IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. US BANK TRUST, NATIONAL ASSOCIATION,	)	CASE NOS. 2021-1090, 1091, 1181
Relators-Appellants	)	Appeals from the Eighth Appellate District, No. CA 21-110297, Sixth Appellate District, No. L-21-1087, and Ninth Appellate District, No. 29889
v.	)	
CUYAHOGA COUNTY, OHIO, LUCAS COUNTY, OHIO BOARD OF COMMISSIONERS, AND SUMMIT COUNTY, OHIO	)	
Respondents-Appellees	)	

AMICUS BRIEF OF COUNTY COMMISSIONERS ASSOCIATION OF OHIO, COUNTY TREASURERS ASSOCIATION OF OHIO, COUNTY AUDITORS ASSOCIATION OF OHIO, AND OHIO MAYORS ALLIANCE IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

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AMICI'S STATEMENT OF INTEREST

This consolidated appeal involves three mandamus actions filed by US Bank Trust, N.A. ("US Bank"), either in its capacity as a property owner or a junior lienholder, arising from the lawful enforcement of Ohio's tax foreclosure laws under Ohio Rev. Code 323.65 to 323.79. The County Commissioners of Ohio ("CCAO"), the County Treasurers Association of Ohio ("CTAO") and the County Auditors Association of Ohio ("CAAO") are filing this Amicus Brief because each and every County Commissioner, County Treasurer, and County Auditor in Ohio has a profound and fundamental interest in ensuring the proper enforcement of Ohio's tax foreclosure laws. The County Treasurers are responsible for the collection of taxes, and the Auditors have the statutory duty to perform sexennial valuations for tax purposes and to distribute property tax revenues to school districts, cities, townships and other local governmental entities. Moreover, the Ohio Mayors Alliance ("OMA") has a strong interest in this case because cities are recipients of property taxes, and thus have a strong interest in ensuring that Ohio's tax foreclosure laws are properly enforced.

This Amicus Brief therefore has been filed because the briefs filed by US Bank and its amici supporters grossly mischaracterize the tax foreclosure process in Ohio and seek to obtain a financial windfall at the expense of Ohio's taxpayers. If Appellants were to prevail, the end result would profoundly interfere with carefully-crafted tax foreclosure statutes adopted by the General Assembly. Moreover, it would create a financial incentive for delinquent taxpayers who have abandoned their properties and ignored their legal obligations to pay real estate taxes and participate in tax foreclosure proceedings. Instead, it would reward the delinquent taxpayers for this neglect, which is contrary to long-standing Supreme Court precedent. *See Texaco, Inc. v. Short,* 454 U.S. 516, 530 (1982) (This Court "has never required the State to compensate the owner for the consequences of his own neglect").

US Bank and its amici supporters want this Court to believe that innocent and unsophisticated property owners and junior lienholders (in this case a publicly traded bank holding mortgage paper) were unsuspectingly, inequitably, and unconstitutionally stripped of their alleged "property rights," and that they should be granted "just compensation" at the expense of the law-abiding taxpayers of Cuyahoga, Lucas, and Summit Counties. We find their position disingenuous, as their takings claims are based upon the flawed assertions that, if a property is foreclosed upon for real estate taxes, then the County Commissioners have an alleged constitutional duty to calculate the difference between the alleged "value" of the tax-delinquent, abandoned property and the amount of taxes owed, and then compensate the delinquent taxpayers for this alleged "surplus equity" in the property.

This is an inherently flawed concept that grossly distorts the tax foreclosure process and eschews any personal accountability for compliance with Ohio tax laws. Indeed, if "surplus equity" truly existed, the property owner could have easily listed the property for sale in order to generate proceeds to pay the outstanding taxes and assessments, or could have entered into a payment plan under R.C. 323.31. US Bank and its predecessor-in-interest, of course, did not do any of this, but did the opposite by failing to answer or otherwise contest the tax foreclosure actions. Yet, US Bank now wants this Court to believe that property owners and junior lienholders, who received multiple notices of unpaid taxes and multiple notices about the tax foreclosure proceedings, including a summons that notified them that the tax foreclosure action may result in a transfer under R.C. 323.78, innocently woke-up one day to find that their "valuable" equity (which they had disclaimed and abandoned in the first place) had been allegedly "stripped" from them. Nothing could be further from the truth.

US Bank's claims also are meritless because US Bank's complaints wrongfully attempt to rely upon the Auditor's most recent tax valuation (but only when it supports their position) to argue that there is "surplus equity" in a tax-foreclosed property for which the property owner or junior lienholder should be paid. This is a transparent attempt to game the system because Appellants know that virtually every jurisdiction in the United State of America – both State and Federal, including Ohio – forbid using an Auditor's valuations to determine the fair market value of a property for purposes of an alleged takings claim. Yet, US Bank cites and relies upon the Auditor's most recent valuation as if it were admissible to prove that there was allegedly "surplus equity" at the time of the alleged "taking."

Why are Appellants seeking to claim unspecified "surplus equity" in a property based on the cherry-picked and self-serving tax valuation of these properties? It is because, by definition, all of the properties subject to the tax foreclosure process set forth in R.C. 323.65 through R.C. 323.79 are long-vacant and abandoned properties that, in virtually all cases, are in extraordinarily poor condition and in significant disrepair. The true value of these abandoned, tax delinquent properties, therefore, is typically de minimis, or a legal and financial liability, because the subsequent property owner must incur the cost of demolishing or renovating the dilapidated structures on the property. This is why US Bank is attempting to rely upon the auditor's tax valuations (which are based upon mass appraisals conducted every six years) because if they had to perform an individual appraisal of each property based upon the actual condition of the abandoned property at the time of foreclosure, their alleged "surplus equity" claims would vanish. Further, any attempt to establish "surplus equity" four years after a foreclosure decree, puts the County at a severe disadvantage, due to the passage of time and change in property conditions.

Before addressing the legal issues, the CCAO, CTAO, CAAO, and OMA would ask the Court to consider the following description of a typical defendant in a tax foreclosure proceeding filed against a vacant and abandoned property under R.C. 323.65-323.79. While US Bank seeks to portray the owners or junior lienholders of tax delinquent properties as unsuspecting victims, the reality is completely the opposite. In the context of long-time tax delinquent vacant and abandoned property (which are the only properties that can be subject to the expedited foreclosure process in R.C. 323.65, et seq.), the owners already have made deliberate, economic decisions to abandon the properties in question. They have not paid the real estate taxes for years, and have not invested any other money to keep the properties from becoming a blight on the community and negatively impacting the tax base. They themselves have essentially chosen not to "throw good money after bad." Moreover, many of these properties are owned by deceased individuals whose heirs have never undertaken to probate the property and have effected a de facto disclaimer of interest, because they didn't perceive the property to have any value. Thus, in the vast majority of tax foreclosure actions filed under R.C. 323.65, *et seq.*, the property owners (and any junior lienholders) generally do not contest or attend any of the tax foreclosure hearings.

