IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

2 CROOKED CREEK LLC and
RUSSIAN FERRO ALLOYS, INC,

Plaintiffs-Appellants,

v

CASS COUNTY TREASURER,

Defendant-Appellee.
_____/

Supreme Court No. 159856

Court Of Appeals No. 342797

Court Of Claims No. 14-000181-MZ

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BRIEF OF AMICUS CURIAE
MICHIGAN ASSOCIATION OF COUNTY TREASURERS
ON APPLICATION FOR LEAVE TO APPEAL[1]

[1] Pursuant to MCR 7.312(H)(4), counsel for Michigan Association Of County Treasurers attests that they authored the brief in whole and that no counsel or parties made a monetary contribution intended to fund the preparation or submission of the brief.

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QUESTION PRESENTED

1. Whether an owner of a property interest that was extinguished by tax foreclosure after being accorded notice sufficient to satisfy minimum due process requirements can sustain an action to recover monetary damages pursuant to MCL 211.78*l*(1) by claiming that it "did not receive any notice required under this act" due to a lack of actual notice.

   The trial court answered: No.

   The Court of Appeals answered: No.

   Plaintiffs-Appellants answer: Yes.

   Defendant-Appellee answers: No.

   Amicus Curiae MACT answers: No.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Michigan Association of County Treasurers ("MACT") respectfully submits this brief in opposition to plaintiffs-appellants' Application for Leave to Appeal and in support of defendant-appellee, Cass County Treasurer. In its November 20, 2019, Order directing the Clerk to schedule oral argument on the application the Court invited the MACT to file a brief amicus curiae.

MACT, an association formed in 1934 and organized as a Michigan nonprofit corporation, includes as members every county treasurer from the 83 counties in the State of Michigan. County treasurers are constitutional officers elected in each Michigan county and are charged with performing duties and exercising powers provided by law under Const 1963, art 7, sec 4, which provides:

> *There shall be elected* for four-year terms *in each organized county* a sheriff, a county clerk, *a county treasurer*, a register of deeds and a prosecuting attorney, *whose duties and powers shall be provided by law*. The board of supervisors in any county may combine the offices of county clerk and register of deeds in one office or separate the same at pleasure. [Emphasis added.]

For many years, Michigan law has imposed on county treasurers a wide range of functions relating to the collection of delinquent real property taxes. As Justice Thomas M. Cooley stated in *People ex rel Attorney Gen v Supervisors of St Clair Co*, 30 Mich 388, 391 (1874):

> The county treasurer is made an indispensable officer in the [property tax] system . . . and duties too numerous to mention in this place are specifically imposed upon and to be performed by him officially, and without which it would be impracticable to enforce the collection of taxes.

In 1999, as the Legislature considered legislation significantly revising the tax foreclosure process under the General Property Tax Act ("GPTA"), 1893 PA 206, as

amended, MCL 211.1-.155, and the related duties of county treasurers, MACT was actively involved in the drafting and amendment of that legislation, which became 1999 PA 123 ("Act 123"). Recognizing the importance of MACT's role after the enactment of Act 123, the Legislature required a committee of county treasurers appointed by MACT to provide a report to the legislative committees involved in the law's passage that discussed the law's successes, identified areas for improvement, and addressed the adequacy of fees. 1999 PA 123, § 78p(4), repealed by 2003 PA 263. Recommendations offered by MACT were submitted to the Legislature and are reflected in subsequent GPTA amendments, including 2003 PA 263.

MACT is keenly interested in this case because one of the primary duties of a county treasurer is the collection of delinquent real property taxes under the GPTA. In 75 of Michigan's 83 counties, the county has opted under section 78 of the GPTA, MCL 211.78, for the county treasurer to function as the foreclosing governmental unit ("FGU") within the county on behalf of the State of Michigan.[2] 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. County treasurers also act as agents for each of their counties' delinquent tax revolving funds under GPTA sections 87b and 87f, MCL 211.87b, .87f.

The MACT believes that section 78*l* of the GPTA, MCL 211.78*l*, addressing the rights of property owners who lose their property interests by tax foreclosure to

[2] The State of Michigan remains the FGU for Branch, Clinton, Iosco, Keweenaw, Livingston, Luce, Mecosta, and Shiawassee Counties.

monetary damages, is a critical component of Michigan's delinquent property tax collection process. Misinterpretation of this section, as proposed by plaintiffs-appellants, could make monetary damages related to tax foreclosure so great that FGUs could *lose* money on tax foreclosures, meaning tax foreclosure would no longer be a viable means of enforcing property tax statutes. And without foreclosure as an enforcement mechanism, many Michigan property owners would simply quit paying property taxes. Moreover, when counties and county treasurers opted to become FGUs on behalf of the State of Michigan they understood GPTA section 78(2), MCL 211.78(2), as limiting claims that could be brought by owners of foreclosed properties to situations where property was foreclosed without notice sufficient to satisfy minimum due process requirements.

