No. _____

In the Supreme Court of the United States

DAVID HILL, INDIVIDUALLY AND D/B/A
DOH OIL COMPANY, PETITIONER

v.

HUNTLEY FORT GILL, ROBYN G. ATTAWAY, AND
MIRIAM G. STIRN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Texas Tax Code provides a statute of limitations on challenges to a purchaser's title to property acquired at a tax foreclosure sale. If a person was not served citation in the tax foreclosure suit, but continues paying property taxes following the tax sale, that person may challenge the validity of the tax sale at any time. Otherwise, a one-year limitations period applies, after which the purchaser has full title to the property. The Texas Supreme Court rejected the statute's application to a claim that a tax sale was invalid because the foreclosed owner was not properly served. The court held that a statute can never limit the time to challenge a judgment taken without constitutionally adequate notice.

The question presented, on which the States are deeply divided, is:

Whether a statute can limit the time to challenge a tax sale for lack of constitutionally adequate notice to the owner, provided that the statute does not unreasonably limit the aggrieved owner's time to enforce its rights.

RELATED PROCEEDINGS

143rd District Court of Reeves County, Texas:

Gill v. Hill, No. 19-02-22804-CVR (Dec. 16, 2019)

Eighth Court of Appeals, El Paso, Texas:

Gill v. Hill, No. 08-20-00081-CV (Aug. 30, 2022)

Supreme Court of Texas:

Gill v. Hill, No. 22-0913 (April 26, 2024)

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David Hill, Individually and d/b/a DOH Oil Company, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App. 1a-15a) is reported at 688 S.W.3d 863. The opinion of the El Paso Court of Appeals (App. 16a-43a) is reported at 658 S.W.3d 618.

JURISDICTION

The Supreme Court of Texas entered its judgment on April 26, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The Supreme Court of Texas's decision qualifies as a final judgment within the meaning of the statute. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"No State shall … deprive any person of life, liberty, or property, without due process of law…." U.S. Const. amend. XIV.

Tex. Tax Code § 33.54 provides in relevant part:

(a) Except as provided by Subsection (b), an action relating to the title to property may not be maintained against the purchaser of the property at a tax sale unless the action is commenced:

> (1) before the first anniversary of the date that the deed executed to the purchaser at the tax sale is filed of record;
>
> * * *

(b) If a person other than the purchaser at the tax sale or the person's successor in interest pays taxes on the property during the applicable limitations period and until the commencement of an action challenging the validity of the tax sale and that person was not served citation in the suit to foreclose the tax

lien, that limitations period does not apply to that person.

(c) When actions are barred by this section, the purchaser at the tax sale or the purchaser's successor in interest has full title to the property, precluding all other claims.

Tex. Tax Code § 33.54.

INTRODUCTION

This case presents an important question on the Constitution's limits on state legislative power that has long divided the States.

Most States have statutes that limit the time to challenge tax foreclosure sales. They exist to provide finality and certainty of the purchaser's title. And they effectuate the public policy, shared throughout the States, to encourage participation in tax sales to prevent budgetary shortfalls and find new owners that will make productive use of the property and continue to pay the taxes.

Yet the States are deeply divided on the question of whether a statute can limit the time to challenge a tax sale when the delinquent owner did not receive constitutionally adequate notice. In one camp, States such as California, Oregon, and West Virginia hold that it can. These states recognize that the issue turns on the reasonableness of the time bar and not whether the underlying form of service violated due process under *Mullane* and its progeny. This Court has likewise held that a legislature has the power to limit the time to challenge a tax sale for jurisdictional defects, provided that the statute allows a reasonable period for an aggrieved owner to enforce its

rights. *Saranac Land & Timber Co. v. Comptroller of N.Y.*, 177 U.S. 318, 330-31 (1900); *see also Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982).

In the other camp, States such as Texas, Kansas, and Utah answer the question in the negative. These states interpret *Mullane* and its progeny to hold that a time bar can never run against an owner who was denied due process, regardless of the legislative intent.

The split among the States is longstanding and entrenched—at least 12 have adopted the former rule and at least 18 have adopted the latter. State high courts addressing the issue over the last 15 years are split 4-4. The conflict will not resolve itself absent this Court's intervention, and this case presents an ideal vehicle to do so. The Court should grant the petition and resolve this important constitutional question.

STATEMENT OF THE CASE

A. Statutory Background

Section 33.54 of the Texas Tax Code provides a one-year statute of limitations for any action "relating to the title to property" against the purchaser of the property at a tax foreclosure sale. Tex. Tax Code § 33.54(a). The statute of limitations begins running on the date that the purchaser's deed is filed. *Id.* The limitations period may be tolled only if the challenger (1) was "not served citation" in the tax foreclosure suit, and (2) paid taxes on the property during the limitations period. Tex. Tax Code § 33.54(b). After the statute of limitations lapses, the purchaser at the tax sale is vested with full title to the property and

all other claims are precluded. Tex. Tax Code §§ 33.54(c), 34.01(n).

The Texas Legislature intended section 33.54 to apply to claims based on lack of constitutionally adequate notice. The plain text states that only persons who were "not served citation in the suit to foreclose the tax lien" may toll limitations by paying taxes. Tex. Tax Code § 33.54(b). The legislative history also confirms that section 33.54 was intended to apply to a property owner claiming that "he or she was not properly notified of the pending foreclosure action."[1] And the broad language barring any "action relating to the title to property" against the purchaser encompasses a collateral attack on the validity of the purchaser's deed, whether for lack of notice or any other reason. Tex. Tax Code § 33.54(a).

B. This Case

In 1998, taxing authorities in Reeves County, Texas, filed a lawsuit to foreclose upon certain mineral interests because the property taxes on them had not been paid. R. 6, 24. In 1999, the tax court granted a judgment to the taxing authorities and ordered the sale of the mineral interests.[2] R. 7-8, 24-29.

DOH Oil Company purchased the mineral interests at auction. R. 24. A sheriff's deed conveying the

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[1] Senate Comm. on Intergovernmental Relations, Bill Analysis, Tex. S.B. 1249, 75th Leg., R.S. (1997), http://www.capitol.state.tx.us/tlodocs/75R/analysis/html/SB01249S.htm.

[2] The same state district court presided over the tax foreclosure suit and this case. To avoid confusion, "tax court" refers to the district court as it presided over the tax foreclosure suit.

mineral interests to DOH was recorded in the county records on April 8, 1999. R. 24-29.

The delinquent owners at the time of the tax suit never challenged the validity of the tax foreclosure sale.

1. In 2019, the plaintiffs below filed suit challenging the validity of the tax sale. R. 3. The plaintiffs claimed that they inherited the mineral interests from the delinquent owners in 2002. They alleged that the prior owners were improperly served by posting in the tax suit, in violation of their due process rights. R. 4-7. They sought a judgment voiding the tax sale and vesting them with title to the mineral interests. R. 8-9.

DOH moved for summary judgment on the one-year statute of limitations in section 33.54, arguing that it barred any challenge to DOH's title under the tax sale and sheriff's deed, regardless of the merits of the challenge. R. 11-13. In response, the plaintiffs asserted that the limitations provision does not apply when an owner of record is not properly served or made a party to the tax suit. R. 30-34. They did not, however, present any evidence that their predecessors were not validly served by posting in the tax suit. R. 30-34. The trial court granted DOH's motion for summary judgment, which became a final judgment. R.52.

2. The plaintiffs appealed the judgment to the El Paso Court of Appeals, arguing that the statute of limitations does not apply when an owner is denied due process. App. 21a. The court of appeals noted that the Texas Supreme Court recently addressed this very issue in *Mitchell v. MAP Resources, Inc.*, which held that section 33.54 does not apply when

notice was constitutionally inadequate and clarified the type of evidence that could be used in a collateral attack on this ground. App. 20a n.1; *Mitchell v. MAP Res., Inc.*, 649 S.W.3d 180, 191-94 (Tex. 2022); App. 66a-68a. Nevertheless, the court of appeals affirmed the judgment because the plaintiffs failed to raise a fact issue on the alleged lack of constitutional notice, thus, they could not avoid the application of section 33.54.[3] App. 27a-28a.

3. The Texas Supreme Court granted review. By cross-point, DOH raised the same issue presented here—whether a state statute of limitations can bar a challenge to a tax sale for lack of constitutionally adequate notice, provided that it gives the aggrieved owner a reasonable time to enforce its rights.[4] DOH argued that, because section 33.54's limitations period is reasonable as applied to claims based on lack of constitutional notice, the judgment should be affirmed regardless of whether the plaintiffs could have established a due process violation.[5]

The Texas Supreme Court held that the trial court properly granted summary judgment for DOH, and that the appellate court properly affirmed it, because the plaintiffs failed to present evidence of a due process violation. App. 12a. Nevertheless, it reversed and remanded to allow the plaintiffs to reargue the summary judgment motion in light of the *Mitchell* decision. App. 14a-15a.

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[3] It was undisputed that the plaintiffs or their predecessors did not toll limitations by paying taxes following the tax sale. Tex. Tax Code § 33.54(b).

[4] Respondent's Br. at xi.

[5] Respondent's Br. at 28-44

In neither this case nor *Mitchell* did the Texas Supreme Court perform an analysis of whether section 33.54's limitations bar is reasonable as applied to claims based on lack of notice. App. 8a; *Mitchell*, 649 S.W.3d at 194; App. 66a-68a. Rather, the Texas Supreme Court broadly held that a statute of limitations can never bar a challenge to judgment by a defendant who did not receive constitutionally adequate notice. App. 8a; *Mitchell*, 649 S.W.3d at 194; App. 66a-68a.

REASONS FOR GRANTING THE PETITION

A. The States are split on whether challenges to tax sales based on lack of constitutional notice can be time-barred.

The decision below further deepens a long-entrenched conflict among the States on an important constitutional question: whether state legislatures have the power to limit the time to challenge tax sales for lack of constitutionally adequate notice.

Section 33.54 has analogs in most States, and the split on this issue is well-recognized and mature. *See Shaffer v. Mareve Oil Corp.*, 204 S.E.2d 404, 411 (W. Va. 1974); *Register v. Kenai Peninsula Borough*, 667 P.2d 1236, 1238 (Alaska 1983). Of the state high courts that have addressed the issue, at least 12 have taken the position that such statutes can preclude claims based on lack of adequate notice.[6] At

[6] *Sage Land & Lumber Co. v. Hickey*, 257 S.W.2d 941, 942 (Ark. 1953); *Kaufman v. Gross & Co.*, 591 P.2d 1229, 1231 (Cal. 1979); *Lake Canal Reservoir Co. v. Beethe*, 227 P.3d 882, 886-87 (Colo. 2010); *Saffo v. Foxworthy, Inc.*, 687 S.E.2d 463, 467 (Ga. 2009); *O'Donnell v. Krneta*, 154 N.E.2d 45, 52 (Ind. 1958); *Town*

least 18—including Texas—have gone the other way, holding statutory time bars ineffective against a challenge based on constitutionally inadequate notice.[7] The Third Circuit has applied this position as well. *Benoit v. Panthaky*, 780 F.2d 336, 339 (3d Cir. 1985). The former view is sometimes called the "minority" position, and the latter the "majority." *Id.*; *Shaffer*, 204 S.E.2d at 409 ("Where the policy bolstering a judicial rule is clear, the number of courts adhering to a particular position loses significance.").

Many States adopting the "minority" view recognize that the issue of whether a statute can bar a

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of Hudson v. Gate City Dev. Corp., 660 A.2d 1100, 1101-02 (N.H. 1995); *Hunter v. Grier*, 180 N.E.2d 603, 606 (Ohio 1962); *Hood River Cty. v. Dabney*, 423 P.2d 954, 961-62 (Or. 1967); *Herder Spring Hunting Club v. Keller*, 143 A.3d 358, 377-78 (Pa. 2016); *Jorgensen v. Thurston Cty.*, 259 P. 720, 720 (Wash. 1927); *Shaffer*, 204 S.E.2d at 409 (West Virginia); *Anadarko Land Corp. v. Family Tree Corp.*, 389 P.3d 1218, 1224 n.6 (Wyo. 2017).

[7] *Mitchell*, 649 S.W.3d at 194; *Register*, 667 P.2d at 1238; *Wells v. Thomas*, 78 So.2d 378, 383 (Fla. 1954); *Chapin v. Aylward*, 464 P.2d 177, 182 (Kan. 1970); *Smitko v. Gulf S. Shrimp, Inc.*, 94 So. 3d 750, 759 (La. 2012); *Thomas v. Hardisty*, 143 A.2d 618, 625 (Md. 1958); *Tallage Lincoln, LLC v. Williams*, 151 N.E.3d 344, 352 (Mass. 2020); *Wayne Cty. Treasurer v. Perfecting Church (In re Treasurer of Wayne Foreclosure)*, 732 N.W.2d 458, 462-63 (Mich. 2007); *Small v. Hull*, 32 P.2d 4, 7-8 (Mont. 1934); *Bogart v. Lathrop*, 523 P.2d 838, 840 (Nev. 1974); *Bonded Certificate Corp. v. Wildey*, 45 A.2d 684, 685 (N.J. 1946); *ISCA Enters. v. City of N.Y.*, 572 N.E.2d 610, 614 (N.Y. 1991); *Bd. of Comm'rs v. Bumpass*, 63 S.E.2d 144, 147 (N.C. 1951); *Knowlton v. Coye*, 37 N.W.2d 343, 350 (N.D. 1949); *Ewart v. Boettcher*, 50 P.2d 676, 678-79 (Okla. 1935); *First Nat'l Bank v. Meyer*, 476 N.W.2d 267, 269 (S.D. 1991) (holding that due process requires tolling of the limitations period until notice is received); *Naylor v. Billington*, 378 S.W.2d 737, 740-41 (Tenn. 1964); *Jordan v. Jensen*, 391 P.3d 183, 196 (Utah 2017).

challenge based on lack of adequate notice is separate from the issue of whether the type of notice provided comported with due process under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The question instead turns on whether the limitations period itself is reasonable and the intent of the particular legislature. *See Kaufman*, 591 P.2d at 1231; *Dabney*, 423 P.2d at 958-62; *Shaffer*, 204 S.E.2d at 409.

In *Kaufman v. Gross & Co.*, the California Supreme Court held that a six-month statute of limitations barred an alleged owner's challenge to a tax deed based on lack of constitutional notice. *Kaufman*, 591 P.2d at 1231. The court expressly noted that its holding was valid under *Mullane*. *Id.* at 1234 n.9 ("[D]efects of the type here considered, even if they can be said to involve constitutional interests of the type in question in *Mullane*, were nevertheless subject to the operation of reasonable statutes of limitation….") (citing *Elbert, Ltd. v. Gross*, 260 P.2d 35, 39 (Cal. 1953)); *see also Quelimane Co. v. Stewart Title Guar. Co.*, 960 P.2d 513, 529 (Cal. 1998) ("Since the state may fix a statute of limitations for the exercise of constitutional rights, it may fix a reasonable limit for claims affecting the right to property.").

In *Hood River County v. Dabney*, the Supreme Court of Oregon upheld a statute requiring a suit challenging the validity of a tax foreclosure to be brought by the later of two years from the date of the judgment or within six months from the statute's effective date. *Dabney*, 423 P.2d at 962. The court found that the statute provided a reasonable time for an aggrieved owner to assert its rights, even as to jurisdictional defects for lack of notice, because the legislature had the constitutional power to limit the

rights of delinquent taxpayers and the nature of taxation statutes "give warning to the owner that if he does not pay his taxes he may lose his land." *Id.* at 960-62.

In *Shaffer v. Mareve Oil Corp.*, the West Virginia Supreme Court considered a three-year limitations provision that expressly applied to persons not served with notice. *Shaffer*, 204 S.E.2d at 407. The court noted that statutes of limitations that bar attacks on jurisdictionally defective or void tax deeds are "constitutional and not violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 409. And it held that the statute was valid as to claims that a tax deed was void for a jurisdictional defect because that was the legislative intent. *Id.* at 410-11. The court also found that the statute itself gave fair warning to any delinquent taxpayer that he might lose his property, and it observed that *Mullane* "held that sufficiency of notice under the Fourteenth Amendment depends on the type of transaction and property interest involved with a weighing of the public interest in resolving the litigation in which the notice is involved." *Id.* at 411; *see Wells Fargo Bank, N.A. v. Up Ventures II, LLC*, 675 S.E.2d 883, 889 (W. Va. 2009) (finding that *Shaffer*'s holding was not overruled or modified by *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983)).

Other States have applied the same principles and likewise concluded that reasonable statutes may limit the time to attack jurisdictionally defective or void tax deeds. *See Herder*, 143 A.3d at 378 (upholding Pennsylvania's statutory two-year redemption period "even if the owner received no notice of sale"); *Hudson*, 660 A.2d at 1101 (holding New Hampshire's incontestability provision "conclusive against the al-

leged lack of notice"); *Sage*, 257 S.W.2d at 942 (holding Arkansas's two-year statute of limitations "applicable to possession under a tax deed which sufficiently describes the land even though such deed is void for other reasons, including jurisdictional defects"); *Saffo*, 687 S.E.2d at 467 (stating the Georgia rule that "any failure to provide the appropriate tax notice would not serve as a basis for nullifying the ultimate tax sale."); *Jorgensen*, 259 P. at 720 (applying Washington's three-year statute of limitations to a claim that a tax deed was void).

