STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Before: Markey, P.J., and Meter and Shapiro, JJ.

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 Circuit Court No. 2015-147429-CZ

BRIEF ON APPEAL OF AMICUS CURIAE MICHIGAN DEPARTMENT OF TREASURY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Michigan Department of Treasury concurs with Plaintiff-Appellants' statement of jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

Michigan's in rem delinquent property tax collection statute provides abundant notice and comprehensive remedies and court review such that a property owner can completely avoid foreclosure, making the loss of property far from inevitable. The notices and remedies are clear, complete, and available for an extended period of time. Michigan's law is fundamentally different from a compensable government "taking."

1. Was the lower court correct to deny Plaintiff-Appellants' requested relief because, when properly implemented, Michigan's statute is fundamentally different from, and is not, a taking without just compensation under the cited constitutional provisions?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

   Treasury's answer: Yes.

STATUTES INVOLVED

MCL 211.78 provides:

> (2) It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States but that those provisions do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States. The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated.

MCL 211.78k provides:

> (2) A person claiming an interest in a parcel of property set forth in the petition for foreclosure may contest the validity or correctness of the forfeited taxes . . . for 1 or more of the following reasons:
>
> (a) No law authorizes the tax.
>
> (b) The person appointed to decide whether a tax shall be levied under a law of this state acted without jurisdiction, or did not impose the tax in question.
>
> (c) The property was exempt from the tax in question, or the tax was not legally levied.
>
> (d) The tax has been paid within the time limited by law for payment or redemption.
>
> (e) The tax was assessed fraudulently.
>
> (f) The description of the property used in the assessment was so indefinite or erroneous that the forfeiture was void.
>
> (3) A person claiming an interest in a parcel of property set forth in the petition for foreclosure who desires to contest that petition shall file written objections with the clerk of the circuit court . . . .

(4) If the court determines that the owner of property subject to foreclosure is a minor heir, is incompetent, is without means of support, or is undergoing a substantial financial hardship, the court may withhold that property from foreclosure for 1 year or may enter an order extending the redemption period as the court determines to be equitable. If the court withholds property from foreclosure under this subsection, a taxing unit's lien for taxes due is not prejudiced and that property shall be included in the immediately succeeding year's tax foreclosure proceeding.

* * *

(5)(g) A judgment entered under this section is a final order with respect to the property affected by the judgment and except as provided in subsection (7) shall not be modified, stayed, or held invalid after the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or for contested cases 21 days after the entry of a judgment foreclosing the property.

INTRODUCTION

Michigan's property tax law is fundamentally different from a "taking." Here, property loss is far from inevitable, and it is not the desired result; the opposite is true as the statute is designed to collect delinquent taxes not properties. From assessment appeals and available tax exemptions, to multiple delinquency and foreclosure notices and hearings, to a long redemption period and subsequent appellate court review—the entire statute is structured to minimize, if not eliminate, foreclosures.

But here, the delinquent property owners were given sufficient notice, remedies, and time to act, yet they failed to take any action to preserve their property interest. Appellants ignored all the available state law remedies prior to foreclosure and now ask this Court to follow their lead, ignore those expired remedies and rights, and treat an extended period of inaction as a "taking," as if Appellants had no say in the outcome and no recourse under Michigan law.

Michigan's property tax law gives a delinquent property owner the ability to appeal the underlying tax assessment, seek a tax exemption, and timely pay the taxes as well as time to get a loan to pay the taxes late, time to sell the property privately to secure any "equity" and pay the taxes from proceeds, and the chance to seek equitable relief from the circuit court—or they can choose to give the property over in satisfaction of the delinquent tax debt.

That last option is entirely up to the property owner; if the delinquent property owner chooses to turn the property over in satisfaction of the taxes, whether the auction proceeds later prove to be enough to cover the taxes or not, the

foreclosing governmental unit (FGU) cannot reject that decision. Appellants turn their inaction on its head, calling the result of their unilateral series of decisions a government "taking."

The statute is designed to avoid foreclosures and with good reason; the FGU is not a realtor, nor a land investor, nor an appraiser or auctioneer. Land cannot be used to pay for ambulances, or police cars, or schools. The FGU wants to collect taxes, not properties, especially those virtually abandoned by their owners.

Michigan's law hangs its hat on providing notice—notice of the original assessment, notice of the tax bill, notice of delinquency, notice of forfeiture, and notice of a pending in rem circuit court foreclosure action. Notice includes information about available remedies, hearing opportunities, and about what will happen if the taxes remain unpaid. But after all the notices, hearings, time to pay, and opportunities to seek relief, there is finality. The statute cuts off property rights at the end of the redemption period. It is not a punitive measure or a money grab, it is a policy decision to frontload remedies to the pre-foreclosure phase.

