STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Honorable Boonstra, P.J., Riordan, and Redford, JJ, presiding

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COMERICA, INC.,	Supreme Court No. 161661
Plaintiff-Appellee,	Court of Appeals No. 344754
v	Tax Tribunal No. 17-000150-TT
MICHIGAN DEPARTMENT OF TREASURY,	
Defendant-Appellant.	

AMICUS CURIAE BRIEF OF MICHIGAN BANKERS ASSOCIATION

FILED UNDER AO 2019-6

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Dated: December 1, 2021

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STATEMENT OF INTEREST[1]

Amicus Curiae Michigan Bankers Association (the "MBA") is the premier trade organization for Michigan's banking industry. The MBA, founded in 1887, is a nonprofit trade association serving Michigan's banks. The MBA's members have more than 3,000 branches located throughout the state and have combined assets of more than $200 billion. The MBA strives to advance a positive business environment for the Michigan banking industry and to foster safe, profitable, and successful banks, which in turn promote strong communities and a vibrant Michigan economy.

The Court's treatment of the consolidated entity after a bank consolidation is of great importance to the MBA's members. The language of MCL 487.13703 in Michigan's Banking Code expresses a policy choice of facilitating consolidations by assuring banks there will be no legal detriment in such restructuring. Treasury's attempt to put blinders on the Court and disregard the express provisions of Michigan's Banking Code regarding the legal consequences of a consolidation threatens to undermine that Legislative policy. The MBA has a profound interest in protecting its members' expectations that the consolidation provisions in Michigan's Banking Code will be given full effect.

The MBA also has a great interest in the proper application of the Banking Code's consolidation provisions. The Court appears to have been steered toward addressing legal

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[1] This brief was authored solely by counsel for Michigan Bankers Association, without input or influence from Comerica, Inc. Michigan Bankers Association received partial financial support from Comerica, Inc. for attorney fees incurred in preparing the brief.

questions that need not be answered due to a potential misunderstanding of the identity of the consolidated banks under the Banking Code. This brief provides an alternative analysis focused on that issue, which has been touched on but not developed in the same way by the parties or amici.

QUESTION PRESENTED

Michigan's Banking Code dictates that when Comerica-Michigan consolidated into Comerica-Texas, it continued its existence in Comerica-Texas and lost none of its rights, privileges, and interests. Should Comerica-Texas be treated as a continuation of Comerica-Michigan and therefore allowed to claim Comerica-Michigan's tax credit as the first assignee under the Single-Business Tax Act ("SBTA"), MCL 208.1 *et seq*.?

Department of Treasury answered:	No.
Comerica, Inc. answered:	Yes.
The tax tribunal answered:	No.
The Court of Appeals answered:	Yes.

INTRODUCTION

The central issue in this appeal is whether Comerica-Texas could claim the SBTA tax credits previously assigned to Comerica-Michigan as a result of the consolidation that occurred under Michigan's Banking Code. The arguments thus far have turned primarily on the issue of whether Comerica-Michigan's SBTA tax credits could be "transferred" by operation of law to Comerica-Texas. Treasury argues they cannot because there can be no second transfer under the SBTA by assignment or otherwise, but whether a second transfer could occur is not an issue the Court should have to

address in this appeal. To reach this issue, one must first presume, incorrectly, that Comerica-Texas is not the original assignee. Michigan's Banking Code says otherwise.

Section 13703 of the Banking Code states that once the consolidation agreement is approved and certified, "the corporate existence of each consolidating organization is merged into and continued in the consolidated bank." The consolidated bank then "possesses all of the rights, interests, privileges, powers, and franchises" of the consolidating banks. This would naturally include the right to claim a tax credit—not because the right or privilege was "transferred" to Comerica-Texas—but because Comerica-Texas is Comerica-Michigan under a different name.