This Court, too, has held that state legislatures have the power to preclude an attack on a tax deed after a reasonable time, even if the attack is based on a jurisdictional defect. *Turner v. New York*, 168 U.S. 90, 94 (1897); *Saranac*, 177 U.S. at 330-31.

In *Turner*, this Court upheld a six-month statute of limitations on actions to redeem land sold for nonpayment of taxes. *Turner*, 168 U.S. at 94. This Court held that because the time bar merely demanded prompt action, and took away no rights, it was within the legislature's constitutional power. *Id.*

In *Saranac*, this Court considered a Fourteenth Amendment challenge to a two-year statute of limitations on a property owner's right of redemption despite "jurisdictional defects" in the tax proceeding. *Saranac*, 177 U.S. at 330. Following *Turner*, the Court held that the statute was within the constitutional power of the legislature, provided that the owner be given a reasonable time in which to enforce its rights. *Id.* at 330-31.

In reaching the opposite conclusion, many States adopting the "majority" position did not analyze whether the specific time bar was unreasonable as

applied to persons who did not receive constitutionally adequate notice. Rather, they seemed to read *Mullane* and its progeny for the proposition that a statute can *never* limit the time to challenge a jurisdictionally defective or void tax judgment.

In *Chapin v. Aylward*, the Supreme Court of Kansas considered whether a statutory 12-month time limit precluded attacking a tax sale for lack of constitutionally adequate notice. *Chapin*, 464 P.2d at 181. The court's prior precedents had held that "the time limitation provision of the statute is *absolute* -- regardless of any claimed infirmity in a tax foreclosure action." *Id.* The court noted that since those precedents, this Court issued its opinions in *Mullane* and *Walker*, which rendered publication service constitutionally inadequate in the case before it. *Id.* at 182. The court then held that "the provision in question must give way to a situation where the facts clearly establish a denial of due process of law." *Id.*

The Utah Supreme Court reached a similar conclusion in *Jordan v. Jensen*, 391 P.3d 183, 196 (Utah 2017). There, it considered whether a four-year limitations period applied to challenges to tax sales for denial of due process. *Id.* at 194. It, too, overruled its pre-*Mullane* precedent upholding the limitations provision against such attacks, stating that *Mullane* and its progeny "suggest that when state action occurring without due process of law triggers a statute that limits a party's ability to obtain relief, a due process violation prevents that statute from running against the aggrieved party." *Id.* at 196. Thus, the court held that the statute does not run against a defendant who does not receive constitutionally adequate notice. *Id.*

In *Mitchell*, the Texas Supreme Court similarly held that "Texas rules must yield to contrary precedent from the U.S. Supreme Court." *Mitchell*, 649 S.W.3d at 194. And it likewise relied on *Mullane* and its progeny for the proposition that section 33.54 can never apply to a defendant whose due process rights are violated. *Id.* at 188-90 (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988) and *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956)).

B. This Issue Is Important and Recurring

The question presented is of important legal significance and national scope. It is well-established that state legislatures have the power to vest clear and conclusive title to property and may prescribe the best procedures for satisfying due process considerations in doing so. *Texaco*, 454 U.S. at 532. So long as such legislation is not unreasonable or arbitrary, no constitutional limitations apply. *Id.* at 532 n.25. "This is especially the case with respect to those statutes relating to the taxation or condemnation of land." *Id.* (citing *N. Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925)); *see also Saranac*, 177 U.S. at 330; *Izaak Walton League of Am. Endowment, Inc. v. State, Dep't of Nat. Res.*, 252 N.W.2d 852, 854 n.1 (Minn. 1977) ("The restraints upon such legislation, and tax forfeiture proceedings generally, are only those imposed by the state and Federal constitutions, which require that such statutes comport with the requirements of due process of law."); *see also United States v. Locke*, 471 U.S. 84, 104 (1985) ("Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or

to condition their continued retention on performance of certain affirmative duties.").

Such is the case in Texas. The Texas Supreme Court has long held that the legislature has the necessary power to prescribe the best procedure for foreclosing tax liens and selling property to collect taxes. *Duncan v. Gabler*, 215 S.W.2d 155, 159 (Tex. 1948); *see Mitchell*, 649 S.W.3d at 188 n.7 ("[T]he federal Due Process Clause and the Texas Constitution's Due Course of Law clause are, for the most part, co-extensive.").

It is equally well-recognized that tax foreclosure proceedings—unlike private controversies—implicate important public interests, including the government's need to support its very existence through the collection of tax revenue. *King v. Mullins*, 171 U.S. 404, 429 (1898); *see also Shaffer*, 204 S.E.2d at 411; *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 564 (Tex. 2003) (explaining that "local ad valorem taxes supplied more than half the funding for public schools"). Accordingly, the resounding public policy throughout the States is to encourage participation in tax foreclosure sales.[8] To effectuate that

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[8] *Am. Homeowner Pres. Fund, LP v. Pirkle*, 475 S.W.3d 507, 522-23 (Tex. App.—Fort Worth 2015, pet. denied) (noting that "[t]he public policy underlying [the Texas Tax Code], and all other jurisdictions with similar delinquent-property-tax-sale statutes, is to encourage tax sale purchases") (citing Frank S. Alexander, Tax Liens, Tax Sales, and Due Process, 75 Ind. L.J. 747, 763 (2000)); *Moorehead v. John Deere Indus. Equip. Co.*, 572 P.2d 1207, 1210 (Colo. 1977) ("Persons should be encouraged to purchase personal property sold for delinquent taxes at tax sales. Prospective buyers may be deterred from purchasing if they cannot receive paramount title. If they are not willing to purchase at such sales, tax collections will be less effective.");

policy, legislatures must strike a balance between the need to afford due process to delinquent taxpayers, and the need to ensure finality and stability of the purchaser's title. *Simon*, 915 A.2d at 495; *Stiff v.*

Sallie v. Tax Sale Inv'rs, 998 F. Supp. 612, 618 (D. Md. 1998) ("Maryland has a significant interest in encouraging participation in its tax sale program and in decreeing marketable title. Further, Maryland's tax sale mechanism is an effective means of collecting property taxes for the state, and is critical to the state's need to provide a source of revenue for a host of governmental services provided to its citizens."); *Lohr v. Saratoga Partners, L.P.*, 238 A.3d 1198, 1212 (Pa. 2020) (recognizing "the legislative interest in facilitating the collection of delinquent taxes by ensuring certainty and finality for tax sales, which, in turn, likely encourages higher bids based on the greater security provided to the purchaser"); *Coughlin v. Pierre*, 286 N.W. 877, 879 (S.D. 1939) ("Viewing these statutes broadly…it becomes apparent that they were enacted to further the collection of the public revenues. As a means to that end they not only seek to strengthen the position of the county as the collector of these revenues in situations not here important, but they also propose to encourage bidding at tax sales through the expedient of enhancing the security of such purchasers.").

See also Ross v. Rosen-Rager, 67 So. 3d 29, 44 (Ala. 2010); *Burgett v. McCray*, 33 S.W. 639, 640 (Ark. 1896); *Thornton, Ltd. v. Rosewell*, 381 N.E.2d 249, 253 (Ill. 1978); *Duff v. Penick*, 26 P.2d 603, 604 (Kan. 1933); *Michel v. Stream*, 19 So. 215, 218 (La. 1896); *Hardisty v. Kay*, 299 A.2d 771, 774 (Md. 1973); *Case v. Dean*, 16 Mich. 12, 29 (1867); *Oakland Cemetery Ass'n v. Cty. Of Ramsey*, 108 N.W. 857, 858 (Minn. 1906); *Hatten v. Parcels of Land, etc.*, 217 S.W.2d 511, 514 (Mo. 1949); *State ex rel. Snow v. Farney*, 54 N.W. 862, 865 (Neb. 1893); *Simon v. Cronecker*, 915 A.2d 489, 497 (N.J. 2007); *Tyler v. Cass Cty.*, 48 N.W. 232, 236 (N.D. 1890); *Shnier v. Vahlberg*, 110 P.2d 593, 595 (Okla. 1941); *Wilder v. Dennis*, 202 F. 667, 675 (4th Cir. 1912); *Anadarko Land Corp. v. Family Tree Corp.*, 389 P.3d 1218, 1226 (Wyo. 2017).

Equivest Fin., LLC, 325 So. 3d 738, 740-41 (Ala. 2020).

The enactment and strict enforcement of reasonable statutes of limitations are important to achieving those legislative objectives. *See Saranac*, 177 U.S. at 323-24; *Lake Canal*, 227 P.3d at 887 (finding application of the statute of limitations to claims based on insufficient notice "neither harsh nor unreasonable, but necessary for the protection of purchasers at tax sales, and to secure the collection of the public revenue"); *Dabney*, 423 P.2d at 961 ("The imposition of the duty upon the defendant owner to learn what was being done to enforce the payment of taxes against his property and the limitation upon his right to attack the foreclosure decree…is a legitimate exercise of legislative power in carrying out a property tax program."). Such time limits are valid exercises of a legislature's power, provided that the statute itself does not violate due process. *Saranac*, 177 U.S. at 330-31; *Shaffer*, 204 S.E.2d at 410; *see Hudson*, 660 A.2d at 1101 ("This incontestability provision is therefore conclusive against the alleged lack of notice here, provided the statute is itself not violative of due process."); *see also Blinn v. Nelson*, 222 U.S. 1, 7 (1911) ("If the legislature thinks that a year is long enough to allow a party to recover his property from a third hand, and establishes that time in cases where he has not been heard of for fourteen years and presumably is dead, it acts within its constitutional discretion.").

The Federal Constitution's limits on state legislative power to preclude challenges to tax foreclosure sales are no different in Texas than in California. Yet the States are deeply divided as to the limits of that power when a delinquent taxpayer did not receive

constitutionally adequate notice. The conflict is beyond resolving itself; it persists in even the most recent decisions from state high courts. Over the past 15 years, those that have addressed the question are split 4-4.[9] This Court should grant certiorari to resolve the conflict.

C. The Decision Below Is Wrong and Conflicts With This Court's Cases

Statutes are presumed constitutional. *Lujan v. G & G Fire Sprinklers*, 532 U.S. 189, 198 (2001). The burden is on the challenging party to establish the unconstitutionality of a statute, and a court will not substitute its judgment for that of the legislature. *Id.*; *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 17 (1988).

Statutes of limitations are intended to prevent plaintiffs from sleeping on their rights and to protect defendants against stale or unduly delayed claims. *Crown v. Parker*, 462 U.S. 345, 352 (1983); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221,

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[9] Since 2009, Georgia, Colorado, Pennsylvania, and Wyoming have endorsed the "minority" position. *See Saffo*, 687 S.E.2d at 467 (reaffirming "the rule in this state…that defects in following the notice provisions of the tax sale statute may give an injured party a claim for damages, but will not render the tax sale or the deed therefrom void," where foreclosed owner failed to timely redeem the property); *Lake Canal*, 227 P.3d at 886; *Herder*, 143 A.3d at 378; *Anadarko*, 389 P.3d at 1224 n.6 ("We recognize that a legislature may limit challenges to even a void deed by specifically imposing a statute of limitations on challenges to a void deed."). In the same time period, Louisiana, Utah, Massachusetts, and Texas have endorsed the "majority" position. *See Smitko*, 94 So. 3d at 759; *Jordan*, 391 P.3d at 196; *Tallage*, 151 N.E.3d at 352; *Mitchell*, 649 S.W.3d at 194.

227 (2012). By definition, they are arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

In *Donaldson*, this Court recognized that "statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Id.* A statute of limitations "will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right." *Saranac*, 177 U.S. at 330. This includes fundamental rights. *See, e.g.*, 28 U.S.C. § 2244(d) (providing a one-year statute of limitations on the constitutional guarantee of habeas corpus); *Owens v. Okure*, 488 U.S. 235, 250 (1989) (holding that a forum state's general statute of limitations for personal injury actions applies to a civil action for deprivation of constitutional rights under 42 U.S.C. § 1983); *see also Barren v. Pa. State Police*, 219 A.3d 722, 722 (Pa. Commw. Ct. 2019) ("Statutes of limitations can be asserted in proceedings that seek to remedy an alleged void order, such as a return of property or monetary relief."). So long as the statute itself is not unreasonable or arbitrary, it is within the legislature's constitutional power. *Texaco*, 454 U.S. at 532; *Donaldson*, 325 U.S. at 314-316; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

Here, even assuming that the tax judgment and sheriff's deed were taken without constitutionally adequate notice to the delinquent owners, section 33.54 does not unreasonably limit their right of redress. The statute allows any aggrieved owner to challenge the tax sale within one year of the recording of the sheriff's deed, and it allows an owner who

was not validly served to extend that time indefinitely by the simple act of paying the taxes. Tex. Tax Code § 33.54(b).

As many States have recognized with respect to similar statutes, "we are not here dealing with a statute of limitations which cuts off the rights of the owner without warning." *Dabney*, 423 P.2d at 961; *Shaffer*, 204 S.E.2d at 411. The statutory scheme itself puts every property owner on notice that the failure to pay taxes may result in the loss of one's property via foreclosure. Tex. Tax Code §§ 33.41 – 33.58. This Court has long held that "persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." *Texaco*, 454 U.S. at 532. Property owners must take note of the procedure adopted, and "when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it." *Id.* at 532 n.25 (quoting *Hoffman*, 268 U.S. at 283); *see also Spitcaufsky v. Hatten*, 182 S.W.2d 86, 96 (Mo. 1944) ("[T]axes are collected periodically under fixed laws which, in a restricted sense, impart their own notice."); *Knapp v. Josephine Cty.*, 235 P.2d 564, 570 (Ore. 1951) ("[T]ax obligations are imposed under public statutes with which the property owner is presumably familiar.").

Even without the tolling provision, section 33.54's one-year period alone is reasonable. Property taxes are due every year and owners know whether they have paid them. Tex. Tax Code § 31.02. One year provides enough time for the claimant to challenge the sale within the next assessment cycle, but it is not so long that it discourages prospective purchasers from bidding at tax sales. *See* pp. 15-17 and n.8,

supra; *see also Bd. of Regents v. Tomanio*, 446 U.S. 478, 485 (1980) ("Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.").

Moreover, section 33.54's tolling provision for persons not served in the tax suit prevents unfair results. If a person continues to pay the taxes and that person was not properly served in the foreclosure suit, the statute of limitations is tolled *indefinitely*. Tex. Tax Code § 33.54(b). Thus, a foreclosed owner without notice could toll limitations, even unwittingly, by simply doing what a property owner is supposed to do—paying the taxes.

Further, section 33.54 does more than just provide the limitations period for challenges to the purchaser's title; it explicitly confers upon the purchaser "full title to the property, precluding all other claims," when a prior owner fails to timely challenge the tax sale. Tex. Tax Code § 33.54(c).[10] This Court has recognized the distinction between a statute of limitations that merely operates as a defense and one that vests title to a property interest. *Campbell v.*

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[10] Other provisions of the Tax Code likewise evidence the legislature's intent to balance the due process rights of aggrieved owners with the public policy for finality and certainty of titles. *See* pp. 15-17 and n.8, *supra*. Indeed, the Tax Code is "replete with affirmations that the purchaser at tax sales should take the property free and clear" of all adverse claims. *Pirkle*, 475 S.W.3d at 522; *see* Tex. Tax Code §§ 33.54(c), 34.08(b), 34.01(n), 34.05(f).

Holt, 115 U.S. 620, 625 (1885). Where a statute of limitations has vested a party with title to property, it cannot be repealed without implicating the vested party's due process rights. *Id.*; *see Donaldson*, 325 U.S. at 311-12. In other words, applying section 33.54's limitations period does not implicate an unserved owner's due process rights, but not applying it after it has expired *does* implicate a purchaser's due process rights. *Donaldson*, 325 U.S. at 311-12.

Importantly, section 33.54 does not cut off every right of redress for the foreclosed owner. The statute only cuts off "an action relating to the title to property…against the purchaser." Tex. Tax Code § 33.54(a). It is silent as to other forms of redress, including the right to recover the excess proceeds from the sale. *See* Tex. Tax Code § 34.04. Nor does it purport to bar any other legal action by which an aggrieved owner might seek to be made whole, such as a suit for damages under 42 U.S.C. § 1983. Of course, section 1983 actions are subject to a reasonable statute of limitations of their own. *Owens*, 488 U.S. at 250.

