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STATE OF MICHIGAN
IN THE SUPREME COURT

RAFAELI, L.L.C. and
ANDRE OHANESSIAN,

Plaintiffs/Appellants,

v.

OAKLAND COUNTY and
ANDREW MEISNER,

Defendants/Appellees.

Supreme Court No. 156849

Court of Appeals No. 330696

Oakland County Circuit Court

No. 15-147429-CZ

Hon. Langford-Morris

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BRIEF OF 2 CROOKED CREEK, LLC, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

DATED: April 23, 2019

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STATEMENT REGARDING JURISDICTION

This Court has jurisdiction pursuant to MCR 7.303(B)(1). The Court of Appeals issued its unpublished opinion on October 24, 2017. On December 4, 2017, Appellants timely filed an application for leave to appeal with this Court. This Court granted Appellants' application for leave to appeal on November 21, 2018. On December 14, 2018, this Court extended the time for Appellants to file their brief to February 13, 2019. On February 13, 2019, Appellants timely filed their brief. On March 18, 2019, this Court extended the time for Appellees to file their brief to April 3, 2019. On April 3, 2019, the Appellees timely filed their brief.

This amicus brief is submitted by amicus curiae 2 Crooked Creek, LLC pursuant to MCR 7.312(H).

STATEMENT OF QUESTION PRESENTED

Does a local government violate the federal takings clause by retaining proceeds from the sale of tax-foreclosed property, where the sale yields a windfall surplus over the amount of the tax delinquency?

Plaintiffs/Appellants: Yes

Defendants/Appellees: No

Court of Appeals: No

Amicus Curiae: Yes

STATEMENT OF INTEREST

Amicus curiae, 2 Crooked Creek, LLC ("2CC"), has a substantial interest in this takings issue because 2CC lost a $3.5 million property as a result of a $15,000 tax delinquency, and Cass County has kept that surplus—about $3,485,000—as a windfall. This government action—transferring 2CC's fee-simple interest to the government—is a taking without just compensation.

2CC is an Indiana limited liability company created in 2010 by Sergei Antipov, the trustee of its ultimate owners, to own a new home he planned to build, on land he purchased on beautiful Diamond Lake in Cass County, Michigan. Antipov lives in Illinois, but his business, Russian Ferro-Alloys ("RFA"), is headquartered in Mishawaka, Indiana, about twenty miles southwest of the land he purchased in Cass County.

Antipov built the new home on the land he purchased. But on April 1, 2014, as construction neared completion on the $3.5 million home, the Cass County Treasurer took possession of it, for 2CC's failure to pay its 2011 property taxes of $14,743.24. Neither 2CC nor Antipov had received tax bills or any notices of tax deficiency before foreclosure for the tax

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delinquency. Cass County never compensated Antipov for taking the new home he paid to build—but never lived in.

The present case filed by Rafaeli and Ohanessian ("Appellants") involves issues of major significance to 2CC and to Michigan property owners throughout the state. Appellants' properties, which they allege were improperly taken from them, are in Oakland County. But the taking of valuable property by county treasurers, for relatively minor tax delinquencies, and without reimbursement of the surplus over what was owed, is a grave concern throughout Michigan, not just Oakland County.

I. The Cass County Treasurer Takes 2CC's Property

In July 2010, 2CC purchased a parcel of vacant land for $820,000 located at 61320 Crooked Creek Road, Cassopolis, Cass County, Michigan (the "Property"). *2 Crooked Creek LLC v Cass County Treasurer*, unpublished per curiam opinion of the Court of Appeals, issued March 14, 2019 (Docket No. 342797), p. 2 ("*Cass County Case*"). 2CC purchased the Property from a revocable living trust by trustee's deed. *Id.* The deed identified 2CC as an Indiana limited liability company. The trust and 2CC also executed a Real Estate Agreement at that time, which also identified 2CC as an Indiana limited liability company. *Id; see also* Affidavit of Douglas Anderson, filed contemporaneously in support of 2CC's Motion for Leave to File Amicus Brief, at ¶3 ("Anderson Aff."); MCR 7.311(A)(1). The Real Estate Agreement has a signature block for 2CC and was signed by Sergei Antipov. *Cass County Case* at 2.

The deed and the Real Estate Agreement listed 2CC's address as "36 Bradford Lane, Chicago, Illinois 60502." But, there is no such address. At the time, Antipov lived at 36 Bradford Lane, *Oak Brook*, Illinois 60523; but he moved from that address between June and August 2011. The trustee's deed and the Real Estate Agreement were both recorded with the Cass County Register of Deeds on July 20, 2010. *Id.*

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A. 2CC's Tax Delinquency

$14,743.24 in property taxes were not paid for the Property for 2011, because the tax notices were sent to Antipov's former address. *Id*. at 2, 4. As a result, Antipov never received any tax assessment notices sent by Cass County or its Treasurer ("Treasurer" or "Linda Irwin") to 2CC for the 2011 tax year or any later tax year. *Id.* at 8.

In January 2013, the Treasurer initiated forfeiture and foreclosure proceedings on the Property pursuant to the Michigan General Property Tax Act ("GPTA"), MCL 211.1 *et seq.* On January 14, 2013, the Treasurer's agent, Title Check, LLC, sent a forfeiture notice regarding the 2011 property taxes for the Property, pursuant to MCL 211.78f, by certified mail, return receipt requested, to 36 Bradford Lane, *Chicago*, IL 60523. *Id.* at 2. Because 60523 is Oak Brook's zip code, the notice was tendered on January 16th, to 36 Bradford Lane, *Oak Brook*, IL 60523. The letter was never claimed because Antipov had moved by that time. On February 15th, it was returned to Title Check marked "Unclaimed—Unable to Forward." *Id*.

On March 1, 2013, the Property was forfeited to the Treasurer for non-payment of the 2011 property taxes. On April 12, 2013, the Treasurer recorded a Certificate of Forfeiture of Real Property ("Certificate of Forfeiture") with the Cass County Register of Deeds. *Id*.

Pursuant to MCL 211.78i, by May 1, 2013, the Treasurer, as the "foreclosing governmental unit," must initiate a search of certain public records to identify entities with a property interest in the Property entitled to notice of a show cause hearing and the final foreclosure hearing. *See* MCL 211.78i(6), 211.78j, 211.78k. After searching these records, the Treasurer or Title Check "shall determine the address reasonably calculated to apprise those owners" of the two hearings and notify them of those hearings by certified mail at least thirty days before the show cause hearing. MCL 211.78i(2).

