that they  
6 should not make expensive improvements to property  
7 until that time has closed.

8 JUSTICE STEVENS: May I ask, Mr. Kirkpatrick?

9 In Arkansas, is the tax -- tax delinquency a matter of  
10 public record so a prospective purchaser would find it  
11 by making a title search?

12 MR. KIRKPATRICK: It is a matter of public  
13 record. I'm not sure whether --

14 JUSTICE STEVENS: But it could be revealed by  
15 a title search?

16 MR. KIRKPATRICK: I don't know, Your Honor,  
17 whether a title search would reveal it, but certainly  
18 in the county records, all of the delinquent properties  
19 are entered and open to the public for inspection.  
20 They may have to look in two different places.

21 JUSTICE SCALIA: Would this case come out  
22 differently? You know, your client had an  
23 obligation to keep the State informed of -- of his --  
24 his address so that they could send the tax bills to  
25 him, suppose the statute, in addition to simply

1     reciting that obligation, said, and if the taxpayer  
2     does not keep the State advised of his current address,  
3     any notice mailed to the last address that he gave will  
4     suffice for all purposes.

5             MR. KIRKPATRICK: Justice Scalia, I --

6             JUSTICE SCALIA: Suppose it said that  
7     explicitly. Would that -- would that make this case  
8     come out differently?

9             MR. KIRKPATRICK: No, it would not because --

10            JUSTICE SCALIA: Why? I mean, the State can  
11    punish people for not doing what the law tells them to  
12    do, and here the State is saying we tell you to keep us  
13    -- you keep us advised of your -- your address. If you  
14    don't, I guess we could throw you in jail for half a  
15    year, but no, we're not going to do that. We're just  
16    going to say that -- that your -- your punishment for  
17    violating the law is that this kind of a notice will  
18    suffice.

19            MR. KIRKPATRICK: Justice Scalia, I believe  
20    the Federal constitutional obligation would still apply  
21    regardless of whether the State of Arkansas tried to  
22    legislate its way out of it.

23            JUSTICE SCALIA: Well, but there -- no, but  
24    this is a consequence of violating the law of -- of  
25    Arkansas. Certainly the State can impose consequences

1 for violating its law.

2 MR. KIRKPATRICK: Well, it --

3 JUSTICE SCALIA: You know, and my next  
4 question is going to be, if you say it would come out  
5 differently, then isn't -- isn't it sort of silly to  
6 make the State go on and say that? If they could do  
7 the same thing by simply reciting what's going to  
8 happen, why -- why should we make them do that?

9 MR. KIRKPATRICK: I don't think that --  
10 Justice Scalia, I don't think that -- if Arkansas  
11 had that kind of statute, that it would make this case  
12 come out differently because I think the due process  
13 analysis and the application of the Mullane standard to  
14 these facts where the initial mailed notice comes back  
15 would be the same. I think it may be a factor, when  
16 we're determining what is reasonable, whether or not  
17 the owner complied with that statute, but I don't think  
18 that Mr. Jones loses his constitutional right.

19 JUSTICE SCALIA: Could they fine him for not  
20 -- could they fine him for not -- for not keeping them  
21 advised of -- of where -- where his tax address is?

22 MR. KIRKPATRICK: I suppose as a matter of  
23 criminal law they could.

24 JUSTICE SCALIA: They could. Suppose they  
25 could. Right.

1                   Could they fine him -- how much money did you  
2   lose here?

3                   MR. KIRKPATRICK:  He lost about \$70,000 worth  
4   of equity.

5                   JUSTICE SCALIA:  Could they fine him \$70,000?

6                   MR. KIRKPATRICK:  That would seem to be a  
7   very harsh penalty.

8                   JUSTICE SCALIA:  It's pretty harsh, but do  
9   you think this Court would strike it down?

10                  MR. KIRKPATRICK:  I do.

11                  JUSTICE SCALIA:  You do.

12                  JUSTICE STEVENS:  I frankly don't see the  
13   difference between failing to keep the State advised as  
14   to your residence and failing to pay your taxes.  He  
15   knew he had a duty to pay the taxes.

16                  MR. KIRKPATRICK:  That's right.

17                  JUSTICE STEVENS:  And should not that figure  
18   into the analysis?

19                  MR. KIRKPATRICK:  Justice Stevens, it should  
20   not figure in at all because he still had a statutory  
21   right to redeem the property, and once he had that  
22   statutory right to redeem the property, due process --

23                  JUSTICE STEVENS:  Well, no, I understand  
24   that.  But doesn't -- he would know whether the taxes  
25   had been paid or not.

1           MR. KIRKPATRICK: In fact, in this case he  
2 did not. And while the record is rather sparse on  
3 this, the mortgage company paid the taxes for 30 years.

4       After the mortgage was retired, Mr. Jones thought that  
5 the occupant, Mrs. Jones, was paying the taxes. He was  
6 mistaken in that belief and that's what happened here.

7           JUSTICE STEVENS: Well, this is a very unique  
8 fact situation. We're trying to announce a rule that  
9 will govern the typical transaction. And is it not  
10 true that typically the homeowner will know whether or  
11 not he's paid his taxes?

12          MR. KIRKPATRICK: Typically the homeowner  
13 certainly should, but we all make mistakes and  
14 certainly there are lawyers --

15          JUSTICE STEVENS: But he has to make mistakes  
16 for 2 or 3 years running before it's significant.

17          MR. KIRKPATRICK: Arkansas set up a statutory  
18 scheme that gave him a right to redeem up until 30 days  
19 after the sale of the property. That statutory right  
20 -- he gets due process whether he's innocent or not  
21 innocent. And I think in the case where --

22          JUSTICE STEVENS: No, but how long do the  
23 taxes have to be in arrears before they can send him a  
24 notice and start the proceeding running?

25          MR. KIRKPATRICK: They wait until the taxes

1 have been delinquent for 1 year. At that time, it's  
2 certified from the county to the State. They send  
3 notice saying that 2 years into the future, there will  
4 be a tax sale if the property hasn't been redeemed.  
5 Even after that public sale, there's a 30-day  
6 redemption period.

7 In this case the house didn't sell at the  
8 public sale. So then we started an entirely new  
9 process of the negotiated sale, which again involved  
10 notice and ultimately the property was sold at  
11 negotiated sale. So there is sufficient time after the  
12 State learns about the failure of the initial mailed  
13 notice to take further reasonable steps.