The only reason that a property becomes subject to a foreclosure and direct transfer, therefore, is because the property owner has taken no action to pay their taxes or to take advantage of any of the statutory protective rights and judicial remedies set forth in R.C. 323.65 to R.C. 323.79. In fact, before a property ever becomes subject to a final tax foreclosure order, the following events would have occurred:

> 1. The property has been abandoned by the property owner. Properties that get adjudicated pursuant to R.C. 323.78 are properties that are vacant and abandoned, as defined by the statute. Indeed, under R.C. 323.65-79, if a property is occupied, is operating as a business, or even has a squatter living in the home, then the R.C. 323.65-79 tax foreclosure proceeding must either be dismissed or transferred to the Court of Common Pleas and proceed under R.C. 323.25 and R.C. 5721.18.
>
> 2. The owners fail to pay their taxes. In order for a tax foreclosure to be initiated, the property must have been delinquent for at least two (2) years. In the case of vacant and abandoned properties, in fact, the delinquency has existed for many years, often more than a decade. Thus, in order to become subject to a tax foreclosure proceeding, the owner and all junior lienholders must have <u>ignored</u> their statutory obligation to pay all taxes and assessments on the property.
>
> 3. The owner receives written notices (often multiple times from the County Treasurer) asking that the outstanding taxes be paid, all of which are <u>ignored</u>;

4. The County Auditor publishes a list of tax delinquent properties in the newspaper in an effort to encourage collection, again all of which are <u>ignored</u> by the delinquent owner and junior lienholders;

5. A tax foreclosure case eventually gets filed and, based upon a title search, a Notice of Summons and a copy of the Complaint is served upon all persons who may have an interest in the property in accordance with Civil Rules 4 and 5.

6. Pursuant to R.C. 323.69(B), the Notice of Summons must clearly indicate that the property is vacant and abandoned and subject to direct transfer to a municipality or county land bank if the taxes are not paid – again which is <u>ignored</u> by the delinquent owner and junior lienholders;

7. After the tax foreclosure action is filed, the property owner again fails to pay their taxes or enter into a payment plan. R.C. 323.31 provides that a tax delinquent property owner may enter into a payment plan to avoid foreclosure and terminate the proceeding. This right, therefore, is also <u>ignored</u> by the delinquent owner;

8. The property owner has a <u>unilateral</u> right under R.C. 323.691 and R.C. 323.70 to have the case transferred to the court of common pleas where they can raise any and all claims and assert any rights—also <u>ignored</u>;.

9. After a properly noticed final hearing, the taxpayer does not attend the Board of Revision's final hearing—again <u>ignoring</u> all notices of the final hearing and does not attend;

10. After the case is adjudicated and a decree of foreclosure is journalized, the property has a statutory right under R.C. 323.78 to exercise its right to redeem the property which also was <u>ignored</u>;

11. Any aggrieved party has a statutory right to file a ***de novo*** appeal with the court of common pleas, which allows them to pursue any and all claims, including any constitutional claims in the court of common pleas. This judicial remedy also was <u>ignored</u>.

The basic affront that these writ of mandamus cases justifiably elicit is that the alleged injury set forth in US Bank's complaints is the direct result and consequence of the property owner's own failure to pay the outstanding real estate taxes, and the admitted failure of US Bank and/or its predecessors in interest to participate in the tax foreclosure proceedings and to take advantage of the judicial remedies provided by the General Assembly. US Bank and its predecessors seek to be rewarded for their inaction, neglect, or ignorance, at the expense of law-abiding taxpayers. They now want to argue, years after the fact, they did not pursue their statutory appeal rights because the alleged "taking" did not occur until the deed to transfer the property to the land bank was recorded. This is a ludicrous notion on its face, as a direct transfer only occurs as a result of the Board's tax foreclosure order and only as a consequence of the tax delinquent property owner's inaction or conscious disregard for the statutory legal process.

The statute itself plainly authorizes a de novo appeal, so that all issues can be resolved, before the legal title to the property is transferred to a third party. Indeed, the transfer of title is a mere ministerial act at that point. This is a "Hail Mary" argument to try to explain away why US Bank and its predecessors blatantly ignored the judicial review process created by the General Assembly in addition to ignoring every other adequate legal remedy set forth in the Ohio Revised Code, as listed in Paragraphs 1-11 above.

Indeed, if these tax delinquent owners or junior lienholders – in this case, a publicly traded bank – truly believed that there was "equity" in these abandoned, tax delinquent properties, then they would have had financial incentive to list the property (or at least participate in the legal process) and could have privately sold it to pay the taxes and preserve their alleged equity (or at least requested as sheriff sale under the statutory framework). Or, since US Bank was the successor to the mortgage holder in two of the cases, its predecessor could have initiated its own mortgage foreclosure proceeding (which would have provided for the satisfaction of delinquent real estate taxes). Yet, none of this ever happened because US Bank and its predecessors knew that it would have had to pay taxes on a property with little or no equity. US Bank and its predecessors took no effort to protect their alleged interests within the statutory framework provided by the General Assembly, but now wants to shift the burden of their own neglect and inaction upon county government.

Again, the reality is that these abandoned, tax delinquent properties had very little, if any, equity, and this is why these property owners abandoned the property in the first place and stopped paying their taxes. It defies common sense, therefore, to suggest that someone who abandons a property and loses their interest in a property as a result of the failure to pay taxes, should now be able to game the system by coming to court years later and expect the County to pay money to a delinquent taxpayer or junior lienholders who did absolutely nothing during the tax foreclosure process to protect their alleged interests. This is nothing more than a meritless attempt to make a profit off of these tax-delinquent, vacant, and abandoned properties, which US Bank and its predecessors disclaimed and failed to protect when the tax foreclosure proceedings were being prosecuted. It is an affront to all tax-paying property owners to suggest that the State must serve as de facto real estate agent for these delinquent owners, by pursuing wasteful and ineffective sheriff sales on vacant, tax delinquent properties that the owners have consciously abandoned.

County Treasurers expend a tremendous amount of time and resources trying to collect lawful property taxes, and work diligently in working with delinquent taxpayers to enter into statutorily-authorized payment plans if they have fallen into hardship. As a last resort, in the case of vacant and abandoned properties, they are forced to file tax foreclosures at great expense using the resources of county prosecutor offices. It is a slap in the face to all of these hard working public servants, for long-delinquent property owners who have abandoned their properties, to come back years later after their tax foreclosure proceedings were concluded, to suggest for the first time that they are allegedly owed money. Additionally, this does not account for the tremendous cost on local communities that must board-up these tax-foreclosed properties, demolish the structures in disrepair, cut the weeds, and address the criminal activity that often occurs on these tax-delinquent, abandoned properties.