That policy decision requires significant FGU effort and expense on the front end through notices, hearings, and delayed tax collection. But overall, providing those substantial rights and remedies up front is not only practical, it is the right thing to do. Just as the FGU is not a realtor or the former owner's agent-auctioneer, it is not an arbiter of priority as between lienholders, either. If liens survived foreclosure, who amongst the possible lenders, construction lienholders, judgment creditor-lienholders, and former owners would be entitled to any auction

proceeds and in what order of priority and proportions? And who would administer (and pay the expense of) resolving the disputes? In the interim, what would happen to the property? The Legislature addresses these concerns during the circuit court foreclosure action—make your arguments and protect your interests now or hold your peace—then the law severs all interests at the end of the redemption period, clearing title for resale.

To make matters worse, under Appellants' argument the delinquent owner (and lienholders) could take a flyer, let the property go to foreclosure and, if it sells for less than the aggregate taxes, leave the county (and really, other taxpayers) holding the bag on the shortfall. But if a property sells for more than the taxes, after refusing to exercise existing state law remedies or make any effort to protect the property, claim the "excess." As the County aptly describes it, Appellants seek to privatize gains while socializing losses. (Appellees' Br, p 1.)

But perhaps worse, Appellants ignored the existing rights and remedies, which failure to act resulted in the very "loss" or "taking" they complain of, and now advocate for different relief when it is more convenient. That policy preference is proper subject matter for lobbying, not litigating.

Finally, if former interest holders *were* entitled to claim auction proceeds and, hypothetically, had 90 days from the date of the auction to make a claim, but with adequate notice of their rights and the deadlines waited until day 110, would denying that claim and the resulting government windfall be a "taking"? It would not. It would be missing yet another statutory deadline to exercise a remedy.

Respectfully, if the delinquent property owner wants proceeds from selling a tax delinquent property, net of taxes, that is an option: the owner can sell it privately before the redemption period expires. And if the nearly three years provided by statute is not enough time, they can ask the circuit court for more time to pay the taxes, get a loan, or sell the property privately. But as the County correctly argues, the Legislature did not authorize taxpayers to conscript the FGU as their realtor or auctioneer. (Appellees' Br, pp 1, 22, 23.) Realtors, lenders, and auctioneers were readily available before the deadline expired.

Michigan's law is practical and constitutionally sound. It frontloads the rights and remedies and provides plenty of notice and time to act. Then it lets the delinquent taxpayer decide. Appellants gloss over the process, asking this Court to focus on the last five minutes of a three-hour movie. But it was their inaction and personal choices, not a government "taking," that resulted in tax foreclosure.

Appellants cannot sit on their hands and then complain about the result. What Appellants seek here is an extended deadline, more time before their property rights expire. The request reflects a policy preference, not redress for a constitutional infirmity.

COUNTER STATEMENT OF FACTS AND PROCEEDINGS

Michigan's Statutory Property Taxation Assessment Process

In Michigan, real property is assessed annually to determine true cash value (TCV) as of "tax day." MCL 211.27; MCL 211.2. Local assessors issue assessment notices each February. MCL 211.24c(4). The assessment is appealable to the local Board of Review and Michigan Tax Tribunal. MCL 211.29; 205.735a. Since 1994, Michigan has provided property tax relief via "capped" taxable value, which limits year-over-year tax increases between transfers of ownership. MCL 211.27a(3). Taxable value is multiplied by the millage rate—total rate for schools, ambulance and veterans' services, road mills, etc.—to set tax liability for each specific parcel.

Michigan's Statutory Property Tax Collection Process

Once the assessor determines true cash and taxable values, the local treasurer applies the millage rate, with bills typically split into two levies. In 2011, the first bill was issued on or about July 1, 2011 (summer tax) and the second on or about December 1, 2011 (winter tax). MCL 211.44. Any 2011 property taxes unpaid as of March 1, 2012, were "delinquent" and turned over to the county treasurer for collection; delinquent taxes can no longer be paid to the village, township, or city treasurer. MCL 211.78a(2). Each taxpayer of record is sent notice of the delinquency and risk of future foreclosure. MCL 211.78b.

Any 2011 property taxes that remained delinquent for another year were "forfeited" as of March 1, 2013. MCL 211.78g. A notice of forfeiture is sent to the taxpayer by certified mail and recorded with the county register of deeds.