Foreclosure and the sale of tax-foreclosed properties helps assure that each county treasurer has sufficient funds to administer the delinquent real property tax collection process, repay any advances made from a delinquent tax revolving fund to local taxing units, repay any delinquent tax anticipation notes issued, and avoid chargebacks to local tax units for uncollected property taxes. The MACT believes this case could have significant impacts on counties throughout Michigan and their ability to satisfy obligations to other taxing units relating to the administration of delinquent tax revolving funds and to assure that taxes levied in amounts sufficient to pay the expenses of government are collected in full.

For these reasons, MACT believes it can assist the Court through this amicus brief in better understanding Michigan's process for the collection of delinquent real

property taxes, the interplay of GPTA sections 78(2) and 78*l*, and the appropriate resolution of this appeal.

KEY STATUTES INVOLVED

MCL 211.78(2) provides:

> 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 211.78*l*(1) provides:

> If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she *did not receive* ***any*** *notice required under this act* shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section. [Emphasis added.]

INTRODUCTION AND SUMMARY OF ARGUMENT

It has been the law in this state since before the 1893 adoption of the GPTA that if taxes are unpaid on a parcel of property the tax lien will eventually be foreclosed, prior interests in the property cancelled, and former owners receive nothing. *Meltzer v State Land Office Board*, 301 Mich 541; 3 NW2d 875 (1942). Prior to this Court's decision in *Dow v State*, 396 Mich 192; 240 NW2d 450 (1976), holding that notice by publication, alone, was not constitutionally-sufficient, former owners had no interest in foreclosed property and no claim to the property or any monetary relief after the foreclosure was complete. After *Dow* and prior to the 1999 adoption of Act 123, former owners who lost their property without constitutionally-sufficient notice could reacquire title to the property even after it was sold by the state, but had no claim to the property or any right to monetary relief if the tax lien was constitutionally foreclosed.

Prior to *Dow*, when the State of Michigan became the fee owner of tax reverted lands a new chain of title was started and all prior interests were cancelled. *Krench v State*, 277 Mich 168; 269 NW 131 (1936); *Rathbun v State*, 284 Mich 521; 280 NW 35 (1938). Title to tax reverted lands was easily insurable since an insurer need only search title back to the state's title by tax reversion. After *Dow*, because former owners could reacquire title to foreclosed property after it had been sold, it became very difficult to get title insurance on property after it had been foreclosed, making it increasingly difficult to redevelop blighted urban lands. This was one of the key problems leading to the adoption of Act 123. In section 78*l* of the GPTA, added by Act 123, the Legislature chose to address this problem by eliminating the right of former owners to reacquire title to property foreclosed without constitutionally-sufficient notice, substituting a

right to monetary damages. But the Legislature did nothing to change the law with respect to those parcels that were constitutionally foreclosed.

This Court has now directed the parties to address whether an owner of a property interest that was extinguished by tax foreclosure after being accorded notice sufficient to satisfy minimum due process requirements can sustain an action to recover monetary damages pursuant to MCL 211.78*l*(1) by claiming that it "did not receive any notice required under this act" due to a lack of actual notice. This is a question of statutory construction. And the Legislature provided an answer to that precise question.

In MCL 211.78(2) the Legislature expressly stated that the provisions of the GPTA relating to the return, forfeiture, and foreclosure of property for delinquent taxes do not create new rights beyond those required under the Michigan and United States Constitutions. Neither constitution requires the payment of monetary damages if notice sufficient to satisfy due process requirements has been provided to owners of property interests. *But*, *see*, *Rafaeli, LLC v Oakland Cty*, MSC No. 156849, presently pending before this Court. As part of a carefully constructed and thorough statutory scheme set forth by Act 123, section 78(2) provides that former owners have no claim against an FGU if property is foreclosed with constitutionally-sufficient notice, and section 78*l* provides the only remedy available to former owners whose property was foreclosed without constitutionally-sufficient notice—monetary damages. Although this legislative scheme was modified in situations where a former owner was not afforded constitutionally-sufficient notice in *In re Petition by Treasurer of Wayne Co for Foreclosure*, 478 Mich 1; 732 NW2d 458 (2007) (*Perfecting Church*), that does not change the legislative intent set forth in MCL 211.78*l*(1), which was never intended to provide

a right to monetary damages for property foreclosed with constitutionally-sufficient notice.

Because due process does not require actual notice, *Jones v Flowers*, 547 US 220, 226; 126 S Ct 1708; 164 L Ed 2d 414 (2006); *Dow*, 396 Mich at 211, constructive notice given by a notice that is posted to property during a time when the owner is exercising control and dominion over it is sufficient to fall within the confines of "any notice" under MCL 211.78*l*(1).