This result is not only dictated by the plain language of the Banking Code but also by this Court's precedents. The Court has long held that when the statutory provisions confer all rights and obligations of the merging entities on the merged entity, the merged entity "is to be regarded merely as a continuance of the old corporations, under a new name, as to the business of the old corporations." *Guardian Depositors Corp v Currie*, 292 Mich 549, 559; 291 NW 2 (1940). There is no reason why that principle would not apply here, particularly when Michigan's Banking Code itself makes clear that the consolidating bank's existence continues.

Because Comerica-Texas is Comerica-Michigan, there is no reason to decide whether a second transfer of the tax credits could occur by operation of law. As Comerica-Michigan, Comerica-Texas is the first assignee of the tax credits at issue; no second transfer was necessary for Comerica-Texas to exercise Comerica-Michigan's right to claim those credits. For

this reason, the Court should affirm the result reached by the Court of Appeals.

SUMMARY OF PRIOR ARGUMENTS AND DECISIONS

A brief summary of the parties' and the lower courts' various positions is provided to put the dispositive issue of Comerica-Texas's identity in perspective of what has been argued and decided previously. The summary reveals that the point has been made at each level that Comerica-Texas is Comerica-Michigan, but the issue has been disregarded by Treasury, the Tax Tribunal, and the Court of Appeals.

Treasury refuses to honor Comerica-Michigan's certified tax credits because it consolidated into Comerica-Texas.

As the Court of Appeals explained, Comerica, Inc. (the "Taxpayer") is a bank holding company and pays the franchise tax for some 40 subsidiary financial corporations that form a unitary business group under the Michigan Business Tax Act ("MBTA"). One of its subsidiaries, Comerica Bank, was a Michigan banking corporation ("Comerica-Michigan") that, for strategic business purposes, wished to convert to a Texas banking association. To make this change in location and form, Comerica, Inc. (the "Taxpayer") created a new wholly owned subsidiary, Comerica Bank, a Texas Banking Association ("Comerica-Texas") and consolidated Comerica-Michigan into Comerica-Texas through an agreement and plan. For the 2008 tax year, the year in which the merger occurred, the Taxpayer reported Comerica-Michigan's historical net capital as belonging to Comerica-Texas and claimed certain certificated tax credits that Comerica-Michigan

had earned prior to the consolidation under the Single Business Tax Act, MCL 208.1 *et seq*. (COA Op, App 28a-29a.)

When Treasury audited the Taxpayer's 2008-2011 MBTA returns, it concluded that the tax credit could not be claimed because it had already been assigned once from another limited liability company to Comerica-Michigan and could not be reassigned to Comerica-Texas. After an informal conference before a departmental referee did not change Treasury's mind, the Taxpayer appealed that decision to the Tax Tribunal. (*Id*., App 29a-30a.)

The Tax Tribunal affirms Treasury's decision, without addressing arguments regarding the legal effect of a bank consolidation on the consolidated entity and its rights and privileges under Michigan's Banking Code.

In the Tax Tribunal, the parties filed a "joint stipulation of facts." (MTT Op 1, App 7a; see also App 71a-73a). Among the stipulation was an assertion that, immediately following the consolidation, Comerica-Michigan "ceased to exist and was no longer a state chartered bank." (MTT Op 6, App 12a; see also App 72a (stipulation no. 11).) The parties further stipulated that when Comerica filed Michigan Business Tax returns for its unitary business group in 2008 through 2011, the returns "included Comerica-Texas as a member of the unitary business group, but did not separately include Comerica-Michigan as a member of the unitary business group." (*Id*., App 72a-73a (stipulation no. 12).)

The Tribunal granted summary disposition to Treasury, holding that "[w]hen Comerica-MI was extinguished, so were the tax credits." (App 22a.) To reach this conclusion, the Tribunal addressed some arguments and passed by others.

The Tribunal wrestled with whether a voluntary merger results in a transfer by operation of law, but ultimately determined it did not matter because the only means of transfer allowed under the SBTA was assignment. (*Id.*) It also addressed the question of whether tax credits were "property" for purposes of applying the Texas Business Code, and concluded they were not "property." (App 21a.) It held that they were instead "more akin to a privilege." (App 20a.)