In deciding this question against purchasers, the Texas Supreme Court did not analyze the reasonableness of the statutory time bar, and it did not give effect to the express legislative intent to bar claims by persons "not served" in the tax foreclosure proceeding. *Texaco*, 454 U.S. at 532; *Donaldson*, 325 U.S. at 314-16; *Logan*, 455 U.S. at 437. Instead, the court held that under *Mullane*, *Peralta*, and *Walker*, a statute of limitations "cannot place a temporal limit on a challenge to a void judgment filed by a defendant who did not receive the type of notice to which she was constitutionally entitled." *Mitchell*, 649 S.W.3d at 194.

Mullane and its progeny do not support the Texas Supreme Court's broad rule that a time bar may never apply to challenges to tax sales based on lack of constitutional notice. App. 8a; *Mitchell*, 649 S.W.3d at 194; App. 66a-68a. And none of them considered the narrow question presented here.

In *Mullane*, *Walker*, *Schroder*, *Tulsa*, and *Mennonite*, the sole issue before this Court was whether publication notice was constitutionally sufficient in the underlying case. *Mullane*, 339 U.S. at 307; *Walker*, 352 U.S. at 116; *Schroeder v. New York*, 371 U.S. 208, 208-09 (1962); *Tulsa Prof. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 479 (1988); *Mennonite*, 462 U.S. at 792.[11] And *Peralta* concerned whether the former meritorious-defense requirement under Texas's bill of review procedure violates due process where a default judgment was entered without proper notice. *Peralta*, 485 U.S. at 83. None of these cases addressed the constitutionality of a time bar as applied to a foreclosed owner who did not receive adequate notice of a tax foreclosure.

Moreover, *Mennonite* involved a due process challenge to a tax sale by a mortgagee—not an owner—brought outside of a 2-year redemption period. *Mennonite*, 462 U.S. at 795. The balancing of interests differs when cutting off the rights of a lienholder versus the property owner because the property owner, and not the lienholder, is the one responsible for paying the property taxes. Indeed, even before *Mitchell*,

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[11] Each of these cases reached this Court with the lower court having upheld the constitutionality of publication notice under the circumstances. *See Mullane*, 339 U.S. at 307; *Walker*, 352 U.S. at 115; *Schroeder*, 371 U.S. at 211; *Tulsa*, 485 U.S. at 483; *Mennonite*, 462 U.S. at 795.

Texas courts recognized an exception under section 33.54 for record lienholders who do not receive adequate notice of the tax suit and may not be aware of the tax delinquency. *Pirkle*, 475 S.W.3d at 514-15; *see Mennonite*, 462 U.S. at 792 (noting that the mortgagee had no knowledge that the owner had failed to pay the property taxes).

And perhaps most importantly, none of these cases disturbed this Court's holdings in *Turner* and *Saranac*. Indeed, since *Mullane*, many jurisdictions have relied on *Turner* and *Saranac* to uphold the constitutionality of statutes of limitations as applied to claims for the recovery of real property based on lack of notice. *Shaffer*, 204 S.E.2d at 409; *Hudson*, 660 A.2d at 1101; *Quelimane*, 960 P.2d at 529; *see also Littlewolf v. Hodel*, 681 F. Supp. 929, 940 (D.D.C. 1988) (holding that the constitutionality of the White Earth Reservation Land Settlement Act's statute of limitations "is buttressed by the venerable, and still valid, decision in *Turner*….").

D. This Case Is an Ideal Vehicle for Resolving The Issue

This case is an ideal vehicle for resolving this question. DOH presented the issue to the Texas Supreme Court. It held, in reliance on *Mitchell*, that the statute of limitations does not bar a challenge to the tax sale if notice was constitutionally inadequate. App. 8a; *Mitchell*, 649 S.W.3d at 194 ("[A] statute of limitations cannot place a temporal limit on a challenge to a void judgment filed by a defendant who did not receive the type of notice to which she was constitutionally entitled.") (internal quotation marks omitted); App. 67a. The Texas Supreme Court's decisions

here and in *Mitchell* were published. There are no impediments to this Court reaching the issue.

The Texas Supreme Court's judgment was "final" within the meaning of § 1257. *See Cox*, 420 U.S. at 482-83 (holding that, even when further proceedings are pending, the finality requirement is met when "the federal issue has been finally decided in the state courts" and the party seeking review "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"). Thus, "refusal immediately to review the state-court decision might seriously erode federal policy" because the constitutional issue is dispositive. *Id.* at 483.

Indeed, allowing the Texas court's opinion to stand erodes the broad power of the legislature to effectuate public policy and balance competing interests in tax foreclosure proceedings. *See* pp. 15-17 and n.8, *supra*; *Texaco*, 454 U.S. at 532 n.25; *Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 599 (2015) (Ginsburg, J., dissenting) ("Resolving the competing tax policy considerations this case implicates is something the Court is even less well equipped to do. For a century, we have recognized that state legislatures and the Congress are constitutionally assigned and institutionally better equipped to balance such issues.").

Further, this case is emblematic of how the issue commonly arises, both factually and procedurally: A challenger brings a belated challenge to a tax purchaser's title after the statutory period has lapsed, and the purchaser seeks summary judgment under

the statutory bar. *See Herder*, 143 A.3d at 378. Not only will the correct resolution of this question be outcome dispositive, it will also effectuate the legislature's intent to give finality to a tax sale and conclusiveness to a purchaser's title by statute, rather than leaving them open to protracted attacks and uncertainty in the courts. Tex. Tax Code §§ 33.54(c), 34.01(n).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

SUPREME COURT OF TEXAS

No. 22-0913

HUNTLEY FORT GILL, ROBYN G. ATTAWAY, AND MIRIAM G. STIRN, PETITIONERS,

v.

DAVID HILL, INDIVIDUALLY AND D/B/A DOH OIL COMPANY, RESPONDENT

On Petition for Review from the Court of Appeals for the Eighth District of Texas

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Argued: January 9, 2024

Decided and Filed: April 26, 2024

OPINION

JUSTICE HUDDLE delivered the opinion of the Court.

The successors in interest of various mineral-rights holders sued in 2019 for a declaration that a 1999 judgment foreclosing on their predecessors' property for delinquent taxes is void. They contend there was constitutionally inadequate notice of the foreclosure suit, so, their argument goes, the foreclosure judgment and the tax sale that followed both are void, and they should be adjudged the mineral interests' rightful owners.

The current owners sought traditional summary judgment based on the Tax Code's command that an action relating to the title to property against the purchaser of the property at a tax sale may not be commenced later than one year after the date that the deed executed to the purchaser at the tax sale is filed of record. *See* TEX. TAX CODE § 33.54(a)(1). We must decide whether summary judgment based on this statute of limitations was proper despite the nonmovant's assertion that the underlying judgment and tax sale, the recording of which ordinarily would trigger the running of the one-year limitations period, are themselves void for lack of constitutionally required due process.

We hold that under *Draughon v. Johnson*, the nonmovant seeking to avoid the limitations bar by raising a due-process challenge bears the burden to adduce evidence raising a genuine issue of material fact about whether the underlying judgment is actually void for lack of due process. Because the nonmovant here adduced no such evidence, the trial court correctly granted summary judgment based on Section 33.54(a)(1).

But that is not the end of this story. The law governing this case has undergone meaningful refine-

ment since the summary-judgment proceedings took place. Since that time, this Court decided two cases crucial to our analysis: *Draughon*, which addressed the burden of proof when summary judgment is sought based on a statute of limitations; and *Mitchell v. MAP Resources, Inc.*, which clarified the types of evidence that can be used in a collateral attack such as this. Given these recent and substantial developments in the relevant law, we remand this case to the trial court for further proceedings in the interest of justice.

I. Background

In 1998, Pecos-Barstow-Toyah Independent School District, Reeves County, and Reeves County Hospital District sued over 250 defendants who owned property in Reeves County. The attorney for these taxing entities filed a citation-by-posting affidavit claiming that the names and residences of the owners of the properties were unknown and could not be ascertained after diligent inquiry. The property owners were all represented by the same attorney ad litem, who was appointed just eight days before trial. After a bench trial, the trial court rendered judgment in February 1999, authorizing the properties' foreclosure. James W. Gill and Gale T. Goss (collectively, Gill) owned mineral interests that were subject to the foreclosure judgment.

The following month, David Hill d/b/a DOH Oil Company purchased at auction the foreclosed mineral interests previously owned by Gill. The conveyance was by a sheriff's tax deed dated April 6, 1999. The sheriff's deed was filed the same day and recorded on April 8.

Twenty years later, in 2019, Gill's successors in interest, whom we will call the Gill Parties, sued to have the foreclosure judgment declared void for lack of due process and to quiet title to the mineral interests in their names. They allege that the 1999 judgment was void due to "a complete failure of service of citation" on the defendants in the foreclosure suit.

Hill moved for summary judgment, arguing that the one-year statute of limitations in the Texas Tax Code for challenges to property sold in a tax sale barred the suit. *See* TEX. TAX CODE § 33.54(a)(1) ("[A]n action relating to the title to property may not be maintained against the purchaser of the property at a tax sale unless the action is commenced . . . before the first anniversary of the date that the deed executed to the purchaser at the tax sale is filed of record . . . ."). In support, Hill attached a copy of the sheriff's deed showing that it was recorded on April 8, 1999. The Gill Parties responded that the Tax Code's statute of limitations did not apply because the defendants in the foreclosure suit were not properly served and, thus, the foreclosure judgment, tax sale, and resulting deed are void. However, the Gill Parties did not present any evidence to support these arguments. The trial court granted Hill's motion for summary judgment. The Gill Parties appealed.

A divided court of appeals affirmed. The majority held that the sheriff's deed conclusively established the accrual date for limitations, so the burden shifted to the Gill Parties to adduce evidence raising a genuine issue of material fact as to whether there was a due-process violation that could render the statute of limitations inoperable. 658 S.W.3d 618, 624 (Tex. App.—El Paso 2022). Because the Gill Parties relied

only on their arguments and presented no evidence of a due-process violation, the majority concluded, Hill was entitled to summary judgment. *Id.* at 626–27. The dissenting justice would have held that it was Hill's burden, as the movant, to conclusively prove that no due-process violation occurred and that the statute of limitations applied. *Id.* at 632 (Palafox, J., dissenting). The Gill Parties petitioned for review, which we granted.

II. Applicable Law

A. Due Process

The Fourteenth Amendment to the United States Constitution protects the citizens of Texas by preventing the State from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Article I, Section 19 of the Texas Constitution similarly protects a citizen from being deprived of "life, liberty, [or] property . . . except by the *due course* of the law of the land." TEX. CONST. art. I, § 19 (emphasis added). As in *Mitchell v. MAP Resources, Inc.*, a case involving similar issues, the parties in this case have "not identified any differences in text or application that are relevant to the issues raised here, so we treat the requirements of both Constitutions as identical for purposes of this opinion." 649 S.W.3d 180, 188 n.7 (Tex. 2022).

To afford due process, "the government [must] provide the owner [of property to be taken] 'notice and opportunity for hearing appropriate to the nature of the case.'" *Jones v. Flowers*, 547 U.S. 220, 223 (2006) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)). The adequacy of this notice is *not* judged by whether actual notice was provided but by whether the government appropri-

ately attempted to provide actual notice. *See Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (explaining that "the Due Process Clause does not require . . . heroic efforts by the Government" to assure the notice's delivery); *Mullane*, 339 U.S. at 315 ("The means employed [in pursuing notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."). Of course, actual notice is preferable, but if a property owner cannot be "reasonably identif[ied]," constructive notice can satisfy due process. *Mitchell*, 649 S.W.3d at 190 (citation omitted); *see also In re E.R.*, 385 S.W.3d 552, 559 (Tex. 2012) ("For missing or unknown persons, service by . . . 'indirect and even . . . probably futile' means did not raise due process concerns." (quoting *Mullane,* 339 U.S. at 317)).

B. Summary Judgment on Limitations

"The standard for reviewing a summary judgment under Texas Rule of Civil Procedure 166a(c) is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law." *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). "A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense." *Id.* Furthermore, to succeed on limitations at the summary-judgment stage, the movant "must also conclusively negate application of the discovery rule and any tolling doctrines pleaded as an exception to limitations." *Draughon v. Johnson*, 631 S.W.3d 81, 85 (Tex. 2021) (quoting *Erikson v. Renda*, 590 S.W.3d 557, 563 (Tex. 2019)).

However, a summary-judgment movant does not have the burden of proof to negate *every* potential challenge to a limitations defense. While this case was on appeal, we addressed the placement of the burdens of proof in such cases in *Draughon* and established the following rule: "The defendant has the burden regarding any issues raised that affect the running of limitations, while the plaintiff has the burden to raise a fact issue on equitable defenses that defeat limitations even though it has run." *Id.* at 88.

Draughon establishes that the movant seeking traditional summary judgment has the burden of proof on issues that affect whether limitations has in fact run. So if the nonmovant challenges the date on which the limitations period began or argues that limitations did not expire before suit was filed (due to tolling or some other doctrine), a movant must conclusively disprove the nonmovant's allegations to carry its summary-judgment burden. However, if the nonmovant instead asserts that the statute of limitations cannot operate to bar the suit even if the limitations period has expired, then the nonmovant bears the burden to raise a fact issue in support of that assertion. *Id.* at 89; *see also* 658 S.W.3d at 627 (Alley, J., concurring) ("[T]he plaintiff carries the burden to present some evidence in its summary judgment response to support certain doctrines that avoid a statute of limitations defense."). The parties here did not have the benefit of *Draughon* at the time of the summary-judgment proceedings.

Nor did they have the benefit of our decision in *Mitchell*, a case arising from the same 1999 foreclosure suit for delinquent taxes that resulted in the judgment at issue here. As here, the former property

owner's successors in that case asserted that the foreclosure judgment was void for lack of due process, and the current owners argued in a summary-judgment motion that the suit was barred by limitations. 649 S.W.3d at 183–84. Unlike here, however, the successors also sought summary judgment and presented evidence—"warranty deeds on file in the public records at the time of the foreclosure suit"—showing an address at which the former property owner, their predecessor in interest, could have been reached and notified of the foreclosure suit. *Id.* at 186. *Mitchell* held that these public deeds and tax records were not "extrinsic evidence" and thus should have been considered by the trial court in determining whether service on the former property owner by publication satisfied due process. *Id.* at 190–91. And *Mitchell* rejected the argument that the statute of limitations would bar the suit even if notice was constitutionally inadequate, concluding that "state statutory requirements must give way to constitutional protections." *Id.* at 194. We concluded that notice by posting was inadequate for a property owner whose address was filed in the public property records, and, accordingly, we reversed the trial court's grant of summary judgment based on the Tax Code's statute of limitations. *Id.* at 197.

III. Analysis

The Gill Parties argue that a statute-of-limitations defense cannot bar their attack on the 1999 foreclosure judgment because that judgment was obtained without affording their predecessors, the defendants in that suit, constitutionally required due process in the form of notice of the suit. They argue that Hill, as the summary-judgment movant, bore the burden to conclusively negate their asser-

tion that the 1999 judgment and resulting deed are void by proving notice of the suit satisfied due process. In the alternative, the Gill Parties argue that we should take judicial notice of the facts in *Mitchell* and hold, without regard to the record in this case, that there is a fact issue here regarding whether their predecessors were afforded constitutionally adequate notice of the 1999 foreclosure suit. Hill contests all these assertions and also contends that the Gill Parties waived their burden-of-proof argument by failing to assert it below. We begin with the waiver argument and address each other issue in turn.

A. There was no waiver.

Throughout this suit, the Gill Parties have challenged Hill's entitlement to summary judgment on limitations and argued that the 1999 judgment and resulting tax sale did not satisfy due-process requirements. But Hill contends that the Gill Parties waived their argument about which party bore the burden of proof regarding these due-process complaints in the context of a traditional motion for summary judgment by not timely raising it in their briefs in the court of appeals. Requiring parties to first raise issues in the lower courts preserves judicial resources and promotes fairness among litigants. *See In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). But briefs do not have to perfectly articulate every point of law to preserve arguments that are fairly subsumed in the issue addressed. Indeed, one of this Court's common refrains is that briefing waiver is generally disfavored. *See Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 780 (Tex. 2021); *see also Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) ("Appellate briefs are to be construed reasonably, yet liberally, so that the right to appellate review is not

lost by waiver. Simply stated, appellate courts should reach the merits of an appeal whenever reasonably possible." (citations omitted)).

The Gill Parties' argument that it was Hill's summary-judgment burden to conclusively establish the validity of the 1999 judgment and resulting tax sale is fairly subsumed in their issues asserting that the judgment and sale were void and that Hill failed to establish that he was entitled to summary judgment. Construing the Gill Parties' briefing "reasonably, yet liberally," *Perry*, 272 S.W.3d at 587, we hold that there was no waiver. We therefore consider whether Hill bore the burden, in a traditional summary-judgment posture, to establish that posted notice of the 1999 foreclosure suit was constitutionally adequate and thus establish that Section 33.54(a) bars the suit.