Moreover, the Legislature stated that an owner could seek monetary damages only if he or she did not receive "any" notice. The Legislature could just as easily have said that an owner could seek monetary damages if he or she did not receive "actual" notice, which is the term plaintiffs-appellants would have this Court substitute into section 78*l*, and the term the Legislature would have used had that been its intent. The Legislature's use of the term "any" in the statute is binding on this Court, where the question is one of statutory construction.

Finally, the difficulty of an FGU proving that a former owner received actual notice in any situation other than where the former owner signed for the certified mail notice essentially opens up the possibility of claims by any former owner who did not sign for the certified mail notice. And since MCL 211.78*l*(4) provides a remedy up to fair market value of the foreclosed property, a finding that a former owner who received constitutionally-sufficient notice, but not actual notice, was still entitled to damages under section 78*l* could easily bankrupt the tax foreclosure process and make collection of property taxes all but impossible. The Legislature did not intend this result.

There is a perfectly logical, complete, and well-constructed legislative scheme set forth in Act 123. The Legislature (1) provided for numerous different types of notice—much more than constitutionally required, (2) left in place the century old practice that former owners, other than those who did not receive constitutionally-sufficient notice, had no interest in foreclosed property and no right to any compensation, (3) did away with former owners' rights to reacquire property foreclosed without constitutionally-sufficient notice—thus making title to foreclosed property again insurable, and (4) provided a separate right to monetary damages to owners whose interests were cancelled without constitutionally-sufficient notice. A holding by this Court that the Legislature intended to allow anyone, whom an FGU cannot prove received actual notice, to seek monetary relief is contrary to the language and intent of the GPTA as amended by Act 123 and would create a statutory procedure that would subject the FGUs to significant losses, even where constitutional notice was provided.

MICHIGAN'S TAX FORECLOSURE PROCESS

Real Property taxes are assessed and collected under the General Property Tax Act. Act 123 significantly rewrote the provisions of the GPTA relating to the foreclosure of delinquent property taxes, prescribing a streamlined process for foreclosure of delinquent property taxes and converting the process from the sale of tax liens to the sale of fee title to foreclosed property.

Ad valorem real property taxes become a lien on the property on July 1 (summer taxes) and December 1 (winter taxes) of the tax year. Taxes that remain unpaid as of

the last day of February of the following year are turned over delinquent to the county treasurer for collection on March 1. MCL 211.78a(2).

The county treasurer pays the local taxing units the amounts turned over delinquent out of the county's delinquent tax revolving fund established under MCL 211.87b or .87f. The delinquent tax revolving fund allows the county treasurer to provide local units necessary operating funds at the time local taxes are turned over delinquent. The county treasurer then becomes responsible for collection of the delinquent taxes. Taxes, interest, penalties, and fees subsequently collected by the county treasurer are deposited into the delinquent tax revolving fund. However, if the county treasurer is unable to collect taxes that it has paid to the local taxing units at the time of settlement, the taxes remain the ultimate responsibility of the local units and the county treasurer can charge the taxes back to the local units, although it is not required to do so. MCL 211.87b(1) and .87f(2).

On March 1 of the year following delinquency, if the delinquent taxes remain unpaid, the property forfeits to the county treasurer, starting a year-long foreclosure process. MCL 211.78g(1). The GPTA contains detailed notice provisions FGUs must follow prior to foreclosure:

- Recording of a Forfeiture Certificate with the county register of deeds, giving notice to persons who acquire or record their interest after the recording of the Forfeiture Certificate. MCL 211.78g(2).

- Certified mail notice to interest holders in each property whose interests are of record prior to the recording of the Forfeiture Certificate. MCL 211.78i(2).

- Service of notice on occupants of each occupied parcel, whose interests may not be of record. If the FGU is unable to personally serve occupants, the FGU must place notice in a conspicuous manner on the

property if it appears to be occupied. MCL 211.78i(3). Some, but not all, FGUs post all parcels.

- Notice by publication in the name of the interest holders if the FGU is unable to determine an address reasonably calculated to apprise record interest holders of the forfeiture and pending administrative show cause hearing and judicial foreclosure hearing. MCL 211.78i(5). As a practical matter, most FGUs publish the name of all interest holders in all parcels, rather than track the receipt of each individual certified mail notice for publication purposes.

The FGU must hold an administrative show cause hearing at least seven days prior to the judicial foreclosure hearing, at which time interest holders can show cause why the property should not be foreclosed. MCL 211.78j.