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After the records search, if the Treasurer (or Title Check) is "unable to determine an address reasonably calculated to inform a person with an interest in a forfeited property, or if the [Treasurer or Title Check] discovers a deficiency in notice," the Treasurer (or Title Check) "shall take reasonable steps in good faith to correct that deficiency." MCL 211.78i(2), (4). The GPTA describes additional "reasonable steps … to ascertain the address of a person entitled to notice" or "an address necessary to correct [any] deficiency in notice." MCL 211.78i(2). "For a business entity other than a partnership," the Treasurer must conduct "a search of business entity records filed with the department of labor and economic growth." MCL 211.78i(2)(d).[1]

By May 1, 2013, Title Check had objective evidence that "36 Bradford Lane, *Chicago*, Illinois 60523" was not an address where notice could be sent which was reasonably calculated to inform 2CC of the show cause and foreclosure hearings, because certified mail sent to that address on January 14, 2013 had been unclaimed and could not be forwarded as of February 1, 2013. That certified mailing was returned back to Title Check on February 15, 2013. *Cass County Case*, at 2, 7. Antipov had moved from the 36 Bradford Lane address between June and August, 2011. *Id.* at 8. Therefore, the mail forwarding order he filed with the United States

[1] In 2013, Michigan had no "Department of Labor and Economic Growth." Michigan reorganized its executive departments in 2008 and in 2011. The Department of Labor and Economic Growth became part of the Department of Energy, Labor, and Economic Growth ("DELEG") which then became part of the Department of Licensing and Regulatory Affairs ("LARA"). *See* MCL 445.2025 (Executive Reorganization Order No. 2008-4); MCL 445.2030 (Executive Reorganization Order No. 2011-4). Michigan has never amended MCL 211.78i(2)(d) to require a search for records at an extant Michigan executive department. Nor has the statute ever required that the department whose records must be searched be a department of the State of Michigan. Title Check's owner testified at trial that Title Check checked the records of the Michigan Business Entity index, to determine an address or registered agent for 2CC, even though the title in this case, indicated that the Property was held by an Indiana company. *Cass County Case* at 7. Title Check did not check with the agency where 2CC's address could be easily found (*i.e.*, the on-line business database maintained by the Indiana Secretary of State - since 2CC was an Indiana limited liability company). But, at trial in the Michigan Court of Claims, the Court ruled *sua sponte* that MCL 211.78i(2)(d) was limited to Michigan, even though 2CC was an Indiana limited liability company. *Id*.

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Postal Service, to his new address, expired some time in the summer of 2012—before Title Check sent its first notice of delinquent taxes in January, 2013. *Id.*

Despite the returned certified mail, evidencing that "36 Bradford Lane" was not an address where notice could be sent which was reasonably calculated to inform 2CC of the show cause and foreclosure hearings, neither the Treasurer nor Title Check made any effort to find a proper address for 2CC, or determine an address reasonably calculated to give 2CC notice of the show cause and foreclosure hearings. Instead, Title Check simply followed up with a first-class letter to the same address. Title Check's owner, Mr. Spaulding, justified Title Check's lack of effort by pointing out that (1) "Unclaimed--Unable to Forward" did not indicate to Title Check that the address was bad, and (2) there was no statutory requirement for locating another address and resending the notice. *Id.* at 7.

Reviewing the Indiana Secretary of State's online business entity database shows only one business entity with the name, "2 Crooked Creek, LLC".[2] In 2014, clicking on the underlined "2 Crooked Creek, LLC" on the Business Search Results webpage opened a page which showed that 2CC had been a limited liability company since June 30, 2010, and its registered agent's name and address was:

Douglas Anderson
4220 Edison Lakes Parkway Suite 210
Mishawaka, IN 46545[3]

Such a search would have taken about a minute to perform. Anderson Aff. at ¶4.

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[2] A "Google search" identifies only one entity known as "2 Crooked Creek, LLC," and accessing that result leads to sites with the same information: https:/www.google.com/search?q=2+crooked+creek+llc&riz=1C1GGRVenUS751US751&og=2+&aqs=chrome.0.69i59j69i60j69i65I2.3327j0j7&sourceid=chrome&ie=UtF-8 (accessed April 23, 2019).

[3]Indiana Secretary of State, *INBiz*, https://bsd.sos.in.gov/PublicBusinessSearch [complete CAPTCHA, click "Business name," enter "2 Crooked Creek," click "SEARCH," on next screen click Business ID number "2010070100073"] (accessed April 23, 2019).

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Neither the Treasurer nor Title Check ever sent a copy of the notices of the show cause or foreclosure hearings to 2CC at the address of its registered agent in Mishawaka, Indiana. Anderson Aff. at ¶6. After the redemption period expired, however, Title Check was able to contact 2CC's registered agent easily at the Mishawaka, Indiana address, as described below.

MCL 211.78i requires the Treasurer or Title Check, when it discovers any deficiency in the provision of notice, to take reasonable steps to correct that deficiency not later than 30 days before the show cause hearing under MCL 211.78j. On June 5, 2013, the Treasurer filed a Petition for Foreclosure seeking to foreclose (for unpaid taxes) on 579 properties, including the Property, pursuant to MCL 211.78h(1). *Cass County Case* at 3. The Cass County Circuit Court scheduled a hearing on the Treasurer's petition for February 18, 2014. *Id.*

MCL 211.78i(3) states that the Treasurer or Title Check "shall make a personal visit" to the Property "to ascertain whether or not the property is occupied." The Property has never been occupied since 2CC purchased the Property as vacant land. *Id.* Indeed, no certificate of occupancy has ever been issued for any building on the Property, and the home under construction there remains unfinished (but nearly completed) to this day. *Id*. at 8.

A Title Check employee (Katelin McKay) completed a document entitled "Affidavit of Notice of Forfeited Property," which states that, on June 18, 2013, she found the Property to be "an occupied structure" but that she was "not able to personally meet with the occupant," so she posted a notice of the show cause and judicial foreclosure hearings near the front door of the unfinished house. *Cass County Case* at 3. But, in June of 2013, the Property had no occupied building, but instead was openly and obviously a construction site for a still-unfinished home. Anderson Aff. at ¶7. That posted notice was found by Jim Frye, the general contractor 2CC

hired to build the house on the Property. *Cass County Case* at 3. Frye removed the posted notice. *Id*. at 15.