B. Hill carried his summary-judgment burden.

The Gill Parties' suit undoubtedly is an "action relating to the title to property . . . against the purchaser of the property at a tax sale." TEX. TAX CODE § 33.54(a). Under Section 33.54(a), the suit is barred unless it was commenced within one year of "the date that the deed executed to the purchaser at the tax sale [was] filed of record." *Id.* § 33.54(a)(1). Hill, in moving for summary judgment, bore the burden to conclusively establish his defense. *See KPMG Peat Marwick*, 988 S.W.2d at 748. Hill adduced the sheriff's deed as evidence establishing that it was filed on April 6, 1999, and recorded on April 8. Thus, Hill carried his burden to conclusively establish that the Tax Code's one-year limitations period expired in

April 2000—some nineteen years before the Gill Parties brought this suit.

The crux of the parties' dispute is whether Hill had to prove anything more to obtain summary judgment. Hill claims he did not. But the Gill Parties contend Hill also bore the burden to negate their claim that the 1999 foreclosure judgment is void because it was obtained based on constitutionally inadequate notice. Put differently, the Gill Parties contend Hill had to prove that the foreclosure judgment that gave rise to the tax sale by which Hill obtained the mineral interests comports with constitutional due-process requirements. We agree with Hill—under the framework set out in *Draughon*, the burden of proof was on the nonmovant to raise a fact issue on whether the foreclosure judgment was void.

Draughon was a quiet-title action in which the plaintiff argued that a warranty deed was invalid due to his mental incapacity at the time of signing. 631 S.W.3d at 85–86. However, the defendant moved for summary judgment under the general four-year statute of limitations. *Id.* at 86. The plaintiff argued that the defendant had the burden at the summary-judgment stage to disprove his assertion that the running of limitations was tolled while under a legal disability of "unsound mind." *Id.* at 94; *see* TEX. CIV. PRAC. & REM. CODE § 16.001(a)(2), (b). The Court held that the defendant, as the summary-judgment movant on limitations, had the burden to disprove unsound-mind tolling. *Draughon*, 631 S.W.3d at 97. But we noted that the burden of proof on a defense against limitations is not *always* on the movant.

Instead, we explained that there are two types of defenses against limitations with differing burdens of

proof. Affirmative defenses like unsound-mind tolling that argue that certain days within the limitations period should not be counted place the burden of proof on the movant. *Id.* at 88. But affirmative defenses that concede the limitations period expired yet argue limitations should not bar the suit place the burden of proof on the nonmovant. *See id.* at 89. Ultimately, the distinction *Draughon* draws is between defenses that avoid the statute of limitations entirely and those that toll certain days.

In this case, the Gill Parties argue that, although many years have passed since the 1999 deed was recorded, the suit should not be time-barred because the underlying foreclosure judgment was procured in violation of due-process requirements and is thus void and incapable of triggering the Section 33.54(a) limitations clock. This more closely resembles the second *Draughon* category in that it is an argument for avoiding the statute of limitations altogether rather than an argument that certain days within the limitations period should not count. *See Draughon*, 631 S.W.3d at 88–89. The Gill Parties raise a defense that, if established, would "defeat limitations even though it has run." *Id.* at 88. Under *Draughon*, it was their burden to present evidence raising a fact issue whether the foreclosure judgment was, in fact, void. They failed to meet that burden because they adduced no evidence that notice of the 1999 suit was constitutionally inadequate so as to render the judgment void.

The Gill Parties argue we should nevertheless hold that a fact issue exists. They urge the Court to do so by taking judicial notice of the facts in *Mitchell*. They insist that our conclusion that notice was constitutionally inadequate for one of the property-

owner defendants in *Mitchell* allows us to conclude it was so for others. But whether due process was afforded to a particular defendant is an individualized inquiry, and the facts that made notice by posting insufficient for the petitioners' predecessors in *Mitchell* do not necessarily make notice by posting improper for Gill.

The inquiry undergirding the adequacy of due process is individualized to the circumstances of the person to whom notice is directed. *See Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988) ("[A]s *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances."). The Gill Parties suggest that the facts in *Mitchell* show a lack of diligence by the taxing entities and that this supports a finding that notice was inadequate for all defendants. But the appropriate level of diligence needed to satisfy due process is an individualized inquiry. If the evidence shows that Gill was nowhere to be found after a diligent inquiry, then alternative service by posting may have sufficed. *See Mullane*, 339 U.S. at 318 (distinguishing the appropriate notice for those "whose interests or addresses" are unknown); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) ("[I]n some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown."); *see also Mitchell*, 649 S.W.3d at 189–90 (discussing what distinguishes the adequacy of notice by posting versus notice by service). Unlike the petitioners in *Mitchell*, the Gill Parties adduced no individualized proof regarding the ease or difficulty with which Gill could have been located and served.

In any event, taking judicial notice of the facts in *Mitchell* would be inappropriate. An appellate court may take judicial notice of a relevant fact that is either generally known within the trial court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012); *see* TEX. R. EVID. 201(b). The question of whether a particular type of notice comports with due-process requirements is neither generally known nor the kind of fact that is capable of being judicially noticed. We hold that the trial court correctly granted summary judgment.

Having concluded that the trial court's summary judgment was proper, we would typically reinstate the trial court's judgment. But the events surrounding this case have not been typical. Indeed, the law governing this case has developed in two meaningful respects since the summary-judgment proceedings. Both *Draughon* and *Mitchell* were decided after the trial court granted summary judgment. Both cases clarified relevant questions: (1) which side bears the burden to demonstrate a due-process violation that renders a statute of limitations inoperable? and (2) what evidence is admissible to prove such a violation?

The Texas Rules of Appellate Procedure permit a remand when justice requires, *see* TEX. R. APP. P. 60.2(f), 60.3, which we have employed based on intervening developments in the controlling law. *See, e.g.*, *Rogers v. Bagley*, 623 S.W.3d 343, 358 (Tex. 2021) (remanding to the trial court "[b]ecause our decision today substantially clarifies [a] novel issue"); *Carowest Land, Ltd. v. City of New Braunfels*, 615

S.W.3d 156, 159 (Tex. 2020) (similar); *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993) (similar). Because of *Draughon*'s and *Mitchell*'s meaningful import for this case, we conclude that a remand in the interest of justice is appropriate.

IV. Conclusion

Hill satisfied his summary-judgment burden to conclusively show that the one-year statute of limitations expired before this suit was filed. The Gill Parties bore the burden to raise a genuine issue of material fact as to whether the 1999 judgment was void because it was obtained without constitutionally adequate notice, in violation of Gill's due-process rights. The Gill Parties adduced no such evidence; accordingly, the trial court correctly granted summary judgment on Hill's limitations defense.

Nevertheless, because the summary-judgment proceedings took place without either side having the benefit of our decisions in *Draughon* or *Mitchell*, both of which substantially clarified the applicable law and likely would have affected the parties' motion practice, we vacate the lower courts' judgments and remand the case to the trial court for further proceedings. *See* TEX. R. APP. P. 60.2(f).

Rebeca A. Huddle
Justice

OPINION DELIVERED: April 26, 2024

APPENDIX B

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

No. 08-20-00081-CV

HUNTLEY FORT GILL, ROBYN G. ATTAWAY, AND MIRIAM G. STIRN, PETITIONERS,

v.

DAVID HILL, INDIVIDUALLY AND D/B/A DOH OIL COMPANY, RESPONDENT

Appeal from the 143rd District Court of
Reeves County, Texas (TC# 19-02-22804-CVR)

Decided and Filed: August 30, 2022

Before: RODRIGUEZ, Chief Justice,
PALAFOX and ALLEY, Justices

OPINION

Appellants, Huntley Fort Gill, Robyn G. Attaway and Miriam G. Stirn, appeal the trial court's entry of summary judgment against them and in favor of Appellees, David Hill, Individually and d/b/a DOH Oil Company, on Appellees' affirmative defense of limitations. Appellants' 2019 lawsuit was a collateral attack on a tax lien foreclosure which occurred in 1999, which Appellants allege occurred without adequate notice and in violation of their predecessors' due process rights. Appellees moved for summary judgment based on the Tax Code's one-year statute of limitations, which the trial court granted.

We find the trial court did not err in granting summary judgment in favor of Appellees because Appellants failed to meet their burden to present evidence indicating a material issue of fact on the applicability of the statute of limitations to their case. We affirm the judgment of the trial court.

BACKGROUND

In 1999, Appellees purchased various mineral interests at auction after they had been foreclosed upon by Pecos-Barstow-Toya ISD, Reeves County, and Reeves County Hospital District. The sheriff's deed conveying the mineral interests to DOH Oil Company was recorded in the property records on April 8, 1999.

On February 13, 2019, Appellants filed a lawsuit collaterally attacking the validity of the tax sale of the mineral interests to DOH Oil Company. In their petition, they alleged their predecessors-in-title owned a portion of the mineral interests in question at the time of the tax sale foreclosure, and the tax sale was undertaken without any service of process upon their predecessors. As a result, according to

Appellants' petition, the judgment following the tax sale was void for lack of due process. Their petition sought a declaratory judgment that the tax sale judgment was void and sought to quiet title on the subject mineral interests.

In their answer, Appellees pleaded the affirmative defense of limitations, among others. They later moved for summary judgment on limitations, invoking the one-year statute of limitations prescribed by the Texas Tax Code for challenges to title of property sold in a tax sale. *See* TEX.TAX CODE ANN. § 33.54(a)(1). Appellees argued Appellants' deadline to challenge the validity of the sale was one year after the deed of sale to DOH Oil Company was recorded in the property records, or April 8, 2000, pursuant to Section 33.54. *See id*. Because Appellants' lawsuit was not filed until 2019, Appellees asserted Appellants' claims were barred. Additionally, Appellees argued the Tax Code's tolling provision—namely, for Appellants or their predecessors to have paid taxes on the property from the time of the sale until the suit challenging the sale was brought—was not triggered in this case because Appellants did not allege that they or their predecessors paid taxes during that time. *See* TEX.TAX CODE ANN. § 33.54(b). Furthermore, Appellees argued the statute of limitations applies to cases challenging the validity of a tax sale even where due process has been denied to a property owner by improper or a complete lack of service of process, based on Texas precedent. *See, e.g., W.L. Pickens Grandchildren's Joint Venture v. DOH Oil Co.*, 281 S.W.3d 116, 121 (Tex.App.—El Paso 2008, pet. denied); *Am. Homeowner Pres. Fund, LP v. Pirkle*, 475 S.W.3d 507, 514-15 (Tex.App.—Ford Worth 2015, pet. denied); *John K Harrison Holdings, LLC v.*

Strauss, 221 S.W.3d 785, 791 (Tex.App.—Beaumont 2007, pet. denied); *Session v. Woods*, 206 S.W.3d 772, 778 (Tex.App.—Texarkana 2006, pet. denied); *Barrera v. Chererco, LLC*, No. 04-16-00235-CV, 2017 WL 943436, at *2 (Tex.App.—San Antonio 2017, no pet.)(not designated for publication).

In response, Appellants argued Texas intermediate courts applying the statute of limitations to cases asserting constitutional challenges were incorrectly decided. Appellants claim Texas Supreme Court and United States Supreme Court precedent mandates that for the requirements of due process in a tax foreclosure to be met, a property owner was entitled to personal service of process of the proceedings, and the preservation of due process trumped any limitations periods prescribed by state statute. *See, e.g., In re E.R.*, 385 S.W.3d 552, 566-67 (Tex. 2012)(declining to apply statute of limitations under Texas Family Code for suit terminating parental rights when due process was denied to mother through improper service); *see also Schroeder v. New York*, 371 U.S. 208, 211 (1962)(due process was not satisfied when notice of foreclosure was only by publication and posting, even though the challenge was filed outside of the limitations period); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956)(notice by publication deprived landowner of due process even though collateral attack was filed after deadline for appeal).

Appellees filed a reply in support of their motion for summary judgment, reiterating their position that the statute of limitations applied to Appellants' due process claims. Appellees also argued that even if Appellants' due process claims would prevent application of the statute, Appellants had failed to carry their burden of producing any evidence tending to

raise an issue of material fact on the allegedly inadequate notice.

Following a hearing, the trial court granted Appellees' motion for summary judgment. Appellants filed a motion for new trial, reasserting the same argument alleged in their response and newly claiming Appellees failed to meet their burden on summary judgment "demonstrat[ing] that there was not even a scintilla of evidence that the due process rights of [Appellants'] predecessor in interest were not violated." The trial court denied Appellants' motion for new trial.

This timely appeal followed.

DISCUSSION

Appellants present one issue on appeal: whether the trial court erred in granting Appellees' motion for summary judgment on the affirmative defense of limitations when Appellants' case seeks to void a tax judgment based on the denial of constitutional due process for lack of valid service. In response, Appellees argue that ample precedent, including precedent binding on this Court, has upheld summary judgment against plaintiffs challenging the validity of a tax judgment for lack of service and constitutional due process issues when the challenge is raised outside of the limitations period.[1] Moreover, according to

[1] During the pendency of this appeal, the Texas Supreme Court decided *Mitchell v. MAP Resources, Inc.*, No. 21-0124, 2022 WL 1509745, *1 (Tex. May 13, 2022), which squarely addresses this issue. We acknowledge that neither party had the benefit of *Mitchell*'s analysis in the trial court proceedings or briefing stages of this appeal. However, as we discuss more fully below, *Mitchell*'s analysis is inapplicable to the facts of this

Appellees, summary judgment was proper because Appellants failed to present evidence in support of their due process arguments at the summary judgment phase, and thus failed to carry their burden to avoid having summary judgment entered against them.

We first consider Appellees' contention that summary judgment was proper because Appellants failed to meet their burden of proof to defeat Appellees' motion.

Standard of Review and Applicable Law

A grant of summary judgment is reviewed *de novo*. *Murray v. Nabors Well Service*, 622 S.W.3d 43, 50 (Tex.App.—El Paso 2020, no pet.)(*citing Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013)). Summary judgment is appropriate when the movant shows that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a. In deciding whether a genuine issue precludes summary judgment, we treat all evidence favorable to the non-movant as true and indulge every reasonable inference and resolve all doubts in the non-movant's favor. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). When a defendant conclusively establishes all elements of an affirmative defense, the defendant is entitled to summary judgment. *See SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 355 (Tex. 1995); *Holland v. Thompson*, 338 S.W.3d 586, 593 (Tex.App.—El Paso 2010, pet. denied).

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case as a result of evidentiary deficiencies at the summary judgment stage.

To achieve summary judgment on the defense of limitations, "[t]he defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pled or otherwise raised[.]" *Holland*, 338 S.W.3d at 593 (*citing KPMG Peat Marwick v. Harrison County Housing Finance Corp.*, 988 S.W.2d 746, 748 (Tex. 1999)). This well-established tenet applies to cases where a tax judgment is being collaterally attacked. *See W.L. Pickens*, 281 S.W.3d at 119. Upon such showing, the non-movant bears the burden to present evidence raising an issue of material fact to avoid the statute of limitations. *Rodriguez v. Cemex, Inc.*, 579 S.W.3d 152, 160 (Tex.App.—El Paso 2019, no pet.). The non-moving party is not required to marshal all its proof in response to a summary judgment motion but must present evidence that raises a genuine issue of material fact on each of the challenged elements. *Stierwalt v. FFE Transp. Services, Inc.*, 499 S.W.3d 181, 194 (Tex.App.—El Paso 2016, no pet.). If a plaintiff fails to raise a genuine issue of material fact as to the affirmative defense, the trial court must grant the motion. *See id.*

Analysis

We first consider whether Appellees met their burden of proof as the movant. In their motion, Appellees cite to Section 33.54 of the Texas Tax Code, which provides a limitations period of one year from "the date that the deed executed to the purchaser at the tax sale is filed of record" for challenges to title of property sold in a tax sale. *See* TEX.TAX CODE ANN. § 33.54(a).[2] As summary judgment evidence, Appel-

[2] As discussed further in our opinion, Section 33.54 includes an exception to the limitations period for persons who were not

lees attached a copy of the Sheriff's Tax Deed from the sale of the mineral interests including those belonging to Appellants' predecessor-in-interest. The date of filing the deed in the property records establishes the accrual date of claims, which the record affirmatively shows is April 6, 1999.

Accordingly, Appellees have conclusively proved the accrual date for Appellants' claims. It was not necessary for Appellees to negate the discovery rule, since it was neither pleaded by Appellants nor is applicable to claims challenging a tax sale. *See W.L. Pickens*, 281 S.W.3d at 122 (precluding application of the discovery rule to cases challenging a tax sale). Appellees met their initial burden proving their entitlement to summary judgment on limitations.

At this juncture in the summary judgment proceedings, the burden shifted to Appellants to present evidence raising a material issue of fact as to the applicability of the statute of limitations to their petition. *See Rodriguez*, 579 S.W.3d at 160; *W.L. Pickens*, 281 S.W.3d at 123. Evidence which would preclude application of the statute of limitations is proof that Appellants and/or their predecessors paid taxes on the property from the time of the sale in 1999 until their suit was brought. *See W.L. Pickens*, 281 S.W.3d at 123; TEX.TAX CODE ANN. § 33.54(b). When a person challenging a tax sale presents evidence it paid taxes between the time of the sale and the time the challenge is brought, the limitations period on suits challenging the sale is inapplicable. *See W.L. Pick-*

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served with citation in the suit to foreclose the tax lien when those persons paid taxes on the property during the limitations period and until a suit challenging the tax sale is commenced. *See id.* § 33.54(b).

ens, 281 S.W.3d at 123; TEX.TAX CODE ANN. § 33.54(b). However, no such evidence was provided by Appellants, nor did Appellants make any contention they or their predecessors-in-interest paid taxes during this period.