A circuit court hearing is held within 30 days prior to March 1 of the year following the forfeiture. MCL 211.78h(5). A Judgment of Foreclosure is entered following the hearing, which judgment is effective March 31. MCL 211.78k(5). Title to parcels not redeemed by March 31 vests in the FGU. *Id.*

The GPTA provides for multiple post-foreclosure auction sales by the FGU in the year of foreclosure. The auction process is set forth at MCL 211.78m, which also authorizes local units to acquire property before the auction for the "minimum bid", defined as "all delinquent taxes, interest, penalties, and fees due on the property" plus "the expenses of administering the sale, including all preparations for the sale." MCL 211.78m(16)(a). Property must be offered at an initial auction for an amount equal to or greater than the minimum bid. Property unsold in the first auction may then be offered at a final sale for no minimum.

Sale proceeds are statutorily dedicated to certain uses, in order of priority. MCL 211.78m(8). The first priority is reimbursement of the county delinquent tax revolving fund for all taxes, interest, and fees on *all* of the property, whether or not the property

was sold, followed by covering the cost of the sales, covering the costs of foreclosures, and then other specified uses. If sale proceeds are insufficient to reimburse the delinquent tax revolving fund for all payments made by the county treasurer when taxes were turned over delinquent to the county treasurer for collection, the county treasurer can charge the difference back to the local units, making the delinquent tax revolving fund whole and imposing the costs of non-collection on the local taxing authorities. MCL 211.87b(1) and .87f(2).

In adopting Act 123 the Legislature sought to address two problems: (1) the former process was too lengthy, lasting seven to nine years, allowing abandoned parcels to deteriorate and contribute to urban blight, and (2) local units of government or purchasers who acquired tax-reverted property from the state often did not get good title, primarily due to inadequate title work in the foreclosure process or inadequate notice to former owners. Almost any redevelopment of urban property ran into problems with title to land that had gone through tax reversion. The Legislature made specific findings regarding the 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. MCL 211.78(1).

Act 123 attacked these problems by (1) streamlining the process, (2) requiring better title work and significantly more types of notice while passing title search and notice costs on to delinquent parcels, and (3) making title to foreclosed property marketable and insurable by prohibiting former owners of property lost to foreclosure from bringing actions to reacquire title, limiting them, instead, to monetary damages under MCL 211.78*l*. Act 123 clearly reduced the foreclosure timeline, and certainly

increased the types and quality of notice given to owners. But the goal of making title marketable and insurable by limiting former owners to monetary damages failed when *Perfecting Church* held that a foreclosure without constitutionally-sufficient notice was invalid and the circuit court retained jurisdiction to set aside the foreclosure and subsequent sale of the property.

Even without the limitation to monetary damages, the new process adopted in Act 123 has significantly reduced the likelihood of errors in title work or lack of adequate notice, making title to foreclosed property more marketable and more likely to be insurable, although still difficult.

The imposition of fees for title work and notice at the point of forfeiture had the effect of encouraging some owners to pay taxes before the property forfeited. But by and large the numbers of parcels being forfeited and entering into the foreclosure process are similar to the numbers that entered into the tax reversion process under the former process in the 1990s. And the number eventually foreclosed is currently about 10% of forfeited parcels, roughly the same as the percentage that were foreclosed under the former process in the 1990s. (The number of parcels forfeited and the percentage foreclosed was significantly higher for a period of years following the Great Recession.)

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Plaintiff-appellant 2 Crooked Creek (2 Crooked) acquired the subject property in 2010 by a deed with an incorrect address, listing the wrong city in 2 Crooked's mailing address. The deed indicated tax bills should be sent to the incorrect address. Property taxes were not paid on the property in 2011 and in subsequent years. The unpaid 2011 taxes were turned over delinquent to the Cass County Treasurer on March 1, 2012.

In January 2013, notice of the pending forfeiture was sent by certified mail addressed to 2 Crooked at the address on the deed. The US Post Office attempted to deliver the certified mail to the address at the *correct* city, based on the zip code, but the notice was returned "Unclaimed-Unable to Forward" because the manager of the LLC that was the manager of 2 Crooked had moved from that address in mid-2011. 2 Crooked never updated its address with local or county authorities. Trial court Opinion, p 10, Appellants' Appendix 010a.

On March 1, 2013, the property was forfeited to the Cass County Treasurer due to the unpaid 2011 taxes. A Certificate of Forfeiture was recorded with the Cass County Register of Deeds on April 12, 2013. A title search of the property in the Cass County Register of Deeds office was completed by June 3, 2013. On June 5, 2013, the Cass County Treasurer filed a foreclosure action in the Cass County Circuit Court.

In May 2013, after the property had forfeited to the county treasurer, the property was mortgaged to plaintiff-appellant Russian Ferro Alloys, Inc (RFA). The mortgage was recorded on July 10, 2013, after the tax foreclosure title search had been completed.