In their Briefs, US Bank and its amici supporters fail to appreciate that all of the properties subject to the expedited tax foreclosure proceedings are vacant and abandoned properties, as defined by R.C. 323.65, and that the General Assembly adopted the direct transfer remedy in R.C. 323.78 in response to the unique challenges in collecting taxes from the owners of vacant and abandoned properties in Ohio. R.C. 323.78 was enacted by the General Assembly as a last resort tax collection tool for *severely* tax delinquent, vacant and abandoned properties that remain uncollectible year after year. These vacant and abandoned properties would typically be auctioned at a Sheriff's sale where they must be sold for a minimum bid equal to the amount of taxes owed, plus court costs and any special assessments for property maintenance charges or other code violations. In virtually all cases involving vacant and abandoned properties, no one would bid on them because the outstanding taxes and potential demolition and/or renovation costs far exceeded the property's value.[1] As a result, these types of vacant and abandoned properties would be subject to forfeiture to the State and be sold at forfeiture tax sales, where speculators would buy the properties for a fraction of the taxes owed, only to default in most cases on the payment of taxes themselves.

This is one of the primary reasons why the General Assembly adopted the expedited tax foreclosure proceedings set forth in R.C. 323.65 to R.C. 323.79. Prior to the adoption of these statutes in 2006, most of the vacant and abandoned properties would continue to churn through tax foreclosure after tax foreclosure cycle, never resulting in the payment of taxes. Meanwhile, adjacent property owners would be left with the negative consequences of the vacant and abandoned properties, further reducing the value of their properties and the other properties in the neighborhood, which diminishes the tax base and the amount of real estate taxes collected. When these pressures become too great, more properties are left vacant and abandoned, which only further decreases the tax base and a county's ability to collect taxes.

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[1] A fact that US Bank conveniently ignores is that the Cuyahoga County property at 2978 E 59th Street, was subject to a prior mortgage foreclosure action and offered at Sheriff's sale multiple times after April 26, 2010, and eventually on July 16, 2012, was offered for a minimum bid requirement of only $3,334.00, but <u>still</u> received <u>no</u> bidders. *See BAC Home Loans Servicing v. Kurman*, Cuyahoga Cty. Case No. CV-09697676.

While US Bank wants to argue that the counties should be forced to incur the time and expense of at least attempting to sell vacant and abandoned properties at a Sheriff's auction, this argument ignores the fact that it is up to the General Assembly to <u>create</u> and <u>define</u> the statutory remedies for tax foreclosure actions. Indeed, in arguing that the General Assembly must subject all properties to a tax foreclosure sale in every circumstance, US Bank and its amici are essentially asking this Court to act as legislators in crafting the statutory remedies for tax foreclosure actions, which is a matter that falls under the exclusive legislative authority of the General Assembly under Article II, Section 1 of the Ohio Constitution. Accordingly, the baseless claims made by US Bank should not stand. This Court should uphold the General Assembly's exclusive authority to determine the statutory remedies for tax foreclosure actions, and affirm the judgments of the Sixth, Eighth, and Ninth District Court of Appeals.

LAW AND ARGUMENT

The takings claims that are being advanced by US Bank and its amicus supporters are based upon three legal fictions that fundamentally misconstrue Ohio's tax foreclosure laws and should be rejected by this Court.

1. First, the alleged takings claims are based upon the fiction that delinquent taxpayers and/or junior lienholders have a "constitutionally-protected property interest" in recovering the difference between the alleged "fair market value" of the property, and the delinquent taxes and other impositions owed on a property that is subject to a tax foreclosure order under Ohio law. This is not true, and it grossly

distorts long-standing tax foreclosure law to suggest otherwise. Under Ohio law, once a property becomes subject to a tax-foreclosure order, a property owner and all junior lienholders lose *all* of their right, title, and interest in the tax-foreclosed property (including any equity), subject only to the statutory right to redeem the property by paying all outstanding impositions and the statutory right to recover any surplus proceeds, if any, of a tax sale. Both rights are created and defined by statute, and should not be used to create other alleged "rights" that were not adopted by the General Assembly. Thus, the Court should conclude that there is no "constitutionally protected" interest in recovering the difference between the alleged "fair market value" of a tax-foreclosed property and the amount of taxes owed.

In this regard, there is a fundamental difference between the statutory right under R.C. 5721.20 for a property owner to recover the "surplus **proceeds**" of a tax foreclosure sale ***if*** there is a sale, and ***if*** the sale actually results in any surplus proceeds and the alleged right to recover the "surplus equity" in a tax-foreclosed property based upon the difference between the alleged "fair market value" of the property and the amount of taxes owed. This alleged right is not in the Ohio Revised Code and should not be created based upon alleged "equitable" interests. Indeed, in enforcing Ohio's tax laws, this Court has never applied equitable principles to tax matters, which are based entirely upon the rights established by statute, not the common law. *See Gen. Motors Corp. v. Limbach*, 67 Ohio St.3d 90, 93, 616 N.E.2d 204 (1993) ("we have not applied equitable principles to tax matters"). Thus, the Ohio Revised Code is controlling in creating and defining the statutory rights of taxpayers in tax foreclosure process, and it simply has not created or recognized any statutory right to recover alleged "surplus equity" at all. If the Court were to adopt US Bank's theory of the case, it would be setting a dangerous precedent that would undermine the General Assembly's constitutional authority to prescribe the statutory remedies for tax foreclosure actions and unjustly reward delinquent property owners by granting them a financial windfall despite failing to pay their property taxes and having purposefully abandoned their vacant properties to the detriment of the community and the County's tax base.

In their Briefs, US Bank and its amicus supporters fail to appreciate the fundamental difference between the statutory right to recover the "surplus proceeds" of a tax sale, and the alleged right to recover the difference between the purported "fair market value" of a tax-foreclosed property and the amount of taxes and other impositions and costs owed. While amicus parties cite a number of cases from other states, almost of all the cases involved the State's refusal to return the "surplus proceeds" that were actually generated by a tax sale, and do not require the State to use taxpayer money to compensate a delinquent taxpayer for the difference between the alleged "fair market value" of a tax-foreclosed property and the amount of taxes owed. Indeed, as the Michigan Supreme Court recently stated in *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 952 N.W.2d 434, 483 (2020), there is no legal precedent (in Michigan or otherwise) that has ever held that "just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of a position had their properties not been taken at all." *Id.* at 483-484 & n. 134.