On August 20, 2013, Title Check sent a notice letter via regular first class mail to 2CC at the 36 Bradford Lane address –the same address to which the certified mail notice had been sent and returned "Unable to Forward" earlier that year. *Cass County Case* at 4.

On December 6, 2013, Title Check again sent a notice letter via certified mail to 2CC at the 36 Bradford Lane address, which stated that: (1) the Property was forfeited to the Treasurer on March 1, 2013, (2) 2CC could lose its entire interest in the Property due to foreclosure, (3) the total amount to redeem the Property as of March 1, 2013 was $14,743.24, (4) the show cause hearing would occur on January 15, 2014, (5) the foreclosure hearing would occur on February 18, 2014, and (6) unless the delinquent taxes, penalties, interest and fees were paid by March 31, 2014, 2CC would lose its interest in the Property and title would "vest absolutely" in the Treasurer. *Id.* Again, Title Check sent this notice to the 36 Bradford Lane address despite having knowledge for almost a year that that address was not reasonably calculated to provide notice to 2CC of the foreclosure hearing (and despite the fact that RFA had recorded a mortgage on the Property in July, 2013 with the Cass County Register of Deeds showing Antipov's correct address in Illinois). *Id.* at 3-4.

Like the certified mail sent to the Bradford Lane address almost a year earlier, the December 6, 2013 notice was returned to Title Check on January 10, 2014 (five days before the show cause hearing) by the United States Postal Service as "Refused--Unable to Forward." *Id.* at 4.

On December 19, 2013, December 26, 2013 and January 2, 2014, a notice of show cause hearing and judicial foreclosure hearing was published in the Cassopolis Vigilant, a weekly

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newspaper circulated almost exclusively in Cass County. *Id*.

B. Treasurer's Foreclosure Action Against 2CC

After the Postal Service returned the second certified mail notice to Title Check on January 10, 2014 (*i.e.*, before the show cause hearing), Title Check took no further action to notify 2CC of the show cause or foreclosure hearings set for January 15, 2014 and February 18, 2014 or to ascertain 2CC's correct address. Title Check and the Treasurer also made no effort to notify RFA of either of those hearings or the judgment of foreclosure. Because Title Check performed its only search of the records nine months before the show cause hearing in June, 2013, it never saw the mortgage RFA recorded eight months before the show cause hearing in July 2013. *Id.* at 3.

On January 15, 2014, the show cause hearing occurred. No one appeared for 2CC or RFA. *Id.* at 4.

On February 18, 2014, the Cass County Circuit Court heard the Treasurer's petition for foreclosure. Again, no one appeared for 2CC or RFA. *Id.* The court concluded that the Treasurer had complied with MCL 211.78's notice provisions and due process under the Michigan and federal constitutions. The Court then entered a judgment of foreclosure based on unpaid delinquent taxes, interest, penalties, and fees for the Property and ordered that fee simple title to the foreclosed Property "vest absolutely" in the Treasurer, without any further redemption rights, if the entire delinquent balance was not paid by March 31, 2014. *Id.* at 4-5.

Because 2CC and RFA never received actual notice of the unpaid taxes, the show cause and foreclosure hearings, or the February 18, 2014 judgment, they remained unaware of these proceedings. *Id.* at 8. As a result, they did not pay the $14,743.24, plus interest, penalties, and fees, to redeem the Property by March 31, 2014, and on March 31, 2014 at 5 p.m., title to the Property vested absolutely in the Treasurer. *Id.* at 5, 8.

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Throughout the entire foreclosure process, Antipov owned another Cass County, Michigan property, for which the tax bills were sent to Antipov's correct address, and on which he timely paid all property taxes. Anderson Aff. at ¶5.

C. Title Check's Excitement Upon Foreclosure of 2CC's Property.

By the next morning, April 1, 2014, Title Check employees emailed each other that 2CC's Property was very valuable and that the Treasurer, Ms. Irwin, was "tickled pink" that the Property had not been redeemed. Anderson Aff. at ¶9. Title Check's owner, Mr. Spaulding, replied, "Wowzers." *Id.* He was also told that a Title Check employee (Renea Lockwood) in fact knew 2CC's representatives and had participated in another real estate closing with them before the County foreclosed on the Property.[4] By mid-afternoon, Spaulding e-mailed the Treasurer, telling her "Nice work," and "We'll just call you 'moneybags' from now on" and "assum[ing] Tom King [the Treasurer's attorney] is on speed dial." *Id.* He also joked with the Treasurer about buying a new living room set and hosting a cookout at 2CC's foreclosed Property. *Id.*

Two weeks later, on April 16, 2014, the Treasurer asked Mr. Spaulding if he had a form of notice she could post on 2CC's Property "to let them know they have been foreclosed on." She had been advised that 2CC was seeking pier estimates, and she wanted "to let them know they don't own the property anymore." To which Mr. Spaulding responded, "Egad. They would have gotten several first class mail notices from us in addition to the certified. I suspect they are not getting the mail from that address for some reason, . . ." *Id.* The next day, Mr. Spaulding wrote again to the treasurer: "it still smells like someone is not even getting *any* of the mail. . . . first class or not." *Id.* This is the first time the Treasurer or her contractor, Title Check,

[4] Mr. Spaulding testified about Ms. Lockwood: "as of 11:51 you knew someone in your company had information on these people before the redemption period ended, right? A: Correct." *Id.*

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considered that 2CC may not have gotten any notice, despite the returned certified mailings. Yet, their obvious desire, as expressed in their emails, was not in getting the property back on the tax rolls, but ensuring that they kept the foreclosed property. *Id.*

The next day, on April 18, 2014, Mr. Spaulding left 2CC's registered agent, Mr. Anderson, a voicemail – at 2CC's offices in Mishawaka, Indiana – notifying Anderson that the Property had been foreclosed on and the redemption period had expired. *Cass County Case* at 5. Spaulding testified that it had taken him "several hours" to determine how to contact 2CC's agent, Mr. Anderson, even though his contact information was readily available on the Indiana Secretary of State's business entity database and on other sites identifiable with a Google search. Anderson Aff. at ¶10.