The property was examined on June 18, 2013. The land examiner was unable to personally serve anyone on the property and notice was posted in a window next to a

door on the home under construction on the property. The notice was seen by several individuals involved in constructing the home. It is unclear whether 2 Crooked was informed of the notice. The building contractor's president attested that he saw the notice and directly contacted "a representative of 2 Crooked Creek, LLC by telephone and advised them of the posted notice and was advised by the representative of 2 Crooked Creek, LLC that the matter would be taken care of." That phone call was witnessed by at least two other individuals. *2 Crooked Creek v Cass County Treasurer*, __ Mich App __; __ NW2d __ (2019) (slip op, p 3). But representatives of 2 Crooked attested that 2 Crooked was not informed of the notice. *Id*. The trial court concluded that 2 Crooked received at least constructive notice by the posting. Trial court Opinion, p 16, Appellants' Appendix 016a.

Additional notices were sent by first class and certified mail to the correct address. The certified mail notices were returned unclaimed or undeliverable. The first class mailings were not returned. The trial court concluded that 2 Crooked received at least some of the tax bills or notices mailed to the correct address. Trial court Opinion, p 15, Appellants' Appendix 015a.

Notice was posted three times in a local newspaper in Cass County prior to the judicial foreclosure hearing.

No one appeared at the judicial foreclosure hearing and judgment of foreclosure was entered against the property. The final redemption period expired on March 31, 2014.

Following expiration of the final redemption period, 2 Crooked and RFA moved the trial court in the foreclosure action to set aside the judgment of foreclosure claiming

they did not receive constitutionally-sufficient notice of the foreclosure action. The circuit court denied relief, finding both had received constitutionally-sufficient notice. The Court of Appeals affirmed. *In re Petition of Cass Co Treasurer for Foreclosure*, unpublished per curiam opinion, issued March 6, 2016 (Docket No. 324519), lv den 500 Mich 882; 886 NW2d 169 (2016), cert den ___ US ___; 138 S Ct 422 (2017).

At about the same time plaintiffs-appellants filed their motion in the foreclosure action, they filed this action in the Court of Claims. The Court of Claims involuntarily dismissed plaintiffs' claims at the close of plaintiffs' proofs during a bench trial, pursuant to MCR 2.504(B)(2). The Court of Appeals affirmed. *2 Crooked Creek v Cass County Treasurer*. This appeal followed.

STANDARD OF REVIEW

The principles of statutory interpretation are well established. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The statutory language is the best indicator of the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v Gen Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted; the statute must be enforced as written. *Michigan v McQueen*, 493 Mich 135, 147; 828 NW2d 644 (2013). "Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory." *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), citing *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

ARGUMENT

I. MCL 211.78(2) PROVIDES THAT A FORMER OWNER WHO RECEIVES NOTICE THAT MEETS THE MINIMUM REQUIREMENTS OF DUE PROCESS HAS NO CLAIM AGAINST A FORECLOSING GOVERNMENTAL UNIT.

Arguably, the use of the phrase "did not receive any notice required under this act" in MCL 211.78*l* may be subject to differing meanings. Thus, in *Gillie v Genesee County Treasurer*, 277 Mich App 333; 745 NW2d 137 (2007), the court suggested in dicta that a former owner of foreclosed property who received constitutionally-sufficient notice can, nonetheless, sue for monetary damages if deprived of statutory notice under MCL 211.78i(2) to (5). Here, however, the Court of Appeals rejected appellants' argument that only actual notice is sufficient to deny a claim under section 78*l*, and held that "when the Legislature stated that an owner must claim that it 'did not receive any notice required under the act,' it referred to the situation when an owner received no notice whatsoever[.]" Slip Op at 12. But the Legislature expressly stated that a former owner who received constitutionally-sufficient notice has no cause of action for damages resulting from the failure to receive actual notice or all notices. MCL 211.78(2) provides:

> 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.

Although not mentioned by the Court of Appeals in either *Gillie* or this case, MCL 211.78(2) is dispositive, whether standing alone or in conjunction with the language of MCL 211.78*l*; *if the minimum requirements of due process have been met the notice provisions of the GPTA do not create any cause of action for monetary damages*. This analysis applies equally well to this Court's language in *Perfecting Church*, 478 Mich at 10, suggesting section 78*l* provides a damage remedy that is not constitutionally required.

> [T]he plain language of [MCL 211.78k] simply does not permit a construction that renders the statute constitutional because the statute's jurisdictional limitation encompasses all foreclosures, including those where there has been a failure to satisfy minimum due process requirements, as well as those situations in which constitutional notice is provided, but the property owner does not receive actual notice. In cases where the foreclosing governmental unit complies with the GPTA notice provisions, MCL 211.78k is not problematic. *Indeed, MCL 211.78l provides in such cases a damages remedy that is not constitutionally required*. [Emphasis added.]