14 JUSTICE GINSBURG: Mr. Kirkpatrick, you  
15 distinguish Mullane. You recognize that a lot of the  
16 people never got that notice, and you said there were  
17 many people involved there, that you could rely on  
18 others. It's also how much of a burden are you going  
19 to put on the notice-giver when you have a large class  
20 involved.

21 There was a figure -- and I forgot what the  
22 number it was -- of how many notices are -- don't succeed  
23 in delivery.

24 MR. KIRKPATRICK: Yes, Justice Ginsburg. The  
25 -- the figure, which comes from the Tsann Kuen case out

1 of Arkansas Supreme Court, is that there are 18,000 tax  
2 delinquent parcels certified every year in Arkansas.  
3 But what we do know is that 85 percent of tax  
4 delinquent properties in Arkansas are redeemed by the  
5 owner either before the tax sale or within 30 days  
6 after. So we don't know how many notices came back  
7 unclaimed after the first attempt.

8 JUSTICE BREYER: His wife is living in the  
9 house?

10 MR. KIRKPATRICK: She was.

11 JUSTICE BREYER: Were they divorced?

12 MR. KIRKPATRICK: No. They were separated.

13 JUSTICE BREYER: All right. So he owns the  
14 house. She doesn't. She must not pay any taxes, and  
15 she sees these letters coming from him registered and  
16 says, oh, they're his problem. That's basically what  
17 could have happened.

18 MR. KIRKPATRICK: Basically, Justice Breyer,  
19 but the -- the letters --

20 JUSTICE BREYER: If you have that kind of  
21 relationship with your wife, doesn't he have an  
22 obligation to watch what's going on?

23 MR. KIRKPATRICK: Yes, he does have some  
24 obligation to watch what's going on.

25 But I would like to point out that the



1 letters did not actually come to the house. There were  
2 three delivery attempts for each letter, but the  
3 letters themselves -- nobody was at home during the day  
4 when the letter carrier came by. So the letters  
5 themselves were not left.

6 JUSTICE BREYER: Did they leave a notice?

7 MR. KIRKPATRICK: If the letter carrier  
8 followed proper procedures, a notice would have been  
9 left, but there's nothing in the record to indicate one  
10 way or the other whether that happened.

11 But at most, that notice would say that there  
12 was a certified letter for Gary Jones and it may have  
13 said that it was sent by the Commissioner of State  
14 Lands. It didn't say tax delinquent notice. The  
15 county is who assesses the taxes. Many lay people  
16 might think that the Land Commissioner of Arkansas was  
17 writing about the parks or the State forests or any  
18 number of things. So I don't think we can charge Mrs.  
19 Jones with knowledge that there was a tax delinquent  
20 notice waiting for Mr. Jones just because, if the  
21 letter carrier did what he or she should have, a notice  
22 of delivery slip would have been left at the house.

23 But remember also that after the first notice  
24 came back, it was 3 years later when they sent the  
25 notice of the negotiated sale, and that was after they

1 knew that it was likely a futile gesture to send  
2 certified mail to Mr. Jones at that address, and it was  
3 after they had actually gone out and visited the house.

4 So at a minimum, they should have posted a  
5 notice at the property. And while in some cases like  
6 *Greene v. Lindsey* or *Schroeder v. City of New York*,  
7 posting was inadequate, and the Court said that mail  
8 would have been better, at least here, knowing that  
9 mail had not worked, even if the State chose not to  
10 search for a better address, at a minimum they should  
11 have posted a notice at the property and that would  
12 have made all the difference in this case.

13 If there are no further questions, I'd like  
14 to reserve my time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Phillips, we'll hear from you.

17 ORAL ARGUMENT OF CARTER G. PHILLIPS

18 ON BEHALF OF THE RESPONDENT

19 MR. PHILLIPS: Thank you, Mr. Chief Justice,  
20 and may it please the Court:

21 It's somewhat startling to me that in a case  
22 involving the fundamental question of what notice is due  
23 under the Due Process Clause, that the phrase,  
24 reasonably calculated to provide notice to the affected  
25 property owner, was never used in the petitioner's

1 submission because at least, as I remember Mullane I  
2 suppose from my law school days and -- and since then,  
3 that is the fundamental test. The question is has the  
4 State undertaken to -- to make a reasonable calculation  
5 to, in fact, provide notice under these circumstances.

6 It's sort of startling to me in the -- in the  
7 face of a decision like this Court wrote in Mennonite  
8 Board, where it says explicitly, you know, the minor  
9 inconvenience and administrative burden of using the  
10 regular mails is a complete answer to claims that  
11 something less than that should be provided.

12 And again, petitioner's counsel's first answer  
13 to the question, would ordinary mail have been  
14 sufficient under these circumstances, is no. For  
15 property like this, that's not sufficient. It seems to  
16 me that -- that the Dusenbery case answers that because  
17 while it was true that the mails that were sent  
18 originally to the prison itself were certified, there's  
19 no certification process to get the mails --

20 JUSTICE BREYER: Maybe this day -- in today's  
21 world, a registered letter is worse than ordinary mail.

22 That is, I don't think -- my understanding is that the  
23 post office, unlike FedEx and unlike UPS, if you're not  
24 home, they leave a -- a notice, you know, and you check  
25 a box, and if you check the box, they'll leave it off

1 the next day. We don't live in a -- my wife isn't  
2 home. My wife works. And -- and most wives no longer  
3 stay home to get the mail, and we don't all have  
4 butlers at the door.

5 And you call up the post office. They say,  
6 oh -- if you get through to a human being, which takes  
7 15 minutes, after you go through the menu, they say,  
8 phone the post office branch. And they say go get in  
9 the car, find a parking place, get in the line, and  
10 there's half a morning gone.

11 Now, why is that a reasonable way? Why can't  
12 they do what FedEx does? This is a world -- husband  
13 works, wife works, two children are screaming. We've  
14 got to get them to the doctor. We have to have them at  
15 school. They have appointments all morning, and  
16 there's nobody home.

17 So whatever they did with Mullane and said  
18 registered mail is fine, why isn't it unreasonable to  
19 use that system rather than use FedEx's system?

20 MR. PHILLIPS: Well, I mean, that's a pretty  
21 remarkable due process constitutional --

22 JUSTICE BREYER: Well, why not? It says  
23 calculated. It may be. Now, you tell me why it's so  
24 remarkable because I think I could take judicial notice  
25 of what life is like for most families in the world

1       today, that they don't have butlers, et cetera.

