STATE OF MICHIGAN

IN THE SUPREME COURT

RAFAELI, LLC, 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
Case No. 15-147429-CZ

Hon. Langford-Morris

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State government action is invalid.

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AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION OF COUNTIES, MICHIGAN TOWNSHIPS ASSOCIATION, AND THE MICHIGAN MUNICIPAL LEAGUE

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Sec. 78k.

(5) That fee simple title to property foreclosed by the judgment will vest absolutely in the foreclosing governmental unit, except as otherwise provided in subdivisions (c) and (e), without any further rights of redemption, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section.

* * *

(6) Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property, including all interests in oil or gas in that property except the interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h, and interests preserved as provided in section 1(3) of 1963

PA 42, MCL 554.291. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9).

MCL 211.78m

211.78m Granting state right of first refusal; election by state not to purchase property; purchase of property by city, village, township, or county; property sale at auction; notice of time and location; procedure; property not previously sold; disposition of sale proceeds; joint sale by 2 or more county treasurers; deed recording; cancellation of taxes and certain costs upon transfer or retention of property; foreclosed property defined as facility under MCL 324.20101; person convicted for executing false affidavit; definitions.

Sec. 78m.

(1) Not later than the first Tuesday in July, immediately succeeding the entry of judgment under section 78k vesting absolute title to tax delinquent property in the foreclosing governmental unit, this state is granted the right of first refusal to purchase property at the greater of the minimum bid or its fair market value by paying that amount to the foreclosing governmental unit if the foreclosing governmental unit is not this state. If this state elects not to purchase the property under its right of first refusal, a city, village, or township may purchase for a public purpose any property located within that city, village, or township set forth in the judgment and subject to sale under this section by payment to the foreclosing governmental unit of the minimum bid. If a city, village, or township does not purchase that property, the county in which that property is located may purchase that property under this section by payment to the foreclosing governmental unit of the minimum bid. If property is purchased by a city, village, township, or county under this subsection, the foreclosing governmental unit shall convey the property to the purchasing city, village, township, or county within 30 days. If property purchased by a city, village, township, or county under this subsection is subsequently sold for an amount in excess of the minimum bid and all costs incurred relating to demolition, renovation, improvements, or infrastructure development, the excess amount shall be returned to the delinquent tax property sales proceeds account for the year in which the property was purchased by the city, village,

township, or county or, if this state is the foreclosing governmental unit within a county, to the land reutilization fund created under section 78n. Upon the request of the foreclosing governmental unit, a city, village, township, or county that purchased property under this subsection shall provide to the foreclosing governmental unit without cost information regarding any subsequent sale or transfer of the property. This subsection applies to the purchase of property by this state, a city, village, or township, or a county prior to a sale held under subsection (2).

(2) Subject to subsection (1), beginning on the third Tuesday in July immediately succeeding the entry of the judgment under section 78k vesting absolute title to tax delinquent property in the foreclosing governmental unit and ending on the immediately succeeding first Tuesday in November, the foreclosing governmental unit, or its authorized agent, at the option of the foreclosing governmental unit, shall hold 1 or more property sales at 1 or more convenient locations at which property foreclosed by the judgment entered under section 78k shall be sold by auction sale, which may include an auction sale conducted via an internet website. Notice of the time and location of a sale shall be published not less than 30 days before a sale in a newspaper published and circulated in the county in which the property is located, if there is one. If no newspaper is published in that county, publication shall be made in a newspaper published and circulated in an adjoining county. Each sale shall be completed before the first Tuesday in November immediately succeeding the entry of judgment under section 78k vesting absolute title to the tax delinquent property in the foreclosing governmental unit. Except as provided in this subsection and subsection (5), property shall be sold to the person bidding the minimum bid, or if a bid is greater than the minimum bid, the highest amount above the minimum bid. The foreclosing governmental unit may sell parcels individually or may offer 2 or more parcels for sale as a group. The minimum bid for a group of parcels shall equal the sum of the minimum bid for each parcel included in the group. The foreclosing governmental unit may adopt procedures governing the conduct of the sale and the conveyance of parcels under this section and may cancel the sale prior to the issuance of a deed under this subsection if authorized under the procedures. The foreclosing governmental unit shall require full payment at the close of each day's bidding or by a date not more than 21 days after the sale. Before the foreclosing governmental unit conveys a parcel sold at a sale, the purchaser shall provide the foreclosing governmental unit with proof of payment to the local tax collecting

unit in which the property is located of any property taxes owed on the parcel at the time of the sale.

(3) For sales held under subsection (2), after the conclusion of that sale, and prior to any additional sale held under subsection (2), a city, village, or township may purchase any property not previously sold under subsection (1) or (2) by paying the minimum bid to the foreclosing governmental unit. If a city, village, or township does not purchase that property, the county in which that property is located may purchase that property under this section by payment to the foreclosing governmental unit of the minimum bid.

(4) If property is purchased by a city, village, township, or county under subsection (3), the foreclosing governmental unit shall convey the property to the purchasing city, village, township, or county within 30 days.

* * *

(6) On or before December 1 immediately succeeding the entry of judgment under section 78k, a list of all property not previously sold by the foreclosing governmental unit under this section shall be transferred to the clerk of the city, village, or township in which the property is located. The city, village, or township may object in writing to the transfer of 1 or more parcels of property set forth on that list. On or before December 30 immediately succeeding the entry of judgment under section 78k, all property not previously sold by the foreclosing governmental unit under this section shall be transferred to the city, village, or township in which the property is located, except those parcels of property to which the city, village, or township has objected. Property located in both a village and a township may be transferred under this subsection only to a village. The city, village, or township may make the property available under the urban homestead act, 1999 PA 127, MCL 125.2701 to 125.2709, or for any other lawful purpose.

(7) If property not previously sold is not transferred to the city, village, or township in which the property is located under subsection (6), the foreclosing governmental unit shall retain possession of that property. If the foreclosing governmental unit retains possession of the property and the foreclosing governmental unit is this state, title to the property shall vest in

the land bank fast track authority created under section 15 of the land bank fast track act, 2003 PA 258, MCL 124.765.

(8) A foreclosing governmental unit shall deposit the proceeds from the sale of property under this section into a restricted account designated as the "delinquent tax property sales proceeds for the year _____". The foreclosing governmental unit shall direct the investment of the account. The foreclosing governmental unit shall credit to the account interest and earnings from account investments. Proceeds in that account shall only be used by the foreclosing governmental unit for the following purposes in the following order of priority:

(a) The delinquent tax revolving fund shall be reimbursed for all taxes, interest, and fees on all of the property, whether or not all of the property was sold.

(b) All costs of the sale of property for the year shall be paid.

(c) Any costs of the foreclosure proceedings for the year, including, but not limited to, costs of mailing, publication, personal service, and outside contractors shall be paid.

(d) Any costs for the sale of property or foreclosure proceedings for any prior year that have not been paid or reimbursed from that prior year's delinquent tax property sales proceeds shall be paid.

(e) Any costs incurred by the foreclosing governmental unit in maintaining property foreclosed under section 78k before the sale under this section shall be paid, including costs of any environmental remediation.

