In the Supreme Court of Ohio

STATE OF OHIO, EX REL. U.S. BANK TRUST, NATIONAL ASSOCIATION, Appellant, v. **SUMMIT COUNTY, OHIO**, Appellees.	Case No. 2021-1181 Consolidated with Nos. 2021-1090 & 2021-1091 Appeal of Right from the Summit County Court of Appeals, Ninth Appellate District Case No. 29889

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANT AND REVERSAL

JAY R. CARSON
Ohio Bar No. 0068526
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
Telephone: (614) 224-4422
Email: j.carson@buckeyeinstitute.org

Counsel for Amicus Curiae
The Buckeye Institute

OLIVER J. DUNFORD
Ohio Bar No. 0073933
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: 916.503.9060
Email: ODunford@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

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STATEMENT OF INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) and The Buckeye Institute respectfully submit this brief amicus curiae in support of Appellant U.S. Bank, and reversal.

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded nearly 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

PLF attorneys have extensive experience with the questions at issue in this case through their representation of owners of tax-delinquent property lost to foreclosure. *See, e.g.*, *Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429 (2020) (holding county effected unconstitutional taking when it took absolute title to properties without any compensation for property's extra value, which was later realized in county's sale of the property); *Tyler v. Hennepin County*, appeal docketed, No. 20-3730 (8th Cir. Dec. 30, 2020); *Wayside Church v. County of Van Buren*, No. 1:14-

CV-1274, Order Granting Motion to Reopen Proceedings (W.D. Mich. Mar. 26, 2019); *Mucciaccio v. Town of Easton, Mass.*, No. 2173cv00004B (Mass. Super. Ct. Mar. 8, 2021) (filed and dismissed in 2021 upon favorable outcome).

PLF frequently participates as amicus curiae in cases where courts must address jurisdictional questions and claims asserting the property rights of individuals who owed the government money. *See, e.g., Harrison v. Montgomery Cty., Ohio*, 997 F.3d 643 (6th Cir. 2021); *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020); *Polonsky v. Town of Bedford*, 238 A.3d 1102, 1104 (N.H. 2020) (government violates state takings clause when it takes and sells property and fails to refund surplus profits to former owner). PLF believes this experience and its unique perspective will assist the Court in its adjudication of this appeal.

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its

mission and goals. The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. The Buckeye Institute is a leading advocate of protecting private property.

The requirement that "just compensation" must accompany any taking of private property predates the United States Constitution and has a pedigree stretching back nearly a millennium. Indeed, this safeguard against governmental abuse, enshrined in the Fifth Amendment, as well as the Ohio Constitution, is one of the oldest and most firmly rooted principles in the Anglo-American legal tradition. The Buckeye Institute has a particular interest in this case because the Ohio statute at issue flies in the face of this well-established protection and robs Ohioans of the fundamental liberties protected by the constitutions.

STATEMENT OF FACTS

U.S. Bank owned a parcel of real property in Summit County worth approximately $48,000. Complaint ¶ 8. On October 4, 2017, the Summit County Board of Revision commenced a foreclosure action to take this property because the bank owed approximately $4,000 in taxes, interest, and costs for that property.[1] *Id*.

[1] These consolidated appeals arise from three different tax foreclosures involving U.S. Bank's private property interests. For the sake of brevity this amicus brief focuses on the Summit County case and interests of titleholders at the time of foreclosure. However, this brief addresses issues that arise in all three cases.

¶ 6. The Board held a foreclosure hearing a little over one month later—on November 17, 2017—and ordered that if the debt was not fully paid (i.e., redeemed) within 28 days, the property would be foreclosed and transferred to the government. *Id*. ¶¶ 7–10. The bank did not redeem the debt within 28 days, and the County took and transferred title to the County's land bank. *Id.* ¶ 11.

Ordinarily, Ohio counties collect delinquent property taxes by foreclosing and selling the property at auction, keeping the amount of the owners' tax debts, and returning the surplus to the (now-former) owners. R.C. §§ 323.73, 5721.20. But Ohio law allows counties, rather than conducting an auction and collecting taxes from the sale, to transfer foreclosed properties to government entities like land banks for use as economic revitalization or other public purposes. R.C. §§ 323.78(B), 5721.20.