The Tribunal did not address the Taxpayer's position that Comerica-Texas possessed the right to claim the tax credits following consolidation, pursuant to Section 3703 of Michigan's Banking Code, MCL 487.13703. (See App 134a.) It also did not address the Taxpayer's position that Comerica-Texas and Comerica-Michigan are merely a change in form of the same entity, pursuant to that same provision. (App 22a-23a; see also App 134a.) It instead "accept[ed] the parties' stipulation that Comerica-MI ceased to exist on October 31, 2007," and held this meant not only that the "net capital should not contain the capital of this defunct entity in Petitioner's 2008 tax base" but also that "Comerica-TX is not the same entity as Comerica-MI and does not inherit the privileges of the tax credits." (*Id.*)

Based on Michigan's Banking Code, the Court of Appeals reverses the Tax Tribunal's decision regarding tax credits but does not address the Taxpayer's "same entity" argument.

The Court of Appeals reversed that part of the Tribunal's decision, holding that Comerica-Texas was entitled to claim the tax credits on two grounds:

> [First, w]e conclude that the SBTA's single-assignment limitation applies only to assignments,

> and not to transfers made by operation of law. Because the tax credits here transferred by operation of law pursuant to the merger statute, MCL 487.13703(1), they were not subject to the single-assignment limitation. [App 33a.]
>
> [Second], the case before us concerns the transfer of certified tax credits in a merger—not a mere expectation that tax credits could be obtainable in the future. Thus, we conclude that the tax credits in controversy constitute property interests within the meaning of the merger statute, MCL 487.13703(1). [App 35a (cleaned up).]

However, one of the underlying premises of the Court of Appeals' analysis was that when the merger occurred, "Comerica-Michigan ceased to exist." (App 12a.) The Court of Appeals did not address the Taxpayer's renewed argument that "the Department should have considered Comerica-Michigan and Comerica-Texas as 'the same entity' for purposes of the tax credits." (App 190a.)

This Court grants leave, focusing on whether the tax credits transferred by operation of law.

In granting leave, this Court required the parties to "include among the issues to be briefed whether, under the now-repealed Single Business Tax Act, MCL 208.1 *et seq.*, the appellee is entitled to the transfer of single business tax credits, by virtue of the merger of two of its subsidiaries, under the theory that the tax credits are either vested property rights or privileges that automatically transferred by operation of law during the merger." (3/17/2021 MSC Order.)

Treasury argues that no transfer could occur except by assignment, which is not allowed.

Treasury argues that Comerica cannot assign or otherwise transfer the credits to Comerica-Texas because they were already previously assigned and assignment is the only mechanism for transfer recognized under the SBTA. Treasury argues that the SBT credits are privileges not freely transferrable for two reasons. First, it contends—without citation to any authority—that the tax credits may only be transferred by means authorized under the SBTA, and the SBTA only permits a single assignment from a qualified taxpayer. Because Comerica-Michigan was not a qualified taxpayer, it could not transfer the tax credits to Comerica-Texas, nor by any other means. Second, Treasury contends the tax credits are not freely transferrable because they are not vested property rights; they are merely privileges available to be claimed by either a qualified taxpayer or its assignee. Treasury argues that Comerica is neither.

Comerica argues the SBTA does not prohibit transfers by operation of law and that Comerica-Texas should be treated as a continuation of Comerica-Michigan.

The Taxpayer contends that no assignment occurred; rather, the credits were transferred to Comerica-Texas by operation of law under Michigan's Banking Code. It contends that the Court of Appeals correctly determined the SBTA does not prohibit transfers by means other than an assignment. Even if such transfers are not expressly authorized by the SBTA, they are authorized under the Banking Code in a merger. If the Legislature intended a different rule to apply to tax credits, it would have said so. The fact that the Legislature did not mention the other forms of transfer indicates only that

it was not concerned with other means of transfer. It cannot be inferred that it means the ordinary rules for bank merger law do not apply to tax credits. The Taxpayer also requests affirmance of the determination that the credits are vested property rights, but notes this is unnecessary to affirm the Court of Appeals' holding, since both property rights and privileges transfer by operation of law under the Banking Code. Finally, the Taxpayer also again argues that Comerica-Michigan and Comerica-Texas should be treated as a same entity for purposes of claiming the tax credits.