Thus, the Michigan Supreme Court expressly rejected this type of takings claim because it would wrongfully be "taking money away from the public as a whole" in order to provide a financial windfall to delinquent taxpayers who would thereby "benefit from their tax delinquency." *Id.*

2. Second, US Bank's takings claims are based upon the fiction that there actually is "surplus equity" in a tax delinquent property. Under Ohio's tax foreclosure laws, a property may be subject to transfer to an electing subdivision under R.C. 323.78 only if the property is vacant and abandoned. These abandoned properties, in fact, have not been maintained by the owner for many, many years before they become subject to tax foreclosure proceedings. They are in a dilapidated condition when they ultimately become subject to a final tax foreclosure order. This may be why they abandoned the property in the first place. If there truly were "surplus equity" in the tax delinquent properties, the property owner and/or junior lienholders would have taken all necessary action to protect this alleged "surplus equity" during the tax foreclosure proceedings before the property ever became subject to a final tax foreclosure order. Yet, even though the statute requires that the Summons set forth all of the potential remedies that may result, the vast majority of delinquent property owners and junior lienholders (such as US Bank) fail to appear in the tax foreclosure proceedings at all.

In adopting Ohio's tax foreclosure laws, the General Assembly provided delinquent property owners and any other interested parties with multiple opportunities to protect their alleged interests and to contest the foreclosure before a final order is entered. These opportunities included the filing of a timely answer, requesting a transfer to common pleas court, demonstrating that no taxes are owed, showing that the property is not vacant and abandoned, redeeming the property by paying all outstanding taxes, or entering into a payment plan. Moreover, after a final tax foreclosure order is entered, Ohio Rev. Code 323.79 provides any aggrieved party with the right to obtain *de novo* judicial review, including the right to raise new constitutional issues and claims in the common pleas court even if they were not raised in the tax foreclosure proceedings. *See* R.C. 323.79.

In this case, however, it is undisputed that none of the defendants participated in the tax foreclosure actions or did anything else to protect their alleged interest in the properties. Indeed, they ignored the notice of summons, ignored the hearings, and ignored their statutory redemption rights. Moreover, none of the property owners or lienholders filed a timely administrative appeal under R.C. 323.79, and yet, they now seek to circumvent the General Assembly's expedited judicial review scheme in order to compel the lawful taxpayers of Cuyahoga, Lucas, and Summit Counties to pay them money. This proposition is not only unsupported by any statutes or case law, but runs counter to the fundamental premise that the nonpayment of real estate taxes and inaction in tax foreclosure proceedings should be discouraged, not rewarded.

3. Third, US Bank's theory of the case is based upon the legal fiction that the Board of Revision is exercising the power of "eminent domain" when it orders a direct transfer of a tax-foreclosed property under R.C. 323.78. As discussed below,

however, it is clear that the statutory powers granted to boards of revision under R.C. 323.65 through R.C. 323.79 are based entirely upon the State's *taxing* powers under Art. II, Sec. 1 of the Ohio Constitution. *Scarborough v. Gibson*, 13 Ohio Dec. 738, 740 (1903), aff'd, 69 Ohio St. 578, 70 N.E. 1130 (1904) (explaining that county boards of revision act as the "state's agents" in carrying out the statutory powers granted by the General Assembly). R.C. 323.78, in fact, is part of the Chapter of the Ohio Revised Code, entitled "Collection of Taxes." By enforcing the state statutes established by the General Assembly for tax foreclosure actions, therefore, the Board of Revision is exercising the State's taxing powers, not the power of eminent domain. *Leasor v. Kapszukiewicz*, 6th Dist. Lucas No. L-08-1004, 2008-Ohio-6176, ¶ 14 (dismissing takings claim arising from tax foreclosure proceedings because they involve the exercise of the "State's taxing power, not the power of eminent domain").

I. PROPOSITION OF LAW #1: THE OWNER OF A TAX-FORECLOSED PROPERTY, AND ANY JUNIOR LIENHOLDERS, DO NOT HAVE A CONSTITUTIONALLY-PROTECTED PROPERTY INTEREST IN RECOVERING THE DIFFERENCE BETWEEN THE FAIR MARKET VALUE OF THE PROPERTY AND THE AMOUNT OF TAXES OWED.

US Bank's takings claims are based upon the flawed premise that the lawful enforcement of Ohio's tax foreclosure laws unconstitutionally deprived US Bank of its "property interest," either as a property owner or junior lienholder, in the "surplus equity" of a tax foreclosed property. In this regard, US Bank and its Amici argue that debtors have a "deeply rooted" property right to recover the "surplus equity" of a property, which they define as the difference between the alleged "fair market value" of a tax-foreclosed property and the amount of taxes owed. (Amici Brief, pg. 10).

This argument, however, fails to appreciate that Ohio's tax foreclosure laws have never recognized that a property owner has any statutory (or common law) right to recover the difference between the fair market value of a tax-foreclosed property and the amount of taxes owed. Rather, under Ohio's tax foreclosure laws, a property owner (and all junior lienholders) lose *all* of their right, title, and interest in a tax-foreclosed property (including any alleged "equity"), subject only to two statutory rights that have been created and defined by the General Assembly in the Ohio Revised Code: (1) the statutory right of redemption (which permits an interested party to "redeem" their interest in a tax-foreclosed property by paying all of the taxes and other impositions owed), and (2) the statutory right to recover the "surplus proceeds" of a tax sale if it is actually sold for more than the amount of taxes owed, and only if the property owner requests a return of the surplus proceeds in accordance the statutory procedures. *See* R.C. 323.78 and 5721.20. Under either statutory right, however, there is no alleged "right" to recover the difference between their perceived "fair market value" of the property and the amount of taxes owed.

Indeed, if the Court were to accept US Bank's flawed theory, it would fundamentally change and disrupt the tax foreclosure process in Ohio. It would require that the County incur the cost of a tax sale in every tax foreclosure process and/or incur the cost of obtaining an individualized appraisal of the interior and exterior of a property, which has never been the law of Ohio in tax foreclosure cases. If an appraisal determined that the value exceeded the taxes owed, then the County would be required to pay the difference to the delinquent taxpayer, which would result in an unjustified windfall. Indeed, under US Bank's theory, even if the Property were sold at a Sheriff's auction, a property owner still could allege that it was deprived of the "surplus equity" because the "true" value was allegedly greater than the sale price at the auction. The net result would have a chilling effect upon the enforcement of tax foreclosure actions of all types and increase the already overwhelming administrative burden placed on County government.