(f) If the foreclosing governmental unit is not this state, any of the following:

(i) Any costs for the sale of property or foreclosure proceedings for any subsequent year that are not paid or reimbursed from that subsequent year's delinquent tax property sales proceeds shall be paid from any remaining balance in any prior year's delinquent tax property sales proceeds account.

(ii) Any costs for the defense of title actions.

(iii) Any costs incurred in administering the foreclosure and disposition of property forfeited for delinquent taxes under this act.

(g) If the foreclosing governmental unit is this state, any remaining balance shall be transferred to the land reutilization fund created under section 78n.

(h) In 2008 and each year after 2008, if the foreclosing governmental unit is not this state, not later than June 30 of the second calendar year after foreclosure, the foreclosing governmental unit shall submit a written report to its board of commissioners identifying any remaining balance and any contingent costs of title or other legal claims described in subdivisions (a) through (f). All or a portion of any remaining balance, less any contingent costs of title or other legal claims described in subdivisions (a) through (f), may subsequently be transferred into the general fund of the county by the board of commissioners.

* * *

(13) If property foreclosed under section 78k and held by or under the control of a foreclosing governmental unit is a facility as defined under section 20101 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101, prior to the sale or transfer of the property under this section, the property is subject to all of the following:

(a) Upon reasonable written notice from the department of environmental quality, the foreclosing governmental unit shall provide access to the department of environmental quality, its employees, contractors, and any other person expressly authorized by the department of environmental quality to conduct response activities at the foreclosed property. Reasonable written notice under this subdivision may include, but is not limited to, notice by electronic mail or facsimile, if the foreclosing governmental unit consents to notice by electronic mail or facsimile prior to the provision of notice by the department of environmental quality.

(b) If requested by the department of environmental quality to protect public health, safety, and welfare or the environment, the foreclosing governmental unit shall grant an easement for access to conduct response activities on the foreclosed property as authorized under chapter 7 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101 to 324.20302.

(c) If requested by the department of environmental quality to protect public health, safety, and welfare or the environment, the foreclosing governmental unit shall place and record deed restrictions on the foreclosed property as authorized under chapter 7 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101 to 324.20302.

(d) The department of environmental quality may place an environmental lien on the foreclosed property as authorized under section 20138 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20138.

(14) If property foreclosed under section 78k and held by or under the control of a foreclosing governmental unit is a facility as defined under section 20101 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101, prior to the sale or transfer of the property under this section, the department of environmental quality shall request and the foreclosing governmental unit shall transfer the property to the state land bank fast track authority created under section 15 of the land bank fast track act, 2003 PA 258, MCL 124.765, if all of the following apply:

(a) The department of environmental quality determines that conditions at a foreclosed property are an acute threat to the public health, safety, and welfare, to the environment, or to other property.

(b) The department of environmental quality proposes to undertake or is undertaking state-funded response activities at the property.

(c) The department of environmental quality determines that the sale, retention, or transfer of the property other than

under this subsection would interfere with response activities by the department of environmental quality.

* * * *

IDENTITY AND INTERESTS OF AMICI

Amici curiae the Michigan Association of Counties ("MAC"), Michigan Townships Association ("MTA"), and the Michigan Municipal League ("MML") respectfully submit this brief in support of the Defendants-Appellees, Oakland County and Oakland County Treasurer Andrew Meisner, and in support of affirmation of the Court of Appeals' decision holding that Plaintiffs-Appellants have no right to excess sale proceeds, if any, from the sale of tax-foreclosed property.

The MAC, a non-profit association founded in 1898, consists of 83 Member Michigan Counites. It is a statewide organization dedicated to representing the interests of Michigan's county commissioners. It promotes the education of those county officials and communication and cooperation between them, and it advocates on their behalf in the Michigan and federal legislatures.

For many years, Michigan law has imposed on counties a wide range of functions relating to the collection of delinquent real property taxes. The MAC is keenly interested in this case because one of the primary duties of a county is the collection of delinquent real property taxes under the General Property Tax Act ("GPTA"). In 75 of Michigan's 83 counties, the county has opted under MCL 211.78, to have the county's elected county treasurer function as the foreclosing governmental unit ("FGU") on behalf of the State. FGUs have the responsibility to foreclose property for unpaid delinquent real property taxes, take title to unredeemed properties, and to either transfer the property for public purpose or sell the unredeemed parcels to generate revenue necessary to pay for unpaid

property taxes, and related collection expenses. Counties also have a role in administering the delinquent tax revolving fund under MCL 211.87b, 211.87f.

Further, in the last few months, putative class action lawsuits against 80 Michigan counties—i.e., most of MAC's members—have been filed by various plaintiffs asserting claims that parallel the claims here. Depending upon the outcome, this pending litigation could also have serious and detrimental consequences for Michigan's counties, and their residents.

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. MTA was established in 1953 and is widely recognized for its years of experience and knowledge regarding township issues. Through its legal defense fund, MTA has participated as amicus curiae in numerous state and federal cases presenting issues of statewide significance to Michigan townships. In doing so, MTA has edified and assisted the courts in their understanding of township law.

Townships are established by Const 1963 art 7, § 17, and township elected officers provided for in Const 1963 art 7, § 18: "In each organized township there shall be elected . . . a treasurer." Under the GPTA, townships have the crucial duties of assessing, billing, and collecting taxes. MCL 211.41, 211.44. Michigan State University Extension, *The General Property Tax Act*, https://bit.ly/2IrbdaP.

They also implement the systems that give school districts their necessary funds and certify to FGUs (usually counties) unpaid property taxes. MCL 211.43, 211.55. Townships are often the public's first and usually only contact with the property-tax system. They are also the ones on the hook for charge backs related to uncollected property taxes using the GPTA's statutory provisions to combat sometimes crippling blight in many of their communities—both problems of which the GPTA sought to alleviate.

The Michigan Municipal League ("MML"), a non-profit corporation founded in 1899, consists of over 520 member Cities and Villages including, among others, Detroit, Grand Rapids, Flint, and Saginaw. The MML's mission is to make Michigan's communities better by helping its members exchange information and develop unified policies on all issues of municipal concern, including assessing and collecting taxes. It provides its members sample charters, franchises, ordinances, regulations, programs, and policies and advocates for its members in the state and federal legislatures. For many years, the MML has communicated to the State on behalf of its members the importance of empowering local governments to effectively serve their constituents. The MML actively supported the most recent major overhaul of GPTA, 1999 PA 123 ("Act 123"), provisions of which form the basis of this lawsuit.

The MML is deeply interested in this case for a variety of reasons, including because one of the primary duties of City and Village government, like townships, is to assess and collect taxes; under the GPTA, their duties largely parallel the duties of townships, see, e.g., MCL 211.43–45, 211.47. MML members also

constantly fight against the blight, which often spawns public health and environmental concerns, which the GPTA was also designed by the Michigan Legislature to alleviate.