Summit County took advantage of the latter option and transferred U.S. Bank's foreclosed property to the County's land bank. The County did not pay the bank for the property's value that exceeded the bank's tax debt—more than $44,000. Compl. ¶¶ 7–8, 16–17. Instead, the County took the full value of the property as a windfall. *Id*.

U.S. Bank filed an action in mandamus in the court of appeals. There the court held the bank should have appealed the board's foreclosure decision to the Court of Common Pleas. *Ex rel. U.S. Bank v. Summit County, C.A.*, No. 29889 at ¶ 24 (Sept. 15, 2021).

SUMMARY OF ARGUMENT

I. This case asks whether property owners who fall behind on property taxes may seek just compensation in Ohio's courts after counties take that private property for a public use without just compensation. This Court's answer about the rights and remedies available to the plaintiff in this case, a bank, will affect the rights of struggling property owners across the state.

As noted above, counties may foreclose on properties subject to tax debt and transfer those properties to government entities like land banks. R.C. §§ 323.78(B), 5721.20. But these statutes do not require counties to pay the former owners for surplus amounts above the amounts of the tax debts. The counties, therefore, claim that becoming indebted to the government gives them power under Ohio law to take property for a public use without just compensation. But this process violates the Ohio Constitution's requirement that the government pay compensation when it takes private property. *See* Ohio Const. art. 1, §19.

First, because the counties here do not even collect taxes—by statute, the government keeps the property and waives the tax debt—so the counties' attempted reliance on tax collection as a justification for the takings here fails. But even if a county could be deemed as collecting a property tax through its foreclosure and confiscation of title, the Constitution's just compensation mandate still prohibits the county from taking more than it is owed. Every property owner has deeply rooted

property rights that require government-as-tax-collector to sell the owner's property, use the proceeds to pay the debt, and refund any surplus to the former owner. When government fails to abide by this common law protection, the government effects a taking. But, as the Texas Supreme Court recognized, "[t]axing authorities are not (nor should they be) in the business of buying and selling real estate for profit." *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191–92 (Tex. 1995), as amended (June 22, 1995).

II. The procedure employed in these situations threatens the ability of property owners to even claim a right to just compensation. Property owners have only 14 days to appeal a county's decision to foreclose. According to the counties here, Ohio property owners must include in their appeal claims for uncompensated takings—even though it is impossible for an uncompensated taking to occur until 28 days after foreclosure.

Under Ohio law, property owners have 28 days after the foreclosure decision to redeem, *i.e.*, pay the tax debt (plus interests and costs) and keep their properties. R.C. § 323.65(J) (setting redemption period). Until the redemption period has expired, the owners hold title to their property. And, because owners maintain ownership of their properties until the redemption period is over, the government cannot effect a taking until that redemption period has ended. *See Hart v. City of Detroit*, 331 N.W.2d 438, 445 (Mich. 1982) (takings cause of action involving

foreclosed property accrued when right to redeem tax-delinquent property expired). In short, unless and until the owner fails to redeem his property and a county actually confiscates that property, no taking occurs. *See Danforth v. United States*, 308 U.S. 271, 284 (1939).

The counties' claim that owners must raise—or forever waive—a claim for an uncompensated taking before the redemption period's expiration is precluded by owners' statutory right to redeem. But according to the counties, an owner who fails to navigate this complicated procedure within the small appellate window—before the government even takes property without just compensation—loses his constitutional right to just compensation. Such a rule would be unfair and violate due process. Moreover it would leave the state's most vulnerable property owners without meaningful protection against uncompensated takings for modest tax debts.

This Court should reverse.