2               MR. PHILLIPS: I may -- I may let Mr. Feldman  
3 defend the -- the Postal Service because he is the  
4 Solicitor General's lawyer.

5               (Laughter.)

6               MR. PHILLIPS: But the reality is that for  
7 the vast majority of the mails, the mails do get  
8 through. And -- and it is a reasonable calculation  
9 that if you mail something to someone --

10              CHIEF JUSTICE ROBERTS: But --

11              MR. PHILLIPS: -- that it will get there and  
12 it will be properly delivered. That's the -- the  
13 purpose of the certification.

14              CHIEF JUSTICE ROBERTS: But the whole point  
15 -- at least I understand -- of Justice Breyer's  
16 question is that you have taken a step to make it more  
17 difficult for the mail to get through by insisting that  
18 the person be there to sign for it, and it's obviously  
19 more likely than not he's not going to be there. And  
20 if you had just used regular mail and dropped it off, I  
21 think more likely he would have gotten it.

22              MR. PHILLIPS: Well, the -- the purpose of  
23 using certified mail is to make sure that it actually  
24 got to the person --

25              CHIEF JUSTICE ROBERTS: No. The purpose of

1 certified mail is to make sure you know if it didn't  
2 get to the person. And you knew that and then you  
3 didn't do anything about it.

4 MR. PHILLIPS: Well, now it works both ways,  
5 though, Mr. Chief Justice, because if -- if it goes to  
6 my neighbor -- let's assume numbers are transposed --  
7 it goes to my neighbor and the neighbor is there and  
8 sees the information, they'll say that the -- that  
9 that's -- that goes to across the street. And then you  
10 take it across the street and you get it signed.  
11 That's because you talked to a specific individual. So  
12 it is, in fact, designed to enhance the likelihood that  
13 it will actually get there.

14 But I don't think the issue here is --

15 JUSTICE BREYER: Wait. Let -- let them do  
16 that. Fine. Just have a little box and the person  
17 signs and says, tomorrow leave it at the house, just  
18 like FedEx does.

19 (Laughter.)

20 MR. PHILLIPS: And as a matter of policy, I  
21 wouldn't necessarily disagree with that.

22 JUSTICE KENNEDY: This is the FedEx rule of  
23 due process.

24 MR. PHILLIPS: I'm sorry?

25 JUSTICE KENNEDY: This is the FedEx rule of

1 due process.

2 (Laughter.)

3 MR. PHILLIPS: That's exactly what it is.

4 And as I say, as a matter of policy, Justice Breyer, I  
5 wouldn't necessarily disagree with it. But as a matter  
6 of what the Constitution strait-jackets States to  
7 provide, it strikes me as a -- as a pretty  
8 extraordinary rule.

9 JUSTICE STEVENS: But is the Chief Justice  
10 not correct that ordinary mail is more apt to get to  
11 the destination than certified mail?

12 MR. PHILLIPS: Well, if it is, it's probably  
13 only at a -- at a marginal number. My guess is --

14 JUSTICE STEVENS: But even if it's marginal --

15 MR. PHILLIPS: -- the percentages are very  
16 small.

17 JUSTICE STEVENS: -- the -- the principal  
18 purpose of the certified mail is to let the sender know  
19 whether or not the notice was received. It would seem  
20 that a State that decides to -- to make it necessary in  
21 every case to find that answer should have some -- some  
22 purpose in doing so and -- and, therefore, some follow-  
23 up that would occur when it's not delivered.

24 MR. PHILLIPS: Well, except for this problem  
25 -- I mean, the other problem you have is that we don't

1       -- all we know is that it wasn't -- it -- it came back  
2       unclaimed. So we don't even know that it didn't get  
3       delivered. All we know is that no one was prepared to  
4       sign for it and accept it.

5               We don't know, as Justice Breyer's  
6       hypothetical --

7               JUSTICE STEVENS: Well, but you also know  
8       that nobody got the notice. If nobody signed for it  
9       and took it, nobody read the letter.

10              MR. PHILLIPS: Well, you could look at the --  
11      you could look at the outside and say, I'm not going to  
12      sign for this, and it's unclaimed.

13              JUSTICE STEVENS: Well, you would know that  
14      the letter was not opened and read by the addressee.

15              MR. PHILLIPS: Well, to be sure, I know that  
16      it wasn't opened and read, but all I'm saying is that  
17      what we don't -- we don't even know --

18              JUSTICE STEVENS: And if it isn't opened and  
19      read --

20              MR. PHILLIPS: -- that Justice Breyer is  
21      correct.

22              JUSTICE STEVENS: -- if it isn't opened and  
23      read, they didn't get notice. They didn't get actual  
24      notice.

25              MR. PHILLIPS: They didn't receive actual



1 notice. And, of course, this Court has routinely said  
2 that there's no constitutional requirement that they  
3 receive actual notice.

4 JUSTICE STEVENS: May I ask one other  
5 question I intended to ask your opponent? How many  
6 States have rules that require something more?

7 MR. PHILLIPS: I -- I think in their reply  
8 brief at least, they make an effort, and we didn't go  
9 and -- and do a 50-State survey between a week ago and  
10 now to find out. But, you know, a fair number of  
11 States do. I -- I would say 15, 20.

12 JUSTICE GINSBURG: Including -- including  
13 Arkansas. Didn't Arkansas change its law so now it  
14 requires if you -- if it's unclaimed, they have to do  
15 personal service?

16 MR. PHILLIPS: If it's their homestead, not  
17 -- not for every property that is -- for which taxes  
18 are not paid, but for --

19 JUSTICE GINSBURG: This taxpayer, though --

20 MR. PHILLIPS: -- for property -- I'm sorry?

21 JUSTICE GINSBURG: This taxpayer -- even  
22 though he failed to give notice of his current address,  
23 this taxpayer would be entitled under the current  
24 statute to personal service.