Together, the Amici represent the views of every governmental level of the property tax process (except the State of Michigan).[1] They understand that MCL 211.78m is a critical component of Michigan's delinquent-property-tax collection process — including to combat blight and address public health concerns that arise from abandoned property. The disposition of "surplus" proceeds from the sale of tax-foreclosed properties helps assure that each county treasurer will have sufficient funds to administer the delinquent real property tax collection process, repay any advances made from a delinquent tax revolving fund, including any delinquent tax anticipation notes issued, avoid charge backs to local tax units for uncollected property taxes, and confront difficult blight issues that the GPTA's tax-foreclosure process was enacted to address. In sum, the Amici believe that this case could significantly harm the ability of Michigan counties, townships, cities, and villages to collect taxes and, by extension, their ability to provide necessary government services to their residents.

[1] On April 23, 2019, the State of Michigan, Department of Treasury, filed an amicus curiae brief in support of Defendants-Appellees' position, which was followed by the Court's April 26, 2019 Order granting the Department of Treasury five minutes of Defendant-Appellees' oral argument time. In that same order, the Court also granted separate motions of other amici to file amicus briefs, including the Michigan Association of County Treasurers.

INTRODUCTION AND SUMMARY OF ARGUMENT

At its root, this case presents a policy choice: should the tax, blight, funding, and public heath burdens created by delinquent property owners be borne by those property owners, or by society at large? Michigan's Legislature—the only appropriate body to make such a decision—chose the former approach through its passage of Act 123. It did so after many years of Michigan's counties, townships, cities, and villages suffering from an inefficient tax lien system: a system that encouraged blight, apathy, confusion, gamesmanship, and inequality across the spectrum of property rights and public funding concerns. Act 123 sought to alleviate those problems by streamlining the tax-foreclosure process, while at the same time, vigorously guarding property owners' constitutional rights. In addition, Act 123 was later further amended to address the public health and environmental issues that often come with tax-foreclosed properties. Simply put, Act 123 works well within the constructs of the United States and Michigan Constitutions, and thus, the Court should not disturb this successful tax system enacted by the Legislature.

HISTORY OF MICHIGAN'S TAX-FORECLOSURE SYSTEM

I. Michigan's Pre-1999 Tax System Under the GPTA

Each state legislates its own process for collecting overdue property taxes owed on real property. Some states (each a "Tax Lien State") sell liens on the property to private buyers who purchase the right to collect from the owners. Other states (each a "Tax Deed State") collect overdue taxes by foreclosing real property for non-payment of taxes owed on the property. In a Tax Lien State,

owners of the property retain ownership of the property while taxes remain unpaid, subject to the private buyer's purchased interest. In a Tax Deed State, owners of the property do not a retain ownership of property with delinquent taxes. After the property is foreclosed by the government and the redemption period expires, ownership of the property vests in the government, which retains or disposes of the property as provided under state law.

In 1893, the Legislature passed the GPTA, establishing Michigan as a Tax Lien State. Suppose that, under this former system, a property owner failed to pay her property taxes in Year 1. Those unpaid taxes became a lien late in Year 1. In Year 2, they would be deemed delinquent and sent to the county for collection. In Years 2 and 3, the county would send notices of the delinquency to the property owner. In Year 4, the circuit court would certify that the taxes were owed and, after notice was sent and published in a local newspaper, the tax lien would be offered at an annual tax sale. Even though the lien was sold to a private buyer or the state in Year 4, because of a lengthy first redemption period, a tax deed would not issue until Year 5. A second redemption period and other provisions could extend the date the tax deed would issue to Year 7 for private buyers and Year 9 if the buyer was the state.

This system did not work well. Many homes and business lingered in the tax-reversion process and were left abandoned. Often the abandoned properties were hazardous, and the longer they were left unaddressed, the costlier and more burdensome clean-up or rebuilding became. Too often the burden of these consequences fell upon local governments and their taxpayers—especially in

urban areas. According to the Citizens Research Council of Michigan, in 1999, unpaid property taxes contributed to local revenue shortfalls, consumption of additional administrative resources, and neighborhood blight. Citizens Research Council of Michigan, *Delinquent Property Taxes in Michigan*, April 1999, https://bit.ly/2IsACRg. This process was a "significant contributor to urban decay" because "such tax reverted properties remain legally encumbered for too long a time, effectively sending development interest elsewhere." *Id.* The House Legislative Analysis Section echoed this analysis: "**the system is unfair to those who pay their taxes on time; the lack of tax revenue thwarts local government operations; the tax collection process is labor intensive and time-consuming; tax delinquent properties . . . cause urban blight; and it hamstrings land acquisition and redevelopment projects**." The House Legislative Analysis Section, *Analysis of GPTA Amendment Bills Package*, July 23, 1999, https://bit.ly/2Dat95V (emphasis added). Given these systemic flaws, the Legislature decided that something had to change.

II. The 1999 Amendment to the GPTA: Act 123

The Legislature completely revised the process for the collection of delinquent property taxes by enacting Act 123. The new process reduced the time to foreclose tax-delinquent property from seven to nine years down to just over two years. Kevin T. Smith, *Foreclosure of Real Property Tax Liens under Michigan's New Foreclosure Process*, Mich. Real Prop. Rev., 51, 60 (Summer 2002). In adopting Act 123, the Legislature made clear its overriding concern about the impact of tax-delinquent property on the state:

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.

MCL 211.78(1).[2] The process for the return, forfeiture, and foreclosure of property for delinquent taxes under Act 123 was explicitly intended to satisfy the minimum requirements of due process required under the Michigan and United States constitutions and to be strictly construed against persons with an interest in delinquent property or former interest holders:

> 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.

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[2] Other states have amended their tax-foreclosure statutes in similar ways to address similar problems. Indiana (a Tax Deed state), for example, amended its law in 2016 to streamline the tax-foreclosure process. See Indiana's 2016 Public Law 183. The law's sponsor stated that the purpose of streamlining the tax-foreclosure process was to combat blight and allow investors to quickly return valuable properties to the market. Indianapolis Star, *Indiana Blight Bills Take Aim at Zombie Squatters*, https://bit.ly/2X3mWAd. This was echoed by the Indiana Legislature's Fiscal Agency's Impact Statement. Fiscal Impact Statement, https://bit.ly/2GazL4T.

MCL 211.78(2).

In 2004, the Legislature amended the GPTA by passing PA 263. In part, PA 263 changed the redemption period for foreclosed property. Prior to the enactment of PA 263, owners of interest in property generally could redeem property within 21 days after entry of a court order foreclosing that property. PA 263 changed the redemption period (lengthening the time), however, by allowing owners of interests in property in uncontested cases to redeem that property until the March 31 immediately succeeding entry of the court foreclosure order.

In addition, the Legislature also included within PA 263, provisions addressing foreclosed properties, which "could be the site of environmental contamination."[3] This concern was incorporated into MCL 211.78m(13)-(14), which also set forth the process to transfer tax-foreclosed properties with environmental issues to the State of Michigan, pursuant to the Land Bank Fast Track Act, 2003 PA 258, MCL 124.765.