ARGUMENT

AMICI'S PROPOSITION OF LAW I: Government effects a taking without just compensation when it confiscates private property worth more than the owner's debt to the government

Section 19, Article I, of the Ohio Constitution states: "[W]here private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money . . . ." This provision allows the government to take private property for a public use, but "it also confers an

'inviolable' right of property on the people." *Norwood v. Horney*, 110 Ohio St. 3d 353, ¶ 68 (2006). Ohio's public-use and just-compensation requirements afford greater protection for property owners than their federal counterparts. *Id.*

Ohio's Takings Clause ensures that when government appropriates property for a public use, it must pay just compensation. *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Comm'rs*, 115 Ohio St. 3d 337, 340 (2007) (appropriation or physical invasion of private property requires compensation for the property owner). When Ohio counties take title to properties for transfer to a land bank or other government entity, this protection still applies. Therefore, a debt to the government does not erase the Ohio (or federal) Constitution's just compensation mandate. Logically that means, while the government may foreclose on property to collect a tax debt, the government may not keep more than the amount of that debt. *See, e.g., Burnquist v. Flach*, 6 N.W.2d 805, 809 (Minn. 1942) (requiring government to pay just compensation for value of the property that exceeded tax debt because even though title to the property was foreclosed for delinquent taxes, the money paid by the state for the property "stands in the place of the property itself"). In other words, the government must pay for the value of the property that exceeds any public debt. *See Norwood*, 110 Ohio St. 3d at 364, n.9 ("'[J]ust compensation' is that compensation that places the individual in 'as good a position pecuniarily as if his

property had not been taken,' to be 'made whole,' but no more.") (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).

The counties' contention that the existence of a property-tax debt absolves the government of its duty to pay just compensation fails for several reasons. First, to be clear, counties that take private property for the use of land banks and other public uses do not collect any taxes; instead, when counties take title to properties, they forgive the owners' tax debts. *See* R.C. 323.78(B); Compl. ¶ 15. But even if the government's activity here could be characterized as collecting a debt, the government still effected an unconstitutional taking when it refused to provide just compensation. The government can seize property to collect a tax debt. But it must pay for the surplus value of that property. Ordinarily that surplus value is protected by selling the property to the highest bidder, paying the debt, and then refunding any surplus proceeds to former owners. This traditional practice has deep roots that reflect the traditional understanding that the government—just like any private creditor—cannot take more than what it is owed. When government strays from this limitation, it effects a taking.

A. Debtors have a deeply rooted property right that prevents government from taking more than it is owed without paying just compensation

Assuming for the sake of argument that the County's seizure of property here included some tax collection, the County still unconstitutionally took a protected property interest traditionally recognized by the common law. Under the common law, tax collectors could seize property to collect a debt, but they had to sell the property, pay the debt with the proceeds, and refund the surplus profits to the former owner. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *452; *McDuffee v. Collins*, 23 So. 45, 46 (Ala. 1898) (tax collector must follow "well-known general rule of law" by paying surplus proceeds to former owners/lienholders in order of priority). Therefore, courts have long held that when a tax collector fails to refund the surplus, the former owner has an action to recover it. *See, e.g.*, *Cone v. Forest*, 126 Mass. 97, 101 (1879) (action for conversion); *see also Knick*, 139 S. Ct. at 2176 ("Until the 1870s," takings claims were typically brought as "common law trespass action[s] against the responsible corporation or government official."). A debtor's common law right to the surplus value of his property exists regardless of whether state statutes recognize it. *See, e.g., Farnham v. Jones*, 19 N.W. 83, 85 (Minn. 1884) ("[T]he right to the surplus exists independently of such statutory provision.").

For over 100 years after the founding of this nation, the states and courts were in apparent accord in protecting the equity interest of property-tax debtors. *See, e.g.*, *Martin v. Snowden*, 59 Va. 100, 137 (1868), *aff'd sub nom. Bennett v. Hunter*, 76 U.S. 326 (1869) (discussing common law, English land tax statute, and early colonial laws); Thomas M. Cooley, A Treatise on the Law of Taxation 343 (1876) (noting that a tax debt authorized the government to take only as much property as the taxes owed and observing that he was unaware of any jurisdiction that followed a contrary rule). So secure was this right, that when Congress passed a statute partly aimed at "suppressing rebellion" in Confederate states, which appeared to forfeit title and all equity in tax-delinquent property, the U.S. Supreme Court twice chose a strained statutory interpretation to avoid that outcome. *Bennett*, 76 U.S. at 335, 337 (avoiding the takings question by interpreting "forfeit" as meaning the owner was merely in danger of a tax sale and could still redeem the property until sale, because it is "proper" to avoid such a "highly penal" provision where milder construction is possible); *United States v. Taylor*, 104 U.S. 216, 219, 221–22 (1881) (relying on *Bennett* and noting the purpose was tax collection, not "confiscation," in construing the same statute to hold former owner entitled to surplus proceeds from the sale of his tax-delinquent property). And today most states' statutes still protect tax debtors' property rights in the surplus value of their property by requiring a sale of the property and a refund of the surplus proceeds. Jenna Christine Foos, Comment, *State*