MCL 211.78f; MCL 211.78g. Each notice warns that if the taxes are not paid by March 31 of the next year, the property will be foreclosed and all rights in the property will be lost. *Id.*

Forfeited parcels that remain unpaid are included in a single in rem foreclosure action filed in the county circuit court where the property is located; forfeited 2011 property taxes were included in circuit court petitions filed by June 15, 2013. MCL 211.78h. The court clerk sets the petition for hearing "not more than 30 days before . . . March 1." MCL 211.78h(5). Delinquent 2011 property taxes were subject to circuit court hearings in February or March of 2014, and the 2014 taxes had to be paid on or before March 31, 2014, unless a later date was set for a specific parcel by circuit court order. MCL 211.78k(5), (6), (7).

No later than May 1 next succeeding forfeiture, the FGU (or its "authorized representative" or "authorized agent") begins title work for each parcel in order to identify all interest holders entitled to notice for each forfeited parcel of property. MCL 211.78i(1). Over the succeeding months, each identified interest holder is sent numerous notices describing the parcel, the date of forfeiture, the circuit court case number, an explanation that the person may lose their entire interest in the property if the taxes remain unpaid, the amount required to redeem, the date and time and location for the administrative show cause and circuit court hearings, and other relevant information—including how to object to the foreclosure. MCL 211.78i(7). The notices are sent by certified mail and many FGU's also send

the same by first class mail. MCL 211.78i(2). See *Jones v Flowers*, 547 US 220 (2006) and the lower court's decision discussing same, App pp 61a-63a.

The FGU or its agent also personally visits each property to provide notice; for occupied properties notice is either hand delivered to the occupant answering the door, along with a verbal explanation of the pending foreclosure action, or if notice cannot be hand delivered the property is physically posted with a notice. MCL 211.78i(3)(a)-(d). See App 61a-62a citing *Sidun v Wayne Co Treasurer*, 481 Mich 503, 505. Notice is also published in a local newspaper and may be posted on a website. MCL 211.78i(5); 211.78s.

Interest holders in parcels subject to foreclosure may appear and raise defenses or objections at the administrative show-cause hearing conducted by the FGU. MCL 211.78j. Interest holders may also file written objections with the circuit court. MCL 211.78k(3). Interest holders may also appear before the circuit court and raise objections, defenses, or otherwise seek equitable relief from foreclosure. MCL 211.78k(4).

Parcels that were included in a 2014 circuit court judgment of foreclosure and that were not redeemed by March 31, 2014, or a later date set by the court, were foreclosed and subject to public auction later that year. MCL 211.78m. As of April 1, 2014, a now former interest holder's right, title, and interest in any unredeemed parcels is extinguished except as provided by statute or as separately addressed by circuit court order or by appellate court order. MCL 211.78k.

Michigan law requires that auctioned parcels be offered at a minimum bid, which includes all the outstanding taxes, interest, penalties, and fees and the proportional costs of preparing for and conducting the auction sale. MCL 211.78m(16)(a). Parcels that do not receive a qualifying "minimum bid" at the first annual auction are offered at a later auction for a nominal opening bid. MCL 211.78m(5). There is no provision allowing the FGU to seek recovery of any deficiency from former owners if the sale proceeds do not fully meet the minimum bid; a foreclosed property satisfies the property tax debt in full.

Proceeds from the tax auction must be deposited "into a restricted account designated as the 'delinquent tax property sales proceeds'" specific to the year at issue. MCL 211.78m(8). The funds in that account may only be used for specific enumerated purposes and in the order of priority set by statute as follows:

- to reimburse the fund the County uses to pre-pay local taxing authorities on behalf of delinquent property owners;
- to cover auction related expenses;
- to cover title work, first class and certified notices, inspection fees, posting expenses, personal service fees, publication fees, etc.;
- to cover property maintenance costs prior to auction; and
- to cover unreimbursed expenses in subsequent tax foreclosure proceedings or title defense actions. MCL 211.78m(8).

Appellants do not allege that they appeared at the administrative show cause hearing under MCL 211.78j; nor at the Circuit Court hearing under MCL 211.78k; nor that they filed timely written objections or defenses with the Circuit Court before, during, or after the hearing (but before April 1, 2014) under MCL 211.78k.

Nor do Appellants allege that they timely sought any other relief from the Circuit Court *before* the March 31 redemption deadline. MCL 211.78k(5).

Appellants do not allege that they sought a repayment plan under MCL 211.78q. Appellants do not allege that they could not afford to pay the delinquent taxes. MCL 211.78k(4). Appellants do not allege any pending appeals of the underlying tax assessments or any pending bankruptcy court action impacting the properties.