Additionally, Appellants could have presented evidence to support their due process claims. Since this appeal was filed, the Texas Supreme Court issued its opinion in *Mitchell v. MAP Resources, Inc.*, No. 21-0124, 2022 WL 1509745, *1 (Tex. May 13, 2022). *Mitchell* also examined whether due process rights were violated after heirs to a mineral interest learned their predecessor's rights were foreclosed upon after she was served by publication, despite her address being available in recorded warranty deeds and the county's tax records. *See id.* The Texas Supreme Court held that the publicly available property records offered as evidence in a summary judgment proceeding should have been considered by the trial court in a collateral attack on a judgment for due process concerns. *Id.* Further, because the records contained the predecessor-in-interest's address, serving her by posting violated her right to procedural due process. *Id.*

We realize Appellants did not have the benefit of *Mitchell* as precedent at the time of their proceedings in the trial court. However, if they intended to rely on allegations of a due process violation as a response to a motion for summary judgment, they were required to present **evidence** of the alleged violation in response to Appellees' motion. *See Sec. State Bank & Tr. v. Bexar County*, 397 S.W.3d 715, 723 (Tex.App.—San Antonio 2012, pet. denied)(where bank was a lienholder of record and entitled to notice of tax sale, but evidence on summary judgment

showed complete lack of notice, one-year statute of limitations did not bar challenge to sale brought by the bank).[3] They did not. In fact, Appellants did not attach any evidence to their response to Appellees' motion for summary judgment. Rather, they relied on the arguments in their response and the substance of their petition claiming the notice by posting to their predecessors-in-interest was constitutionally infirm and deprived them of due process, which they assert precludes application of the statute of limitations. Their failure to present any evidence of the alleged violation is a key distinction between the facts of this case and *Mitchell*, where the successors-in-interest attached as evidence in the summary judgment proceedings copies of public records which had been readily available to the taxing authorities at the time of the foreclosure sale. *See Mitchell*, 2022 WL 1509745 at *3. Appellants argue that documents filed among the property records of Reeves County would have demonstrated the lack of diligent inquiry into their whereabouts at the time of the foreclosure sale. However, they failed to attach those documents, or any other evidence in support of the alleged due process violations, and instead relied on the substance of their arguments. But—and on this there can be no

[3] *See also Ocwen Loan Servicing, LLC v. Gonzalez Fin. Holdings, Inc.*, 77 F. Supp. 3d 584, 588 (S.D. Tex. 2015), *aff'd sub nom. Ocwen Loan Servicing, L.L.C. v. Moss*, 628 Fed. Appx. 327, 328 (5th Cir. 2016)(declining to apply one-year statute of limitations to a lienholder who did not receive notice of the tax sale)("When the moving party has met its [summary judgment] burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings. The nonmovant must identify specific evidence in the record and explain how that evidence prevents summary judgment on the movant's claim.").

disagreement—arguments in pleadings are not evidence, even when sworn to or verified. *CHRISTUS Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 540 (Tex. 2016); *In re Elamex, S.A. de C.V.*, 367 S.W.3d 891, 898 (Tex.App.—El Paso 2012, no pet.).

In their reply brief, Appellants argue for the first time on appeal that Appellees failed to satisfy their summary judgment burden. Specifically, Appellants argue Appellees "clearly asserted in their Petition that the Texas Tax Code's statute of limitations does not apply to sales held in violation of a property owner's due process rights[,]" and therefore, Appellees were required to negate this contention in their motion for summary judgment.[4] Appellants claim that in order to prove Appellees were entitled to summary judgment, Appellees needed to "proffer . . . evidence to negate Appellants' claimed due process violation, *i.e.* evidence that notice and service of process was proper[.]" First, any issue not raised initially in an appellant's primary brief is not preserved for review. *Fox v. City of El Paso*¸ 292 S.W.3d 249, 251 (Tex.App.—El Paso 2009, pet. denied)(citing TEX.R.APP.P. 38.3). Appellants attempt to couch this argument as responsive to Appellees' brief; however, the argument made by Appellees to which Appellants address this new contention is the very same ground upon which Appellees sought summary judgment in the first place. In fact, Appellants made a similar argument in their motion for new trial, indicating an intention to pursue this position on appeal. However, they failed to raise it in their brief on the merits,

[4] It is unclear to this Court where in Appellants' petition they plead the inapplicability of the Tax Code's statute of limitations to their case.

thereby waiving the issue on appeal. *See* TEX.R.APP.P. 38.1(i); *Fox*, 292 S.W.3d at 251.

Even if Appellants had properly preserved this issue, their position is a misstatement of the summary judgment burden. Appellants argue that for Appellees to succeed on their limitations defense *at the summary judgment stage*, they must marshal evidence "conclusively establishing" that service upon Appellants' predecessors was proper, thus foreclosing on Appellants' due process claims. In other words, Appellants interpret the law to mean that to succeed on an affirmative defense through a summary judgment motion, the party must "conclusively" dispose of the merits of its opponent's claim. Appellants' position is incorrect. An affirmative defense is a reason offered by a defendant why the plaintiff is ineligible for recovery regardless of the merits of his claim. *See MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 137 (Tex. 2014). We acknowledge the somewhat unique circumstances of this particular case, and Appellants' assertion their predecessors-in-interests' violation of due process—their substantive claim—precludes application of Appellees' statute of limitations affirmative defense. However, the summary judgment standard is well-settled and the parties' respective burdens at the summary judgment stage are clear: the burden to present some evidence demonstrating an issue of material fact on the applicability of the statute of limitations lay with Appellants as the non-movants. *See Stierwalt*, 499 S.W.3d at 194. If they intended to rely solely on their due process claims to defeat the limitations assertion, as their petition and response indicate, it was their burden to present **some evidence** of a due pro-

cess violation.[5] Their failure to present **any evidence** of a due process violation or any other reason why the limitations period should not apply after Appellees satisfied their burden proving the limitations period should apply is insufficient to avoid imposing summary judgment against them.

Appellants also raise for the first time in their reply brief that a summary judgment based upon the plaintiff's pleadings requires the court to assume all allegations and facts contained in the plaintiff's petition are true. This argument has also not been preserved for review. *See* TEX.R.APP.P. 38.1(i); *Fox*, 292 S.W.3d at 251. Even if it was, however, Appellants misstate the law. A defendant moving for summary judgment against a plaintiff for failing to state a cause of action relies solely upon the contents of the plaintiff's petition, and "all allegations, facts, and inferences in the pleadings are taken as true and viewed in the light most favorable to the nonmovant." *Valles v. Texas Com'n on Jail Standards*, 845 S.W.2d 284, 286 (Tex.App.—Austin 1992, writ denied). However, Appellants misapprehend Appel-

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[5] We recognize, as the concurring opinion expounds on, there are circumstances where a defendant asserting a statute of limitations affirmative defense has the burden to conclusively negate a plaintiff's claim that the limitations period has not expired. Those circumstances include, as we mentioned previously in this opinion, where the plaintiff has pleaded the discovery rule. *See Draughon v. Johnson*, 631 S.W.3d 81, 89 (Tex. 2021). Similarly, the burden lies with a defendant to conclusively negate other tolling provisions when they have been pleaded by the plaintiff. *Id.* at 95. However, when, as here, the plaintiff's argument is not for the tolling of limitations, but rather its complete avoidance for reasons of equity, the burden lies with the plaintiff to raise a fact issue to preclude summary judgment against it on a limitations defense. *Id.* at 88.

lees' motion. Appellees did not assert Appellants had failed to state a claim against them in their petition; rather, Appellees argued only that (1) Appellants' lawsuit was barred by limitations, and (2) Appellants had not alleged they or their predecessors paid taxes on the property which would toll the limitations period. Accordingly, even if this argument were preserved on appeal, it is without merit.

We find the record shows Appellees satisfied their burden showing applicability of the Tax Code's statute of limitations to Appellants' lawsuit. We likewise find Appellants failed to present any evidence raising a genuine issue of material fact to avoid application of the statute of limitations. *Rodriguez*, 579 S.W.3d at 160. Accordingly, we find it was proper for the trial court to grant Appellees' motion for summary judgment.

Appellants' sole issue is overruled.

CONCLUSION

Having overruled Appellants' sole issue, the judgment of the trial court is affirmed.

August 30, 2022

YVONNE T. RODRIGUEZ,
Chief Justice

Before Rodriguez, C.J., Palafox and Alley, JJ.
Alley, J., Concurring
Palafox, J., Dissenting

CONCURRENCE

I concur in the Court's judgment. I write separately to further explain why the Appellants here carried the burden to submit some evidence of their claimed due process violation once the Appellees met their initial summary judgment burden for establishing the statute of limitations defense.

When a plaintiff files suit outside of the statute of limitations but alleges a reason for doing so, must the defendant disprove that asserted reason when pursuing a traditional motion for summary judgment on limitations? Or must the plaintiff submit some evidence to support the reason avoiding limitations in its response? Well, it depends. The Texas Supreme Court's latest writing on the question, *Draughon v. Johnson*, answered the question when the plaintiff claimed that his mental incapacity excused an untimely suit to set aside a deed. 631 S.W.3d 81, 85 (Tex. 2021). Section 16.001 of the Texas Civil Practice and Remedies Code tolls the limitations period "[i]f a person entitled to bring a personal action is under a legal disability"—defined as being under 18 years old or "of unsound mind." TEX.CIV.PRAC.& REM.CODE ANN. § 16.001(a), (b). If the plaintiff has pleaded the tolling provision, *Draughon* holds that a party advancing a statute of limitations defense through a traditional motion for summary judgment must conclusively negate that tolling provision's applicability. *Draughon*, 631 S.W.3d at 95. Stated otherwise, because the plaintiff alleged that he was of

unsound mind, the defendant needed to affirmatively negate that contention to prevail on a traditional summary judgment motion based on limitations. The plaintiff carried no burden to prove his mental incapacity in response to the summary judgment motion.

And the *Draughon* court noted other situations that are similarly treated, such as when a party pleads the discovery rule. *Id.* at 89-90; *Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 834 (Tex. 2018) ("In cases in which the plaintiff pleads the discovery rule, the defendant moving for summary judgment on limitations bears the additional burden of negating the rule."). The same is true for other tolling provisions. *Draughon*, 631 S.W.3d at 92. ("In sum, a plaintiff's assertion that the statute of limitations was tolled falls within the category of issues affecting the running of limitations on which the moving defendant bears the burden. To obtain traditional summary judgment on the ground that the limitations period expired before the plaintiff brought suit, the defendant must conclusively negate any tolling doctrines asserted.").

Conversely, the plaintiff carries the burden to present some evidence in its summary judgment response to support certain doctrines that avoid a statute of limitations defense. "[I]f the defendant carries that burden and conclusively establishes its [limitations] defense, the plaintiff can avoid summary judgment by raising a genuine issue of material fact on any equitable defense that its suit should not be barred even though the limitations period has run—such as fraudulent concealment, estoppel, or diligent service." *Draughon*, 631 S.W.3d at 88-89, *citing Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 593 (Tex. 2017) (estoppel); *Murray v. San Jacinto Agency,*

Inc., 800 S.W.2d 826, 830 (Tex. 1990) (lack of due diligence in service of process); *Nichols v. Smith*, 507 S.W.2d 518, 521 (Tex. 1974) (fraudulent concealment). The court describes these cases as falling into a second category called reasons to "avoid" limitations that are "independent of the defendant's conclusive showing that the limitations period expired." *Draughon*, 631 S.W.3d at 93-94.

In summary, the court reconciled these situations by writing the "defendant has the burden regarding any issues raised that affect the running of limitations, while the plaintiff has the burden to raise a fact issue of equitable defenses that defeat limitations even though it has run." *Draughon*, 631 S.W.3d at 88.

So where does the Appellants' lack-of-service-due-process claim fall? It is not like a tolling provision. The Tax Code has a statutory tolling provision, but that would have required Appellants to be paying the taxes, and so long as they did, their deed claim would have not accrued. *See* TEX.TAX CODE ANN. § 33.54(b). Appellants did not plead section 33.54(b) tolling in their petition. Instead, they allege that the 1999 tax suit judgment was void based on the lack of service on the record owners of the property. And that claim is unlike a tolling provision because under their theory of the case, the statute of limitations is not simply interrupted—it never applies. Traditional tolling may come to an end—that is, the plaintiff reaches the age of majority, or achieves a sound mind. TEX.CIV.PRAC.& REM.CODE ANN. § 16.001(a), (b). If a party was not served before a judgment was rendered, that fault can never be undone.

Nor is Appellants' limitations-avoidance claim like the discovery rule, which delays accrual until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury. *Schlumberger*, 544 S.W.3d at 834. Appellants do not allege the discovery rule nor does their argument turn on when some person learned of the tax sale. Rather, it more resembles a confession and avoidance claim, as it admits that limitations have run, but they avoid its consequences due to lack of service. It is also a claim in equity, as it asks a court to overturn a judgment outside the confines of the tax statute and divest the Appellees of property that was purchased some nineteen years earlier in a facially proper tax sale.[1] And *Draughon* placed "equitable defenses that defeat limitations" into the category of defenses which require a plaintiff to present some evidence in response to the summary judgment. 631 S.W.3d at 88-89. Appellants' due process claim most neatly fits into that category. And as the majority notes, Appellants did not present any evidence to demonstrate their due process violation.[2] So while

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[1] We describe a bill of review as an "equitable proceeding" that allows a court to set aside a judgment that is no longer subject to regular appeal. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979). How much more so is a collateral attack on a judgment brought even after the time for filing an equitable bill of review

[2] I recognize, of course, that at the time the summary judgment was heard, Appellants would have faced the argument that the kind of extrinsic evidence at issue here—public deed records—would have been inadmissible in a collateral attack. *See York v. State*, 373 S.W.3d 32, 41 (Tex. 2012). The Texas Supreme Court modified that rule in an appeal arising from the very same tax sale judgment that gives rise to this case. *Mitch-*

the due-process-lack-of-service claim could negate the statute of limitations, the procedural posture of the summary judgment record precludes our consideration of that argument.

With this additional explanation, I join the majority opinion.

JEFF ALLEY, Justice

August 30, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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ell v. MAP Resources, Inc., No. 21-0124, 2022 WL 1509745, at *1 (Tex. May 13, 2022). I concede that the result here is harsh: the Appellants were not prescient enough to foresee the outcome of the *Mitchell* case and include their own deed records in their summary judgment response. But we cannot merely assume what those deed records may have shown, and further assume they would have provided the original taxing entities with a viable address for service of process.

DISSENTING OPINION

As evident by the differing views of my two colleagues—who otherwise agree on the outcome of the case—the critical inquiry of this summary judgment dispute necessarily requires that we determine on which party the burden of proof rested, and whether that burden was met. Chief Justice Rodriguez determines that Appellees met their initial summary judgment burden such that a burden of proof shifted to Appellants to present evidence raising a fact issue precluding the applicability of Appellees' statute of limitations defense. She determines that evidence satisfying that burden, which Appellants failed to produce, would include proof that taxes were paid on their property from the time of the tax sale in 1999 to the date of the filing of their suit. While Justice Alley agrees that the initial burden shifted to Appellants, he writes separately to further explain that he would categorize Appellants' due process claim as one that "more resembles a confession and avoidance claim." He nonetheless agrees such equitable defense to the running of limitations required Appellants to present evidence raising a fact issue to avoid summary judgment.

Regardless of the differences reflected by these separate writings, the plurality opinion concludes that based on the evidence attached to Appellees' motion for summary judgment, they met their initial burden of proof to conclusively establish the running of the one-year statute of limitations against Appel-

lants' due process claim. *See* TEX. TAX CODE ANN. § 33.54. As proof of such defense, Appellees relied on the sheriff's deed from which title of the property at issue had been conveyed to Appellees following a tax sale. That deed reflected a recording date of April 1999. The majority concludes the deed conclusively established that Appellants' suit was brought nearly nineteen years after the running of the applicable statute of limitations. The majority further concludes the burden shifted to Appellants to produce evidence raising a fact issue on their due process claim, which they failed to do.

Based on the nature of Appellants' claim and the well-established standards of a traditional motion for summary judgment, I disagree that Appellees met their initial burden of proof, such that a burden ever shifted to Appellants to create a fact issue.

I.