25 MR. PHILLIPS: No, Justice Ginsburg, I don't

1 believe that is true because this is not this  
2 taxpayer's homestead. He no longer lives at this  
3 address. He, as his -- as his argument, spends a great  
4 deal of time explaining --

5 JUSTICE GINSBURG: I thought he still lived  
6 in --

7 MR. PHILLIPS: -- he lives elsewhere.

8 JUSTICE GINSBURG: I thought he still lived  
9 in Arkansas.

10 MR. PHILLIPS: Well, he lives in Arkansas,  
11 but that doesn't make this his homestead.

12 JUSTICE GINSBURG: Homestead.

13 MR. PHILLIPS: Yes.

14 JUSTICE GINSBURG: I see.

15 MR. PHILLIPS: So he wouldn't -- he wouldn't  
16 qualify for the --

17 JUSTICE GINSBURG: Right.

18 MR. PHILLIPS: -- for the additional law.

19 But again -- and it seems to me that just  
20 demonstrates the wisdom of Justice Brandeis' reference  
21 to the small laboratories because what we -- what we  
22 have here are a raft of different approaches that the  
23 States take to give either more or less notice so long  
24 as you satisfy the constitutional minimum. The problem --

25 CHIEF JUSTICE ROBERTS: Well, counsel, one

1     thing you did -- your client did was provide notice by  
2     publication in a local newspaper.

3             MR. PHILLIPS:  Yes, Mr. Chief Justice.

4             CHIEF JUSTICE ROBERTS:  Why do you bother  
5     doing that?

6             MR. PHILLIPS:  Well, in part because we --  
7     we're putting out a notice to the public that we're  
8     selling the property.  So it serves two purposes.  It  
9     notifies that there's a sale to take place.  It also  
10    identifies the landowner, giving -- or the property  
11    owner one more opportunity --

12            CHIEF JUSTICE ROBERTS:  You don't -- you  
13    don't rely on that as in any way discharging your  
14    constitutional obligation to provide notice to the --  
15    to the homeowner.

16            MR. PHILLIPS:  On its own, it clearly  
17    wouldn't suffice.  The Court has decided that a long  
18    time -- I mean, that is Mullane.

19            But I think as an -- as an additional  
20    component, if you -- if you really want to get into the  
21    totality of the circumstances rather than what I think  
22    is the better rule, which is to say, as you evaluate  
23    what we did, was it reasonably calculated to provide  
24    notice, and conclude, yes, it was reasonably calculated  
25    to provide notice under this Court's rulings that

1 mailing is an appropriate way to proceed, I think we  
2 would win there.

3 If you go beyond that and say, well, no, you  
4 have to do something-plus, if you go down the  
5 reasonably diligent efforts kind of an approach, I  
6 would say then don't go any further than say that  
7 you're required to publish the fact of the sale itself  
8 because to go beyond that is -- is to open this. And  
9 -- and we've already seen this --

10 JUSTICE BREYER: See what you think of this.

11 If in fact the letter --

12 JUSTICE STEVENS: What would you think of a  
13 rule that said --

14 MR. PHILLIPS: I'm sorry.

15 JUSTICE STEVENS: What would you think of a  
16 rule that said if you use certified mail and it returns  
17 uncollected, the additional step you must take, you  
18 just send ordinary mail?

19 MR. PHILLIPS: I think if the Court were to  
20 say the -- the additional step you must take is to send  
21 ordinary mail, we could probably live with that kind of  
22 a rule. The problem is, one, that's not the standard  
23 that's been proposed here. Their standard is going to  
24 be and if it turns out that you find out after that  
25 that that didn't get delivered, then you have to go

1 through this litany. You have to -- you have to engage  
2 in posting. You have to contact the occupant and  
3 contact the relatives, contact their employers, retain  
4 a skip tracing service, use the telephone directory,  
5 run a credit check, although we don't have Social  
6 Security numbers, do an Internet search. And each time  
7 when it comes back that there's some indication that  
8 you didn't -- that they didn't receive notice, which  
9 they'll always say is because -- otherwise for -- for a  
10 property that is valuable, if I had received notice, I  
11 would have shown up. You have an ongoing, continuing  
12 obligation to find --

13 JUSTICE BREYER: No, but skip that. What  
14 about -- you know, I was thinking precisely the same,  
15 but just with slight -- if you get the letter back  
16 and you don't have the FedEx rule, you either have to  
17 have the FedEx rule or send a letter.

18 MR. PHILLIPS: It sounds like you're  
19 legislating, Justice Breyer.

20 JUSTICE BREYER: No, because the purpose is  
21 to get reasonably calculated to get notice, and in the  
22 world today, there are an awful lot of houses where  
23 nobody is home, you know, and there's no convenient way  
24 for them to go to the post office without giving up a  
25 certain amount of work. And so they say, forget it.

1 If it comes from the lands division or something, who  
2 cares? Now, that -- I don't know how you'd know how  
3 many there are like that, but it's a question of  
4 reasonable calculation now to get the mail through.

5 MR. PHILLIPS: Well, it seems to me, Justice  
6 Breyer, you're adopting a rule that's designed to  
7 protect a very, very tiny minority and to impose a  
8 burden, a significant burden, on every State.

9 JUSTICE BREYER: Is it a tiny minority --

10 JUSTICE SCALIA: I'm not even sure it  
11 protects that minority. I think there are a lot of  
12 people who won't be home when the -- when the postman  
13 comes with the -- with the registered letter, but there  
14 are very few who -- who won't take the trouble to -- to  
15 pick it up. I mean, it may be --

16 MR. PHILLIPS: And -- and the flip side of  
17 that is there's nothing that indicates why even -- even  
18 the person -- if somebody is unwilling to go -- to take  
19 the time to find out what the Commissioner of Lands in  
20 the State has sent a certified letter for, why is it --  
21 why would you assume that whenever the letter comes in  
22 when it's addressed to Mr. Jones, that Mrs. Jones isn't  
23 going to toss it aside just as quickly?

24 JUSTICE KENNEDY: Can --

25 MR. PHILLIPS: There's no -- there's nothing

1     that indicates one way or the other what -- what is a  
2     preferable system to operate. And that's why I think  
3     this is intensely a legislative judgement.

4             JUSTICE SCALIA: But isn't there a second  
5     purpose for -- for sending it certified mail? And that  
6     is, it assures that it doesn't get lost. I think they  
7     track it closer. They can tell you where the letter  
8     is. I think each post office has to record that  
9     they've received it and so forth.

10            MR. PHILLIPS: They do. That -- that's --

11            JUSTICE SCALIA: Whereas if you just sent it  
12     regular mail, it may have been lost.

13            MR. PHILLIPS: Right. That -- that's always --

14            JUSTICE SCALIA: This -- this assures that it  
15     reaches the destination.

16            MR. PHILLIPS: Yes. That --

17            JUSTICE GINSBURG: Suppose -- suppose we had  
18     a case where the homeowner has kept the Lands  
19     Commissioner informed of her current address, does  
20     everything she was supposed to do except at the time  
21     this notice, certified mail notice -- at the time of  
22     the delivery attempt, she's hospitalized having a  
23     quadruple bypass, so she never gets it. And then what  
24     -- what are the consequences of that?