As amicus curiae, Treasury relies on and incorporates into this brief Defendant-Appellee's recitation of the specific proceedings below.

STANDARD OF REVIEW

"Issues of statutory construction are questions of law that are reviewed de novo." *People v Dowdy*, 489 Mich 373, 379 (2011). Likewise, "constitutional issues . . . are also questions of law reviewed de novo." *Id.*

SUMMARY OF ARGUMENT

Appellants ignored dozens of notices and warnings, over multiple years, turning their backs on the state law remedies and opportunities to be heard *before the redemption deadline.* Now they act as though their properties were abruptly and affirmatively "taken" from them with no recourse or opportunity to preserve their property interests. But that is not what the law provides nor is it what happened here.

Under Michigan's property tax foreclosure statutes, when notice is properly sent, the delinquent taxpayer has control, options, and time to act. The FGU provides notice and then waits for the owner to make an informed decision; the FGU is forced to accept the owner's payment or the property in satisfaction of the property tax. Appellants already had access to the very relief they seek here during the multi-year collection process. But they did not take any action, ignored the warnings, and let their rights and remedies expire. Failure to act, with notice and opportunity to avoid any loss, is not a taking under the state or federal constitutions.

ARGUMENT

I. Appellants' inaction during the extended period preceding the redemption deadline is the cause of any loss. Appellants rebrand their inaction as a "taking" and ask this Court to revive expired rights and remedies Appellants already had but failed to act on.

Michigan law provides numerous safeguards and remedies that fully and timely address the alleged inequities about which Appellants complain. Their "takings" theory glosses over the state law's comprehensive plain, speedy, and efficient remedies available during the lengthy property taxation process and long before any property interest is extinguished. The process cannot be described as abrupt or clandestine, nor is property loss inevitable.

Appellants focus exclusively on what remedies are available *after* a tax foreclosure is final. Respectfully that argument misses, or dismisses, a substantive

set of pre-deprivation remedies and protections. Appellants start their story with the final deadline and paint a picture of inevitability and alleged inequity.

In evaluating the constitutionality of the statute, this Court must consider all the remedies, rights, and protections available—before, during, and after forfeiture—not just what happens after the redemption deadline expires. Property owners have a right to a minimum set of remedies and procedural protections, not a right to a specific cause of action or an open-ended time period to act. Appellants had notice of what would happen and how to avoid it. They waited far too long and did far too little and seek further extension of their expired rights.

A. Appellants had remedies to address the tax liability and to avoid any property loss, but they failed to act in the extended time period set by law.

Appellants failed to fully pay their respective 2011 property taxes to their local treasurers as required by MCL 211.55. By statute, the delinquent amounts were turned over to the county treasurer for collection as of March 1, 2012. Thereafter, statutory fees for title work, recording documents, publication, mailing, and statutory interest to compensate for the time value of money, increased the delinquent amounts. MCL 211.78a(3); 211.78d; 211.78g(1).

But long before that, Appellants could have appealed the 2011 tax assessments to the Michigan Tax Tribunal. MCL 205.735a. They could have sought tax exemption in 2011; for qualifying individuals that could have reduced or completely eliminated any tax liability. See, e.g., MCL 211.7cc for principal

residence; MCL 211.7u for impoverished homeowners; MCL 211.7b for disabled veterans. There is no record that Appellants pursued appeals or exemptions.

Appellants do not allege that they fully paid the 2011 taxes, fees, and interest but were not fully credited. MCL 211.78k(2)(d). To the contrary, Appellants each admit knowing how and where to make payment, but further admit that they did not fully pay the 2011 redemption amounts. (Appellants' Br, pp 3, 11.)

Appellants could have, but admit that they did not, attend the administrative show cause hearing under MCL 211.78j. (App 64a.) Appellants could have filed written objections to the foreclosure under MCL 211.78k(3) and could have appeared at the Circuit Court hearing to object or seek equitable relief under MCL 211.78(3)-(4). There is no record evidence that Appellants exercised those rights. Qualifying individuals could have pled a financial hardship under MCL 211.78k(4). The FGU may also provide extended repayment plans for qualifying individuals that seek that relief. MCL 211.78q. Appellants could have sought additional time to pay, get a loan, sell the property privately, or otherwise avoid foreclosure *before* the March 31, 2014 redemption deadline. In the three years from the time of the original assessment notice in February 2011 until expiration of the redemption deadline as of April 1, 2014, Appellants chose *none of the above.*

B. It is not unconstitutional to set a date by which a litigant must exercise its rights and remedies so long as there is sufficient notice and time to act on those rights.