To the extent this language may suggest that section 78*l* provides for the possibility of damages in the case of foreclosures with constitutionally-sufficient notice, it is contrary to the clear language of section 78(2), which limits claims for monetary damage to constitutionally-deficient foreclosures.

Republic Bank v Genesee County Treasurer, 471 Mich 732; 690 NW2d 918 (2005), held that section 78(2) bars a claim for monetary damages where an owner has received actual notice, but the FGU failed to provide other, statutorily-required notice. But MACT is unaware of any case that analyzes MCL 211.78*l* in light of MCL 211.78(2) where the owner received constructive, but not actual, notice. Any analysis that allows a former owner who was accorded constitutionally-sufficient notice to bring an action to recover monetary damages pursuant to MCL 211.78*l*(1) by claiming that it "did not

receive any notice required under this act" due to a lack of actual notice, improperly renders nugatory the language of MCL 211.78(2), which does not distinguish between actual and constructive notice.

Moreover, as discussed immediately below, section 78*l*(1) was intended to provide monetary damages only in situations where property was foreclosed without notice sufficient to meet the minimum requirements of due process.

II. MCL 211.78*l* DOES NOT PROVIDE A CAUSE OF ACTION FOR A FORMER OWNER WHO RECEIVED NOTICE THAT MEETS THE MINIMUM REQUIREMENTS OF DUE PROCESS BUT NOT ACTUAL NOTICE. RATHER IT PROVIDES A CAUSE OF ACTION ONLY FOR A FORMER OWNER WHO DID NOT RECEIVE NOTICE THAT MEETS THE MINIMUM REQUIREMENTS OF DUE PROCESS.

In adopting Act 123 the Legislature sought to address two problems: (1) the former process was too lengthy, allowing abandoned properties to deteriorate and contribute to blight, and (2) local units of government or purchasers who acquired tax-reverted lands from the state often did not get good title, primarily due to inadequate title work or notice to former owners. Inadequate title work or notice allowed former owners to reacquire foreclosed property even after it had been sold, making it very difficult to get title insurance on such property. Smith, *An Update on Foreclosure of Real Property Tax Liens under Michigan's New Tax Foreclosure Process*, Mich Real Prop Rev, Spring 2009, p 30. Critical to addressing the second issue was the Legislature's adoption of section 78*l*, which limited owners of foreclosed property to monetary damages if they lost property to foreclosure without constitutionally-sufficient notice, and provided that such owners may be compensated up to the fair market value of the property. This would compensate former owners and ensure that FGUs had insurable title to foreclosed

properties, making foreclosed properties marketable and less likely to interfere with redevelopment of blighted areas.

The new, streamlined process adopted in Act 123 significantly shortened the foreclosure process and provided for better title work and notice. But the Legislature's goal of making title to foreclosed properties insurable failed in large part with this Court's holding in *Perfecting Church* that a foreclosure without constitutionally-sufficient notice was invalid and the circuit court retained jurisdiction to set aside the foreclosure even after sale of the property. However, while the Legislature's attempt to provide for marketable title has been circumscribed, this does not change the Legislature's objective and intent in adopting section 78*l*, *i.e.*, to provide a remedy for former owners who lost property to foreclosure *without constitutionally-sufficient notice*.

Although the MACT and its individual member treasurers were involved in the process of drafting Act 123 and its amendments, none had any inkling that the Legislature intended to change a century-long process whereby owners of constitutionally-foreclosed property were not entitled to any relief. Certainly most of them would not have opted to become FGUs had they any idea Act 123 intended such a result.

III. IT IS ILLOGICAL FOR THE LEGISLATURE TO HAVE INTENDED MCL 211.78*l* TO PROVIDE MONETARY RELIEF TO FORMER OWNERS WHO RECEIVED CONSTITUTIONALLY-SUFFICIENT NOTICE, BUT NOT ACTUAL NOTICE, SINCE IT IS VIRTUALLY IMPOSSIBLE FOR AN FGU TO PROVE THAT AN OWNER RECEIVED ACTUAL NOTICE.

The GPTA contains four notice provisions FGUs must follow prior to foreclosure:

- Recording of a Forfeiture Certificate with the county register of deeds, giving notice to persons who record their interest after the recording of the Forfeiture Certificate. MCL 211.78g(2).

- Certified mail notice to interest holders in each property whose interests are of record prior to the recording of the Forfeiture Certificate. MCL 211.78i(2).

- Service of notice on occupants of each occupied parcel, whose interests may not be of record. If the FGU is unable to personally serve occupants, the FGU must place notice in a conspicuous manner on the property. MCL 211.78i(3).