25            MR. PHILLIPS: Well, I mean, I don't want --

1 I don't want to fight the hypothetical, but you have to  
2 put a little in context in a case like this because the  
3 process here is one that's fairly protracted. You get  
4 the first notice and then there's not -- there's no  
5 actual sale for 2 years. And in this case, the sale  
6 didn't take place, so there was -- you know, the  
7 auction didn't lead to anything, and then there was  
8 another -- another sale. So we're talking about  
9 essentially a 3-year period of time when the person has  
10 to be incapacitated, during which presumably -- and  
11 there have been multiple, six different efforts to try  
12 to send notice to her. So it's, you know, one, not a  
13 particularly likely hypothetical. I realize I  
14 shouldn't fight it.

15 But two, I think at the end of the day, the  
16 answer is you can't put the burden on the State to  
17 understand the -- the precise situation of each of the  
18 individual homeowners, that they have some duties  
19 because they know, one, they do owe taxes; two, in  
20 Arkansas they should know that they owe us a duty to  
21 keep us up-to-date with respect to their situation, and  
22 where -- and where it is that we can reach them. And  
23 so it's reasonable to impose those duties --

24 CHIEF JUSTICE ROBERTS: But your --

25 MR. PHILLIPS: -- because in the vast



1 majority of cases -- I'm sorry -- due process will be  
2 satisfied because notice will, in fact, be received.

3 CHIEF JUSTICE ROBERTS: But your -- your  
4 position is, though, when you get the certified  
5 letter returned is you have no obligation to do  
6 anything further.

7 MR. PHILLIPS: That's correct, because --  
8 because the difficulty is once you go past that, what  
9 -- what obligation you have becomes completely  
10 unknowable at that stage.

11 JUSTICE STEVENS: But it seems to me that  
12 even you might not have an obligation, it seemed to me  
13 you would have a motivation to do more because you want  
14 to collect your taxes.

15 MR. PHILLIPS: Well, and that's -- that --

16 JUSTICE STEVENS: Which is sort of puzzling  
17 to me as why the States don't have a -- an affirmative  
18 interest in providing the best notice that they can.

19 MR. PHILLIPS: Justice Stevens, the truth is  
20 most of them -- we do. And -- and this is not a -- and  
21 -- and look at the way the system operates here. It's  
22 not like we -- we sent out this notice, got back, and  
23 raced off to sell the property with a gotcha in hand.  
24 I mean, we -- we went through a very protracted process  
25 each time trying to get this person to -- to show up.

1           I mean, put this into a certain amount of  
2     context. And again, you have to deal with the  
3     generality of cases rather than this one, but I mean,  
4     this is a property that's got a tax lien on it already  
5     for unpaid income taxes of -- of approximately, I  
6     think, about \$14,000, and then it has unpaid property  
7     taxes, you know, up to the -- up to the total amount of  
8     \$200. And you know, under those circumstances, we let  
9     it sit there for years. I mean, there's no question we  
10    would be better served if -- if they would have shown  
11    up and just paid off the taxes.

12           But it seems to me that all goes into the  
13    calculation of what's the right answer as a legislative  
14    matter, and legislatures have made pretty reasonable  
15    adjustments in terms of, you know, how strong is -- I  
16    mean, I think what Arkansas did here. If this is your  
17    homestead, we're going to go just as far as you said,  
18    Justice Stevens, to try to make sure we get the  
19    information to you.

20           JUSTICE KENNEDY: Is it of any --

21           MR. PHILLIPS: If it's not, then we're not --  
22    I'm sorry.

23           JUSTICE KENNEDY: Is it of any relevance to  
24    consider the burden or the obligations this rule  
25    that petitioners advocate place on downstream

1 purchasers?

2 MR. PHILLIPS: Oh, I think absolutely because  
3 it's significantly undermines the State's overall  
4 effort in trying to get its money back because it's all  
5 well and good to say we can sell the property, but if  
6 nobody is going to pay for the property anything that  
7 comes close to the value of even getting our liens paid  
8 off, then we're not going to get the revenue stream  
9 that we would otherwise be entitled to. And even if  
10 you, you know, go through the -- through the kind of  
11 machinations of --

12 CHIEF JUSTICE ROBERTS: Oh, you would get the  
13 whole -- you'd just get a little bit less because the  
14 cost of notice is borne by the purchaser and if they  
15 have to do a Google search or use one of these other  
16 services, it's going to add a little bit more to their  
17 cost, and you're just going to get a little bit less.  
18 It's not going to interfere with the administration of  
19 the program.

20 MR. PHILLIPS: That assumes that there's a --  
21 that there's a purchaser that wants to undertake the  
22 burden and -- and to assume that risk.

23 CHIEF JUSTICE ROBERTS: For getting the  
24 property --

25 MR. PHILLIPS: I mean, we couldn't sell this

1 the first time out.

2 CHIEF JUSTICE ROBERTS: -- for getting the  
3 property in this case, we're at 20 percent of its  
4 market value. It's -- it's worth another \$500 to you.

5 MR. PHILLIPS: Well, Mr. Chief Justice, it's  
6 worth taking at least 2 seconds to focus on the market  
7 value argument here, this \$80,000 number. That was a  
8 number that arises in connection with the supersedeas  
9 bond, and it's only a number that came forward by the  
10 private loan -- property purchaser, not the State. And  
11 the reason was, was because they said, if you don't put  
12 up an \$80,000 bond, we want to take over the property  
13 immediately. And so they had every incentive to say a  
14 number that was significantly higher than what the  
15 value of this property is.

16 The best evidence of what the value of this  
17 property is is around the \$20,000 that a real purchaser  
18 put on the table in order to purchase it. The point  
19 here --

20 CHIEF JUSTICE ROBERTS: No, no, no. That's  
21 -- Mr. Phillips, property bought at -- at delinquent  
22 tax sales is usually bought at far less than its market  
23 value.

24 MR. PHILLIPS: I'd be willing to stipulate to  
25 that, Mr. Chief Justice, but the truth is nobody showed

1 up even for an auction on this property. So we don't  
2 have much in the way of evidence as to the value of it.

3 And all I'm saying is the suggestion of -- of  
4 \$80,000 as the relevant number here is a number that's  
5 picked out of the air for a purpose that has nothing to  
6 do with fair market value. It has to do with the value  
7 of a -- of a bond that would have to be issued in order  
8 to stop the transfer of possession of the property in  
9 the ejectment action.