Michigan provides all the rights and remedies described above to protect property interests. But as it relates to this dispute, the rights and remedies are

frontloaded. They are available primarily leading up to, and then during, the circuit court foreclosure proceeding; there are numerous protections and remedies available during delinquency. There is also a final redemption period between the time when the circuit court enters a judgment of foreclosure and the March 31 redemption deadline. MCL 211.78k(5)(g).

After March 31, the circuit court is deprived of jurisdiction, and the judgment of foreclosure "shall not be modified, stayed, or held invalid" unless there has been a timely appeal to the Michigan Court of Appeals, or unless there is a showing that due process was not satisfied. See *In re Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 8, 10-11 (2007).

But so long as due process (notice) is satisfied, it is not unconstitutional to set a deadline—before which a property owner has multiple remedies available to stop the foreclosure process, and the circuit court has broad authority to fully address property rights and legal and equitable claims and defenses to foreclosure—and after which the circuit court no longer has jurisdiction, and those remedies expire. *Id.* at 10. "In cases where the [FGU] complies with the GPTA notice provisions," that bright line divestiture cutting off circuit court jurisdiction "is not problematic." *Id.*

The same is true for myriad claims against the government, including other areas of taxation. For instance, there is a four-year window within which to claim an overpayment of income taxes to the state. MCL 211.27a(2). Property owners have until June 30 of the tax year to appeal property tax assessments that they

believe are too high. MCL 205.735a. And they have 35 days to appeal a property tax exemption denial under MCL 211.7cc(6). A taxpayer may, objectively speaking, meet all the criteria for a tax refund, reduced property tax bill, or a tax exemption but fail to timely assert the refund claim, assessment appeal, or exemption claim or appeal. The resulting government "windfall," funds the government was not entitled to collect or keep, is not a taking.

Michigan's property tax statute foreclosure statute is no different. As discussed below, it is consistent with the U.S. Supreme Court's decision on a nearly identical New York tax foreclosure law. Michigan provides notice, time to act, and comprehensive remedies to avoid loss. But a properly noticed taxpayer must act on those rights and remedies before the statutory deadline.

C. Michigan's statute is consistent with the process affirmed by the U.S. Supreme Court in *New York v Nelson*, because Michigan's law provides more notice and gives the circuit court greater authority.

If a delinquent property owner knowingly disregards all the available state law remedies and a property is foreclosed for unpaid taxes, "nothing in the Federal Constitution prevents this [if] the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings." *Nelson v City of New York*, 352 US 103, 110 (1956)[1]. And, "in the absence of timely action to redeem or to recover [] any surplus," which is exactly what happened here, a state law may

[1] *Nelson* postdates, and in fact discusses and then distinguishes, its prior decision in *United State v Lawton*, 110 US 146 (1884).

allow the foreclosing entity to "retain the property or the entire proceeds of its sale." *Nelson,* 352 US at 110. Michigan's law nearly mirrors the process reviewed in *Nelson*, and then Michigan law goes further to provide additional notices, more remedies, more opportunities to be heard, and more circuit court discretion.

1. Nelson v New York

In *Nelson*, a property owner lost its entire property interest due to tax foreclosure after an extended delinquency for unpaid water charges collected in the same manner as property taxes. *Id*., at 105. The delinquent water charges were $65 and dated back four years. *Id*. The property was assessed at $6,000. *Id*. A larger bill from that same time period but for the "real estate taxes," had been paid. *Id*. at 108.

The in rem tax foreclosure statute in *Nelson* required notice of the pending foreclosure be published, posted, and mailed to the owner of record. *Id*. A judgment of foreclosure was entered by the state court, the delinquent taxpayer owner "took no action during the [redemption period]," and the government foreclosed the property and later sold it for $7,000. *Id*., at 106. The government retained all the sale proceeds. *Id*. The former owner later tried to pay the delinquent charges to regain the property, but the government rejected payment. *Id*.

The *Nelson* plaintiffs sought relief claiming that the state's foreclosure statute and sale process amounted to a due process violation (insufficient notice) or "a taking without just compensation," relying on *United States v Lawton*, 110 US 146 (1884). See *Nelson,* 352 US at 109.