- Notice by publication in the name of the interest holders if the FGU is unable to determine an address reasonably calculated to apprise record interest holders of the forfeiture and pending foreclosure. MCL 211.78i(5). As a practical matter, most FGUs publish the name of all interest holders in all parcels, rather than track the receipt of each certified mail notice for publication purposes.

Most property owners do not receive all notices described by the Legislature in the GPTA. First, few, if any, property owners would have any reason to check for recorded notices at the office of the register of deeds. Thus, almost none would receive the notice recorded under section 78g(2). And recorded notices do not give notice to those whose interests are already of record. *Cf. Adams v Adams (On Reconsideration)*, 276 Mich App 704, 720 n 8; 742 NW2d 399 (2007), lv den 480 Mich 1111; 745 NW2d 761 (2008), (a record owner is not required to search the public record for notice of adverse filings, citing the former language MCL 565.25(4), and recordation of an adverse document is only notice to parties other than the record landowner).

Second, owners who do not reside in the same county that the property is located in will often be unaware of the notice by publication.

Third, notice need only be posted on property that appears to be occupied. Although many FGUs post on all property, it is not required and some do not post on

vacant or unoccupied lands. And if notice is delivered to an occupant, FGUs do not normally post on the property.

It is for precisely this reason that the Legislature required so many different notices. The Legislature realized that many owners would not receive notice if only certified mail notice was required. But the Legislature did not expect all interest holders to receive all notices. To the contrary, the Legislature wisely required multiple notices, more than due process requires, to provide notice to the largest possible number of persons or entities entitled to notice, fully recognizing that many owners would not receive all notices. See, also, *In re Petition of Ingham Cty Treasurer*, __ Mich App __; __ NW2d __ (2020) (authored opinion issued Jan 21, 2020) (Docket No. 346626) (holding that the owner of an unrecorded land contract was not entitled to notice, either statutorily or constitutionally.)

About the only notice an FGU can prove was actually received by an owner is where the owner actually signed for certified mail notice. Although most owners receive actual notice by one method or another, essentially any owner who does not sign for a certified mail notice can claim not to have received actual notice and it will be difficult for an FGU to prove otherwise. (The trial court in this matter did not ultimately decide whether 2 Crooked received actual notice, a disputed factual issue.) This means that if former owners who did not receive actual notice can claim damages under section 78*l*, an FGU can only foreclose on properties where all parties entitled to notice have signed for certified mail notice. Clearly the Legislature did not intend this result. And such a result would mean FGUs could not foreclose on a significant number of tax-delinquent parcels. Although the question this Court poses to the parties assumes 2 Crooked did

not receive actual notice, the factual situations of 2 Crooked and RFA highlight the difficulty FGUs face in proving actual notice.

2 Crooked claims not to have received actual notice of the posting on the property. Yet three contractors saw the notice, one attested that he called a representative of 2 Crooked and was told the tax issue would be taken care of, and the other two attested that they saw the notice and were present when the phone call to a representative of 2 Crooked was made. This is significantly more evidence of actual notice than will occur in most situations involving posted notices, yet 2 Crooked claims no actual notice.

RFA acquired its interest after the property had already been forfeited to the Cass County Treasurer. RFA recorded its interest after the notice of forfeiture was recorded and after the title search to identify interest holders entitled to notice had been completed. RFA was not sent certified mail notice because the title search did not identify RFA as an owner. The Cass County Treasurer has no means of proving that RFA received actual notice of the posting or publication. RFA claims not to have bothered to search the records of the Cass County Register of Deeds when it recorded its mortgage interest. And, yet, RFA argues in its Supplemental Brief that it, too, is entitled to monetary relief, even though this Court only asked the parties to address 2 Crooked's right to damages. Admittedly, the recorded Certificate of Forfeiture doesn't provide actual notice if a later-recording interest holder doesn't bother to look at the records, although it is clearly constructive notice. And the same lack of actual notice argument could be made by anyone who simply refuses to claim certified mail at the post office after having been left notice that there is certified mail that must be signed for. That RFA nonetheless argues that it is entitled to monetary relief under section

78*l*(1) highlights the almost impossible burden that would befall FGUs if this Court grants the relief plaintiffs-appellants seek. Allowing those who have received constitutionally-sufficient notice, but have not signed for certified mail, to claim damages under section 78*l* simply invites gaming the tax foreclosure process.

The potential cost of foreclosing on parcels that have received constitutionally-sufficient notice, but not actual notice, is daunting. MCL 211.78*l*(4) describes the damages available under section 78*l*(1) as not more that the fair market value of the property:

> Any monetary damages recoverable under this section shall be determined as of the date a judgment for foreclosure is entered under section 78k and shall not exceed the fair market value of the interest in the property held by the person bringing the action under this section on that date, less any taxes, interest, penalties, and fees owed on the property as of that date.