On May 2, 2014, Spaulding continued to joke with the Treasurer about the foreclosure of 2CC's Property, making light of Antipov's Russian heritage. Anderson Aff. at ¶11. At trial in the Court of Claims, Mr. Spaulding later testified that Title Check gets paid a percentage of the sales price on foreclosed properties that are not redeemed and then are ultimately sold at auction. *Id.* at ¶14.

After 2CC learned of the tax delinquency, it tendered a check to the Treasurer well in excess of all outstanding taxes. It was refused and returned by the Treasurer. *Cass County Case* at 8. In fact, the Treasurer spoke to a newspaper reporter a few days after she refused 2CC's tendered check covering back taxes, telling the reporter, "it's a done deal. . . They've tried to send us a check for $100,000, and I've returned it. I've had my council [sic] look at it, and

we've done everything right. We didn't make any mistakes; they did." Ted Yoakum, *County forecloses on lakeside property*, Leader Publications (June 24, 2014).[5]

As of October 31, 2017, the Treasurer had incurred $249,232 in attorney fees pursuing and litigating its foreclosure of 2CC's Property. Anderson Aff. at ¶15. Since then, there has been an unsuccessful mediation, briefing in the Court of Claims, and appellate briefing and argument of that court's decision.

II. 2CC's Motion to Set Aside Foreclosure Fails.

On July 3, 2014, 2CC and RFA moved the Cass County Circuit Court to set aside the foreclosure judgment on 2CC's Property, arguing that they did not receive notice of the foreclosure proceedings. *Cass County Case* at 5. In opposing that motion, the Treasurer was supported by affidavits supplied by Mr. Frye, 2CC's general contractor. *Id*. at 3, 15. On September 10, 2014, the Circuit Court denied 2CC and RFA's motion to set aside the foreclosure. *Id*. at 6.

Because of lengthy delays in constructing the house and the Treasurer taking possession of it, among other things, 2CC and Frye were no longer on good terms by the summer of 2014. *Id.* at 15. When Anderson learned of the tax delinquency and was told that a notice had been posted on the house, he asked Frye if he had seen such a notice. Anderson Aff. at ¶12. Frye originally told 2CC that he emailed it to someone at 2CC. *Id*. When confronted with the lack of any such email, he suggested he had sent a text with the information. *Id*. When that too proved not to exist, Frye said he called someone at 2CC to report seeing the tax notice, but he could not recall who he called. *Id*.

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[5] https://www.leaderpub.com/2014/06/24/county-forecloses-on-lakeside-property/ (accessed April 23, 2019).

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So when the Treasurer's attorney, Tom King, asked Frye to provide affidavits to help the Treasurer foreclose on 2CC's Property, Frye agreed, in return for the Treasurer "getting me paid." *Id*. at ¶13. Frye provided three affidavits, his own and two from his subcontractors, both claiming to have seen Frye call an unidentified representative of 2CC to report the posted tax notice, including one from a painter, who later testified that he did not sign the affidavit. *Id*.

On appeal of 2CC's challenge to the foreclosure, the Court of Appeals concluded that the Treasurer had complied with due process minimums because actual notice is not required to satisfy due process. *Cass County Case* at 6 ("due process does not require that a property owner receive actual notice before the government may take his property.") (citing *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008)). The Court of Appeals concluded (contrary to Spaulding's later testimony in the Court of Claims) that "[t]he return of [the two certified] letters informed [the Treasurer] that its <u>attempt at notice had failed</u>, and that it was required to 'take additional reasonable steps to attempt to provide notice to the property owner.'" *In re Petition of Cass Co Treasurer for Foreclosure*, unpublished per curiam opinion, issued March 6, 2016 (Docket No. 324519) at 8 (quoting *Sidun*, 481 Mich at 511) (emphasis added). The Court of Appeals then relied on Title Check's first-class mailing of the required notices to the same bad address, the notice posted at 2CC's Property, and publication in the local weekly newspaper in its ruling that the Treasurer had "met the minimum requirements of due process." *Cass County Case* at 6.

III. 2CC's Suit Against The Treasurer In The Court of Claims Fails.

On July 18, 2014, 2CC and RFA filed their complaint against the Treasurer in the Court of Claims seeking monetary damages pursuant to MCL 211.78l of the GPTA. *Cass County Case* at 6. MCL 211.78l creates a claim to recover money damages following a judgment for foreclosure on behalf of "the owner of any extinguished recorded or unrecorded interest in that

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property who claims that he or she *did not receive any notice required* under [MCL 211.78]." MCL 211.78l(1) (emphasis added); see also *In re Petition by Wayne Co Treasurer,* 478 Mich 1, 10; 732 NW2d 458 (2007).

In 2CC and RFA's complaint, they alleged that the Treasurer failed to provide them with actual notice as required under MCL 211.78l of the GPTA of the 2011 taxes, the delinquency of those taxes, the show cause and foreclosure hearings, and the judgment of foreclosure, causing them to suffer monetary damages. *Cass County Case* at 9.

Antipov testified that, had he received notice of the property taxes, he "of course" would have paid the taxes (as he did for his other properties) because the amount of taxes "is nothing compared to the value of the property." *Id.* at 8.

Antipov also testified that 2CC borrowed $3.5 million from RFA, secured by RFA's mortgage on the Property, for the construction of the home on the Property. *Id.* Antipov never received notice of the personal visit purportedly posted on the Property, the notice of publication, or the notices of the show cause hearing, the foreclosure hearing, or the judgment of foreclosure, either by first-class mail or certified mail or by any other means. *Id*. He testified that he first learned of the foreclosure proceedings from 2CC's registered agent and counsel, Doug Anderson, in mid-April 2014, whereupon he sent a check to Cass County to cover the delinquent taxes. The Treasurer rejected that check. *Id*.

Doug Anderson, RFA's president and 2CC's registered agent, testified that the Property was worth approximately $3,420,000 ($820,000 was payment for the vacant land and "almost 2.6 million dollars for the improvement."). *Id*. He testified further that he had never received any notice of tax delinquency or deficiency prior to April 1, 2014 (the expiration of the redemption period). *Id.*

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Following the close of Plaintiffs' case in chief at trial, the court granted a "motion for involuntary dismissal of 2CC and RFA's complaint under MCR 2.504(B)(2)," which was affirmed on appeal. *Id*. at 18. A motion for reconsideration of that decision is currently pending before the Court of Appeals. Thus, as of April 1, 2014, 2CC and RFA were divested of a brand new $3.5 million home by the State of Michigan, for the failure to pay $14,743.24 in property taxes. Since that time, they have not received any compensation whatsoever for that taking.