The *Nelson* Court first addressed the adequacy of the government's notices prior to foreclosure, including whether the notices were properly sent and whether the government should have known "something was amiss" when the large property tax bill was paid, but the comparatively smaller water charges were not paid. *Id.* at 108. The *Nelson* Court held that notice was sent to the correct person—the bookkeeper of record designated to receive such notices—and any failure by the bookkeeper was not attributable to the government. *Id.* at 107. Moreover, there was no claim that the statutory notice publication or posting requirements were not satisfied. *Id.*

The *Nelson* Court further distinguished between situations when the government knows that notice is ineffective because of the recipient's inability to comprehend and the lack of any such allegation by the *Nelson* plaintiffs. The government had to *know*, not presume or deduce, that notice was ineffective for the intended recipient. *Id.* at 109. In *Nelson*, the government satisfied due process requirements by properly sending and publishing notices. *Id.*

Finally, the *Nelson* Court rejected the plaintiffs' takings claims, including their reliance on *Lawton*, holding that "the [state] statute involved in [*Lawton*] had been construed," in a prior United States Supreme Court case, "to require that the surplus" from a tax foreclosure sale "be paid to the [former land] owner." *Nelson,* 352 US at 110. But *Lawton* addressed a state statute previously "construed . . . to require that the surplus be paid to the owner" under that state's law making it a question of state "statutory construction without constitutional overtones." *Nelson,*

352 US at 110. In *Nelson*, New York had no such state law guarantee. *Id*. at 110. Nor did New York have a statute that "absolutely preclude[d]" a delinquent taxpayer from recovering any surplus—the difference between the tax liability and the perceived value of the property—*if the delinquent taxpayer took timely action*. *Id*.

As the *Nelson* Court held, a property owner could seek recovery of any surplus by filing a "*timely answer in a foreclosure proceeding*, asserting his property [has] a value substantially exceeding the tax due" and seeking the opportunity for a "separate sale." *Id*. at 110. (Emphasis added.) In other words, nothing precluded the state Legislature from using the existing state court foreclosure action to resolve any claims of surplus or equity and thus avoid a later "takings" claim. The delinquent taxpayer in *Nelson* had to answer in the state foreclosure proceeding and act to protect his property interest.

2. Michigan's tax foreclosure statute in light of *Nelson*

As discussed above, property owners have the right to appeal their assessments annually. MCL 205.735a. There are also dozens of property tax exemptions available for individuals, businesses, religious and non-profit organizations, educational facilities, industrial users, and for myriad other uses. (See by way of example but not an exhaustive list, MCL §§: 211.7b for disabled veterans; 211.7d for elderly or disabled housing; 211.7n for non-profit theater, science, or music and art promoting properties; 211.7s for houses of public worship; 211.7u for poverty; 211.7cc for principle residence; 211.7ee for agricultural property;

211.7jj for forest property; 211.7mm for charitable housing.) Tax appeals and tax exemptions can reduce, or eliminate entirely, property tax liability and provide an important first line of substantive and procedural protections to avoid any loss of property.

Michigan law provides notice and time to act from the time of billing, which in this case was in July 2011, during delinquency in 2012 and 2013, through the administrative and circuit court hearings in early 2014, and up to the March 31, 2014 redemption deadline. (See discussion of tax collection process, *supra*, pp 5-8.) Michigan provides for forfeiture and foreclosure notices by first-class and certified mail, posting, hand delivery, publication, and recording. MCL 211.78k. Michigan law mirrors, and then surpasses, the notice provisions affirmed in *Nelson*.

Michigan law also provides notice protections for "minor heirs or persons who are incompetent" as well as for "persons without means of support, or persons unable to manage their affairs due to age or infirmity, until a guardian is appointed to protect the person's rights and interests." MCL 211.78h(3)(a). This statutory provision could easily pass for a postscript to *Nelson* and its discussion of *Covey v Town of Somers,* 351 US 141 (1956).

Michigan law also provides more comprehensive remedies than the statute affirmed in *Nelson*. Generally, Michigan property tax bills are paid in full by single payment. MCL 211.53. But once property taxes are delinquent, the FGU may provide for installment payment plans. MCL 211.78q. This quasi-diversion plan removes property from the tax foreclosure petition and allows repayment over an

extended term of up to five years. *Id*. The law also provides for relief from accrued interest when the repayment agreement is satisfied. *Id*.