10 JUSTICE SCALIA: Your -- your friend said  
11 that the \$80,000 comes from the fact that it -- at the  
12 -- at the auction, it -- the opening bid is one-quarter  
13 of the fair market value. He said something like that.

14 MR. PHILLIPS: Well, it has to be -- I think  
15 it has to be a minimum that, but you know, it could be  
16 100 percent of the fair market value.

17 JUSTICE SCALIA: Well -- well, was the  
18 opening bid \$20,000? So it was at least one-quarter of  
19 the --

20 MR. PHILLIPS: Right, but it could also be  
21 100 percent.

22 JUSTICE SCALIA: I see.

23 MR. PHILLIPS: So you don't know. And -- and  
24 in his brief, his argument was that we -- that there  
25 was a stipulation to the \$80,000.

1 JUSTICE STEVENS: And the \$20,000 would have  
2 been a permissible bid even if the market value was  
3 \$40,000.

4 MR. PHILLIPS: Exactly. That -- that's the  
5 only point I was trying to make on that score.

6 JUSTICE SOUTER: Would your argument be any  
7 different if there weren't a statutory obligation to  
8 keep the government informed of the -- of one's mailing  
9 address?

10 MR. PHILLIPS: I think I would still make the  
11 same argument. I just think the argument has  
12 extraordinary force when the -- when the petitioner has  
13 an obligation to provide us with notice because, again,  
14 it goes -- you know, why is this reasonably calculated?

15 It's -- it's in the context of a scheme that says you  
16 will provide us specific information and we will rely  
17 upon that as the mechanism by which we inform you of  
18 your obligations to us and that under those  
19 circumstances and only those circumstances, do you  
20 forfeit your property rights.

21 JUSTICE STEVENS: But it seems to me  
22 unrealistic to assume that the average citizen would  
23 know that duty more clearly than he'd know the duty to  
24 pay his taxes.

25 MR. PHILLIPS: The -- the only reason he

1     would know that duty is because every -- every property  
2     tax form has on it a change of address at the very  
3     bottom of it that's perforated. So every time you get  
4     a tax form, you get a thing that says change your --  
5     let me know if you've changed your address.

6                 JUSTICE SOUTER: Is there a provision of  
7     Arkansas law that if in fact they do track down the  
8     property owner and he is at an address different from  
9     the last address that he had given, that the expense of  
10    tracking him down may be charged to him, along with the  
11    delinquent taxes, penalties, and so on?

12                MR. PHILLIPS: The -- the statute talks about  
13    costs, but the State has never interpreted that term to  
14    mean just sort of the out-of-pocket -- those kinds of  
15    inchoate costs, and they usually talk about very  
16    specific costs like the cost of noticing publication  
17    and other -- you know, other items that you can -- you  
18    know, where you have a receipt.

19                JUSTICE SOUTER: So in practice the answer is  
20    no?

21                MR. PHILLIPS: In practice the answer is no.

22                If there are no other questions, Your Honors,  
23    I urge the Court to affirm.

24                CHIEF JUSTICE ROBERTS: Thank you, Mr.  
25    Phillips.

1 Mr. Feldman.

2 ORAL ARGUMENT OF JAMES A. FELDMAN

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

5 MR. FELDMAN: Mr. Chief Justice, and may it  
6 please the Court:

7 The notice that was provided in this case  
8 satisfies the Mullane reasonably calculated test.

9 First, the State sent it by certified mail.  
10 Certified mail -- actually in response to a question  
11 that came up earlier, the form -- when certified mail  
12 is -- is delivered and the recipient is not there, they  
13 leave a form 3849. That form isn't in the record, but  
14 I think it's probably available from any post office.  
15 On the reverse side, it says, we will redeliver or your  
16 agent can pick up your mail at the post office, and it  
17 has a place for the person to check off a box saying to  
18 redeliver and leaves instructions to leave this where  
19 the postman can find it.

20 JUSTICE BREYER: Yes, but redeliver -- you  
21 have to be there to sign for it again.

22 MR. FELDMAN: Right, but they --

23 JUSTICE BREYER: All right. Well, then --  
24 then the problem --

25 MR. FELDMAN: They do need a signature.



1 JUSTICE BREYER: -- I'm thinking -- what I'm  
2 thinking is that where -- where you're trying to reach  
3 a person, the means has to be reasonably calculated.  
4 I'm simply saying a means today is not reasonably  
5 calculated to reach the average person unless it gives  
6 him the choice of getting it when he's not home. All  
7 right?

8 Now, there are two ways that could happen.  
9 One, you could modify that form or, second, the simple  
10 rule would be if it comes back undelivered, mail them a  
11 letter.

12 MR. FELDMAN: The Court -- I believe that  
13 certified mail is -- is a more reliable method than  
14 first class mail because it requires the mailperson,  
15 the carrier, to get to -- get a signature at -- at --  
16 he has to go from a particular person. He can't  
17 deliver it to the wrong place. Also, the post office  
18 itself has means whereby the carrier has to keep track  
19 of how many receipts he's supposed to have, whether  
20 he's brought them back and so on.

21 JUSTICE BREYER: I didn't say all that.

22 MR. FELDMAN: And --

23 JUSTICE BREYER: I said do either. What I --  
24 what I was thinking of, which isn't clearly I think  
25 coming across, is send it certified mail, by all means.

1 Fine. He either has to sign and say, leave it off  
2 tomorrow, I'm not home, or if the post office doesn't  
3 make that available, then if the letter comes back  
4 undelivered, the person who's trying to send him notice  
5 has to send him an ordinary letter.

6 MR. FELDMAN: And if the Court were to adopt  
7 that rule, it would give States an enormous incentive  
8 and people giving notice to just send things by first  
9 class mail in the first instance, which this Court has  
10 repeatedly said and has -- has said is -- is sufficient  
11 to satisfy due process, including in cases involving  
12 tax sales in the Mennonite case, condemnation of  
13 property in the -- in the City of New York case, and  
14 similar kinds of events.

15 Certified -- what the State did here, though,  
16 it has always -- it has generally been thought that  
17 certified mail is a more reliable means of giving  
18 people notice, and that's what the State used here.  
19 And I don't -- I don't take petitioner to be arguing  
20 that they made a mistake because they used certified  
21 mail rather than First class mail.