To start, Appellants identified their claim as "a collateral attack on a void 1999 tax suit judgment." The petition contends that the tax judgment was entered without personal jurisdiction over James W. Gill and Gale T. Goss (James and Gale), now deceased, who were Appellants' predecessors-in-title to a mineral interest in land located in Reeves County. Appellants' claim alleged "[t]he [tax] [j]udgment was void as to James and Gale because there was a complete failure of service of citation on them and they were thereby denied due process guaranteed to them under the Fourteenth Amendment to the United States Constitution and Article I, Sections 13 and 19 of the Constitution of the State of Texas." Moreover, Appellants asserted that, because the judgment was void, "the resulting tax sale and [s]heriffs' [t]ax

[d]eed to [DOH Oil Company] were also void as to the [p]roperty." Finally, Appellants alleged that even though the sheriff's deed correctly identified the interests formerly owned by James, "it did not correctly identify the interest purportedly owned by Gale." Based on all these allegations, Appellants sought a judgment declaring the tax judgment void and of no effect as to James, Gale, and the property; and further declaring that the sheriff's deed could not and did not convey any interest that was not included in the tax suit petition and foreclosed upon by the judgment.

As the majority opinion describes, the Supreme Court of Texas recently addressed a similar due process claim brought against the same 1999 tax judgment at issue here. *See Mitchell v. MAP Resources, Inc.*, No. 21-0124, 2022 WL 1509745, at *1 (Tex. May 13, 2022). In *Mitchell*, the heirs of Elizabeth Mitchell sued the current owners of disputed mineral interests, alleging the tax foreclosure judgment rendered against Elizabeth was void as to her because she had not been properly served, thus violating her federal and state constitutional rights. *Id.* Elizabeth was a named defendant— "[among the] almost 500 other defendants"—whose mineral interests were foreclosed upon by taxing authorities. *Id. Mitchell* considered whether section 33.54 of the Tax Code applied to the heirs' due process claim. *Id.* at *9.

Regarding the nature of such claim, *Mitchell* explained, "[t]he Due Process Clause of the [Fourteenth Amendment to the] United States Constitution prevents the government from depriving a person of his or her property, without due process of law." *Id.* at *5 (citing U.S. CONST. AMEND. XIV, § 1 and TEX. CONST. art. I, § 19). Thus, constitutional protections "require

that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)). Notice must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Id.* (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988)).

Regarding claims of this nature, *Mitchell* builds on the guidance earlier provided by the Supreme Court of Texas in *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 273 (Tex. 2012). Addressing procedural aspects of such due process claims, *PNS Stores* held that "a judgment may also be challenged through a collateral attack when a failure to establish personal jurisdiction violates due process." *Id.* (citing *Peralta*, 485 U.S. at 84). The Supreme Court observed that "a judgment entered without notice or service is constitutionally infirm, and some form of attack must be available when defects in personal jurisdiction violate due process." *Id.* at 272–73. *PNS Stores* further described that a failure to give notice violates "the most rudimentary demands of due process of law." *Id.* at 273. A litigant may attack a void judgment directly or collaterally. *Id.* at 271. Although a direct attack must be brought within a definite time, a collateral attack may be brought at any time. *Id.* at 272 (citing *In re E.R.,* 385 S.W.3d 552, 566 (Tex.2012)). When attacked collaterally, a judgment alleged as void is presumed valid, but the presumption disappears when the record affirmatively reveals a jurisdictional defect. *Id.* at 273. Here, Appellants brought such a collateral attack outside the one-year limita-

tions period provided by the Tax Code, alleging the tax judgment and resulting sheriff's deed were void and without effect.

When reviewing such a due process claim, *Mitchell* also discussed the applicability of counterarguments and defenses raised by the property owners' own motion for summary judgment. Similar to the defense asserted in the case at hand, the property owners named as defendants in the Mitchell heirs' suit alleged that even if the foreclosure judgment violated due process, the judgment could not be declared void given it was barred by the running of the Tax Code's one-year statute of limitations. *Mitchell*, 2022 WL 1509745, at *9. But *Mitchell* rejected this argument. The Supreme Court noted that no temporal limits may be placed on a challenge to a void judgment when such a claim is filed by a party who did not receive the type of notice to which the party was entitled to receive under the circumstances. *Id.* at *10. Rather, "state statutory requirements must give way to constitutional protections." *Id.* (citing *E.R.*, 385 S.W.3d at 566)(providing that Texas rules "must yield to contrary precedent from the U.S. Supreme Court"). *Mitchell* concluded that when such a claim is properly brought, the requirements of section 33.54 of the Tax Code are "irrelevant" as the suit operates independent of the state statutory provision. *Id.*

Appellees' Traditional Motion for Summary Judgment

Yet *Mitchell* offers only limited guidance here because its procedural posture significantly differs. As stated earlier, the parties in *Mitchell* filed cross-motions for summary judgment and those motions included a hybrid motion for summary judgment

filed by defendant, MAP Resources. *Id.* at *3. As a result, both sides of the lawsuit attached evidence to their motions, and both affirmatively argued that each were entitled to judgment as a matter of law.

Here, only Appellees filed a motion for summary judgment, not Appellants. Relying on section 33.54 of the Tax Code and the recording date of the attached sheriff's deed, Appellees argued first that "the time for challenging the tax [sale] passed nineteen years ago." Second, they urged that Appellants did not allege that they or their predecessors had paid taxes in the interim. Based on the form and substance of the motion, Appellees filed a traditional motion for summary judgment, not a no-evidence or hybrid motion. *Compare* TEX. R. CIV. P. 166a(c)(traditional motion), *with* TEX. R. CIV. P. 166a(i)(no-evidence motion); *see also Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013)(discussing the combination of a traditional motion with a no-evidence motion results in a hybrid motion). Nowhere in the motion did Appellees assert that no evidence supported one or more essential elements of Appellants' due process claim.

The standard for reviewing motions filed under Rule 166a(c) of the Texas Rules of Civil Procedure "is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law." *KPMG Peat Marwick v. Harrison County Housing Fin. Corp.,* 988 S.W.2d 746, 748 (Tex. 1999); *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548 (Tex.1985)). Under that standard, we must take as true all evidence favorable to the non-movant and must make all reasonable inferences in the non-movant's favor as well.

See KPMG Peat Marwick, 988 S.W.2d at 748; *Nixon,* 690 S.W.2d at 548–49.

In *Draughon v. Jones*, the Supreme Court of Texas instructed that "[a] court must grant a 'traditional' motion for summary judgment 'forthwith if [the summary judgment evidence] show[s] that . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out.'" *Draughon v. Johnson*, 631 S.W.3d 81, 87 (Tex. 2021)(alteration in original)(quoting TEX. R. CIV. P. 166a(c)). Describing the movant's burden of proof under our traditional rule, *Draughon* stated, "courts never shift the burden of proof to the non-movant unless and until the movant has established his entitlement to a summary judgment by conclusively proving all essential elements of his cause of action or defense as a matter of law." *Id.* at 87–88. Of further note, *Draughon* clarified that the traditional motion has been interpreted such that "the presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear." *Draughon*, 631 S.W.3d at 87 (citing *Missouri-Kansas-Texas R.R. v. City of Dallas*, 623 S.W.2d 296, 298 (Tex. 1981); *Chavez v. Kan. City So. Ry. Co.*, 520 S.W.3d 898, 899 (Tex. 2017)(per curiam)). "The non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right." *Draughon*, 631 S.W.3d at 88.

Applicable to this case, Appellants carry the burden at trial to rebut the presumption of validity that applies to the tax judgment and sheriff's deed, which they collaterally attack by their pending suit. *See PNS Stores*, 379 S.W.3d at 273. And based on that

presumption, they must affirmatively demonstrate that the trial court lacked personal jurisdiction over James and Gale, their predecessors-in-interest. Yet, as relevant to the standards applicable to this summary judgment proceeding, that burden operates in reverse order in this instance. *See Draughon,* 631 S.W.3d at 81; *Chavez v. Kan. City So. Ry. Co.*, 520 S.W.3d at 899 (Tex. 2017).

Because Appellees carry the initial burden to conclusively establish their entitlement to the Tax Code's limitations defense, that burden necessarily includes a requirement to show that such defense would apply to Appellants' claim. To do so, Appellees carry the burden to show that no due process violation occurred with regard to the collaterally attacked tax judgment and sheriff's deed. Said differently, to rely on the deed to establish the running of limitations, Appellees carried the burden of establishing not only the date of the deed's recording but also its validity. That is, not merely that the judgment and deed were presumed valid, but that they were in fact valid and of legal force and effect. When such burden of proof is met, the statute of limitations defense would be applicable to Appellants' claim.

In sum, the sheriff's deed did not enjoy a presumption of validity in this proceeding, as it does enjoy at trial, such that Appellees could rely on it alone to shift the burden of proof to Appellants to prove otherwise. As *Draughon* aptly stated, "[i]f a defendant prefers to place the burden on the plaintiff to raise a fact issue regarding any aspects of limitations on which the plaintiff would have the burden at trial, it is free to file a no-evidence motion for summary judgment as to those matters." *Id.* at 85. Here, Appellees chose not to file a no-evidence or hybrid mo-

tion, and Appellants themselves had neither sought a summary judgment on their claim. Choosing to travel solely on a traditional motion for summary judgment, Appellees carried the full burden to establish the date of the sheriff's deed and its validity.

Conclusion

Because I would conclude that Appellees failed to conclusively establish their affirmative defense of limitations as a matter of law, I respectfully dissent.

August 30, 2022

GINA M. PALAFOX, Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

APPENDIX C

SUPREME COURT OF TEXAS

No. 21-0124

STEPHEN L. MITCHELL, JANIE MITCHELL BELEW, LISA MITCHELL SEIGMANN, AND LINDA MITCHELL STAPLETON, PETITIONERS,

v.

MAP RESOURCES, INC., PECOS BEND ROYALTIES, LLP, PBR PROPERTIES JOINT VENTURES, AND TOMMY VASCOCU, RESPONDENTS

On Petition for Review from the
Court of Appeals for the Eighth District of Texas

Argued: February 22, 2022

Decided and Filed: May 13, 2022

OPINION

JUSTICE BUSBY delivered the opinion of the Court.

Elizabeth S. Mitchell owned a mineral interest in property in Reeves County, and she died in 2009. Her heirs, the petitioners, sued to declare void a 1999 default judgment foreclosing a tax lien on Elizabeth's interest, alleging that she was not properly served with notice of the underlying foreclosure suit and thus the judgment violated her constitutional right to procedural due process. The taxing authorities that brought the foreclosure suit served Elizabeth and almost 500 other defendants by posting citation on the courthouse door.

Elizabeth's heirs contend that she should have been served personally because her name and address were available in eight publicly recorded warranty deeds and in the county's tax records. Respondents, the current owners who purchased the property at a tax sale or later acquired an interest in it, reply that those deeds and records cannot be considered in this collateral attack on the foreclosure judgment because they are outside the record of the underlying suit.

The trial court granted summary judgment for the current owners, ordering that the heirs take nothing. A divided court of appeals affirmed, holding the heirs did not conclusively establish a violation of Elizabeth's due process rights and declining to consider the warranty deeds because of the bar on extrinsic evidence in collateral attacks.

There are two questions before us: (1) can information available in relevant public records be considered in a collateral attack on a judgment that al-

leges constitutional due process violations; and (2) if those records are considered here, were Elizabeth Mitchell's due process rights violated in the 1999 suit? We answer both questions yes. When public property or tax records include contact information for a defendant that was served by publication, we hold that a court hearing a collateral attack on a judgment on due process grounds may consider those records. And because the deed records here featured Elizabeth's mailing address, we hold that serving her by posting did not comply with procedural due process. Accordingly, we reverse the court of appeals' judgment, render partial summary judgment for the heirs, and remand the case to the trial court for further proceedings regarding certain of the current owners' defenses.

BACKGROUND

As the concurring justice in the court of appeals observed, "to anyone who values property rights and due process, the facts of this case are troubling." 615 S.W.3d 212, 224 (Tex. App.—El Paso 2020) (Alley, C.J., concurring). In December 1998, the Pecos-Barstow-Toyah Independent School District, Reeves County Hospital District, and Reeves County (collectively the Taxing Authorities) sued approximately 500 owners of more than 1600 parcels of mineral property—totaling tens of thousands of acres—who had failed to pay their property taxes.[1] To notify the

[1] The original petition by the Taxing Authorities does not name the defendants individually. Instead, it incorporates an attached exhibit listing the mineral leases and their owners. The list is arranged alphabetically by owner first name and spans 55 pages in the record. Strangely, starting on page 29 of the list, it begins to repeat itself. Every subsequent page is a

defendants that they had been sued, the Taxing Authorities posted citations on the door of the Reeves County Courthouse.

Citation by posting was necessary, the Taxing Authorities swore, because not one of the 500 defendants could be located for personal service despite the Authorities' allegedly diligent search. Roughly one month, two attorneys ad litem, and a five-minute bench trial later, the court signed a default judgment foreclosing tax liens on all 1600 parcels, including mineral interests in 320 acres owned by Elizabeth S. Mitchell (misidentified in the defendant list as "Elizabeth A. Mitchell"). Sixteen years later, Elizabeth's heirs brought suit to have the 1999 judgment and subsequent sale set aside for constitutional due process violations.

A. The tax suit and 1999 foreclosure judgment

The Taxing Authorities' original suit sought to foreclose tax liens on mineral interests whose owners had not paid their taxes at some point between 1978 and 1998. Several months after filing their original petition with an attached exhibit listing all defendants and properties, the Taxing Authorities' attorney filed an affidavit seeking court approval for citation by posting under Texas Rule of Civil Procedure 117a. [2] Tracking the requirements of Rule 117a,

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duplicate of a prior page, although the order is not the same. Our review of the first 28 pages of the list, before the entries duplicate, revealed roughly 500 unique owners, 80 owners identified only as "unknown," and 1600 parcels of property.

[2] Rule 117a(3) provides:

counsel said in part that each defendant listed in the exhibit was either a nonresident, absent from the state, or a transient person. Additionally, he said that the names or residences of the other landowners involved in the suit were unknown and could not be ascertained after diligent inquiry. Counsel further swore that, for any defendants for whom a rendition was filed in the previous five years with the appraisal district office that showed the address of any record owner, personal service was issued to the rendition address. The record contains no citation or return of attempted service on any defendant listed in the exhibit.

The court took the Taxing Authorities at their word and authorized citation by posting. On December 17, 1998, the exhibit and a two-page notice to defendants were provided to the Reeves County Sheriff's Office and posted at the county courthouse. The notice required defendants to appear and answer the suit within 42 days, by January 31, 1999. *See* TEX. R. CIV. P. 114.

Also on December 17, the Taxing Authorities filed a motion to appoint an attorney ad litem for the de-

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Where any defendant in a tax suit is a nonresident of the State, or is absent from the State, or is a transient person, or the name or the residence of any owner of any interest in any property upon which a tax lien is sought to be foreclosed, is unknown to the attorney requesting the issuance of process or filing the suit for the taxing unit, and such attorney shall make affidavit that such defendant is a nonresident of the State, or is absent from the State, or is a transient person, or that the name or residence of such owner is unknown and cannot be ascertained after diligent inquiry, each such person in every such class above mentioned, together with any and all other persons . . . may be cited by publication.

fendants who had not appeared or answered. *See* TEX. R. CIV. P. 244. The Court appointed Roddy Harrison, who withdrew two months later, on February 10, 1999, due to conflicts. The next day, the court appointed a new attorney ad litem, Jesse Gonzalez, Jr. At that time, a non-jury trial was scheduled for February 19, 1999. Mr. Gonzalez did not receive the records for the case until February 16, three days before trial.

The trial apparently took less than five minutes.[3] After trial, the court signed a Statement of Evidence—to which the attorney ad litem agreed—reciting that the court had inquired into the sufficiency of the diligence exercised by the Taxing Authorities in attempting to discover the whereabouts of defendants. *See id.* According to the statement, the Taxing Authorities' witness testified to a search of the public records of the county, and that, where the records showed an address for a defendant, "citation was issued for personal service . . . at such address . . . but was unserved." The court concluded that diligent inquiry had been made and signed a default judgment foreclosing the Taxing Authorities' liens on the subject properties. The properties, including Elizabeth's mineral interests, were then sold at a sheriff's sale.

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[3] The record indicates that six other tax delinquency suits were scheduled for trial at the same time as the suit at issue here, each with a different defendant or attorney ad litem. Trying all seven cases was estimated to take thirty minutes. Assuming each case received roughly the same amount of time, that would allow about four minutes per case.

B. The Mitchell heirs' 2015 suit

Elizabeth's heirs (collectively the Mitchells) filed the present suit in 2015—five years after Elizabeth's death and sixteen years after the foreclosure judgment—against respondents, MAP Resources and other current owners of the mineral interests (collectively MAP). The Mitchells sought declarations that the foreclosure judgment was void as to Elizabeth because she had not been properly served and thus her federal and state constitutional rights had been violated. Specifically, they alleged that the attorney for the Taxing Authorities gave false testimony that Elizabeth's address could not be ascertained after diligent inquiry because eight warranty deeds on file in the public records at the time of the foreclosure suit showed that Elizabeth owned the subject property and listed a post office box where she could be reached.[4] They contended that if the Taxing Authorities had actually conducted the diligent inquiry they claimed, Elizabeth's address would have been discovered in the deed records.