If nearly three years is not enough time to pay one year of property taxes, or a repayment plan is not an option, Michigan law also provides both administrative and judicial hearings to argue why a property should not be foreclosed. MCL 211.78j; 211.78k. At the hearings, property owners can ask for more time based on equitable hardship claims. MCL 211.78k. Written "objections" also provide for appearance in writing; no personal appearance is required. *Id*. Circuit courts have equitable authority to forestall or cancel a pending tax foreclosure and may address legal challenges to the tax or tax collection action. MCL 211.78k(2)-(4). (See also *In re Treasurer of Wayne County*, 478 Mich at 11, holding that "the Legislature cannot create a statutory regime that allows for constitutional violations with no recourse" and allowing circuit courts to address prior foreclosures if there was not sufficient notice.) Unlike the New York state courts in *Nelson*, Michigan circuit courts can grant additional time to pay or otherwise forestall tax collection for a year; and with that time a property owner can pay the taxes, get a loan, sell the property privately, or otherwise protect any property interest. MCL 211.78k(3).

Michigan's statute, process, and remedies again mirror the processes and remedies reviewed and upheld in *Nelson*. But Michigan courts *do* have the authority to, effectively, grant an "injunction against proceeding with foreclosure and an extension of time for redemption," relief that New York's statute did not

authorize New York courts to grant. *City of New York v Chapman Docks Co*, 1 A.D 2d 895, 896 (NY App Div 1956).

As noted in *Nelson*, citing the New York state court's holding in *Chapman*, "an owner filed a timely answer in the foreclosure proceeding, asserting his property had a value substantially exceeding the tax due," and requested relief rather than total loss of his property. *Nelson,* 352 US at 110. But "in the absence of timely action to redeem," i.e., pay the required amount of tax before the foreclosure is final or otherwise take action "to recover any surplus," i.e., ask the court for more time to pay, get a loan, or sell the property privately during the state court proceeding, "nothing in the Federal Constitution" provides any additional rights or protections. *Id.* That includes any claim against a state law that allows the government to "retain the property or the entire proceeds of its sale." *Id.*

Appellants cite no such state constitutional guarantee here; to the contrary, the statutory damages claim available under MCL 211.78l (if notice satisfies due process but is still alleged to be insufficient) has been described as a legislative accommodation; "a remedy that is not constitutionally required." *In re Treasurer of Wayne County,* 478 Mich at 10.

Like *Nelson*, in Michigan, a delinquent taxpayer must use one or more of the myriad remedies *before* the deadline. Even after the final redemption deadline has otherwise expired, state law provides two more protections for inadequate notice; the property itself may be returned consistent with *In re Treasurer for Wayne County,* 478 Mich 1 (2007), or the owner may seek damages in Michigan's Court of

Claims under MCL 211.78l. But when notice is provided, property owners must timely act.

Nelson is on point, controls for purposes of federal constitutional claims, and helps differentiate a properly administered tax foreclosure statute from an unconstitutional taking. *Nelson*, given the comprehensive remedies and court review available under Michigan law, provides a useful way of analyzing the instant case and differentiating this tax collection process from a true taking.

D. This Court must consider the entirety of the process, both before and after judgment is entered, in determining the constitutionality of the statute.

Appellants focus on what remedies are available *after* a tax foreclosure is final. But in considering the adequacy of remedies and protections, "the sufficiency of pre-deprivation procedures must be considered in conjunction with the options for post-deprivation review." *Leary v Daeschner*, 228 F3d 729, 743 (2000). And, "[i]n some cases, post-deprivation review may possibly be sufficient, and no pre-deprivation process is required." *Id*. That general concept is true in state tax collection, too, as "the collection of a tax constitutes a deprivation of property, a state must provide sufficient procedural safeguards to satisfy due process requirements." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 29 (2005), citing *McKesson Corp v Div of Alcoholic Beverages,* 496 US 18, 36 (1990).

However, "states 'are afforded great flexibility in satisfying the requirements of due process in the field of taxation.'" *By Lo,* 267 Mich at 29, quoting *Nat'l Private*

Truck Council, Inc v Oklahoma Tax Comm, 515 US 582, 587 (1995).[2] See also *Levin v Commerce Energy, Inc,* 560 US 413, 417 holding that the comity doctrine "reflects 'a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States . . . are left to perform their separate functions in separate ways.'" *Id.* at 421, quoting *Fair Assessment in Real Estate Ass'n, Inc v McNary,* 454 US 100, 102 (1981).

Given that "the Constitution does not require pre-deprivation process [if] it would be impossible or impracticable to provide a meaningful hearing before the deprivation," and that "the Constitution is satisfied by the provision of meaningful post-deprivation process," courts have discussed pre-deprivation processes as ideal but not required in all instances. *Williamson County Regional Planning Com'n v Hamilton Bank of Johnson City*, 473 US 172, 195 (1985). In this case, the pre-deprivation remedies are comprehensive and there is a post-judgment redemption period and a right to appellate court review.