While appraisals often occur in <u>private</u> mortgage foreclosure cases, private foreclosures are fundamentally different than tax foreclosure actions because they arise out of private contractual relationships between private borrower and private lender, which has lent money on a property, and ultimately are governed by a separate statutory scheme. Real estate appraisals, however, have never been required in <u>tax foreclosure</u> actions. Rather, subject to two statutory rights set forth above, the General Assembly has provided that the delinquent taxpayer and all junior lienholders lose *all* of their ownership interest in a tax-foreclosed property, <u>regardless</u> of the fair market value of the property. Thus, regardless of whether the property is sold, transferred or forfeited to the State, the property owners and junior lienholders only lose their ownership interest (including any alleged "equity") because they failed to pay their taxes.

With respect to this issue, Appellant's Brief and the Pacific Legal Foundation's Brief fail to cite to any Ohio statutes or cases that provide a delinquent property owner or junior lienholder, who lost their interest in a tax-foreclosed property, with the right to receive financial compensation based upon the difference between the alleged "fair market value" and the amount of taxes owed. While their Briefs cite a number of cases from other states relating to the right to recover the surplus proceeds that were actually received by the government from a tax sale, this argument fails to appreciate the difference between the statutory right to recover the surplus proceeds of a tax sale, as created and defined in by Section 5721.20 of the Ohio Revised Code, and the spurious assertion of an alleged "right" to recover the difference between the "fair market value" of a tax-foreclosed property and the amount of taxes owed, which is not granted by the Ohio Revised Code at all.

This difference is best explained by the Michigan Supreme Court's recent opinion in *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429, 952 N.W.2d 434 (2020), which, in fact, supports the Respondents' position in this case. *Rafaeli* involved Oakland County's refusal to refund the surplus proceeds that were actually received and retained by the County as a result of a tax foreclosure sale of the property. *Id.* In so doing, however, the Michigan Supreme Court clearly differentiated between the common law right to recover the "surplus proceeds" of a tax sale, and any alleged right to recover the difference between the "fair market value" of the property and the amount of taxes owed. It specifically found that a delinquent taxpayer has no constitutionally-protected interest in recovering the unspecified "surplus equity" of a tax-foreclosed property, and that such a ruling would result in a financial windfall to delinquent taxpayers who are "largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full," and would be "taking money away from the public as a whole." *Id.* at 465-466. Thus, since *Rafaeli* was decided, the federal courts have <u>rejected</u> takings claims that are based upon the alleged failure to compensate a property owner for the surplus "equity" in a home that was lost as a result of a final tax foreclosure order. *See, e.g., Rose v. Oakland Cty. Treasurer,* No. 19-13066, 2021 WL 2562419, *3 (E.D. Mich. Apr. 28, 2021).

This is a critical distinction that is largely ignored by US Bank and the Pacific Legal Foundation in their Briefs. Most of the tax foreclosure cases cited on pages 10-11 and 13-14 of the Pacific Legal Foundation's Brief, in fact, involve the alleged failure to refund the surplus <u>proceeds</u> of a tax sale in violation of a statutory or common law right. *See, e.g., United States v. Taylor*, 104 U.S. 216, 217-218, 26 L.Ed. 721 (1881) (interpreting federal tax statute as granting a statutory right to recover the surplus proceeds of a tax sale); *United States v. Lawton*, 110 U.S. 146, 3 S.Ct. 545, 28 L.Ed. 100 (1884) (following *Taylor* to conclude that tax debtor was entitled to the surplus proceeds of a tax sale); *see also McDuffee v. Collins*, 117 Ala. 487, 23 So. 45 (1898) (right to recover surplus proceeds of tax sale created by state statute); *City of Anchorage v. Thomas*, 624 P.2d 271 (Alaska 1981) (right to recover surplus proceeds created by state statute); *Lake County Auditor v. Burks*, 802 N.E.2d 896, 899-900 (Ind. 2004) (right to recover surplus proceeds created by Indiana Tax Code); *Cone v. Forest*, 126 Mass. 97, 97-98 (1879) (holding that the failure to refund the surplus proceeds of a tax sale violated Massachusetts state statute); *Farnham v. Jones*, 32 Minn. 7, 19 N.W. 83 (1884) (right to recover surplus proceeds created by Minnesota statutes and common law); *Shattuck v. Smith*, 6 N.D. 56, 69 N.W. 5 (1896) (upholding North Dakota statute that provided for the recovery of surplus proceeds from tax sale); *Syntax, Inc. v. Hall*, 899 S.W.2d 189 (Tex. 1995) (interpreting Sections 34.06 and 34.02 of Texas Tax Code, which provided the disgorgement of the "excess proceeds" of a tax sale); *Bogie v. Town of Barnet*, 129 Vt. 46, 270 A.2d 898 (1970) (holding that Vermont statutes granted the right to recover the surplus proceeds of a tax sale). [2] Thus, none of the cases support U.S. Bank's proposition that a delinquent taxpayer has the right to recover the difference between the alleged "fair market value" of a property and the amount of taxes owed, which is a legal theory that finds no support in the case law and was expressly rejected in *Rafaeli*. *Id.*, 952 N.W.2d at 484, n.134 (explaining difference between the right to the surplus proceeds of a tax sale, and the right to recover "surplus equity" of a tax-foreclosed property, holding that "we are unaware of any authority affirming a vested property right in equity held in property generally").

In this regard, the Pacific Legal Foundation's Brief completely ignores the United States Supreme Court's decision in *Nelson v. City of New York*, 352 U.S. 103, 77 S.Ct. 195, 1 L.Ed.2d 171 (1956), which upheld the constitutionality of a New York state statute that provided the City of New York with the authority to foreclose upon

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[2] We note that Amici's Brief also cites several other state cases that either do not involve tax foreclosure actions at all, or involved the statutory right of redemption, are not relevant to the takings claims alleged in this case. *See Stierle v. Rohmeyer*, 218 Wis. 149, 260 N.W. 647 (1935) (discussing the constitutionality of state statute relating to private mortgage foreclosures); *King v. Hatfield*, 130 F. 564 (D. W.Va. 1900) (holding that it violated due process under the West Virginia Constitution to provide for the forfeiture of real property, by legislation, without any judicial proceeding or the right of redemption); *Griffin v. Mixon*, 38 Miss. 424 (1860) (holding that forfeiture of property for the failure to pay taxes violated the Mississippi Constitution because the legislature failed to provide the delinquent taxpayer with the "opportunity to show that he has paid" the taxes owed).

property for the failure to pay taxes, and further provided that "in the absence of a timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale." *Id.* at 110. Upon review, the U.S. Supreme Court rejected the alleged takings claims, holding that "nothing in the Federal Constitution prevents this where the record shows adequate steps to notify the owners of the charges due and the foreclosure proceedings." *Id.* Although the Supreme Court observed that New York's law may result in "extreme hardships" in certain cases, it nevertheless found that "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not the courts." *Id.* at 111.