The parties filed cross-motions for summary judgment in the trial court. The Mitchells' motion argued that the foreclosure judgment is void as to Elizabeth and her property because the Taxing Authorities, despite having knowledge of her address, failed to serve her in compliance with Texas Rule of Civil Procedure 117a and thereby violated both the United States and Texas Constitutions. Because the judgment is void, they contended that the resulting

[4] All eight warranty deeds are included in the record before us in this 2015 suit. Each deed was filed in 1983, names Elizabeth S. Mitchell as the grantee of the property, and lists as Elizabeth's address "P.O. Box 428, Van Horn, Texas 79855."

deeds and sales of the property are also void.[5] The Mitchells sought declaratory relief to that effect and to quiet title to the property. As evidence, the Mitchells provided, among other things, copies of the eight publicly recorded warranty deeds, probate documents regarding Elizabeth's estate, and copies of documents from the original foreclosure suit, including the citation by posting, statement of evidence, and default judgment.

In response to the Mitchells' motion, MAP raised a number of defenses, including that the Mitchells failed to comply with certain statutory requirements in the Tax Code. Specifically, MAP argued that the Mitchells' claims are barred by the one-year statute of limitations for challenging tax sales. *See* TEX. TAX CODE § 33.54(a). MAP also contended that the Mitchells failed to satisfy the Tax Code's statutory precondition for suits challenging the validity of a tax sale, which requires deposit of any delinquent taxes before the action may be commenced. *Id.* § 34.08(a). Additionally, MAP argued that the Mitchells could not collaterally attack the tax judgment because the statement of evidence established that Elizabeth was properly served, and the Mitchells improperly sought to introduce the warranty deeds despite the bar on extrinsic evidence. Finally, MAP argued that the Mitchells' claims were barred by laches because they unreasonably delayed bringing suit.

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[5] After the judgment, the mineral interests were sold at a sheriff's sale to respondents PBR Properties Joint Ventures, Pecos Bend Royalties, Inc., and Tommy Vascocu, who received a sheriff's deed. That interest was subsequently conveyed in part to MAP Resources via quitclaim deed. The Mitchells seek to have both the sheriff's and quitclaim deeds declared void.

MAP also filed its own hybrid motion for summary judgment.[6] Its motion raised many of the same grounds it argued in response to the Mitchells' motion for summary judgment, with the exception of its laches defense. MAP argued in its motion that the Mitchells' claims failed because they did not file within the statutory limitations period or comply with statutory procedure for challenging a tax sale. It also contended that the Mitchells' attempt to attack the judgment collaterally was impermissible because they could not demonstrate that the judgment was void on its face. As evidence, MAP provided copies of the record from the foreclosure suit, the sher-

[6] Motions for traditional summary judgment under Rules 166a(a) or (b) may be combined with Rule 166a(i) no-evidence motions in "hybrid" motions for summary judgment. *Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004); *see also City of Magnolia 4A Econ. Dev. Corp. v. Smedley*, 533 S.W.3d 297, 299 (Tex. 2017) (per curiam). If a party has the burden of proof on claims or defenses, however, it cannot use a no-evidence motion to establish those claims or defenses. *See* TEX. R. CIV. P. 166a(i); *Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 680 (Tex. App.—Houston [14th Dist.] 2003, no pet.). MAP's motion sought summary judgment on the grounds that the statutory limitations period in the Tax Code had run, that the Mitchells provided no evidence that the tolling provision of the statute had been triggered, and that the Mitchells' suit was an improper collateral attack. MAP's claim that the Mitchells failed to provide evidence that the Tax Code's tolling provision applied can properly be decided in a no-evidence motion because the Mitchells would have the burden of proving tolling at trial. *See Draughon v. Johnson*, 631 S.W.3d 81, 85 (Tex. 2021) ("If a defendant prefers to place the burden on the plaintiff to raise a fact issue regarding any aspects of limitations on which the plaintiff would have the burden at trial, it is free to file a no-evidence motion for summary judgment as to those matters."). Given our disposition, however, we do not reach the tolling issue.

iff's tax deed to PBR Properties Joint Venture, Pecos Bend Royalties, Inc., and Tommy Vascocu, and the quitclaim deed from those parties to MAP Resources.

In response to MAP's motion, the Mitchells contended that MAP's argument improperly elevates the statutory requirements of the Tax Code over constitutionally mandated due process rights. In their view, accepting MAP's position would essentially foreclose any collateral attack on a judgment where service was constitutionally inadequate. The Mitchells argued they were not barred from bringing their collateral attack because constitutional due process rights trump statutory requirements.

Following a hearing, the trial court granted MAP's motion for summary judgment and denied the Mitchells' motion. The court rendered judgment for MAP and the other defendants and ordered a take-nothing judgment on the Mitchells' claims. The Mitchells appealed.

C. The court of appeals' opinions

The court of appeals affirmed, holding that the Mitchells had not established as a matter of law that the trial court lacked personal jurisdiction over Elizabeth. 615 S.W.3d at 223 (plurality opinion). Each of the three panel members wrote a separate opinion. Justice Palafox wrote a plurality opinion holding that although a judgment may be collaterally attacked on the ground that the court did not acquire personal jurisdiction over the defendant in compliance with due process, the record in this case does not conclusively establish that no attempt was made by the Taxing Authorities to personally serve Elizabeth. *Id.* at 222.

Chief Justice Alley concurred. He concluded that although the record established a due process violation under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the plurality's outcome was correct in light of Texas precedent barring consideration of extrinsic evidence. He encouraged a reexamination of this precedent, including a possible exception "when a judgment is based on an express representation that a party performed a diligent review of public records to support an alternative form of service." *Id.* at 224 (Alley, C.J., concurring).

Justice Rodriguez dissented, arguing that due process rights should always trump a state statute or evidentiary rule. Because the warranty deeds in the public record created serious doubts that a diligent search for Elizabeth's whereabouts had actually been conducted, she would have set aside the judgment for complete lack of service. *Id.* at 237 (Rodriguez, J., dissenting). As explained below, we agree in part with both the concurrence and the dissent.

The Mitchells filed a petition for review, which we granted. We review the trial court's rulings on the parties' cross-motions for summary judgment *de novo*, considering both sides' summary judgment evidence and determining all questions presented. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

ANALYSIS

I. In a collateral attack on a default judgment, contact information available in deed and tax records may be considered in deciding whether service by posting satisfied due process.

The Mitchells contend that the default foreclosure judgment should be declared void because Elizabeth was not personally served in compliance with constitutional due process requirements, and thus the court did not acquire personal jurisdiction over her. *See PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 273 (Tex. 2012) (holding that "a judgment may . . . be challenged [as void] through a collateral attack when a failure to establish personal jurisdiction violates due process"). The parties' principal dispute concerns what evidence a court may consider in deciding whether Elizabeth was properly served by posting. To place this dispute in context, we begin by discussing the service requirements of the Constitution and our rules.

Texas Rule of Civil Procedure 117a governs the service of citation on defendants in suits for delinquent ad valorem taxes. To justify citation by publication or posting when a defendant is a nonresident of or absent from the state, or its name is unknown to the attorney requesting issuance of process, the attorney must aver that the defendant is absent, transient, or that its name and residence "cannot be ascertained after diligent inquiry." TEX. R. CIV. P. 117a(3). The "diligent inquiry" requirement of Rule 117a incorporates the requirements of constitutional due process.

The Due Process Clause of the United States Constitution prevents the government from depriv-

ing a person of his or her "property, without due process of law." U.S. CONST. amend. XIV, § 1; *see also* TEX. CONST. art. I, § 19 ("No citizen of this State shall be deprived of . . . property . . . except by the due course of the law of the land.").[7] It is well settled that these words "require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane*, 339 U.S. at 313. Notice must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988) (quoting *Mullane*, 339 U.S. at 314).[8]

In *Mullane*, the Supreme Court of the United States explained that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of

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[7] This Court has held that the federal Due Process Clause and the Texas Constitution's Due Course of Law clause are, for the most part, coextensive. *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 86 (Tex. 2015). The parties have not identified any differences in text or application that are relevant to the issues raised here, so we treat the requirements of both Constitutions as identical for purposes of this opinion.

[8] *See also Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983) ("[P]rocedural due process 'requires notice that is reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests.'" (quoting *City of Waco v. Roddey*, 613 S.W.2d 360, 365 (Tex. App.—Waco 1981, writ dism'd))); *Hamm v. Robinson*, 314 S.W.3d 204, 209 (Tex. App.—El Paso 2010, no pet.) ("As an elementary and fundamental requirement, our system of justice comprehends due process to include notice and an opportunity to be heard by interested parties to the action.").

actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315. The reasonableness of any chosen method of providing notice, and hence its constitutionality, "may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Id.* (citations omitted).

This Court echoed *Mullane* in *Anderson v. Collum*, a case concerning the validity of service by publication under Rule 117a. 514 S.W.2d 230 (Tex. 1974). We held that where property owners were residents and could have been found with diligent inquiry, and where the state's affidavit for citation by publication alleged only that the owner was a nonresident or person whose residence was unknown, the tax sale should be set aside. *Id.* at 230–31. "[T]he failure to comply with [Rule 117a], and the admitted lack of diligence to locate the defendants renders the service by publication ineffective." *Id.* at 231; *see also Sgitcovich v. Sgitcovich*, 241 S.W.2d 142, 147 (Tex. 1951).

We have not considered service under Rule 117a since *Anderson*, but when we have discussed the requirement of diligent inquiry as it relates to citation by publication, we have done so with reference to the due process considerations outlined in *Mullane*. *See In re E.R.*, 385 S.W.3d 552, 558–60, 565 (Tex. 2012) ("Sending a few faxes, checking websites, and making three phone calls . . . is not the type of diligent inquiry required before the [State] may dispense with actual service . . . . *Mullane* authorized service by publication when it is not reasonably possible or

practicable to give more adequate warning." (internal quotation marks omitted)). Rule 117a's requirement of a diligent inquiry into the whereabouts of a defendant in a tax foreclosure suit ensures that a party seeking to serve a defendant by publication or posting has provided process that is more than a mere gesture.

A diligent inquiry by a person who actually desires to find a defendant in a tax suit includes a search of public property and tax records. Following *Mullane*, the Supreme Court has consistently held that when an unknown defendant can be identified or a known defendant's address can be ascertained from publicly recorded instruments, notice by posting or publication is insufficient to satisfy due process. In *Walker v. City of Hutchinson*, the Court held that notice of condemnation proceedings published in a local newspaper was an inadequate means of informing a landowner whose name was known to the city and was on its official records. 352 U.S. 112, 116 (1956). "[T]here seem to be no compelling or even persuasive reasons," the Court wrote, "why such direct notice cannot be given." *Id.* A few years later, in *Schroeder v. City of New York*, the Court reaffirmed that publication in newspapers and posted notices was inadequate to apprise a property owner of condemnation proceedings when his name and address were ascertainable from deed records and tax rolls. 371 U.S. 208, 210–11 (1962).

The Court returned to this issue twenty years later in *Mennonite Board of Missions v. Adams*, addressing whether notice by publication and posting provided a mortgagee of real property with adequate notice of a nonjudicial proceeding to sell the mortgaged property to recover delinquent taxes. 462 U.S.

at792. The Court held that a mortgagee has a legally protected property interest and is therefore entitled to notice that is reasonably calculated to apprise her of an impending tax sale. *Id.* at 798. Further, when a mortgagee is identifiable through an instrument "that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." *Id.* "Personal service or mailed notice is required even though sophisticated [defendants] have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are likely to be initiated." *Id.* at 799. Only when a mortgagee is "not reasonably identifiable" does constructive notice alone satisfy the requirements of *Mullane*. *Id.* at 798.

In light of these principles, we likewise hold that citation by publication or posting violates due process when the address of a known defendant is readily ascertainable from public records that someone who actually wants to find the defendant would search. *See E.R.*, 385 S.W.3d at 564 (explaining that reasonable search "must extend to places where information is likely to be obtained and to persons who, in the ordinary course of events, would be likely to have information of the person or entity sought" (quoting *In re S.P.*, 672 N.W.2d 842, 846 (Iowa 2003))). Here, the default judgment and the Taxing Authorities' testimony in the foreclosure suit refer to the county's public records, including the deed records. Those records show that if the "diligent inquiry" required by the Constitution and Rule 117a had been performed by a person actually desirous of locating Elizabeth Mitchell, he would have discovered her correct name and post office box in the deed records.

MAP responds that the warranty deeds listing Elizabeth S. Mitchell's name and address cannot be considered under our precedent because they are extrinsic to the record of the underlying foreclosure suit. MAP is correct that, as a general rule, extrinsic evidence cannot be considered in a collateral attack to set aside a final judgment. *See Templeton v. Ferguson*, 33 S.W. 329, 332–33 (Tex. 1895); *Crawford v. McDonald*, 33 S.W. 325, 328 (Tex. 1895). But this rule does not extend to cases over which a court "has not, under the very law of its creation, any possible power." *Templeton*, 33 S.W. at 332. In *York v. State*, we observed that the law of Texas courts' creation includes the United States Constitution. 373 S.W.3d 32, 42 (Tex. 2012); *see also Burnham v. Superior Court*, 495 U.S. 604, 608–09 (1990) (invoking principle of *coram non judice* in determining validity of judgment challenged for alleged lack of personal jurisdiction).

As explained, the Constitution requires a diligent inquiry into a defendant's whereabouts, including a search of public deed and tax records for the defendant's address. Moreover, the concerns that animate this and other courts' application of the bar on extrinsic evidence—such as fraud, manipulation, and fading memories[9]—are inapplicable to such records. The authenticity of the deed and tax records is not in question here.

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[9] "To permit impeachment of a judgment by extrinsic evidence opens the possibility of fraudulent avoidance of judgments, for example by a claim that process was not actually served. The testimony of a person making such a claim often cannot be contradicted, because the memory of other possible witnesses has faded by the time the claim is litigated." RESTATEMENT (SECOND) OF JUDGMENTS § 77 cmt. b (1982).

Because the Constitution and Rule 117a require a plaintiff to consult public deed and tax records as part of its diligent inquiry when a defendant's name or residence is unknown, the contents of those records should be regarded as part of the record of the suit rather than as extrinsic evidence. We therefore hold that when such public records contain the address of a defendant served by publication or posting, a court hearing a collateral attack on a judgment may consider that evidence in deciding whether service complied with the constitutional demands of due process.

II. Consideration of the deed records demonstrates that serving the defendant by posting did not comply with procedural due process.

Having defined the scope of the record, we next consider whether it establishes a jurisdictional defect. *See PNS Stores*, 379 S.W.3d at 273. Although a judgment attacked collaterally is presumed valid, that presumption disappears when the record "exposes such personal jurisdictional deficiencies as to violate due process." *Id.*

Here, the record shows that the Taxing Authorities did not comply with Rule 117a or the requirements of due process. As explained above, due process requires notice that is reasonably calculated to apprise parties of the pendency of an action. Personal service of written notice is always adequate, but notice by publication must be scrutinized because "chance alone" brings a resident's attention to a notice published in a newspaper or posted on a courthouse door. *Mullane*, 339 U.S. at 315. Thus, notice by publication is not enough with respect to a person whose name or address is easily ascertainable; such

persons should be served personally. *Schroeder*, 371 U.S. at 212–13; *Sgitcovich*, 241 S.W.2d at 147.

There is no evidence that personal service on Elizabeth was ever attempted. The record of the underlying tax foreclosure suit does contain a statement of evidence as required by Texas Rule of Civil Procedure 244.[10] The statement recites that where the Taxing Authorities' search of public records showed the address of any defendant, "citation was issued for personal service . . . at such address . . . but was unserved." But the statement does not address whether an attempt was made to serve the issued citation, and the record contains no citation or return reflecting attempted personal service on any of the 500 defendants, including Elizabeth.

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[10] MAP argues that the Mitchells have not produced a complete record of the foreclosure suit and that this failure is fatal to their collateral attack. Specifically, MAP points out that the Mitchells failed to produce a transcript of the testimony of the attorney for the Taxing Authorities that he diligently searched for but could not ascertain the defendants' whereabouts. We find this argument unpersuasive. As the Mitchells point out, the trial court in this suit took judicial notice of the record of the foreclosure suit. Moreover, it is unclear that a reporter's record was taken of the brief default trial in the foreclosure suit. Court reporters are not required to transcribe court proceedings unless a party requests it, *see* TEX. GOV'T CODE § 52.046(a), which Elizabeth could not do because she was not present. Even if a transcript was taken in 1999, court reporters are only required to preserve their notes for three years. *Id.* § 52.046(a)(4). This potential unavailability of transcripts is precisely why Rule 244 requires a statement of evidence. The statement creates a record of the evidence supporting a default judgment arising from notice by publication or posting. We conclude that parties may rely on that statement in lieu of a transcript.