22 Having said that, the State also sent the  
23 mail to the only address, probably the only address  
24 anywhere in the public record. What it needed was  
25 something that tied this person to this address, not to

1       somebody named Gary Jones somewhere in the State or the  
2       world. And probably the only thing in the --

3               CHIEF JUSTICE ROBERTS: Of course, none of  
4       this would have been sufficient if we were talking  
5       about your -- your client, the IRS. They do far more  
6       extensive effort to find the individual before they  
7       sell property for delinquent taxes.

8               MR. FELDMAN: I say they -- they do slightly  
9       more. What the IRS does do is there is a requirement  
10      and Congress can provide and other States can provide  
11      that more resources should be spent in something like  
12      this than the minimum due process floor. But what  
13      they've provided is that where the property owner is in  
14      the IRS district, then -- then personal service is what  
15      they first attempt. Where the -- where the property  
16      owner is not in the Internal Revenue district, then  
17      they do exactly what the State did, which is they send  
18      it via certified mail. And they check up -- I think  
19      they check a postal database of change of address  
20      forms.

21              But we know in this case that there was no  
22      change of address form because when the letter came  
23      back, it didn't come back saying, moved, here's the new  
24      address or -- or change of address form expired.

25              In any event, this was probably the only

1     thing in the public record that tied this taxpayer to  
2     this property, and that's what the State used. And  
3     then it further used publication and sent another  
4     notice. There was a total of six different times when  
5     the mail carrier attempted to -- to deliver it and, if  
6     he followed the postal regulations -- there's no reason  
7     to think he didn't -- left a notice on the door.

8             CHIEF JUSTICE ROBERTS: Well, which way is  
9     that -- I mean, the fact that he tried six times and he  
10    wasn't there should have told the State this isn't  
11    working.

12            MR. FELDMAN: Well, right, but the State  
13    under the Dusenbery case is not obligated to provide  
14    actual notice. The State is obligated to provide  
15    notice reasonably calculated to let the person know  
16    what's going on, and if the person is not responding to  
17    a notice from the Commissioner of State Lands and going  
18    to the post office to pick it up or asking for it to be  
19    redelivered, I don't think this Court has ever  
20    suggested that in those circumstances, the notice is --  
21    is inappropriate because the -- the landowner hasn't  
22    taken the steps that he should have taken to -- to, in  
23    fact, I think a -- a large part of what petitioner's  
24    argument here is, is really at bottom an attack on  
25    Dusenbery. Dusenbery said -- the Court held actual

1 notice is not required. What's required is just notice  
2 reasonably calculated to reach someone.

3 But under petitioner's rule here, the State,  
4 as soon as it finds out some doubt -- and that's all it  
5 had here -- some doubt about whether it had the right  
6 address because it may well have had the correct  
7 address and he didn't go to the post office to pick it  
8 up. As soon as it had some doubt about whether it had  
9 the right address, it has to take unspecified further  
10 steps to send it out again to another address, and if  
11 that doesn't work, presumably another address and  
12 another address. And each -- whatever method, whether  
13 it's a directory or the Internet or whatever method it  
14 uses, it's -- it's going to create a litigable issue  
15 about whether did it do the right thing, did it use the  
16 right Internet service, did it use the right telephone  
17 directory, did it go in a wide enough area, should it  
18 have done the whole country.

19 CHIEF JUSTICE ROBERTS: Well, but your  
20 position is they don't have to do anything.

21 MR. FELDMAN: Yes, our position is that the  
22 standard is if it was reasonably calculated to provide  
23 notice at the time it was sent, which in this case it  
24 was -- they used the only address in the public record  
25 that ties him to this property, and their belief that

1     they had the right address was supported by the State  
2     law that said he has to provide them with a change of  
3     address. That under those circumstances, they've done  
4     enough, and if it comes back and just says, well, he  
5     didn't pick it up at the post office, then that's --  
6     then they've satisfied the rudimentary --

7             CHIEF JUSTICE ROBERTS: Well, Mullane said  
8     that we look to what a person who really wanted to find  
9     the person would do. A person who really wanted to  
10    find Mr. Jones and got the certified letter back  
11    saying, nobody is claiming this, would have done  
12    something more.

13            MR. FELDMAN: I -- I don't think that that's  
14    necessarily true. And -- and Mullane also said that  
15    what the -- whoever it was who had to provide the  
16    notice in that case had to do was provide notice to the  
17    addresses. The addresses were at hand was the phrase  
18    that it used.

19            And in other cases, the Court has talked  
20    about the line between publication notice, on the one  
21    hand, and notice by mail. That line is a line of  
22    addresses that are very easily ascertainable. If  
23    they're very easily ascertainable, you have to send the  
24    mail. If not, then that's what publication notice is  
25    for.

1                   And it seems to me in this case, when the  
2                   notice came back unclaimed, then the State was entitled  
3                   to assume that either it had provided notice and he  
4                   just didn't want to pick it up or, at worst, that his  
5                   address was no longer very easily ascertainable, and at  
6                   that point his obligation was only to publish notice,  
7                   which it did.

8                   CHIEF JUSTICE ROBERTS: Which -- which you  
9                   agree does no good at all. Right?

10                  MR. FELDMAN: I don't agree it does no good  
11                  at all. I --

12                  CHIEF JUSTICE ROBERTS: When is the last time  
13                  you read legal notices in a newspaper?

14                  MR. FELDMAN: I don't ordinarily do it.

15                  (Laughter.)

16                  CHIEF JUSTICE ROBERTS: Have you ever done  
17                  it?

18                  MR. FELDMAN: I -- I can't recall.

19                  CHIEF JUSTICE ROBERTS: No.

20                  (Laughter.)

21                  MR. FELDMAN: But I --

22                  JUSTICE STEVENS: I think a lot of people who  
23                  buy property at tax sales do read those notices  
24                  regularly.

25                  MR. FELDMAN: What I was going to say is I

1 think that every year, I'm confident that there's home  
2 -- there's people throughout the country probably who  
3 are notified of -- of tax sales and things like that  
4 because someone sees it, someone lets them know.  
5 They're keeping an eye on that to see what's happening  
6 to their property. He had left his property without  
7 leaving a change of address form with the State, and it  
8 -- it is possible.

9 Now, notice by publication is not preferred,  
10 but what -- the line that's drawn in Mullane and the  
11 Court's other cases are where the address is very  
12 easily ascertainable or readily available or at hand  
13 versus where it's not. And unless the Court is going  
14 to say, well, that line has to be -- it's going to  
15 overrule cases that -- that have actually drawn that  
16 line, such as Mullane itself that permitted publication  
17 notice to some people, then I think the result follows  
18 here that when the notice came back unclaimed, that was  
19 -- the State was permitted to go ahead with the sale.