STATEMENT OF FACTS IN THIS CASE

2CC accepts the Appellants' Statement of Facts and Proceedings.

SUMMARY OF ARGUMENT

The Eighth Amendment to the United States Constitution prohibits excessive fines for criminal conduct. The United States Supreme Court has held that this right applies to the states as well as the federal government through the Fourteenth Amendment. In reviewing its history, the court has said that this right dates back to the Magna Carta, which restricted the government's ability to exact inappropriately large fines for relatively minor criminal offenses.

Similarly, the Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation. This protection is also applied to the states by the Fourteenth Amendment. Certainly when no crime has been committed, a property owner is entitled to at least the same constitutional protection against governmental taking that a criminal enjoys when the government seeks to exact an excessive fine as punishment for his crime.

The governmental taking at issue arises out of property foreclosure for failure to pay property taxes. Michigan's GPTA provides for foreclosure and sale of tax delinquent properties, without any return of surplus sale proceeds to the property owner, when a sale generates more proceeds than was owed in taxes.

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Tax foreclosures/sales have many different causes. Some owners do not have the money to pay their property taxes. Some, like Appellant, Rafaeli, miscalculate their tax obligation and underpay it. Some, like amicus 2CC, are unaware of foreclosure proceedings because they have not received a tax bill or actual notice of foreclosure proceedings. Regardless of the cause for failure to pay property taxes, when the government transfers title from the property owner to itself and sells tax delinquent property, retaining the surplus proceeds over what is owed, it is an unconstitutional taking.

Michigan county treasurers have an obligation to perform their duties in a manner designed to keep properties on the tax rolls. But, that duty must not unconstitutionally deprive individual property owners of their property rights. The law that gives surplus proceeds from tax sales to the government creates an improper incentive for County treasurers, most of whom use private contractors to perform their notice and foreclosure proceedings, to do as little as possible to notify property owners of tax delinquencies. Further, the law also incentivizes treasurers to decline belated offers to pay taxes, in favor of spending hundreds of thousands of dollars in taxpayer money to try to enforce the taking of more valuable properties, like 2CC's. The resulting litigation has the effect of keeping properties off the tax rolls—the opposite effect of the treasurer's duty under the GPTA.

ARGUMENT

As the Appellants did in Oakland County, 2CC challenged the Cass County tax deficiency forfeiture in court, but lost. 2CC then filed suit in the Michigan Court of Claims, seeking reimbursement for the lost value of the brand new home. The Court of Claims ruled in favor of the Cass County Treasurer. 2CC spent nearly $3.5 million purchasing and improving a property which has been taken from them by Cass County, for the failure to pay a $14,743.24 tax bill they never received.

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Currently, Michigan law provides 2CC no reimbursement for the surplus value of the home in excess of the delinquent taxes. Appellants assert that by retaining the surplus value of foreclosed property, the State violates the Takings Clause of the Fifth Amendment of the United States Constitution.

2CC files this amicus brief to support Appellants' challenge to the Michigan GPTA which permits Michigan counties to retain the entire value of real property foreclosed on for delinquent taxes—even when the value of the property exceeds taxes, penalties, interest and costs due. This taking of property is contrary to the Fifth Amendment to the Constitution of the United States, as applied to the states under the Fourteenth Amendment.

Like the Appellants, 2CC has been deprived of the entire value of its property, when it failed to pay property taxes amounting to a small fraction (less than 0.5%) of the Property's total value. For this reason, 2CC has a significant interest in the outcome of any court decision which may address the application or validity of the GPTA in permitting county treasurers to take amounts in excess of what the property owner owed in taxes.

I. Under United States Supreme Court Precedent, the GPTA Violates The Takings Clause of the Fifth Amendment.

In its opinion below, the Court of Appeals relied on *Bennis v Michigan,* a property forfeiture case involving criminal activity, to conclude that no unconstitutional taking occurs when "governmental entities retain proceeds beyond those required to satisfy delinquent tax bills." *Rafaeli v Oakland County*, unpublished per curiam opinion of the Court of Appeals, issued October 24, 2017 (Docket No. 330696), p. 5. The court below relied on a single paragraph of the *Bennis* decision, which is otherwise focused on the Fourteenth Amendment due process concerns of allowing an innocent owner's property to be forfeited to the state as property

used in the commission of a crime. *Bennis v Michigan*, 516 US 442, 452-53; 116 S Ct 994; 134 L Ed 2d 68 (1996).

A. The Appellate Court's Reliance on Bennis Is Misplaced.

Ultimately, the *Bennis* Court bowed to the long history of allowing governments this practice. Yet Justice Stevens' dissent foreshadowed arguments made more forcefully later: "The logic of the Court's analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts." *Id.* at 458 (Stevens, J, dissenting). And in concurring, Justice Thomas cited prior Supreme Court approval of a crime forfeiture statute that, even in 1921, "seems to violate that justice which should be the foundation of the due process of law required by the Constitution." *Id.* at 458 (Thomas, J, concurring) (citing *J V Goldsmith, Jr-Grant Co v United States*, 254 US 505, 510; 41 S Ct. 189; 65 L Ed 376 (1921)).

That is the crux of the problem with applying *Bennis* to this case. It is justified by historical concerns of punishment for, and deterrence of, crime. It contains no real analysis of the Fifth Amendment's Takings Clause. Instead, it simply relies on its lengthy due process analysis to conclude that, if the government has not violated the Due Process Clause in taking possession of the property, it has no obligation to pay for it either. The problem with applying this logic to a tax foreclosure case is well-made by Judge Shapiro in his concurrence below. *Rafaeli*, unpub op at 2-3 (Shapiro, J. concurring). For example, he points out that, in *Bennis*, the Court was not willing to consider the possibility that an asset of great value could be seized over a trivial criminal violation. Besides the lack of any crime whatsoever, that is what we have here—a situation the *Bennis* Court declined to consider.