The parties dispute whether our Rules of Civil Procedure required that records of attempted personal service be filed with the court in 1999, at the time of the foreclosure suit. The version of Rule 107—entitled "Return of Service"—then in effect provided: "The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person." TEX. R. CIV. P. 107 (1990, amended 2011). It further provided that "when the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain." *Id*. In addition, Rule 25 required then (and requires now) that the clerk's file show, "in brief form, the officer's return on the process." TEX. R. CIV. P. 25.[11]

Thus, if the Taxing Authorities had attempted to serve Elizabeth personally in compliance with our rules, the record of the underlying tax foreclosure suit should reflect it. It does not.[12]

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[11] The parties also dispute the relevance and applicability of Rule 99. Currently, Rule 99 requires that the clerk retain a copy of citation in the court's file. TEX. R. CIV. P. 99. In 1999, Rule 99 did not have this requirement. Given that Rule 107 (both now and in 1999) requires retention of copies of the return, however, consideration of Rule 99 is unnecessary to resolve the issue.

[12] We have held that it is "the established law of this State that it is imperative and essential that the record affirmatively show a strict compliance with the provided mode of service." *McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965). Specifical-

MAP argues that the absence of citations in the record cannot be treated as affirmative proof that the Taxing Authorities did not attempt personal service. We have noted that "unless the party contesting service presents a preponderance of evidence to the contrary—for example, the party's testimony along with corroborating facts or circumstances—the officer's return of service is sufficient proof that the citation and petition were properly served." *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 648 (Tex. 2001). Citations are also treated as presumptive evidence of service, unless the party challenging service carries its burden of showing, by a preponderance of the evidence, that service was not effected. *Ward v. Nava*, 488 S.W.2d 736, 738 (Tex. 1972). These principles do not apply here, however, because no citation or return for Elizabeth appears in the record.

Because Elizabeth was not personally served, constitutional principles of due process and Rule 117a required the Taxing Authorities to conduct a diligent inquiry regarding her residence before serving her by posting. *See supra* Part I. The statement of evidence reflects the testimony of the Taxing Authorities' counsel that public records were searched for the defendants' addresses, and counsel stated in his affidavit that the names and residences of the de-

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ly, we have held that a failure to comply with the requirements of Rule 107 renders a default judgment invalid. *Hubicki v. Festina*, 226 S.W.3d 405, 408 (Tex. 2007) (per curiam). In *Hubicki*, we held that the respondent's failure to establish return of service in compliance with the requirements of Rule 107 rendered service ineffective. *Id.* "Under these circumstances, as a matter of law, Festina failed to establish that alternative service . . . was reasonably calculated to provide Hubicki with notice of the proceedings." *Id.*

fendant owners being served by publication could not be ascertained after diligent inquiry. But the assertion that not one of the approximately 500 defendants had an identifiable address strains credulity. And the recorded warranty deeds bearing Elizabeth's post office box address reveal that, as to her, the Taxing Authorities either did not complete the diligent records search they claimed or did not act on its results. Thus, the recitation in the judgment that the Taxing Authorities exercised diligence "rings hollow," as Chief Justice Alley observed. 615 S.W.3d at 230 (Alley, C.J., concurring).

MAP argues that a post office box is not a "residence," so "proof that the taxing entities were aware of [Elizabeth's] P.O. Box does not negate their lawyers' statement that her *residence* was unknown, which is all Rule 117a requires for citation by publication." This argument is beside the point. "[O]ne desirous of actually informing" Elizabeth of the suit could simply have sent notice to her post office box. *Mullane*, 339 U.S. at 315. There is no evidence that the Taxing Authorities did so here.

When the record underlying the tax foreclosure judgment, including the eight warranty deeds, is considered in its entirety, it demonstrates that the Taxing Authorities' service of Elizabeth by posting was insufficient to satisfy the requirements of due process. Consequently, we hold that the court handling the tax foreclosure suit did not have personal jurisdiction over Elizabeth. *See PNS Stores*, 379 S.W.3d at 273 (holding that the "record affirmatively demonstrates a jurisdictional defect sufficient to void

a judgment when it . . . exposes such personal jurisdictional deficiencies as to violate due process").[13]

III. None of MAP's counterarguments or defenses that are properly presented provide a basis for affirming the summary judgment.

MAP contends that even if the foreclosure judgment violated due process, that judgment should not be declared void given the various other counterarguments and defenses it raised below. These include that the Mitchells' suit is barred by the Tax Code's statute of limitations and that the Mitchells failed to satisfy the Tax Code's preconditions for bringing suit to challenge a tax judgment. We address each of these arguments in turn.

The Tax Code provides that an action relating to title to property may not be maintained against the purchaser of the property at a tax sale unless the action is commenced "before the first anniversary of the date that the deed executed to the purchaser at the tax sale is filed of record." TEX. TAX CODE § 33.54(a)(1). The one-year limitation is inapplicable if a party is not served with citation in the suit to foreclose the tax lien and continues to pay taxes on the property in question during the limitations peri-

[13] MAP argues that, as in *PNS Stores*, any defect in service on Elizabeth was "merely technical." We disagree. The defendant in *PNS Stores* was personally served; the defects involved failures to comply with all of the requirements of Rules 106 and 107, including, among other things, failure to list the exact time service was performed and failure to state that PNS was served through its registered agent. 379 S.W.3d at 273–74. Here, as explained above, there is no evidence that Elizabeth was personally served.

od and until the commencement of the action challenging the validity of the tax sale. *Id.* § 33.54(b).

For several reasons, the statute of limitations does not bar the Mitchells' suit here. First, state statutory requirements must give way to constitutional protections. *E.R.*, 385 S.W.3d at 566 (Texas rules "must yield to contrary precedent from the U.S. Supreme Court"). The Taxing Authorities' failure to conduct a diligent inquiry into the county records means that their service of Elizabeth by publication violated due process, which is sufficient to void a judgment. *See PNS Stores*, 379 S.W.3d at 273. As we explained in *E.R.*, "[a] complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time." 385 S.W.3d at 566.

Second, a statute of limitations "cannot place a temporal limit on a challenge to a void judgment filed by a defendant who did not receive the type of notice to which she was constitutionally entitled." *Id.* "'[A] judgment entered without notice or service is constitutionally infirm,' and some form of attack must be available when defects in personal jurisdiction violate due process." *PNS Stores*, 379 S.W.3d at 272–73 (quoting *Peralta*, 485 U.S. at 84). Thus, in *Walker v. City of Hutchinson*, the Supreme Court of the United States upheld the petitioner's due process challenge to a condemnation judgment based on insufficient notice even though it was brought outside the thirty-day window for appealing eminent domain awards provided by state statute. 352 U.S. at 114.

Applying these principles to the Texas Tax Code, the U.S. District Court for the Southern District of

Texas has held that section 33.54's limitations period did not bar a mortgagee's quiet-title suit. *See Ocwen Loan Servicing, LLC v. Gonzalez Fin. Holdings, Inc.*, 77 F. Supp. 3d 584, 594 (S.D. Tex. 2015). Relying on *Mennonite* and *E.R.*, the district court concluded that a nonjudicial tax foreclosure and sale was void because the mortgagee had not received constitutionally adequate notice, and therefore its suit was not subject to the limitations period in the Tax Code. *Id.* The court echoed the Supreme Court's observation in *Peralta* that "[w]here a person has been deprived of property in a manner contrary to the most basic tenets of due process, . . . only wip[ing] the slate clean . . . would . . . restore[] the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." *Id.* at 592 (quoting *Peralta*, 485 U.S. at 86–87).

Finally, although MAP is correct that neither Elizabeth nor her heirs have triggered the statute's tolling provision, that fact is irrelevant because the Mitchells' suit is a "proper collateral attack, independent of the Tax Code, based on a violation of its due process rights that render[ed] the tax judgment and tax sale void." *Sec. State Bank & Tr. v. Bexar County*, 397 S.W.3d 715, 724 (Tex. App.—San Antonio 2012, pet. denied).

MAP next argues that this suit is barred by the Tax Code's requirement that "[a] person may not commence an action that challenges the validity of a tax sale under [Chapter 34] unless the person: (1) deposits into the registry of the court an amount equal to the amount of delinquent taxes, penalties, and interest specified in the judgment of foreclosure . . . plus all costs of the tax sale, or (2) files an affidavit of inability to pay." TEX. TAX CODE § 34.08(a). Requir-

ing a deposit before a tax sale may be challenged is a reasonable method of deterring frivolous claims. But the Legislature's legitimate interest in collecting taxes and preventing meritless challenges to tax suits must accommodate a property owner's constitutional right to due process, which we have held was violated here.

The Mitchells argue that section 34.08 does not bar a collateral attack based on constitutionally infirm notice. Our courts of appeals have divided on this question.[14] We conclude that a due process violation occurring after an owner fails to pay taxes on its property does not excuse the owner from having to

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[14] Some courts have rejected the argument that section 34.08's prerequisites are inapplicable to a collateral attack based on a lack of due process. *E.g.*, *Avni v. JPAD Holdings, LLC*, No. 4:18-CV-3119, 2020 WL 10762198, at *4 (S.D. Tex. Mar. 30, 2020) (granting summary judgment on ground that plaintiff challenging tax foreclosure failed to satisfy section 34.08's prerequisites); *Roberts v. T.P. Three Enters., Inc.*, 321 S.W.3d 674, 677 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) ("Having failed to comply with [section 34.08], appellants were barred from commencing their action challenging the validity of the tax sale."). But other courts considering the relationship between section 34.08's requirements and due process challenges have indicated that a failure to satisfy 34.08 does not bar a challenge based on insufficient notice. *Sec. State Bank*, 397 S.W.3d at 722–23 (holding that a lienholder's failure to comply with section 34.08 did not preclude it from challenging a tax sale because the record established a "complete lack of notice" violative of due process); *cf. Am. Homeowner Pres. Fund, LP v. Pirkle*, 475 S.W.3d 507, 525 (Tex. App.—Fort Worth 2015, pet. denied) (holding that party's failure to comply with 34.08 was inexcusable because "at no point in this series of circumstances was [it] ever deprived of a due process right, i.e., the opportunity to avail itself of statutory remedies to challenge the sale").

deposit those taxes in order to pursue a suit to recover the property. On the other hand, an owner deprived of due process is entitled to notice of the amount to be deposited and an opportunity to make the deposit or file an affidavit before its suit is dismissed. *Cf. John K. Harrison Holdings, LLC v. Strauss*, 221 S.W.3d 785, 789 (Tex. App.—Beaumont 2007, pet. denied) (holding that defendant's challenge to tax sale was barred by section 34.08 because court provided him an opportunity to satisfy the deposit requirement and he did not do so). Because MAP's summary judgment evidence does not conclusively establish the amount of the required deposit (including any costs of sale) and that the Mitchells failed to deposit that amount when given the opportunity, we cannot affirm the summary judgment for MAP based on section 34.08. This issue remains open for further consideration on remand.

Finally, we cannot resolve MAP's laches defense in this appeal. MAP did not raise its laches defense in its motion for summary judgment, but only in its response to the Mitchells' motion for summary judgment. Nor did the Mitchells move for summary judgment against MAP on laches. Thus, in granting MAP's motion for summary judgment, the trial court did not address MAP's laches defense.

A motion for summary judgment must "state the specific grounds therefor," and "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). In an appeal from a summary judgment, issues to be reviewed by the appellate court must have been actually presented to and considered by the trial court. *City of Houston v. Clear Creek Basin Auth.*, 589

S.W.2d 671, 675–77 (Tex. 1979). A summary judgment cannot be affirmed on a ground not specifically presented in the motion. *Travis v. City of Mesquite*, 830 S.W.2d 94, 99–100 (Tex. 1992). Thus, the laches defense also remains open for further consideration on remand.

Although we take no position on whether laches or any other equitable doctrine can provide a valid defense to a notice-based collateral attack on a judgment transferring property, we note that our holding above regarding limitations does not necessarily resolve the issue. In *E.R.*, which addressed a judgment terminating parental rights, we held that "the statute's time limits cannot foreclose an attack by a parent who was deprived of constitutionally adequate notice." 385 S.W.3d at 567. Rather, "[a] void judgment . . . can be collaterally attacked at any time." *PNS Stores*, 379 S.W.3d at 272. Many jurisdictions have applied this principle to conclude that laches does not generally provide a basis for refusing relief from a void default judgment.[15]

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[15] *See, e.g.*, *Jackson v. FIE Corp.*, 302 F.3d 515, 523 (5th Cir. 2002); *United States v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000) ("[N]early overwhelming authority exists for the proposition that there are no time limits with regards to a challenge to a void judgment because of its status as a nullity; thus laches is no bar to recourse . . . ."); *Katter v. Ark. La. Gas Co.*, 765 F.2d 730, 734 (8th Cir. 1985); *Raymond v. Raymond*, 36 S.W.3d 733, 738 (Ark. 2001) (holding laches defense was misplaced because decree was void *ab initio*, so "the trial court had no jurisdiction or authority to hear the cases in the first place"); *County of San Diego v. Gorham*, 186 Cal. App. 4th 1215, 1229 (Cal. Ct. App. 2010) (observing that "neither laches nor the ordinary statute of limitation may be invoked as a defense against an action or proceeding to vacate . . . a judgment or order" void due to failure of service); *Michels v. Clem-*

Yet *E.R.* also concluded that "[i]f, after learning that a judgment has terminated her rights, a parent unreasonably stands mute, and granting relief from the judgment would impair another party's substantial reliance interest, the trial court has discretion to deny relief." 385 S.W.3d at 569 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 66); *see id.* at 568 n.30 (collecting cases from other states holding that laches can prevent party from challenging adoption decree). Other states and federal jurisdictions have reached similar conclusions in both adoption and non-adoption contexts.[16] We noted in *E.R.*, however, that

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ens, 342 P.2d 693, 698 (Colo. 1959) ("A void judgment is vulnerable to a direct or collateral attack regardless of the lapse of time." (quoting *Davidson Chevrolet, Inc. v. City & Cnty. of Denver*, 330 P.2d 1116, 1118 (Colo. 1958))); *In re Adoption of D.C.*, 887 N.E.2d 950, 955 (Ind. Ct. App. 2008) ("[D]ue process protections mandate that there be no time limitations for such a fundamental challenge." (citing *Stidham v. Whelchel*, 698 N.E.2d 1152, 1154–56 (Ind. 1998))); *In re Last Will & Testament of Welch v. Welch*, 493 P.3d 400, 414 (N.M. Ct. App. 2020) ("A judgment which is void is subject to direct or collateral attack at any time." (quoting *In re Estate of Baca*, 621 P.2d 511, 513 (N.M. 1980))); *Altman v. Parker*, 123 N.E.3d 382, 384 (Ohio Ct. App. 2018) ("Laches . . . does not bar a movant seeking relief from a void judgment. The law is well settled that a void judgment is a nullity that may be attacked at any time." (citation omitted)); RESTATEMENT (SECOND) OF JUDGMENTS § 65 cmt. b.

[16] *See, e.g.*, *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 737 (11th Cir. 2014) (holding that although motion to set aside judgment for voidness is generally not subject to a typical laches analysis, "there are limitations on this doctrine . . . [including] that objections to personal jurisdiction (unlike subject matter jurisdiction) are generally waivable" (quoting *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1299 (11th Cir. 2003))); *Abernathy v. Mitchell*, 406 So. 2d 862, 864 (Ala. 1981); *Abushmais v. Erby*, 652 S.E.2d 549, 552 (Ga. 2007) ("That is not to say . . . that there is no defense available to an

"a judgment debtor's post-judgment diligence may be irrelevant in cases involving a default judgment for money damages." *Id.* at 569.

This case differs from *E.R.* in that the default judgment transfers real property rather than terminating the parent-child relationship or awarding money damages. In addition, the parties bringing the collateral attack here are the heirs of the person deprived of due process. The record is devoid of information regarding how and when they learned of the judgment. On remand, the parties are free to address these legal authorities, identify other relevant authorities for the trial court to consider, and offer evidence of any facts and circumstances relevant to MAP's laches defense.

CONCLUSION

Because the Mitchells have established that Elizabeth was not properly served in the 1999 suit and that sections 33.54 and 34.08 of the Tax Code are inapplicable, and MAP has not established any of the grounds on which it moved for summary judgment, we reverse the court of appeals' judgment for MAP. But we cannot render final summary judgment for the Mitchells because MAP's issue regarding the deposit requirement of the Tax Code and its laches defense remain unresolved. We therefore render partial summary judgment that the court hearing the tax foreclosure suit did not acquire personal jurisdiction

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equitable attack on a void judgment." (first citing *Howington v. Howington*, 637 S.E.2d 389 (Ga. 2006); then citing *Watson v. Watson*, 218 S.E.2d 863 (Ga. 1975))); *cf. Katter*, 765 F.2d at 734 (noting that the principles of Restatement section 66 are "essentially equivalent to those of equitable estoppel").

over Elizabeth because she was not served in compliance with Rule 117a and the requirements of due process, and we remand the case to the trial court for further proceedings.

J. Brett Busby
Justice

OPINION DELIVERED: May 13, 2022