Theft in Real Property Tax Foreclosure Procedures, 54 Real. Prop. Tr. & Est. L. J. 93, 99–103 & n.38 (2019).

Consistent with the common law, Ohio law ordinarily protects a debtor's equity as protected property in a variety of debt-collection contexts. *See, e.g.*, R.C. §§ 1309.615, 1311.49, 2329.44, 5721.20. And in most tax foreclosures, Ohio counties sell the tax-delinquent property at a public sale and refund any surplus profits to the former owner—to avoid keeping more than the amount of delinquent taxes, interest, and costs. R.C. §§ 323.73, 5721.20. That is not true, however, when counties use the special procedure used in these consolidated cases to complete an expedited foreclosure without sale and without compensation.

The statute here purports to authorize bureaucrats to select unoccupied, tax-indebted property that they want to repurpose for a public purpose. R.C. § 323.78. Likely recognizing the problematic nature of such a seizure, the statute labels all such properties "abandoned" even though they have not been abandoned. *See Sogg v. Zurz*, 121 Ohio St. 3d 449, ¶ 9 (2009) (abandonment requires an intent to abandon). But whatever the procedure and however labeled, foreclosures under this statute create an unconstitutional exception to the traditional rule that government must pay just compensation when it takes private property for public use.

B. Government violates the Takings Clause when it takes property worth more than any public debt without compensation

Because indebted property is still private property, Ohio counties violate the Takings Clause when they take absolute title to property worth more than the owner's tax debts without compensation. *Cf. Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426–27 (2015) (Takings Clause protects property interests recognized by Magna Carta and Founders); *State v. Soto*, 378 N.W.2d 625, 628 (Minn. 1985) ("Blackstone had tremendous impact on the development of the common law in the original American colonies and in the early states of this new country."). When government seizes protected property, it effects a classic, *per se* taking under the Ohio Constitution. *State ex rel. Shelly Materials*, 115 Ohio St. 3d at 340.

The supreme courts of Michigan, Mississippi, New Hampshire, Vermont, and Virginia, and multiple federal district courts have recognized that confiscations like the ones at issue in this case violate the constitutional mandate that government pay just compensation when it takes private property. *See Rafaeli, LLC v. Oakland Cty.*, 505 Mich. 429 (2020) (taking the traditional common law right to surplus proceeds from tax sale violates state Takings Clause); *Griffin v. Mixon*, 38 Miss. 424, 436–37 (Miss. Err. & App. 1860) (violation of due process and just compensation guarantee); *Bogie v. Town of Barnet*, 129 Vt. 46, 55 (1970) (retaining excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation, contrary to . . . the Vermont Constitution"); *Thomas Tool Services,*

Inc. v. Town of Croydon, 761 A.2d 439, 441 (N.H. 2000) (tax-lien procedure takes property without just compensation); *Martin*, 59 Va. at 142–43 (violates due process of law by taking more than owed) *aff'd on other grounds sub nom. Bennett*, 76 U.S. 326; *King v. Hatfield*, 130 F. 564, 579 (C.C.D.W. Va. 1900); *Pung v. Kopke*, No. 1:18-cv-01334-RJJ-PJG, Opinion and Order (W.D. Mich. Sept. 29, 2020) (ECF No. 119, Page ID.1357–58); *Fox v. Cty. of Saginaw*, No. 19-CV-11887, 2021 WL 120855, at *12 (E.D. Mich. Jan. 13, 2021); *Coleman through Bunn v. D.C.*, 70 F. Supp. 3d 58, 80 (D.D.C. 2014) (takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman through Bunn v. D.C.*, No. 13-1456, 2016 WL 10721865 (D.D.C. June 11, 2016) (recognizing district law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits).