Recently, the Legislature again amended the GPTA by passing 2014 PA 132, 202, 499, 500 and 2015 PA 190. These most recent changes to the GPTA foreclosure process dealt with the following: (1) an "opt-in" provision for counties currently using the State of Michigan as the foreclosing governmental unit (2014 PA 132); (2) foreclosed property sale procedures (2014 PA 501); (3) delinquent tax payment plans (2014 PA 499 and 500); (4) governmental land

[3] See Senate Floor Analysis, HB 4484 (December 16, 2003): http://www.legislature.mi.gov/documents/2003-2004/billanalysis/Senate/pdf/2003-SFA-4480-F.pdf

surveys/exchanges (2014 PA 502); and (5) provisions dealing with the optional collection of land taxes (2014 PA 568).[4]

In sum, the Legislature created the following comprehensive and far-reaching tax-foreclosure system:

Tax Lien. The starting point for the assessment and collection of real property taxes is tax day, December 31st of each year. MCL 211.2. On that day, the taxable status of property is determined and the owners of real property subject to taxation must pay taxes levied in the following calendar year, which becomes a debt due, but not yet a lien. Except when a local charter provides for a different date, real property taxes become a lien on the property on the due date for the taxes, July 1 for summer taxes and December 1 for winter taxes. MCL 211.40, 211.44a(4). An assessment is a lien on the property until paid and the lien may be enforced by the sale of the property. *Woodmere Cemetery Ass'n v City of Detroit*, 192 Mich 553, 559–561; 159 NW 383 (Mich 1916).

Delinquency. On March 1 of each year, local government treasurers report as delinquent to the county treasurer both all real property taxes levied in the immediately preceding year that remain unpaid and any unpaid interest, penalties, and fees applicable to the taxes (combined, "total tax bill"). MCL 211.78a(2). If the total tax bill remains unpaid, a notice of delinquent taxes is

[4] Other than a few exceptions set forth by the State Tax Commission, the treasurer is not allowed to withhold a parcel of property from forfeiture. MCL 211.78g(1). The exceptions are set forth in bulletins issued periodically by the State Tax Commission.

sent by first class mail to the taxpayer on the next June 1 and September 1, MCL 211.78b, 211.78c, and by certified mail the following February 1, MCL 211.78f.

Delinquent Tax Revolving Fund. On behalf of taxing units in the county and the state, a county may create a delinquent tax revolving fund (the "Revolving Fund"). MCL 211.87b(1). Once the Revolving Fund is created, all delinquent property taxes and associated interest, penalties, and fees must be put in the Revolving Fund, MCL 211.87b(1), and the county must use it to cover all delinquent taxes due to certain political units—e.g., school districts, intermediate school districts, community college districts, cities, townships, special assessment districts, etc. The Revolving Fund ensures that when taxpayers fail to pay their property taxes local taxing units receive the full amount for taxes levied without waiting years for collection via tax foreclosure. Critically, when foreclosed properties are sold, the proceeds must first be used to reimburse a county's Revolving Fund before anything else. If a county determines that delinquent taxes are uncollectable, it must charge back to any taxing unit receiving an advance from the delinquent tax revolving fund the uncollected amount with interest and administrative fees. MCL 211.87b(1). As an example, in 2011 alone, Wayne County used its Revolving Fund to advance over $200 million dollars to tax collecting units in Wayne County. *Compassionate Leader,* Mich. Chronicle, Mar. 14, 2012, http://goo.gl/DaLW8E. This provided vital funding to those local governments. *Id.*

Forfeiture. Despite the payments to taxing units using the Revolving Fund, the FGU—either the state or the relevant county, if the latter so opts, MCL

211.78—continues the process of collecting delinquent taxes owed. If the taxes are still unpaid one year after they were declared delinquent, the property is "forfeited" to the county. So under the most recent years' foreclosure timeline, unpaid 2016 taxes were returned as delinquent to the county on March 1, 2017, and forfeited to the county treasurer on March 1, 2018, for a judicial foreclosure hearing in February 2019.

Initiation of Foreclosure Proceedings. After forfeiture, the FGU provides record notice of the forfeiture with a warning that if the total tax bill is not paid or the property not redeemed by the following March 31 the fee simple will transfer from the owner to the FGU. MCL 211.78g. If the total tax bill remains unpaid, the FGU is required to initiate judicial foreclosure as an *in rem* proceeding on the following July 1 by filing a single petition for foreclosure with the clerk of the circuit court listing all properties forfeited with unpaid taxes, interest, penalties and fees. MCL 211.78h.

Noticing Persons with Interest in Property and the Administrative Hearing. After filing the foreclosure petition, the FGU provides notice to every owner with an interest in a forfeited property. It identifies owners by searching tax records and title records and provides notice by certified mail of the judicial foreclosure proceeding and administrative hearing. MCL 211.78i(2). An FGU employee must visit every property and attempt to serve this notice in person or post it on the property. MCL 211.78i. The administrative hearing must be held at least 30 days before the March 1 after the petition is filed. MCL 211.78h. At least seven days before the judicial foreclosure proceeding begins, the FGU must hold an

administrative hearing allowing any person with an interest in the property to show cause why fee simple should not vest in the FGU. MCL 211.78j.

Foreclosure and Redemption. If the total tax bill remains unpaid, the property will be the subject of a foreclosure hearing conducted by the circuit court. MCL 211.78k. Any person with an interest in the property may appear at the hearing or file written objections. *Id.* The circuit court must enter final judgment on a petition for foreclosure filed by the FGU by the March 30 following the hearing. MCL 211.78k(5). For all redemption rights in foreclosed property expire on March 31st for uncontested cases and 21 days after the entry of judgment in a contested case. *Id.* If the property is not redeemed following the judicial foreclosure hearing, **"fee simple title to the property. . . *shall vest absolutely* in the [FGU], and the [FGU] *shall have absolute title to the property*"** MCL 211.78k(6) (emphasis added).

After this, Act 123 provides for at least two post-foreclosure land auctions. For the first, the FGU must set a "minimum bid"—i.e., the total tax bill plus the expenses of administering the sale. MCL 211.78m(1)–(2), (10), (16)(a). Before this public auction sale, the State has a right of first refusal to, MCL 211.78m(1). Importantly, if the state does not exercise its right, a city, village, or township may purchase for the minimum bid a property within their respective borders, but only if the purchase is for a public purpose. *Id.* If a city, village, or township does not purchase the property, the county may purchase the property for the minimum bid. *Id.* Any property still unpurchased must be offered at least once more. MCL 211.78m(1)–(2). At second and final sale, there can be no minimum

bid. MCL 211.78m(5). MCL 211.78m(6) and (7) address those properties, which are (a) not taken under the State and local governments' right of first refusal, MCL21178m(1), *supra*, and (b) not sold at public auction. These abandoned, unwanted and often derelict properties are transferred to the "city, village, or township in which the property is located, except those parcels of property to which the city, village, or township has objected." MCL 211.78m(6).[5] Finally, those properties rejected by cities, villages, and township are retained by the FGU. If the FGU is the State, "title to the property [will] vest in the land bank fast track authority [created under the Land Bank Fast Track Act, 2003 PA 258, MCL 124.765]." If the FGU is a county treasurer, then the county treasurer will "retain possession of that property." MCL 211.78m(7).