Judge Shapiro is correct about *Bennis'* inapplicability to forfeitures for tax delinquency. And *Bennis* may be on shaky ground anyway, given the recent decision in *Timbs v. Indiana*, 586

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US __; 139 S Ct 682; 203 L Ed 2d 11 (2019), where the Supreme Court unanimously overturned the Indiana Supreme Court's conclusion that the Eighth Amendment's excessive fines provision was unenforceable against the States. In *Timbs,* the Court's focus was the abuse of governmental authority, and limiting the power of those entrusted with the criminal law function of government. *Id.* at 688-90. As the Court also recognized, "[e]xorbitant tolls undermine other constitutional liberties," *id.* at 689, because "fines may be employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue.'" *Id.* (quoting *Harmelin v Michigan*, 501 US 957, 979 n 9; 111 S Ct 2680; 115 L Ed 2d 836 (1991)). And as the Court said in *Harmelin*, "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin*, 501 US at 979 n 9. So, the United States Supreme Court has highlighted the danger and injustice of governmental actors taking more of the public's property than is warranted, even as a sanction for crime.

But Judge Shapiro's concurrence below was not a dissent only because of *Nelson v City of New York*, 352 US 103; 77 S Ct 195; 1 L Ed 2d 171 (1956).

B. Nelson is distinguished from Lawton.

Judge Shapiro's concurrence relied on *Nelson* to conclude there was no constitutional taking. But in *Nelson*, the Supreme Court dealt with a statute that differs significantly from Michigan's GPTA. There, the Court realized that "we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale." *Nelson*, 352 US at 110. But the GPTA *does* preclude an owner from obtaining the surplus proceeds of a judicial sale—at least when the property owner never receives actual notice of the foreclosure proceedings. The Michigan Court of Appeals has interpreted MCL 211.78l so that constructive notice not only suffices to satisfy due process concerns, but also is enough to constitute notice "received" according to MCL 211.78l. *Cass County Case* at 17. In instances where

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constructive, but not actual, notice of foreclosure is provided, but the property owner has no knowledge of the foreclosure proceedings, the GPTA absolutely precludes that property owner from obtaining the surplus proceeds of a judicial sale—in a non-criminal proceeding. That amounts to an unconstitutional taking.

The Appellants in this case had no method by which to obtain the proceeds of the sale of their former properties. Unlike the property owner in *Nelson*, whose bookkeeper disregarded tax notices, the Appellants, and amicus 2CC, had no actual notice of the foreclosure proceedings which resulted in the taking of their properties. In *Nelson*, the Supreme Court pointed out that, where an opportunity exists to redeem the property in advance of the taking, the taking may not be a constitutional violation. But when there is no actual notice of the tax delinquency or of the foreclosure proceedings, there is also no opportunity to redeem or recover the surplus value in the property. A timely challenge to foreclosure is possible only with knowledge that a foreclosure is taking place. Without that knowledge, there is no pre-taking opportunity to redeem.

In *United States v Lawton,* 110 US 146; 3 S Ct 545; 28 L Ed 100 (1884), retaining the value of property taken for taxes when that value far exceeded the taxes was held to constitute an unconstitutional taking. "To withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and deprive him of his property without due process of law or take his property for public use without just compensation." *Id.* at 150. *Lawton*'s holding is clear. When a governmental actor takes property worth more than what is owed to the government, failure to return the post-sale surplus proceeds to the owner is a violation of the Takings Clause. That is what happened to the Appellants here and to amicus 2CC in Cass County.

Thus, under *Lawton*, retention of the surplus proceeds of the sale of the Appellants' properties violated the Fifth Amendment's Takings Clause. And even if *Nelson* were controlling as to federal law (which it is not), nothing in that case binds this court from finding a taking under the Michigan Constitution.

C. Oakland County's arguments are inconsistent with basic takings law.

Oakland County argues that no taking occurs when the government keeps the surplus from a tax sale because "it is Plaintiffs' own failure to act that caused them to lose their real-property interests, not any unfair government act." Oakland County Brief at 13. But that reasoning would justify even the paradigmatic example of a taking: an exercise of eminent domain that takes property on which the state wants to build a highway. Eg, *Lingle v Chevron USA Inc*, 544 US 528, 537; 125 S Ct 2074; 161 L Ed 2d 876 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property."). Imagine an instance where a family farm sits along the route on which the state wants to build a new highway, and imagine further that the family is unwilling to sell the family farm. Could the state justify taking the farm without providing just compensation on the theory that it was the family's failure to act (by not selling the farm) that caused them to lose the value they could have received for the farm, if they had just sold the farm, and so it was not any "unfair government act" that caused the loss? No, in that instance the Takings Clause would require the state to pay for the property it had acquired—to provide, in the words of the Fifth Amendment, "just compensation."

Oakland County's other arguments are also unpersuasive. The County argues that property owners cannot establish a taking unless they "can point to a specific Michigan law that gives them a property interest in surplus equity after 'fee simple' title vests in a foreclosing governmental unit under MCL 211.78k(6)." Oakland County Brief at 24. But again, that is like

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saying the family that owned the farm in the prior hypothetical is out of luck because it cannot point to any law that gives it title in its farm after the government has exercised eminent domain. It is the exercise of eminent domain (in the hypothetical) and the operation of the foreclosure statute (in this case) that constitutes a taking. That statute takes an existing property right (fee simple in the owner, worth $3.5 million in 2CC's situation) and transfers that entire property right to the government (all $3.5 million of it) to pay for a comparatively small debt. To be sure, the government can retain the taxes and penalties to which it is entitled, but as *Lawton* makes clear, there is no constitutional justification for it retaining the surplus.

Oakland County also defends its regime as a "policy choice." Oakland County Brief at 2, 28–29. But the Constitution takes some policy choices off the table. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W Virginia State Bd of Educ v Barnette*, 319 US 624, 638; 63 S Ct 1178; 87 L Ed. 1628 (1943).

II. Public Policy Supports A Remedy For Appellants Under The Takings Clause.

Not only is the taking of surplus sale proceeds from property owners unconstitutional, it also adversely impacts Michigan citizens in at least three ways. First, it discourages investment in Michigan property. Second, it creates an improper incentive for county treasurers and their private contractors, like Title Check, tasked by treasurers with providing property owners notice of tax deficiency, to do as little as possible to fulfil the treasurer's notice duties—to the detriment of those property owners, and to all Michigan residents who rely on the collection of property taxes. And third, it promotes disputes and litigation which defeat a main purpose of the GPTA—keeping properties on the tax rolls where they *generate* tax revenue instead of *spending* it on expensive litigation.

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A. Investment in Michigan is discouraged when County Treasurers take property worth more than the taxes due.