In that context, when courts consider pre- and post-deprivation remedies *together* (and thus not requiring pre-deprivation remedies if impractical), courts

[2]Two recent federal courts have required a person challenging a state tax scheme to seek relief in state court first consistent with the prudential principles of comity and exhaustion of state court remedies, as well as the Tax Injunction Act (TIA). See *Freed v. Thomas, et al,* USDC ED Mich, SD, 2018 WL3848155 (6th Cir. No. 18-cv-02312) (district court dismissed for lack of jurisdiction under the same statute at issue here based on comity and the TIA), which is currently pending on appeal in the Sixth Circuit; *Wayside Church v Van Buren County,* 847 F 3d 812 (2017) (same). Moreover, the U.S. Supreme Court is also currently reviewing the requirement of exhausting state remedies for facial takings claims under *Williamson County,* 473 US at 172. See *Knick v Township of Scott*, 138 S Ct 1262 (2018) (cert granted).

have held that the "injury" in a takings claim "is not 'complete'," i.e., ripe, "in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate post-deprivation remedy for the property loss.'" *Id.* quoting *Hudson v Palmer*, 468 US 517, 532, n 12 (1984). But importantly, this analysis presumes that the remedies and judicial review are backloaded, i.e., that, at a minimum (because of practicality), that the state offered only post-deprivation remedies.

But the inverse must also be true; abundant notice, time to act, and comprehensive pre-deprivation remedies, with the balance of the post-deprivation redemption period and appellate court review, also provides a mechanism to protect property rights, including any "equity." The ability to secure any perceived equity, or keep the entire property, is the ultimate remedy in a takings case. The ability to completely avoid any loss differentiates this from a "taking." And being allowed to sell a property privately to protect "equity" is self-administered compensation.

The timing of state law remedies is less relevant than the existence of those protections; the remedies are key as the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a '"reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Williamson County,* 473 US at 194, quoting *Regional Rail Reorganization Act Cases,* 419 US 102, 124-125 (1974).

No legal remedy could be greater in this context: the ability to avoid any loss, entirely; being in complete control of whether or not any property (or any portion or "equity" associated with a property) is "lost" is the ultimate remedy.

And "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Williamson County,* 473 US at 194-95, quoting *Ruckelshaus v Monsanto,* 467 US 986, 1013, 1018, n. 21 (1984). But a property owner "cannot claim a violation of the Just Compensation Clause until it has used the procedure [available under the state law] and been denied just compensation." *Williamson County,* 473 US at 195.

Federal courts have long held that a claimant must seek compensation, first, through the "procedures the State has provided for doing so." *Id.* It would stand to reason that state courts would likewise require a claimant to first use "the procedures the state has provided" to obtain relief. Michigan's law provides such remedies primarily up front and up to and through the time when the circuit court has jurisdiction, with a post judgment redemption period, appellate court review rights, and protections for due process (notice) violations.

Although this reasoning is rooted in the lexicon and caselaw of taking cases, and primarily federal court decisions, it is not a concession that the state's property tax foreclosure law implicates taking concepts. Instead, consistent with *Nelson*, it merely shows how Michigan's law is fundamentally different than a taking without just compensation; the state law provides every way possible to avoid any loss and leaves the property owner in control to make reasoned and informed decisions.

Appellants were entitled to state laws and procedures that provided sufficient notice and opportunities to protect their property rights. But they are not entitled

to a particular cause of action, much less one premised on a property loss that is the direct result of *ignoring* existing pre-deprivation state law remedies available before foreclosure. Michigan law already provides the relief Appellants seeks in this case, only sooner and with more comprehensive notice, greater protections, and multiple levels of review. Unfortunately, Appellants did not timely exercise those remedies.

CONCLUSION AND RELIEF REQUESTED

Appellants begin telling their story more than three years into the process and after disregarding all the warnings and failing to avail themselves of the myriad state law remedies and defenses. This case is not about if remedies exist, but when those remedies may be exercised and whether a state may set a deadline that provides true finality. Michigan's law sufficiently safeguards property rights and provides clear and complete remedies consistent with *Nelson*.

With full knowledge of the process and notice of substantial state law rights, remedies, and deadlines, Appellants failed to act. Failing to act and relinquishing property in satisfaction of the in rem taxes is not a governmental taking. The policy may appear to be harsh in some instances, especially if this Court does not have the benefit of context. But in any case, it does not result in a constitutional violation and is a matter appropriate for the Legislature to consider. Treasury respectfully asks that this Honorable Court affirm the lower court's decision.

Respectfully submitted,

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