MCL 211.78m(8)(a)–(f) detail how an FGU must use foreclosure-sale proceeds; the FGU must use those proceeds in the following order of priority:

> (a) All taxes, interest, and fees on all of the property.
>
> (b) Costs of the sale of the property.
>
> (c) Cost of the foreclosure proceedings, including, but not limited to costs of mailing, publication, personal service, and outside contractors.
>
> (d) Any costs for the sale of property or foreclosure proceedings for any prior year that have not been paid or reimbursed from that prior year's delinquent-tax property sale proceeds.
>
> (e) Any costs incurred by the foreclosing governmental unit in maintaining the foreclosed property.

[5] The properties accepted by the city, village, or township may be made **"available under the urban homestead act, 1999 PA 127, MCL 125.2701, or for any other lawful purpose."** MCL 211.78m(6)(emphasis added).

> (f) If the foreclosing governmental unit is not the state, then (i) any costs for the sale of property or foreclosure proceedings for any subsequent year that are not paid or reimbursed from that subsequent year's delinquent tax property sales proceeds must be paid from any remaining balance in any prior year's delinquent tax property sales proceeds account; (ii) any costs for the defense of title actions; and then (iii) any costs incurred in administering the foreclosure and disposition of property forfeited for delinquent property taxes.

Any leftover money may be transferred into the FGU's general fund. MCL 211.78m(h).

Critically, it is rare that FGUs have remaining funds to contribute to the general fund; they are almost always in the red for tax foreclosures and all of the money is allocated as described in MCL 211.78m(8)(a)–(f). For example, in 2015 in Washtenaw County (including the University of Michigan and the city of Ann Arbor) "recouped $1.2 million of the $1.5 million it was owed in back taxes, fees, interest, and penalties and listing costs. The $1.2 million represents 80 percent of what the county needed to earn in order to break even." Matt Durr, *Washtenaw County Nets $1.2M in County Tax Auction, but Falls Short of Goal*, MLive, Nov. 16, 2015, http://goo.gl/D3OVZR. And in 2014, Washtenaw County "earned $1,245,000 of the $1.9 million or 65 percent of what it needed to break even." *Id.* These numbers are typical for most FGUs.

III. Effect of Act 123

A significant reason that the Legislature passed Act 123 was to eliminate blight and facilitate the return of vacant properties to use. See generally Senate Fiscal Agency, *Analysis of Act 123*, https://bit.ly/2UO2shn. See also *City of Bay*

City v Bay Co Treasurer, 292 Mich App 156, 168; 807 NW2d 892 (2011) (stating that Act 123 was intended "to effectuate the efficient and expeditious return to productive use of property returned for delinquent taxes"). It sought to balance these interests with property owners' rights under the state and federal constitutions. *Id.* On both fronts, Act 123 has been a resounding success. ***First***, Act 123's process has "significantly benefitted property owners who are delinquent in their property taxes." Kevin T. Smith, Mich. Real Prop. Rev, 30 (Spring 2009). **Second**, it is working for local communities as the Legislature intended:

> [T]he new process has significantly reduced the time from delinquency to foreclosure, aiding local governments in addressing blighted properties. The funding built into the new process for titlework and notice has resulted in much better titlework and notice, with a corresponding reduction in litigation. And the movement of tax foreclosures to the county level has resulted in more personal service to delinquent taxpayers." [*Id.*]

Commenting on the new tax-foreclosure process, the Berrien County Treasurer said: "The way we're doing it really helps put properties back into productive use much quicker. This has worked phenomenally well for us." Thomas P. Langhorne, *Tax sale: Going a Different Way in Michigan*, Evansville Courier & Press, Sep. 14, 2014, http://goo.gl/wwSy1K.

Third, Act 123 works well in tandem with another government creation meant to expedite the return of real property to the marketplace: land banks. Land banks—first implemented in the early 2000s by now Congressman Daniel Kildee (at the time, the Genesee County Treasurer)—hold and administer the sale

and remediation of foreclosed properties. As mentioned above, under Act 123, local municipalities have the opportunity to purchase tax-foreclosed properties for a public purpose before those properties are offered at a public auction. Some local municipalities choose to do this and transfer that property to land banks. Land banks expedite the transformation of these properties in four ways. First, because they are typically more hands on than the county, they sell the more valuable tax-foreclosed parcels for a greater profit than they could be sold for a tax sale. ***Fourth***, land banks sell fixer-upper houses to buyers who agree to bring the house up to code within six months or the house reverts to the land bank; land banks oversee that process. ***Fifth***, land banks allow tenants who are facing eviction simply because their landlord failed to pay property taxes to complete home ownership classes and get on a payment plan to buy their home. Finally, they expedite demolishing blighted properties and work with the Michigan Department of Environmental Quality to remediate environmentally contaminated properties.[6] This process is set forth in MCL 211.78m(13)-(14), which lays out a process for foreclosed properties with environmental concerns to be presented to the State of Michigan for remediation. In other words, public health concerns — created by complacent former owners who failed to pay property taxes and abandoned the property — can be addressed. See also, MCL 124.765.

[6] Andy Balaskovitz, *In Michigan, unwanted properties could see new life with solar projects*, July 25, 2018, https://bit.ly/2MTSN2a.

Land banks have been a tremendous success for local municipalities. Since their inception in the early 2000s, they have revamped tens of thousands of properties and put them back into the market. John Gallagher, *Detroit Land Bank notches many wins including 10,000 side-lot sales*, September 13, 2018, https://bit.ly/2KyUODX (explaining thoroughly how the land bank improved Detroit's housing situation). Critically, however, land banks need Act 123 to work as efficiently as they do now.[7] Without the option under Act 123 to purchase homes before they go to public auction, it would be more difficult for local municipalities to channel properties into the land bank. And without a streamlined tax-foreclosure process, it could take years longer for land banks to get a hold of potentially valuable properties.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The Amici adopt the Statement of Facts and Proceedings Below set forth in Defendants-Appellees' Brief on Appeal.

STANDARD OF REVIEW

"This Court reviews de novo a question of constitutional law." *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018).

[7] Other states' land banks similarly depend on the tax foreclosure process to function effectively. See, e.g., The Press, *Oregon works with land bank to fight area blight*, February 9, 2012, http://www.presspublications.com/from-the-press/8651-oregon-works-with-land-bank-to-fight-area-blight.

ARGUMENT

The question before the Court is whether Act 123, and its related statutory provisions, including subsequent Legislative amendments, violates the Fifth Amendment's takings clause and the Michigan Constitution's parallel provision.[8]

I. Defendants-Appellees Did Not Violate The Fifth Amendment Because The Government's Taxing And Condemnation Powers Are Distinct And Separate, Processing A Tax Foreclosure And Selling Foreclosed Property Are Exercises Of The Government's Taxing Power, And, Even If They Were Not, Plaintiffs-Appellants Have No Fifth Amendment Claim Because They Had No Interest In The Property When It Was Sold.