Here, like many other states, the Ohio General Assembly has provided a taxpayer with the statutory right to recover the surplus proceeds of a tax sale, but only if the County actually receives surplus proceeds in excess of the taxes owed, and then only if the property owner affirmatively requests a refund of the surplus proceeds in a timely manner and in accordance with the statutory procedures. *See* R.C. 5721.20. There is nothing in the Ohio Revised Code, however, that provides that the State has any statutory obligation to sell the property for more than the amount of taxes owed (and in effect serve as the delinquent owner's real estate agent), or to compensate the property owner for the difference between the perceived fair market value and the amount of taxes owed. Indeed, except for the statutory right of redemption and the statutory right to recover the proceeds of a tax sale, the owner or lienholder of a tax delinquent property lose *all* right, title and interest in the tax-foreclosed property, regardless of the fair market value of the property and regardless of the statutory remedy imposed. Thus, there is nothing in the Ohio Revised Code that creates any right to recover the alleged "equity" asserted by a tax delinquent property owner after it has been foreclosed upon by the Board of Revision in accordance with Ohio's tax foreclosure laws.

Given the lack of authority to support their legal theory, US Bank's Brief and the Pacific Legal Foundation's Brief rely primarily upon <u>general</u> constitutional principles from <u>other</u> U.S. Supreme Court cases that do <u>not</u> involve the enforcement of a state's tax foreclosure laws. These are transparent obfuscations that have nothing to do with this case. (Pacific Legal Foundation's Brief, pp. 15-16). The Supreme Court's decisions in *Armstrong v. United States*, 364 U.S. 40 (1980), and *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), for example, are readily distinguishable because they do not involve takings claims arising from the lawful enforcement of a <u>state's</u> tax laws at all. Thus, neither case discusses or addresses whether a property owner or junior lienholder has a constitutionally-protected interest in recovering the "surplus equity" of a property that becomes subject to a tax foreclosure order under <u>state</u> law.

Indeed, Ohio law is ultimately controlling in deciding this legal issue because it is well-established that "property interests" are not created or defined by the U.S. Constitution, but are created and defined by <u>state</u> law. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998). This is particularly true when it comes to rights of property owners under Ohio's taxation laws, which are created and defined <u>exclusively</u> by the General Assembly under Article II, Section 1 of the Ohio

Constitution. *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 40. Thus, in defining whether a property owner has a legitimate expectation in recovering the alleged "surplus equity" in real property that has become subject to foreclosure, this Court must focus only upon Ohio law, and not any unrelated general constitutional principles or the laws of other states.

As previously discussed, Ohio's tax laws do not grant a property owner with any right to recover the "surplus equity" in a tax delinquent property that becomes subject to a final order of foreclosure, regardless of whether the property is sold, transferred, or forfeited to the State. While US Bank argues that it has an "equitable" interest in recovering the surplus equity of a tax-foreclosed property, this argument should be rejected as a matter of law because this court has never "applied equitable principles to tax matters," which are based entirely upon the rights and obligations established by statute. *See Gen. Motors Corp. v. Limbach*, 67 Ohio St.3d 90, 93, 616 N.E.2d 204 (1993) ("we have not applied equitable principles to tax matters"). Thus, in determining whether a constitutionally-protected property interest exists under state law, the plain language of Ohio's tax laws are controlling in determining whether US Bank has a constitutionally-protected interest in recovering the "surplus equity" in a tax-foreclosed property under Ohio law. *See Tyler v. Hennepin Cty.*, 505 F. Supp.3d 874, 891-95 (D. Minn. 2020) (dismissing takings claim because Minnesota law did not provide any right to the "surplus equity" in a property that became subject to forfeiture).

Similarly, the statutes cited on Pacific Legal Foundation's Brief in support of their argument that Ohio law "protects a debtor's equity . . . in a variety of [other] debt-collection contexts" are not relevant because they do not address the legal effect of a statutory tax foreclosure order upon a property owner's rights. Moreover, any cases or statutes relating to private mortgage foreclosures are not relevant because tax foreclosures are fundamentally different from private mortgage foreclosures under Ohio law. Private mortgage foreclosures are governed by the statutory procedures set forth in R.C. Chapter 2329, and the **contractual** terms and conditions of the mortgage or note between private lender and borrower. Tax foreclosures, on the other hand, are governed exclusively by statute. *Treasurer of Lucas Cty. v. Sheehan*, 6th Dist. Lucas No. L-18-1176, 2020-Ohio-3493, ¶ 27. Thus, any cases addressing the rights of senior or junior lienholders in private mortgage foreclosure proceedings are not applicable to this case at all.

In this regard, it appears that US Bank and the Pacific Legal Foundation are essentially asking this Court to rely upon equitable or common law principles to second-guess and question the statutory remedies created by the Ohio General Assembly for the failure to pay taxes. Their Briefs in fact admit that the State has no obligation for an alleged takings claim if it at least *attempts* to sell the property for more than the taxes owed. Their primary objection, therefore, is that R.C. 323.78 permits a direct transfer of a property to an "electing subdivision," without an appraisal or sale, and thereby deprives a tax delinquent taxpayer of the alleged opportunity to recover some unspecified and speculative surplus proceeds of a tax sale if the public auction actually generates a sale that exceeds the amount of taxes owed. In so doing, US Bank is asking this Court act, in effect, as the delegated legislative authority over taxation laws that has been granted to the General Assembly by Article II, Section 1 of the Ohio Constitution and use its judicial authority to mandate that every tax foreclosed property must proceed to a tax sale before it may be transferred to an electing subdivision under R.C. 323.78.

Indeed, as previously discussed, there is nothing in the United States Constitution or Ohio Constitution that prohibits the General Assembly from adopting state taxation laws that terminate *all* of a property owner's right, title, and interest in the equity of redemption in a tax-foreclosure property for the failure to pay taxes. *Jones v. Flowers*, 547 U.S. 220, 234 (2006) ("People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property"). This is the sole province of the General Assembly. The Due Process Clause requires notice and an opportunity to be heard before a final order of foreclosure is issued, but as indicated in Paragraphs 1-11 above, the tax foreclosure statutes in question are infested with more than sufficient due process to protect US Bank. US Bank and its predecessors, however, simply failed to take advantage of the these statutory protections. The Takings Clause and the Due Process Clause simply do not mandate that the State's legislative authority must adopt taxation laws that subject a tax-foreclosed property to sale in every case. In fact, with respect to vacant and abandoned tax delinquent properties, the vast majority of the tax-foreclosed properties are not sold at the Sheriff's auction, due to the lack of minimum bid at a tax sale. As a result, vacant and abandoned properties are not returned to the tax rolls, but proceed through cycle after cycle of tax foreclosure proceedings at the expense of the taxpayers. Thus, as part of its legislative authority under Article II, Section 1 of the Ohio Constitution, the General Assembly clearly had the constitutional authority to remedy this unique problem by providing for alternative remedies for a vacant and abandoned property that becomes subject to a final tax foreclosure order.