Treasury in rebuttal contends that Comerica-Texas cannot claim the credits because it is neither the "qualified taxpayer" nor the first "assignee."

In rebuttal, Treasury argues that Comerica-Texas is subject to the same credit requirements of the SBTA as other taxpayers, which require it to be either a "qualified taxpayer" or a proper "assignee" to claim a tax credit. Without any citation to authority, Treasury contends that "other bodies of law are inapplicable for the reason that, for certificated credit purposes, the SBTA is a fully self-sufficient tax scheme that neither contains nor requires reference to other legal frameworks." Specifically, Treasury contends that banking law is inapplicable to the question of whether Comerica-Texas satisfied the credit requirements of the SBTA. Treasury also takes issue with the Court of Appeals' application of the doctrine of *espressio unius est exclusio alterius*, arguing that if it applies, the doctrine must apply not only to the prohibition against assignments but also the grant of authority to transfer a tax credit by assignment, thereby precluding other modes of transfer.

The Tax Section of the State Bar of Michigan contends that Michigan's Banking Code governs and vests the certificated credits in Comerica-Texas.

The Tax Section of the State Bar of Michigan contends that the laws governing banking corporations are indeed relevant, as they dictate the effect of the merger between Comerica-Michigan and Comerica-Texas on the rights, privileges, liabilities, etc. of Comerica-Michigan. The Tax Section points to Section 3703 of Michigan's Banking Code provisions to explain that not only does the merged entity "possess all the rights, interests, privileges, powers, and franchises" of Comerica-Michigan, it *is* Comerica-Michigan. "Comerica-Michigan's 'corporate existence . . . continue[s] in the consolidated bank.' MCL 487.13703(1)." (Tax Sect Br 14.) It then correctly observes that the SBTA and MBTA are silent on what happens to certificated credits when the entity that earned the credits merged with a related entity. The Tax Section closes its affirmative argument with the conclusion that "[s]ince the SBTA and MBTA are silent, the Banking Code governs, and the certificated credits vest in Comerica-Texas." (*Id*. at 16.)

ARGUMENT

This Court's analysis of whether Comerica-Texas can claim Comerica-Michigan's tax credits should start and end with Michigan's Banking Code. There is no dispute in this appeal that Comerica-Michigan could rightfully claim the tax credits at issue as the first assignee under the SBTA. The only reason Treasury denied Comerica-Texas the right to claim the credits is because it presumed that Comerica-Michigan ceased to exist when it merged with Comerica-Texas and that Comerica-Texas

is not Comerica-Michigan. But the Michigan Legislature has spoken directly on this issue in the Banking Code and said exactly the opposite—that Comerica-Michigan's existence continues in Comerica-Texas. MCL 487.13703(1). The obvious purpose of this provision is to ensure that Comerica-Texas will be treated as a continuation of Comerica-Michigan, consistent with this Court's own precedents.

The Court should not allow that Legislative rule to be disregarded or overwritten just because it has been disregarded thus far. If the Legislature wished to create an exception for tax credits, where perhaps the merged entity is treated as extinguished or loses the credits upon entering a merger, then the Legislature could do so. But nothing in the applicable tax statutes expresses any such intent. Nor can the parties stipulate to a different rule of law.

Because Comerica-Texas is Comerica-Michigan, there is no need for this Court to decide whether a transfer of previously assigned tax credits is allowed. The Court should instead affirm the Court of Appeals' decision on the basis that Comerica-Texas is the original assignee, Comerica-Michigan.