Plaintiffs-Appellants assert that Defendants-Appellees' tax foreclosure and distribution of the surplus equity violated Plaintiffs-Appellants' rights under Fifth Amendment's takings clause.

This claim confuses the government's taxing power with its condemnation power. The Supreme Court has explicitly stated that "taxation for a public purpose, however great," is not "the taking of private property for public use, in the sense of the Constitution." *County of Mobile v Kimball*, 102 US 691, 703; 26 L Ed 238 (1880). As the Supreme Court summed up more recently:

> It is beyond dispute that "[t]axes and user fees . . . are not 'takings.'" *Brown*, supra, at 243, n. 2, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (Scalia, J., dissenting). We said as much in *County of Mobile v. Kimball*, 102 U. S. 691, 703, 26 L. Ed. 238 (1881), and our cases have been clear on that point ever since. *United States v. Sperry Corp.*, 493 U. S. 52, 62, n. 9, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989); see *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 44, 54 S. Ct. 599, 78 L. Ed. 1109 (1934); *Dane v. Jackson*, 256 U. S. 589, 599, 41 S. Ct. 566, 65 L. Ed.

[8] For the reasons stated in Defendants-Appellees' brief, the Amici's arguments under the Fifth Amendment's taking clause apply with equal force to the parallel clause in Michigan's Constitution, Const 1963 art 10, § 2.

> 1107 (1921); *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614-615, 19 S. Ct. 553, 43 L. Ed. 823 (1899).

Koontz v St Johns River Water Mgt Dist, 570 US 595, 615; 133 S Ct 2586; 186 L Ed 2d 697 (2013). The Sixth Circuit likewise stated that collecting taxes does not implicate the Fifth Amendment and that tax credits—e.g., a surplus equity—fall squarely within the power to tax. See *Laborde v City of Gahanna*, 561 F App'x 476 (CA 6, 2014). Importantly, "teasing out the difference between taxes and takings is more difficult in theory than in practice." *Koontz*, 570 US at 616.

This case falls squarely within the government's taxing power. Defendants-Appellees assessed Plaintiffs-Appellants' *taxes* and attempted to collect those *taxes*. After Plaintiffs-Appellants refused to pay their *taxes*, Plaintiffs-Appellants were declared delinquent on their *taxes*. They initiated *tax-foreclosure* proceedings and completed a *tax-foreclosure* sale. Defendants-Appellees did not foreclose Plaintiffs-Appellants' property because it was blighted, to make room for a public highway, or for some other public purpose. They foreclosed the property because Plaintiffs-Appellants refused to pay their taxes. This case does not stem from the government's condemnation power, but from its taxing power.

But, one might respond, even if normal taxes are not constitutional takings, might not a *tax foreclosure* be a taking? No, case law is clear that a tax foreclosure and tax-foreclosure sale flow directly from the government's power to tax, not from its power of eminent domain. See *Speed v Mills*, 919 F Supp 2d 122, 129 (DDC, 2013) (stating that tax foreclosures take "place pursuant to the District's taxing power, not its power of eminent domain, its regulatory power, or

any other power enabling it to take or encumber private property for a public purpose") (citing *Sol-G Constr Corp v United States*, 231 Ct Cl 846 (1982) (holding that tax foreclosure cannot support a Fifth Amendment takings claim), and *In re Golden*, 190 BR 52, 57 (Bankr WD Penn, 1995) ("In a tax sale context, the takings clause is not dispositive nor the appropriate basis for" a claim)). Other states agree. See, e.g., *Farmers Nat'l Bank v Commonwealth*, 486 SW3d 872, 883 (Ky Ct App, 2015) (stating that Kentucky's "precedent has long rejected the idea that tax sales—and by necessity, the statutory processes that govern those sales—constitute illegal takings").

Not only does *Nelson v City of New York*, 352 US 103; 77 S Ct 195 (1956), not change this analysis, but it supports it. In *Nelson*, the plaintiff argued that a judicial foreclosure sale violated the Fifth Amendment's taking clause. *Nelson*, 352 US at 109. The defendant City of New York had foreclosed Nelson's property for four years of delinquent taxes, sold the property at a foreclosure sale, and kept all of the proceeds, including the surplus equity. *Id.* at 110. The Supreme Court held that "nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings." *Id.* The only notice given in *Nelson* was a single newspaper notice. *Id.* at 105. Yet the Supreme Court held that because the City took "steps to notify appellants of the arrearages and the foreclosure proceedings," and because their agents received the notices, that the City did not violate the plaintiff's due process rights. *Id.* at 108–109.

Defendants-Appellees did not violate Plaintiffs-Appellants' due process rights and, thus, under *Nelson*, did not violate the Fifth Amendment. The GPTA requires (and Plaintiffs-Appellants do not dispute that they received) far more notice than *Nelson*'s plaintiff did. The GPTA requires the government to notify the property owner twice by mail in the first year taxes are delinquent. MCL 211.78b, 211.78c. It requires notice via certified mailing the next February. MCL 211.78f. It then requires notice (again by certified mail) once the FGU files a foreclosure petition. MCL 211.78i(2). And an employee of the FGU must either personally serve notice or post it on the property. MCL 211.78i. If the single newspaper notice in *Nelson* satisfied due process, so does the GPTA's far more substantial notice requirements.[9]

But, one might counter, even if a tax foreclosure is not an exercise of the takings clause, perhaps keeping the surplus equity is. After all, the property was foreclosed to cover a tax bill, so once the total tax bill has been satisfied, doesn't the rest of the money rightfully belong to the original property owners? No, because that property owner's interests in the property were permanently extinguished the moment the redemption period expired.

It is axiomatic that a plaintiff can assert a Fifth Amendment takings claim only if she had an interest in the property when it was taken. Here, Plaintiffs-

[9] Although not exactly notice, the GPTA protects taxpayers' interests in other ways, too. For example, MCL 211.78q allows counties to enter into tax avoidance programs with property owners; this allows the owner of a delinquent property to pay back taxes in periodic installments over five years with reduced interest. Under MCL 211.78q, an FGU may put financially distressed owners of a principal residence on a payment plan.

Appellants must show that they had an interest in the surplus equity of the tax sale. A property interest is "[a] legal share in something; all or part of a legal or equitable claim to or right in property." *Spartan Stores, Inc v City of Grand Rapids*, 307 Mich App 565, 575 n 9; 861 NW2d 347 (2014), quoting Black's Law Dictionary (10th ed), p 934.