Appellants and 2CC have lost valuable property they owned in Michigan. Regardless of the constitutionality of whatever constructive notice they were provided in advance of the State taking their property, the fact is that they lost their properties for failure to pay taxes dwarfed by the value of the property taken. And under the GPTA, the government keeps that surplus value. Recognition of the inequity of Michigan's tax foreclosure statutes is not confined to Judge Shapiro's concurrence. It has received attention from both local media[6] and national media.[7]

The attention accorded this inequitable situation undoubtedly will affect the choices made by property owners considering whether to improve existing Michigan property or to buy property in Michigan. The inequity of state property tax law may be a slight consideration for some. But no doubt it is a consideration which disfavors improvement of property in Michigan.

The reported anecdotes involving property taken by the state for failure to pay taxes, without actual notice to the owner, and the loss of all surplus value through foreclosure, will cause property owners to think twice before improving or buying Michigan property. Negative publicity surrounding Michigan's GPTA will have that effect.

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[6] Sarah Cwiek, *Lawsuit: Michigan tax foreclosure laws unconstitutional*, Michigan Radio.org, Dec 8, 2017, found at https://www.michiganradio.org/post/lawsuit-michigan-tax-foreclosure-laws-unconstitutional (accessed April 23, 2019); Mike Martindale, *Oakland, Wayne sued over tax foreclosures*, THE DETROIT NEWS (July 19, 2015), https://www.detroitnews.com/story/news/local/ oakland-county/2015/07/19/oakland-wayne-sued-tax-foreclosures/30398945 (accessed April 23, 2019); John Turk, *Lawsuits: Tax delinquency foreclosures not handled properly*, THE OAKLAND PRESS (July 20, 2015), https://www.theoaklandpress.com/news/nation-world-news/lawsuits-tax-delinquency-foreclosures-not-handled-properly/article_e62c82a4-f935-5322-b1ce-342c7fffe7b6.html (accessed April 23, 2019).

[7] Christina Martin, *For $8.41 in Unpaid Taxes, the Government Took Uri Rafaeli's House-How Michigan misuses a procedure meant to target pirate ships and drug lords' mansions*, WALL STREET JOURNAL, Dec. 7, 2018, https://www.wsj.com/articles/for-8-41-in-unpaid-taxes-the-government-took-uri-rafaelis-house-1544227055 (available at https://pacificlegal.org/for-8-41-in-unpaid-taxes-the-government-took-uri-rafaelis-house/) (accessed April 23, 2019).

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Michigan law should support investment in Michigan, not discourage it. Paying the surplus value of property taken for failure to pay taxes to the former owner is not only justice, but also avoids the disincentive to invest in Michigan.

B. The GPTA creates improper incentives for County Treasurers and their private contractors to do as little as possible to notify property owners of tax delinquencies.

Michigan county treasurers, like most other governmental officials, are well-meaning people who have, in many cases, sacrificed more lucrative careers to serve the public. Nevertheless, the GPTA improperly tempts treasurers to make less than successful efforts to notify property owners of tax delinquencies, which are sometimes unknown to the property owners for a variety of reasons. Proceeds collected by treasurers as property taxes can be significantly increased by foreclosure and taking of high value properties for relatively small tax delinquencies.

Because the GPTA provides a county treasurer not only with control over delinquent taxes resulting from the sale of foreclosed properties, but also with the surplus proceeds of those sales, treasurers are susceptible to pressure based on the financial needs of their counties. That pressure incentivizes effort (or lack of effort) designed to generate maximal revenue, which in turn, can cause a treasurer to do as little as possible to inform a property owner of a tax delinquency—to the property owner's detriment. This problem has also received media attention.[8]

The incentive to take property and convert it into county funds is not limited to low value properties in urban areas. This incentive is recognized when a treasurer expresses delight at the

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[8] Joel Kurth, Mike Wilkinson, Laura Herberg, *Sorry we foreclosed your home. But thanks for fixing our budget*, Bridge (June 6, 2017), https://www.bridgemi.com/detroit-journalism-cooperative/sorry-we-foreclosed-your-home-thanks-fixing-our-budget (accessed April 23, 2019).

prospect of taking a high value property for the property owner's failure to pay a relatively small tax bill.

Such was the case with the treasurer of Cass County when she learned that 2CC's multi-million dollar property had been taken for a tax delinquency of less than $15,000. An employee with the treasurer's private contractor, Title Check, referred to the treasurer as "tickled pink" about foreclosing on 2CCs house. And she happily discussed her options regarding the sale or county use of 2CC's brand new house with a local newspaper reporter. Ted Yoakum*, County Forecloses on Lakeside Property*, Leader Publications, June 24, 2014.[9]

Generating windfall revenue for the county, at the expense of individual property owners, is not the purpose for tax foreclosure statutes. The statutes are designed to ensure that delinquent taxpayers are notified when they are delinquent in paying their taxes, and that if they persist in not paying, they risk losing the property to foreclosure. Whether the method of providing notice is by mail, posting at the house, publication in a newspaper or some other method, the real purpose is to advise the owner of the delinquency and potential for foreclosure.

Treasurers in Michigan retain the services of private for-profit businesses to perform much of the foreclosure notifications required by the GPTA. The methods of providing notice are set forth in the GPTA. Whether a particular method is constitutionally adequate is determined by balancing the State's interest against the property owner's interest, protected by the Fourteenth Amendment guarantee of due process.

In Cass County, the Treasurer hired and relied on Title Check to perform the notice tasks related to foreclosure on its tax delinquent properties. Privately held companies, like Title Check, also have a profit incentive to do less than what is necessary to provide notice of a

[9] https://www.leaderpub.com/2014/06/24/county-forecloses-on-lakeside-property/ (accessed April 23, 2019).

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delinquency to a property owner. Among the work Title Check contracts for is auctions of foreclosed properties. Title Check's fee for auctioning foreclosed properties is based on the value of the property—the greater the selling price, the greater the fee paid to Title Check. So when certified mailings to the owner of a valuable property come back "Unable to Forward," Title Check has a profit motive to continue to send mail to that same address, without investigating whether the address is a good one. That is what Title Check did to 2CC. Despite their certified mail notices coming back "Unable to Forward," Title Check never did anything to determine whether the address they were using for 2CC was accurate.