I. Under Michigan law Comerica-Texas is a continuation of Comerica-Michigan under a different name.

The existence of a corporation and the powers it may exercise are determined by applicable statutory law. *Detroit Schuetzenbund v Detroit Agitations Verein*, 44 Mich 313, 315; 6 NW 675 (1880) ("No corporation can exist except by force of express law."). *Johnson v Michigan Mut Sav Ass'n*, 242 Mich 558, 561; 219 NW 736 (1928) (holding the building and loan association is a creation of law and "possesses no power or

authority except that which is expressly or impliedly conferred on it by law."). The issue of corporate identity of a successor corporation is likewise determined as a matter of law. See *Saginaw Twp v Sch Dist No 1 of Saginaw*, 9 Mich 541, 542–44 (1862). A natural corollary to these principles is that the effect of a merger on the identity and existence of the corporations involved "depends upon the terms of the statute under which the merger or consolidation is accomplished." *Handley v Wyandotte Chemicals Corp*, 118 Mich App 423, 425; 325 NW2d 447 (1982).

Here, Michigan's Banking Code determines the legal effect of Comerica-Michigan's consolidation and its continued existence after the consolidation. According to the Banking Code, the consolidation does not terminate Comerica-Michigan's existence; Comerica-Michigan instead continues its existence in Comerica-Texas. The Banking Code states this quite plainly: "If approval and certification of the consolidation agreement as required by section 3701 have been completed, the corporate existence of each consolidating organization is merged into and continued in the consolidated bank." MCL 487.13703(1).

Michigan's Banking Code also assures that none of Comerica-Michigan's rights, interests, and privileges will be lost as a result of the consolidation and that all of these may be exercised through the consolidated entity, Comerica-Texas: "To the extent authorized by this act, the consolidated bank possesses all the rights, interests, privileges, powers, and franchises and is subject to all the restrictions, disabilities, liabilities, and duties of each of the consolidating organizations." *Id.*

This Court addressed provisions similar to these in *Guardian Depositors Corp v Currie*, 292 Mich 549; 291 NW 2 (1940). The bank consolidation at issue there was governed by an Act of Congress. *Id*. at 554. The pertinent provision read as follows:

> That any bank incorporated under the laws of any State, * * * may be consolidated with a national banking association located in the same county, city, town, or village under the charter of such national banking association * * *. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located; and all the rights, franchises, and interests of such State or District bank so consolidated with a national banking association in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises, and interests * * * in the same manner and to the same extent as was held and enjoyed by such State or District bank so consolidated with such national banking association. [*Id*. at 554–55 (quoting Act of Congress November 7, 1918, ch 209, § 3, 40 Stat

> 1043, as amended by Act of February 25, 1927, ch 191, § 1, 44 Stat 1225).]

To discern the effect of this language, the Court considered opinions of other jurisdictions and its own. It agreed with the conclusion of *Commonwealth v First National Bank & Trust Co of Easton*, 303 Pa 241; 154 A 379 (1931) that

> when a state bank consolidates with a national bank located in the same county, city, town, or village, pursuant to the acts of Congress authorizing such a consolidation, the charter of the state bank is not thereby extinguished and the state corporation is not thereby dissolved. Pennsylvania could by appropriate legislation provide that under such circumstances a state bank is ipso facto dissolved and it might be expedient so to provide, but this court cannot, under the guise of a judicial decision, enact such legislation. The charter of the Northampton Trust Company still exists, and the company still maintains in contemplation of law its corporate personality. [*Currie*, 292 Mich at 556–57 (quoting *First National Bank & Trust Co of Easton*, 154 A at 382).]

In accepting this interpretation, the Court found instructive its own rule stated in *Reichert v Bank of Royal Oak*, 261 Mich 227, 230; 246 NW 95 (1933), that "a consolidation of corporations, under statutes which impose all obligations and confer all rights of the constituent companies on the consolidated company, is to be regarded merely as a continuance of the old corporations, under a new name, as to the business of the old

corporations." *Currie*, 292 Mich at 559 (quoting *Reichert,* 261 Mich at 230).