In this case, Plaintiffs-Appellants cannot establish a property interest in the proceeds of the sale of property foreclosed by Defendants-Appellees under MCL 211.78m because they were divested by court order of all interest in their former properties before the tax-foreclosed properties were sold. Under the GPTA, absolute title to tax-foreclosed property vests in the FGU once the redemption rights expire, which is always before (and usually several months before) the tax-foreclosed property is sold. MCL 211.78g, 211.78k(5)–(6). Here, the Oakland County Circuit Court issued its Judgment of Foreclosure on February 26, 2014, meaning the redemption period expired on March 31, 2014, Plaintiffs-Appellants' former, tax-foreclosed properties were sold at public auction on August 19, 2014 and September 26, 2014, respectively. Critically, once Plaintiffs-Appellants' interests were extinguished on April 11, 2014, nothing allowed them to assert interests in either their former property or any surplus resulting from its sale. See *Robbins v Becker*, 794 F3d 988, 993–994 (CA8, 2015) ("Property interests protected by due process are not created by the Constitution but, rather, are created and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law." (quotation marks omitted)). Since Plaintiffs-Appellants had no interest in their former property

when it was sold, no matter what power Defendants-Appellees sold it under, Plaintiffs-Appellants were not entitled to a red cent of the proceeds.

This conclusion is supported by this Court's case law. Indeed, Michigan law has long recognized, including under Michigan's pre-Act 123 process, that a former owner retains no interest in tax-reverted property once title vests in the FGU. For example, in *Krench v Michigan*, 227 Mich 168, 171; 269 NW 131 (1936), a taxpayer forfeited his property for failure to pay property taxes. The FGU, the state of Michigan, sold the property at a land auction, but per the contract terms retained all oil rights. *Krench*, 227 Mich at 172. Soon thereafter, oil was discovered on the property. *Id.* The new owner, Krench, sued the state, arguing that the state had improperly intercepted and retained those rights between the time the property was transferred from the former owner to Krench. *Id.* at 172–174. Rejecting that argument, this Court held that before the state sold the tax-reverted property to Krench, the state owned the property in fee simple and had the right to sell all off any or all of its interests in the property. *Krench*, 277 Mich at 179–182. In short, this Court held that a tax reversion absolutely divests former owners of all interests and a new chain of title begins, starting with the FGU. *Id.*[10]

[10] This Court has reached similar conclusions in other cases. See, e.g., *Meltzer v State Land Office Bd.*, 301 Mich 541; 3 NW2d 875 (1942) (holding former co-tenants interest in tax-reverted property extinguished when title vested in state of Michigan and subsequent deed assigning interest in property invalid); and *James A. Welch Co., Inc. v. State Land Office Bd.*, 295 Mich 85; 294 NW 377 (1940) (opining that former owner of property reverted to the state had no right to force a public sale of the property because the owner had no greater interest in the property than a stranger off the street).

The Supreme Court has similarly held that a plaintiff has no interest in personal property once title vests in the government to which it is forfeited. In *Bennis v Michigan*, 516 US 442, 444; 116 S Ct 994, 134 L Ed 2d 68 (1996), the innocent co-owner of a vehicle sought to recover her interest in a vehicle that had been forfeited to the State. The Court rejected her claims, holding that the "government may not be required to compensate an owner for property which it has lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis*, 516 US at 452.

In short, Defendants-Appellees exercised their taxing power, not their eminent domain power, and even if the tax proceedings could have conceivably occurred under the Defendants-Appellees' eminent domain power, Plaintiffs-Appellants are not entitled to a penny of the surplus equity because they had no interest in the property when it was sold.[11]

II. Declaring The GPTA Unconstitutional, And Specifically The Tax-Foreclosure Provisions, Would Significantly Harm Michigan's Counties, Townships, Cities, And Villages.

A. The GPTA is not a "cash cow" for counties, townships, cities and villages.

[11] This is why the Amici agree with the Claremont Center for Constitutional Jurisprudence's statement that "the money from the sale of sale of the property that is left over after payment of back taxes, penalties, and appropriate administrative costs belongs to the *property owner*." Claremont Center's Motion for Leave to File an Amicus Brief, ¶ 3 (emphasis added). The Claremont Center's analysis ignores the undeniable fact that under Michigan law the true property owner at the time of sale is the FGU. The delinquent taxpayer—the *former* property owner pursuant to the GPTA, as a related confirmed judgment and Order of Foreclosure entered by the Circuit Court—has no more right to sale proceeds than any other former owner of that property.

Act 123 requires FGUs to pursue three basic public policy objectives: (1) collect sufficient revenue to fully pay all unpaid delinquent taxes, penalties, interest, and fees; (2) efficiently return tax-delinquent property to productive use while minimizing negative economic consequences; and (3) accomplish (1) and (2) in a way that protects due process rights. But, the Plaintiffs-Appellants paint a different picture. They postulate that all sales of tax-foreclosed property are lucrative and that Michigan's delinquent tax collection process and resulting "surplus proceeds" are funneled into a for-profit real estate empire. This is simply untrue. Again, it is rare that any county or local municipality places proceeds from the GPTA tax-foreclosure process into its general fund.[12] Under Act 123, proceeds from the sale of property sold for non-payment of property taxes must first be used to pay unpaid taxes, to pay for the cost of the foreclosure process, and to maintain tax-foreclosed property that cannot be sold. MCL 211.78(m)(8).

B. Declaring the GPTA provisions unconstitutional would damage counties, townships, cities, and villages financially, decreasing their ability to provide critical local services.

"Traditionally, the property tax—and in particular, the tax on real property—has been the mainstay of municipal revenue-gathering—the largest single source of municipal revenue." *City of Detroit v Walker*, 445 Mich 682, 702; 520 NW2d 135 (1994). Plaintiffs-Appellants' position guts that mainstay of local municipalities.

[12] Washtenaw County is a prime example of this, recovering only 80% of all delinquent taxes through tax-foreclosure sales. *Supra*, p 10.

Granting the relief requested by the Plaintiffs-Appellants will disrupt critical elements of the delinquent tax creation process in Michigan. First, it would make it harder for local municipalities to collect property taxes. As set out in the facts, Act 123 has been a tremendous improvement over Michigan's previous system and has allowed counties, townships, cities, and villages to collect property taxes much more effectively.

Second, Plaintiffs-Appellants' relief would increase the number of charge backs suffered by townships, cities, and villages. If FGUs are required to pay portions of proceeds from the sale of tax-foreclosed property, that will reduce the money available to repay delinquent tax revolving funds. Reduced payments to the Revolving Fund will require county treasurers to increase charge backs to local taxing units. Further, the relative speed of tax foreclosures under Act 123 (two to three years) as opposed to Michigan's previous system (seven to nine years) has helped local municipality's budgets by reducing the end cost of charge backs. When the county advances the local taxing unit money, it adds administration fees and interest to the advance, and this continues to accrue until either the property owner pays up or, years later, the county completes the tax-foreclosure proceeding and sells the property. And even if the county sells the property, the purchase amount often does not even cover the original tax burden plus the county's administrative fee and monthly interest charges.[13]

[13] For example, from 2008–2017, Wayne County's delinquent taxes, penalties, interest, and fees, exceeded its auction proceeds by over $1 billion. In 2016, Genesee County had excess sale proceeds of $82,000 on 38 parcels. After applying the excess sale proceeds to reimburse the delinquent tax revolving fund,

Every month that elapses between the initial shortfall and final tax-foreclosure sale adds interest to the county's advances and, thus, makes these charge backs more costly for the local taxing units. Act 123 lessens these charge backs by streamlining the tax-foreclosure process. If its provisions were declared unconstitutional, the corresponding increase in the number and amount of charge backs would damage local municipalities' long-term budgets.