"[W]hen mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Jones v Flowers*, 547 US 220, 225; 126 S Ct 1708; 164 L Ed 2d 415 (2006). The means by which service of notice is attempted "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 315 (1950). So Title Check sent follow-up letters to the exact same address where certified letters were returned unclaimed, published its notice in a Cass County newspaper of limited distribution, and had an employee stop by 2CC's Property and post the notice of foreclosure on the front door of the house while it was under construction.

Because the general contractor building the house thought the notice might cause his subcontractors to get the wrong impression, he removed it. The general contractor never told anyone at 2CC about the posted notice he removed. But when the relationship between 2CC's general contractor and 2CC's owner soured, the general contractor offered to make a deal with the treasurer. The deal, as expressed in his emails, called for the general contractor to provide affidavits in which he claims to have told an unidentified representative of 2CC about the posted

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notice (allowing the treasurer to claim 2CC received actual notice of the foreclosure proceedings), in return for getting paid. Though the treasurer denied making any deal with the general contractor, the treasurer introduced and relied on the affidavits at the hearing on 2CC's motion to set aside the foreclosure.

Because it provides for potential windfall surplus proceeds of tax foreclosure sales, the GPTA creates improper incentives for county treasurers and Title Check to do as little as possible, beyond the often limited requirements of due process, to notify property owners of tax deficiencies and foreclosure proceedings.

Regardless of how a property owner may be deprived of actual notice of a tax delinquency or foreclosure proceeding, there is no justification for a state to acquire a windfall in tax foreclosure proceedings, at the expense of property owners. Property owners with unpaid taxes are entitled to at least the same constitutional protection as are criminals whose fines are paid through civil forfeiture. Those criminals are protected by the Eighth Amendment's prohibition against excessive fines. The Fifth Amendment's Takings Clause should also protect a property owner's equity. That is, property owners are entitled to the return of the surplus proceeds of a sale of their property foreclosed on for delinquent taxes.

C. Foreclosure sales of property on which the owner does not receive actual notice of delinquent taxes are likely to be tied up in litigation for years, keeping valuable property off the tax rolls.

Statutes that prescribe the method of foreclosing on property for which the owner has not paid taxes when due are designed to get the properties back on the tax rolls, generating revenue for the state, while respecting the property rights of the owners. Accordingly, Michigan's GPTA is designed to encourage "the efficient and expeditious return to productive use of property returned for delinquent taxes." MCL 211.78(1). But when tax foreclosure proceedings include no actual notice of the tax delinquency, and the delinquent taxes are significantly less than the

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value of the foreclosed property, the likelihood for expensive and lengthy litigation over that tax foreclosure is heightened.

Title Check and the Treasurer of Cass County recognized this probability with their handling of 2CC's property. While celebrating their foreclosure of 2CC's property on April 1, 2014, their emails repeatedly refer to the need to involve the treasurer's attorney, Tom King. The Treasurer's expectation of litigation is logical when a property worth $3.5 million is taken for failure to pay a tax bill less than 0.5% of the property's value—without the owner retaining any right to surplus proceeds of a tax sale. The resulting litigation over the foreclosure of 2CC's Property has cost Cass County hundreds of thousands of dollars in litigation expenses, while 2CC's property has sat vacant, unused, largely unmaintained (depreciating), and no property taxes have been levied or paid on the Property since the Treasurer took legal possession more than five years ago in 2014.

In April 2014, Mr. Spaulding of Title Check, the Treasurer's agent, contacted Doug Anderson, 2CC's registered agent, a couple of weeks after the redemption period expired, to notify him that 2CC no longer owned the Property—a communication Mr. Spaulding easily accomplished, and which was not required by any law. 2CC quickly tendered a check to the Treasurer covering all unpaid taxes. That check was refused by the Treasurer.

The result is that litigation of these cases can create a financial burden for the County. In cases like this, litigation over the application of the GPTA can and does keep a property off the tax rolls, instead of the getting it back on the tax rolls.

Expensive litigation and lengthy periods during which taxes are not collected would be far less likely if property owners were provided with surplus proceeds of a tax sale. If surplus proceeds were returned to the property owner, that property owner would have little incentive to

litigate the foreclosure. In fact, the property owner would be incentivized not to contest a foreclosure, because surplus proceeds the owner would be in line to receive, post-tax sale, would be eroded by the Treasurer's expenses in litigation defending the county's foreclosure.

The purpose of the GPTA favors payment of surplus proceeds to tax-foreclosed property owners.

D. Paying surplus proceeds to a foreclosed property owner creates no burden whatsoever on local governments or other taxpayers.

Oakland County argues that allowing local governments to retain windfall surplus proceeds of a tax sale is good public policy. Oakland County Brief at 2. They frame it as a simple either/or question: "Should the burdens associated with tax-delinquent properties be placed on the property owner who failed to pay taxes? Or should they be shifted to local governments and other taxpayers who did nothing wrong?" This is a false dichotomy. There is no burden shifting involved here.

If this court decides, as it should, that retaining windfall proceeds of tax sales violates the Takings Clause when the property is sold for an amount that exceeds the delinquent taxes, interest, penalties and costs of sale, there is no burden imposed on local governments or other taxpayers. Surplus proceeds from a tax sale are those proceeds that exceed the "minimum bid," a term defined in the GPTA. The "minimum bid" is defined as an amount that includes all delinquent taxes, interest, penalties, and costs of the sale. MCL 211.78m(16). So the foreclosing entity has no burden—even its costs are paid first out of the sale proceeds.

The surplus proceeds retained after a tax sale are truly a windfall to the local government, and therefore retaining the surplus proceeds is an unconstitutional taking, which involves no burden on local governments or other taxpayers.

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CONCLUSION

The taking of an entire property without refunding post-sale surplus proceeds is an unconstitutional "taking" under the Fifth Amendment. Defining it as such will go a long way toward eliminating expensive and lengthy disputes over tax foreclosures. Whatever unfortunate series of events results in a property owner receiving no actual notice of a tax delinquency, governmental actors should not be incentivized to play a "gotcha game" with the notice rules.

For the above reasons, amicus curiae 2 Crooked Creek, LLC asks this court to (1) hold that the Michigan GPTA violates the Fifth Amendment's Takings Clause, as applied to the states under the Fourteenth Amendment to the United States Constitution, when it allows a state or local government to keep the surplus proceeds of the tax sales of their properties, (2) hold that Appellants are entitled to the surplus proceeds of the tax sales of their properties, and (3) grant all other appropriate relief.

Dated: April 23, 2019.

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