Here, Michigan's Legislature has not only imposed all obligations and conferred all rights and privileges on the consolidated entity (Comerica-Texas), but it has also expressly stated that the consolidating entity (Comerica-Michigan) continues its existence in the consolidated entity (Comerica-Texas). MCL 487.13703(1). Under the rule recognized in *Currie*, these banking code provisions call for Treasury to treat the consolidated bank, Comerica-Texas, as a continuation of Comerica-Michigan for purposes of claiming tax credits already certified to Comerica-Michigan prior to the consolidation.

II. Comerica-Texas's identity as Comerica-Michigan is not determined by the SBTA or the parties' stipulations but by Michigan's Banking Code.

Treasury has argued—without any citation to any authority—that no other law applies here except tax law. But tax law only determines what requirements must be satisfied to claim a tax credit provided for under that law; it does not determine the existence or identity of a corporate entity claiming that credit. Nor does tax law have anything to say about the legal effect of corporate consolidation on the continued existence of a consolidating entity or the identity of the resulting consolidated company. To make these determinations, the Court must look to other law, namely Michigan's Banking Code. As demonstrated above, Michigan's Banking Code and this Court's precedents control these issues and dictate that Comerica-Texas is Comerica-Michigan for purposes of claiming Comerica-Michigan's tax credits.

Treasury may point to the parties' stipulation—as the Tax Tribunal did—to argue that Comerica-Michigan "ceased to exist" on the effective date of the consolidation, but this stipulation does not prevent the Court from holding that Comerica-Texas is to be treated as Comerica-Michigan as a matter of law. As an initial matter, the stipulation does not explain how Comerica-Michigan ceases to exist. If it just means that Comerica-Michigan ceased to exist as an entity separate from Comerica-Texas, this is accurate.

But regardless of how the stipulation could be construed, whether Comerica-Texas is treated as a continuation of Comerica-Michigan is determined as a matter of law. *Detroit Schuetzenbund v Detroit Agitations Verein*, 44 Mich 313, 315; 6 NW 675 (1880); *Johnson v Michigan Mut Sav Ass'n*, 242 Mich 558, 561–62; 219 NW 736 (1928); *Saginaw Twp v Sch Dist No 1 of Saginaw*, 9 Mich 541, 544 (1862). It is not a question of fact. To the extent the stipulation is construed as an attempt to resolve this issue in a manner contrary to the Legislature's dictates, the Court should disregard the stipulation.

As this Court said in *Matter of Est of Finlay*, 430 Mich 590, 595–96; 424 NW2d 272 (1988),

> [i]t is well established that a court is not bound by the parties' stipulations of law. It is within the inherent power of a court, as the judicial body, to determine the applicable law in each case. To hold otherwise could lead to absurd results; for example, parties could force a court to apply laws that were in direct contravention to the laws of this state. It would also allow the parties to stipulate to laws that were obsolete, overruled, or unconstitutional.

> On the appellate level, this would result in a tremendous waste of judicial resources, since such case law would have no precedential value.

Accepting a stipulation that Comerica-Michigan did not continue its existence in Comerica-Texas would lead to exactly these sort of absurd results. It would allow the parties to override legislative policy and force the Court to accept a legal premise that directly contravenes Michigan law. This in turn would lead (and indeed is leading) the Court to resolve an issue that it does not need to resolve (and may never need to resolve), namely, "whether appellee is entitled to the transfer of single business tax credits." As explained below, the concept of a "transfer" plays no role in the analysis if Comerica-Texas is properly deemed a continuation of Comerica-Michigan under a different name. The Court should not let the parties' stipulation to prevent the Court from properly analyzing and applying Michigan law to resolve this appeal.

III. Because Comerica-Texas is Comerica-Michigan, it is the first assignee of the tax credits, and it does not matter whether a second transfer is possible.