This makes sense if applied only to those few parcels that have been foreclosed without due process—because the Legislature intended that the foreclosed property could not be returned, the damages are the value of the property taken. But if applied to the much larger number of parcels where the owners can claim not to have received actual notice, having to pay damages up to the fair market value of the property means that FGUs face the possibility of *losing money on almost every foreclosure where an owner did not sign for the certified mail notice*, since in almost every situation, the amount of delinquent taxes will be far less than the fair market value of the property.

Imposing potential liability in the form of damages amounting to the fair market value for parcels, even when the owners receive constitutionally-sufficient (but not actual) notice raises the same potential problems as in *Rafaeli, LLC v Oakland Cty*,

MSC No. 156849, presently pending before this Court, and has the same potential to destroy government's ability to assess and collect property taxes.

As discussed at length in the *Brief on Appeal of Amicus Curiae Michigan Association of County Treasurers* filed in *Rafaeli*, most county treasurer FGUs and the State of Michigan as FGU have been sued in state and federal court putative class actions contending that tax foreclosures are takings without just compensation under the State and Federal Constitutions, seeking damages in the amount of the difference between the amount of taxes, fees, penalties, and interest due on the foreclosed properties and the fair market value of the foreclosed properties (125% of the fair market value in the case of personal residences). Counsel for Rafaeli agreed that the remedy for a taking without just compensation is the difference between the fair market value of the foreclosed properties and the amount of taxes, fees, penalties, and interest due on the foreclosed properties if the taking occurs at the time of the foreclosure. https://www.youtube.com/watch?v=8rXmQ_8XOzw&list=PL_3bNEgGS-TZc5V6zW6md-T-oy93fNwBT&index=5&t=0s 9:30-11:00, last accessed Jan 5, 2020. If this Court finds that a taking occurs at the *point of foreclosure* and former owners are found to be entitled to the difference between the fair market value of the foreclosed property and the foreclosed taxes or, in the case of personal residence properties 125% of the properties' fair market value, less taxes owed, the resulting damages are such that FGUs would lose money on essentially every foreclosure. Foreclosure would cease to be a viable means of collecting taxes and, thus, would cease to be an incentive to pay taxes. And without foreclosure as an incentive, there is no means of getting recalcitrant property owners to pay their taxes. The same potential exists if FGUs are unable to

foreclose on delinquent taxes in cases, such as this one, where the former owner has not signed for a certified mail notice.

Notably, before the adoption of 2003 PA 246, which amended MCL 211.89a to require the City of Detroit to turn over its delinquent taxes to Wayne County for collection, many Detroit property owners paid their county taxes, but not their city taxes, because the City of Detroit did not routinely foreclose liens for delinquent taxes. *Delinquent Property Taxes as an Impediment to Development in Michigan*, Citizens Research Council of Michigan, Report 325, April 1999, p 6, https://crcmich.org/PUBLICAT/1990s/1999/rpt325.pdf, last accessed Jan 5, 2020. Elimination of foreclosure as a collection option would allow this to occur state-wide. And a holding by this Court that former owners are entitled to damages under section 78*l*(1) for foreclosures with constitutionally-sufficient (but not actual) notice raises the same concern, since FGUs would be hard-pressed to prove that former owners received actual notice except in cases where the former owners actually signed for the certified mail notice. It will not take long for taxpayers to learn not to accept certified mail notices from the FGU.

CONCLUSION AND RELIEF REQUESTED

The Legislature enacted section 78*l* as a mechanism to limit recovery to monetary damages in situations where former owners were not afforded constitutionally-sufficient notice. While the effectiveness of this section in addressing its original purpose has been diminished, the Legislature's intent in enacting section 78*l* is unchanged. A ruling by this Court which adopts appellant's position is thus problematic for several reason. First, as a matter of statutory interpretation, appellant's position is at odds with the clear expression in MCL 211.78(2) and would render this section nugatory. Second, it would create an "actual notice" standard for tax foreclosures in Michigan which contradicts more than 100 years of precedent and is inconsistent with the *in rem* nature of such proceedings. Furthermore, creating an actual notice standard would, at best, allow delinquent tax payers to avoid paying their taxes indefinitely by merely rejecting their certified mail and, at worst, require the FGU to assume the massive financial liability of paying up to fair market value for property which was constitutionally foreclosed upon.

Amicus curiae MACT asks that this Court, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, affirm the decision of the Court of Appeals in this matter on the basis that MCL 211.78*l* does not provide for monetary damages to former owners of foreclosed land who received constitutionally-sufficient notice and overrule *Gillie* to the extent that it suggests that a former owner

who has received constitutionally-sufficient notice can sue for monetary damages if that person did not receive all notices. Alternatively, this Court should deny leave to appeal.

Respectfully submitted,

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Dated: January 27, 2020

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