II. PROPOSITION OF LAW #2: US BANK SHOULD BE LEGALLY BARRED FROM RELYING UPON THE COUNTY AUDITOR'S VALUATION OF A PROPERTY FOR TAX PURPOSES AS EVIDENCE TO PROVE THAT THE FAIR MARKET VALUE OF A TAX-FORECLOSED PROPERTY EXCEEDED THE TAXES OWED.

As previously discussed, US Bank's takings claims also are meritless because they are based upon the flawed assumption that that the vacant, abandoned, tax-foreclosed properties that were the subject of the expedited tax foreclosure proceedings actually had "surplus equity" when they became subject to tax foreclosure orders in 2017. This is an inaccurate assumption. If a property owner truly believes that there is "surplus equity" in a property that becomes subject to a tax foreclosure action, then they likely would take action to protect this alleged interest by either selling the property to a third party, listing it for sale, or by entering into a payment plan to pay the outstanding taxes before it becomes subject to a final tax foreclosure order. Moreover, if a lienholder, such as US Bank, truly believed that there was "surplus equity" in a tax delinquent property, then they would have initiated their own private mortgage foreclosure in order to sell the property at auction and use the surplus proceeds to pay any outstanding debts, or would have paid the outstanding taxes in order to protect its financial interest in the property. In this case, however, US Bank or its predecessors did not take any action to contest the underlying tax foreclosure proceedings. Moreover, they did not make any attempt to pay the outstanding taxes, to enter into a payment plan, or to take any other timely action under Ohio's judicial review scheme to protect their alleged interests in these abandoned, tax delinquent properties. Yet, notwithstanding these deficiencies, US Bank is attempting a disingenuous method to cash in on the tax foreclosure process by asserting a takings claim years after the tax foreclosure actions were concluded.

In this case, US Bank's takings claims are inherently flawed because the allegation that the alleged "fair market value" of the tax-foreclosed properties actually exceeded the amount of taxes owed is based solely upon the County Auditor's most recent valuation of the property for tax purposes. Under Ohio law, however, "the general rule is that the [county auditor's] assessed valuation of property is not evidence of value for *other than tax purposes*." *Ohio Cas. Ins. Co. v. D&J Distrib. & Mfg., Inc.*, 6th Dist. Lucas No. L-08-1104, 2009-Ohio-3806, ¶ 22 (emphasis added) (quoting *Bana v. Pittsburgh Plate Glass Co.*, 76 N.E.2d 625, 628 (Ohio App. 9 Dist. 1947); *see also Cincinnati v. Jennewein*, 1st Dist. Hamilton No. C-77240, 1978 WL 216461, *1 (Jun. 7, 1978) ("As a general rule the assessed valuation of property is not evidence of value for other than tax purposes"). In fact, under Ohio law, tax appraisals are only conducted every six years based upon mass appraisal techniques that do not take into account the interior, exterior and individual physical conditions of the property. In the case of vacant and abandoned properties, however, the physical condition of the abandoned property rapidly deteriorates over time. Moreover, it is not uncommon that the auditor's tax valuation preceded the demolition of the building. Accordingly, because the value of abandoned property changes over time and is affected by changes in market and physical conditions, it is a wrong assumption to suggest that there is any actual "surplus equity" in abandoned tax delinquent properties that are subject to the statutory remedies set forth in R.C. 323.78.

For this reason, it is a long-standing rule of law that a valuation performed for taxation purposes is not admissible to prove the fair market value of the property in an eminent domain or condemnation proceeding. *See SunTrust Mortgage, Inc. v. Busby*, 469 Fed.Appx. 205, 207 (4th Cir. 2012); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1495-96 (9th Cir. 1997); *United States v. Certain Parcels of Land in the County of Arlington, State of Virginia*, 261 F.2d 287, 289-291 (4th Cir. 1958); *Bowie Lumber Co. v. United States*, 155 F.2d 225, 228 (5th Cir. 1946); *Dubinsky Realty Co. v. Lortz*, 129 F.2d 669, 673 (8th Cir. 1942); *United States v. Easement and Right-of-Way Over 1.58 Acres of Land,* 343 F.Supp.3d 1321, 1345-1346 (N.D. Ga. 2018); *United States v. An Easement and Right-of-Way over 4.42 Acres of Land*, 4:16-CV-0314-HLM, 2018 WL 8131100, *2 (N.D. Ga. Sept. 11, 2018); *Eaton v. Boles*, No. 5:03-CV-165, 2005 WL 8164008, *4 (W.D. Mich. Nov. 3, 2005); *GEM Realty Trust v. First Natl. Bank of Boston*, No. CIV 93-606-SD, 1995 WL 127825, *5 (D. N.H. Mar. 20, 1995). Rather, whenever a federal, state, or local governmental agency exercises its eminent domain powers to take property for public use, both federal and state law require an independent appraisal by a qualified real estate appraiser in order to determine the fair market value of the property as of the date of the taking. *See* 49 C.F.R. § 24.102(c)(1); Ohio Rev. Code 163.04.

Independent fee appraisers are required to adhere to Standards 1 and 2 of the Uniform Standards of Professional Appraisal Practice (USPAP), which, among other things, require a visit to the property, inspection of both the exterior <u>and</u> interior conditions of the property, research and analysis of the comparable sales values and market trends in the appropriate market areas, and a market analysis of the surrounding neighborhood. Additionally, the appraisal report for an independent fee appraisal must include specific details about the physical condition of the subject property, including any needed repairs, deterioration, or the presence of other adverse conditions.

US Bank's attorneys previously have argued that R.C. 5713.03 requires the county auditor to determine the "true value" of the property in performing a valuation for tax purposes. This argument ignores the fact, however, that county auditors are engaged in the mass appraisals of all property every six years, and are not attempting to determine the value of a property at the time when it becomes subject to a final tax foreclosure order, let alone for purpose of an alleged takings claim. Moreover, it ignores the fact that, in an inverse condemnation action that alleges that there has been a taking, it is the <u>Relator's</u> burden to prove, through clear and convincing evidence, that there actually was a taking. Yet, as previously discussed, Ohio law flatly prohibits US Bank from using the auditor's tax valuation to satisfy this burden of proof. *See Ohio Cas. Ins. Co.*, 2009-Ohio-3806, at ¶ 22 (rejecting the argument that R.C. 5713.03 permits the use of a property in a civil proceeding because "[t]he general rule is that the assessed valuation of property is not evidence of its value for other than tax purposes") (citations omitted). Accordingly, for this additional reason, the Court should reject US Bank's alleged takings claims.