Reducing revenue generated by taxes levied to fund schools and necessary local government services means underfunded schools and government services. The reduced payments will also inhibit the ability of FGUs to pay for efforts to combat blight, and reduce resources available to assure that tax delinquent property is expeditiously returned to productive use. In short, the relief requested by the Plaintiffs, when applied throughout Michigan, would fundamentally undermine the key aspects of Michigan's delinquent tax collection process embraced by the Legislature when it enacted Act 123.

Finally, Plaintiffs-Appellants' position fails to address the situation where a property sells for less than the amount of taxes and fees owed. In those cases, the FGU cannot obtain a deficiency judgment against prior owners of tax-foreclosed properties and local taxing units would suffer the loss.[14] The ultimate

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the treasurer charged back over $5 million to the local units. In 2017, Genesee County had to charge back over $3.6 million to local units for uncollected taxes.

[14] The FGUs in Michigan take both sides of the risk of taking title to the property. In other words, Plaintiffs-Appellants seek to enjoy the benefits of the foreclosure sale, without accounting for the risk they would owe more to the FGU than the property is worth, or paying the costs of curing blight and/or remediating environmental issues relating to foreclosed property.

price would be paid by Michigan's taxpayers. The fact of the matter is that counties and local municipalities depend on sale proceeds to cover costs of the foreclosure process. Reducing the ability to fund the tax-foreclosure process would only further burden the state's and counties' budgets, potentially resulting in increased taxes or cutting back government services.

C. Declaring the relevant GPTA provisions unconstitutional would make it more difficult for counties, townships, cities, and villages to combat blight, address environmental issues, and revitalize their communities.

As explained above, a primary reason the Legislature passed Act 123 was to help local municipalities combat blight and revitalize their communities. Before Act 123, many properties that could have been used productively had to sit vacant or abandoned for almost a decade while the tax-foreclosure process dragged on. Act 123 allowed local municipalities to put these properties back into the marketplace two to three times faster than before. And using Act 123's public-purpose rule, they could do so before the properties ever went to a public auction. *Rental Props Owners Ass'n v Kent Co Treasurer*, 308 Mich App 498, 517; 866 NW2d 817 (2014) (noting that Grand Rapids purchased properties under this provision of Act 123 "to provide for the health, safety, and welfare of its community and then conveyed them . . . to fulfill the public purpose of restoring blighted properties and neighborhoods"). As noted above, local municipalities have been especially effective using land banks to accomplish this purpose.

Declaring the GPTA unconstitutional would scrap a system that has been a crucial tool for local municipalities trying to revitalize struggling communities. And most of these properties are not just unproductive, but counterproductive

to economic growth. They are blighted properties that drag down other property values and pose immediate safety risks to the community. Some properties present public health and environmental concerns (including as to the contamination of drinking water) that the Legislature also intended to address through the tax foreclosure process. See, e.g. MCL 211.78m(13)-(14). Granting Plaintiffs-Appellants their requested relief would fundamentally undermine the structure of Act 123's effective tax-foreclosure process and would suppress the GPTA's stated goal of returning tax-delinquent property to productive use. It is in the interests of the people of Michigan to find in favor of Defendants-Appellees because the GPTA is the result of responsible government policy enacted by Legislature and is constitutionally sound.

III. The Legislature Is The Only Appropriate Branch Of Government To Decide How "Surplus Equity" Will Be Distributed, And Since Its Decision For How To Distribute Surplus Equity Is Constitutional, This Is Not The Appropriate Forum To Change That Decision.

In *Woodman v Kera LLC*, 486 Mich 228, 246; 785 NW2d 1 (2010), this Court stated that, "[w]hen formulating public policy for this state, the Legislature possesses superior tools and means for gathering facts, data, and opinion and assessing the will of the public." It is not the courts but the Legislature that "can hold hearings, gather the opinions of experts, procure studies, and generally provide a forum for all societal factions to present their competing views on a particular question of public policy." *Woodman*, 486 Mich at 246.

How to distribute surplus equity is a classic public policy decision. It requires a deep knowledge of how many different levels of government function, individual property rights, and considerations of law and equity. It is complex

and multi-faceted. As demonstrated by the briefing, it is far more than a simple question of law; it has practical public-policy ramifications that far outstrip the limited scope of the legal question before the Court.

Helpfully for the Court, in passing Act 123—and specifically the tax-foreclosure and tax-sale provisions at issue here—the Legislature grappled with this multi-faceted issue and chose to set distribute surplus equity as set out in MCL 211.78m(8). How to best collect delinquent taxes and provide for local municipalities while simultaneously protecting individual property rights is a complex question. Act 123 balances well these interests even while fundamentally bettering the way counties, townships, cities, and villages collect delinquent taxes.

Of course, Plaintiffs-Appellants disagree that MCL 211.78m(8) is so wise. They wish the Legislature would have allowed them to keep the surplus equity rather than it being used to replenish the delinquent tax revolving fund, upkeep foreclosed properties, or address possible public health and environmental concerns, etc.—i.e., they wish to privatize gains and socialize losses. The Legislature could have so balanced the competing interests, but it chose not to. Instead of burdening society with all of the downside and gracing the taxpayer with all of the upside, it put both the potential burden and gain on the taxpayer, allowing her to maximize the benefits of self-governance and social responsibility. It should be no surprise that the Legislature balanced this question so well—it is the only branch of government equipped to do so. But, even if the Legislature

did not balance these interests well, the question before the Court is not what policy choice is best, but whether the act is unconstitutional.

Plaintiffs-Appellants' argument, at is core, suggests that because the consequences of Act 123 can be harsh to the former property owner who avoided the numerous opportunities (and notices) to pay the delinquent taxes, it must be unconstitutional. But is it really so harsh? Granted, a cursory review of the facts in this case could stir the indignation of any decent citizen. A more nuanced and thorough examination of Act 123, however, reveals that this is not a case of the government taking the first opportunity to snatch property away from unsuspecting taxpayers. The Legislature allows the government to petition the circuit court for foreclosure only after *two years'* worth of notices have been given and payment plans and other programs offered. The Legislature also required judicial and administrative hearings and a redemption period. These provisions actively account for individual property rights, and they show that the Legislature was acutely aware of the need to protect due process and property rights.

But so long as the Legislature's decision was constitutional, its perceived harshness or inequity is immaterial. The Supreme Court said it best in *Nelson*, 352 US at 110–111:

> It is contended that this is a harsh statute. The New York Court of Appeals took cognizance of this claim and spoke of the "extreme hardships" resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a state statute is the responsibility of the state legislature and

> not of the courts, unless some constitutional guarantee is infringed.

Defendants-Appellees did not constitutionally infringe Plaintiffs-Appellants' constitutional rights. This decision is properly left to the Legislature.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs-Appellants' appeal, and the decision of the Court of Appeals should be upheld.

Respectfully submitted,

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