20 JUSTICE GINSBURG: But Mullane, as Mr.  
21 Kirkpatrick pointed out, involved masses of people.  
22 This was a common trust fund, and the reliance was on  
23 that a goodly number of them would get notice and they  
24 were kind of stand-ins for the ones who didn't. But  
25 here, we're dealing with a single individual.



1           MR. FELDMAN: Right. That's true, but the  
2 Court has also permitted notice by publication where  
3 other -- I mean, it has always drawn the line of notice  
4 of publication versus notice by mail at where the  
5 address is very easily ascertainable.

6           But I would say that what -- the government's  
7 interest, the most important interest here, is in  
8 knowing what it's supposed to do. If you -- if there's  
9 an open-ended standard that says, well, it just has to  
10 keep doing something, then either it's -- well, then  
11 the result of that predictably is going to be the  
12 government is going to never be able to be satisfied  
13 unless it gives in-hand notice or --

14          JUSTICE SOUTER: Why isn't -- why isn't the  
15 simple answer to that concern to say, look, there's no  
16 way to tell in advance or, you know, by any general  
17 rule, at least not legislatively, how far they've got  
18 to go to try to find the correct address, but they know  
19 where the house is and they've got at that point to go  
20 to the house and put a notice on the door? That's  
21 simple, easy. Why -- why isn't that the answer?

22          MR. FELDMAN: May I respond to that?

23          CHIEF JUSTICE ROBERTS: Sure.

24          MR. FELDMAN: I just have two quick things.

25          One is in the Greene against Lindsey case and

1       -- I can't remember the name of the other case. In the  
2       Greene against Lindsey case, the Court said that --  
3       that kind of notice has its own problems. The IRS and  
4       State authorities have had problems with posting notice  
5       in cases where the owners are not often happy to see  
6       agents from the government trying to collect  
7       taxes. That can actually be rather expensive.

8               And the Arkansas Supreme Court itself said  
9       that the State itself frequently doesn't have the  
10      address for the property. It has only the legal  
11      description and it would be a significant burden to  
12      find it.

13             CHIEF JUSTICE ROBERTS: Thank you, Mr.  
14      Feldman.

15             Mr. Kirkpatrick, you have 4 minutes  
16      remaining.

17             REBUTTAL ARGUMENT OF MICHAEL T. KIRKPATRICK  
18                       ON BEHALF OF THE PETITIONER

19             MR. KIRKPATRICK: Thank you, Mr. Chief  
20      Justice.

21             First, I'd just like to point out that it  
22      absolutely is in the State's interest to provide the  
23      best notice practicable for three reasons.

24             First, redemption of property by the owner is  
25      the most efficient and cost effective means for the

1 State to collect the back taxes.

2 Second, the State has an interest in  
3 protecting its citizens from a loss of assets in  
4 equity, like what was lost by Mr. Jones here.

5 And third, if notice is received because of  
6 follow-up efforts or if the State can show that it has  
7 made follow-up efforts, then it will not face  
8 challenges based on inadequate notice.

9 In terms of the feasibility of doing  
10 something more, the question was raised about other  
11 States. Certainly many States do more. We've listed  
12 about five or six States that actually have a statutory  
13 scheme that deals with what happens when initial mailed  
14 notice comes back. And in footnote 9 and footnote 10  
15 of the reply brief, we indicate States that require  
16 posting and States that require notice to occupants.

17 Justice Souter, with regard to your question  
18 about the cost of tracking down a better address or  
19 providing notice, those costs can be passed on to the  
20 redeemer or purchaser of the property. And if we look  
21 at the statute dealing with notice to homestead owners,  
22 it says that where the mail does not work, the  
23 additional cost of the notice by personal service of  
24 process will be paid by the owner of the homestead who  
25 redeems. So certainly they could pass along those

1 costs. They could pass along the costs of searching  
2 for a better address just like we do in the Freedom of  
3 Information Act context when we charge for Government  
4 employee time to search for records.

5 CHIEF JUSTICE ROBERTS: With -- with respect  
6 to the fact that your client did not alert the State to  
7 its change of address, is there anything in the record  
8 about whether that his separation was permanent or is  
9 that a gradual thing? I mean, did he not know if this  
10 was a permanent change of address or what?

11 MR. KIRKPATRICK: There's nothing in the  
12 record about that, Your Honor, but certainly when he  
13 first moved out, he did not know what the future would  
14 hold in terms of the length of that separation.

15 Now, it -- it is also not in the record, but  
16 he did, in fact, file a change of address form, a  
17 forwarding form, but it had long expired before these  
18 certified letters came. That was actually a mistake on  
19 the part of the letter carrier not to say, forwarding  
20 order expired. And while a forwarding order is only  
21 good for 18 months, there is the national change of  
22 address database which reveals those things for a  
23 period of 4 years. So that's something else the State  
24 could have checked.

25 Also, this is not an attack on Dusenbery.

1 This would be Dusenbery all over again if Mrs. Jones  
2 had signed for the letter and the State had gotten back  
3 the green card saying that letter was received by  
4 somebody at 717 North Bryan Street. Then it would be  
5 Dusenbery. This is not Dusenbery because the  
6 difference is in Dusenbery they knew that the letter  
7 was actually received at the facility where Mr.  
8 Dusenbery was incarcerated. Here, the State actually  
9 knew that the letter had never been received.

10 With regard to value of the property, that  
11 \$80,000 figure is not picked out of the air. It's  
12 true, as Mr. Phillips said, that the parties stipulated  
13 that that was the market value of the property, but in  
14 fact, by statute -- and that's Arkansas Code Annotated  
15 section 26-26-303 -- the assessed value of property  
16 cannot exceed 20 percent of the market value. The  
17 minimum bid was the assessed value, plus the interest,  
18 plus the penalties, plus the costs of notice. Ms.  
19 Flowers, in her negotiated purchase offer, made the  
20 minimum bid plus \$200.

21 With regard to the fact that the letter came  
22 back unclaimed, I'd just like to point out that it -- I  
23 see my time is up.

24 CHIEF JUSTICE ROBERTS: You may finish.

25 MR. KIRKPATRICK: That it was not marked

1 refused. So it did not indicate that somebody saw the  
2 letter and didn't want to take it.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 12:13 p.m., the case in the  
6 above-entitled matter was submitted.)

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