III. PROPOSITION OF LAW #3: A TAKINGS CLAIM CANNOT ARISE FROM THE ENFORCEMENT OF OHIO'S TAX FORECLOSURE LAWS BECAUSE IT INVOLVES THE EXERCISE OF THE STATE'S TAXING POWERS, NOT THE POWER OF EMINENT DOMAIN.

This Court also should affirm the judgments because it is well established that a takings claim cannot arise from the lawful exercise of the State's taxing powers. As the U.S. Supreme Court has held, "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis v. Michigan*, 516 U.S. 442, 452-453, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996); *see also Ostipow v. Federspiel*, 824 Fed.Appx. 336, 341-342 (6th Cir. 2020). Thus, the federal and state courts have consistently held that a takings claim does not arise from the lawful enforcement of tax foreclosure laws because they involve the exercise of the State's taxing power, not the power of eminent domain. *Leasor v. Kapszukiewicz*, 6th Dist. Lucas No. L-08-1004, 2008-Ohio-6176, ¶14; *Leber v. United States*, 146 Fed. Cl. 9, 12 (2019); *Speed v. Mills*, 919 F. Supp.2d 122, 129 (D.D.C. 2013); *Epice Corp. v. Land Reutilization Auth. of St. Louis*, No. 4:07CV00206, 2010 WL 3270114, *2 (E.D.

Mo. Aug. 17, 2010); *Golden v. Mercer Cty. Tax Claim Bureau (In re Golden)*, 190 B.R. 52, 57, 58 (Bankr. W.D. Pa. 1995).

Although the imposition of a direct transfer remedy under R.C. 323.78 does not involve a tax sale, this distinction is immaterial. Regardless of the statutory remedy involved – sale, forfeiture, or transfer – the fact remains that a property owner loses its interest in the property *as a result* of the failure to pay taxes. The Supreme Court "has never required the State to compensate the owner for the consequences of his own neglect." *See Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982). In *Texaco*, for example, the Supreme Court held that the State cannot be held liable to pay compensation for the loss of property where, as here, it results from US Bank's failure to comply with certain statutory conditions imposed by state law. *Id.* at 529-530.

Similarly, the State of Ohio also cannot be liable for an alleged taking that arises from a person's neglect in failing to comply with the statutory requirements for the payment of taxes. In both cases, the property owner loses their interest in the property *through their own neglect* by failing to comply with the statutory requirements for property ownership. Indeed, in this case, it is undisputed that all of the delinquent property owners and all junior lienholders (including US Bank) ignored the tax notices; ignored collection efforts; ignored the summons and complaint; ignored attending the hearing; ignored the right to remove the case to a judicial forum; ignored the right to go on a payment plan; ignored the right to redeem and ignored the right to a de novo appeal as of right. Yet, four years later, they now want to be compensated for the consequences of their own neglect.

In their Complaints, US Bank sought to circumvent the foregoing case law by making the conclusory legal allegation that the Board of Revision's imposition of the direct transfer remedy is not based upon the State's taxing powers, but is based upon the exercise of "eminent domain powers." This conclusory legal allegation, however, should be rejected as a matter of law. The only reason why a property becomes subject to a direct transfer under R.C. 323.78 is because a property owner has failed to pay their taxes. Indeed, the entire tax foreclosure proceeding, and invocation of the applicable statutory remedies (including direct transfer), can occur **only if** the property owners fail to pay their taxes - nothing more, nothing less. Thus, the enforcement of this statutory remedy clearly involves the exercise of the State's taxing power.

Under Ohio law, a county board of revision is a creature of statute that does not have any powers or authority *other* than the specific statutory powers granted by the Ohio Revised Code. The General Assembly, however, has never granted any eminent domain powers to boards of revision. *See* R.C. 5715.02 (granting authority to hear tax valuation complaints); R.C. 323.65 (granting authority to hear tax foreclosure proceedings). Rather, the statutory powers granted to boards of revision under R.C. 323.65 through R.C. 323.79 are based entirely upon the State's *taxing* powers under Art. II, Sec. 1 of the Ohio Constitution. *Scarborough v. Gibson*, 13 Ohio Dec. 738, 740 (1903), *aff'd*, 69 Ohio St. 578, 70 N.E. 1130 (1904) (explaining that county boards of revision act as the "state's agents" in carrying out the statutory powers granted by the General Assembly). R.C. 323.78, in fact, is part of the Chapter of the Ohio Revised Code, entitled "Collection of Taxes." *See* Revised Code Chapter 323. Thus, by enforcing the state statutes established by the General Assembly for the collection of taxes, the Board of Revision is exercising the State's taxing powers under Art. II, Sec. 1 of the Ohio Constitution, not the power of eminent domain.

CONCLUSION

Equity aids the vigilant, not those who slumber on their rights. Any attempt by US Bank to claim or establish the right to recover "surplus equity" in a tax-foreclosed property, four years after the tax foreclosure decision, puts all Counties at a severe disadvantage to defend, due not only to the passage of time, but also due to the anticipated improvements or deterioration to the property and changing market conditions. The alleged taking that US Bank complains of is the direct consequence of the property owner's failure to pay real estate taxes, and failure of US Bank (or its predecessors in interest) to participate in the statutory tax foreclosure proceedings. This inaction, neglect, or ignorance cannot, four years later, justify a mandamus action.

US Bank fails to accept any accountability for the legal obligation to pay real estate taxes, and only attempts to capitalize on the potential for financial upside on their paper transactions, all at the increased financial and administrative burden of the County governments. The unintended consequences of US Bank's disingenuous claims, could have a negative economic impact on County finances not experienced since the mortgage foreclosure crisis that lead to the necessity of adopting the expedited foreclosure procedures set forth in R.C. 323.65 through 323.79. The County

Commissioners of Ohio, the County Treasurers Association of Ohio, the County Auditors Association of Ohio, and the Ohio Mayors Alliance merely wish to ensure that the orderly collection and distribution of real estate taxes can lawfully proceed in accordance with the tax foreclosure laws established by the State of Ohio. The nefarious attempts of US Bank and its amici supporters to pilfer a financial windfall from Ohio's taxpayers must end. Therefore, this Court should conclude that the writ of mandamus claim was properly dismissed for failure to state a claim.

Respectfully Submitted,

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PROOF OF SERVICE

I hereby certify that on this 25th day of January, 2022, that a copy of the foregoing Amicus Brief was sent via regular United States mail to the following counsel of record:

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