Concluding that Comerica-Texas is a continuation of Comerica-Michigan greatly simplifies the analysis here. Though the SBTA dictates what requirements must be fulfilled to claim the tax credits at issue, there is no dispute that Comerica-Michigan satisfied those requirements as the original assignee under MCL 208.38g(18). Because Comerica-Texas is a continuation of Comerica-Michigan, it is the original assignee. There is therefore no need to debate whether a subsequent transfer of the tax credits could occur after the original assignment.

As a legal term of art, "transfer" means "[a]ny mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance." Black's Law Dictionary (11th ed 2019). Under this definition, "[t]he term embraces every method — direct or indirect, absolute or conditional, voluntary or involuntary — of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." *Id*. It is also understood to mean the "[n]egotiation of an instrument according to the forms of law," those methods being indorsement, delivery, assignment, and operation of law. *Id*. Finally, it can mean "[a] conveyance of property or title from one person to another." *Id*.

The case of *Kim v JP Morgan Chase Bank, NA*, 493 Mich 98, 108; 825 NW2d 329 (2012), presents two examples of actual transfers, in that case of a mortgage. The first transfer occurred when the Office of Thrift Management closed Washington Mutual Bank ("WaMu") and appointed FDIC as receiver. *Id*. The transfer occurred automatically under 12 USC 1821(d)(2)(A)(i) and (ii), which provided that FDIC would "succeed to . . . all rights, titles, powers, and privileges of the insured depository institution," in that case WaMu. *Id*. The second transfer occurred when JPMorgan Chase Bank, N.A. purchased the mortgage from FDIC. *Id*. at 109. In both instances, property rights moved from one entity to another, with one entity (WaMu in the first instance and FDIC in the second instance) parting with or disposing of the mortgage, so

that the other entity (FDIC in the first instance, and Chase in the second instance) could acquire the mortgage.[2]

This case is different. The consolidation that occurred here cannot be said to have resulted in a "transfer" of Comerica-Michigan's rights in the usual sense of the word. Comerica-Michigan held the tax credits at the time of consolidation and its corporate existence continues in Comerica-Texas, MCL 487.13703(1). Comerica-Michigan therefore did not need to part with or dispose of the tax credits for Comerica-Texas to possess them.[3] For this reason, there is no need to speak in terms of a "transfer" of rights to Comerica-Texas.

Ultimately, regardless of whether it could be said in some sense that a "transfer" occurred, the Legislature said that Comerica-Michigan's existence continues in Comerica-Texas for a reason. The apparent purpose for this provision is to preclude any distinction being drawn between the Comerica-Michigan and Comerica-Texas after the merger. It therefore cannot be said that Comerica-Michigan is the original assignee but Comerica-Texas is not. Comerica-Texas holds that exact same right—the right of a first assignee—because Michigan's

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[2] Though *Kim* makes passing reference to the possibility of a merger, the Court did not say that a merger results in a transfer by operation of law. In fact, the statute at issue distinguished between a merger and a transfer by operation of law. See *Kim*, 493 Mich at 108 (quoting 12 USC 1821(d)(2)).

[3] With respect to real and personal property, Michigan's Banking Code does state that it "is transferred to the consolidated bank," MCL 487.13703(1). Perhaps such a "transfer" is necessary to satisfy record title acts, due to the change in name and form, but "title" to property is not at issue here, so this is another question that does not need to be answered.

Banking Code provides, and this Court's precedents make clear, that Comerica-Texas *is* Comerica-Michigan.

CONCLUSION AND REQUESTED RELIEF

The Court should affirm the Court of Appeals' decision for the reasons given above, rather than those given by the Court of Appeals.

Respectfully submitted,

Dated: December 1, 2021

WARNER NORCROSS + JUDD LLP

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation pursuant to Administrative Order 2019-6. The brief contains 4,541 words of Century Schoolbook 13.5-point proportional type. The word processing software used to prepare this brief was Microsoft Word 2016.

Dated: December 1, 2021 WARNER NORCROSS + JUDD LLP

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