The Minnesota, Indiana, and North Dakota supreme courts similarly suggest government cannot keep the surplus obtained through a tax-foreclosure statute. *Farnham*, 32 Minn. at 11–12; *Lake Cty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004) (noting statute that precludes "owner's right to the surplus" would "produce severe unfairness" and likely violate the Takings Clause); *Shattuck v. Smith*, 69 N.W. 5 (N.D. 1896) (noting statute would likely be unconstitutional "if [it] contained no provision that the surplus should go to the landowner"); *see also Stierle v. Rohmeyer*, 260 N.W. 647, 652 (Wisc. 1935) (holding government could

not constitutionally penalize mortgagee by extinguishing the entire mortgage, because "the legislature . . . had no authority" to do so "without a just compensation"); *Syntax*, 899 S.W.2d at 191–92 ("Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit."); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981) (refusing to interpret the law as confiscating the surplus).

Outside the context of tax foreclosures, the United States Supreme Court has recognized the federal Takings Clause protects a wide range of property interests that are similar to the property interest at stake here. For example, the Court has found a taking when government takes without payment financial interests including money, interest on money, land, liens, and mortgages. *See, e.g., Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 601–02 (1935) (Takings Clause protects "substantive rights in specific property," including the right to collect on a debt in a timely manner by seizing and selling that property); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013) (Takings Clause protects money and "a right to receive money that is secured by a particular piece of property"); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 158–59 (1980) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens). Similarly, the United States Supreme Court has held that where a statute requires property to be sold to pay debts and the surplus proceeds returned, the Takings Clause protects the

former owner's rights to those proceeds. *United States v. Lawton*, 110 U.S. 146, 150 (1884) ("To withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and . . . take his property for public use without just compensation.").

This Court, too, has recognized the Ohio Constitution's Takings Clause protects comparable property interests. *See, e.g.*, *Sogg*, 121 Ohio St. 3d 449, ¶ 12 (right to receive interest on money held by government). An owner's monetary interest in their real estate is as important and protected as those other property interests.

Accordingly, by confiscating U.S. Bank's property without payment for the fair market value minus the debt—roughly $44,000—the County effected a classic physical taking. *See, e.g., Webb's Fabulous Pharmacies*, 449 U.S. at 164 (Government cannot "by *ipse dixit* . . . transform private property into public property without compensation."); *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (holding that confiscation of a privately owned interest is a taking); *Armstrong*, 364 U.S. at 48 (taking occurred when government extinguished liens without compensation).

Ohio's counties cannot hide behind Ohio's tax statutes to avoid the just compensation mandate. In *Webb's Fabulous Pharmacies*, for instance, the Supreme Court held that the government violated the Takings Clause by keeping the interest

earned on private funds deposited with a court, even though a Florida statute so provided, and the Florida Supreme Court had agreed it was legal. 449 U.S. at 158–59. The Court explained, "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. The plaintiff had a traditionally protected property right, which the Florida legislature and Florida Supreme Court could not take away.

This Court should likewise uphold the property rights of Ohioans and reverse. *See Sogg*, 121 Ohio St. 3d 449, ¶ 14 ("'It is regrettable that there should be an apparent necessity for re-stating such familiar principles; but there seems to be a growing disposition to legislate, by ordinance and by general statute, regardless of constitutional limitations, thus imposing upon the courts the odium of declaring them to be unconstitutional.'") (quoting *Kiser v. Bd. of Comm'rs of Logan Cty.*, 85 Ohio St. 129, 132–33 (1911)).

PROPOSITION OF LAW II
The takings claims are properly raised in an action in mandamus

A. The taking did not occur until the right to redeem expired

U.S. Bank's claim was properly raised in a mandamus action. *State ex rel. Elsass v. Shelby Cty. Bd. of Comm'rs*, 92 Ohio St. 3d 529, 533 (2001). Indeed, the bank's takings claim *could not have been litigated* at the administrative hearing and *would have been premature* on appeal to a state court. *See, e.g., Hart*, 331 N.W.2d

at 445 (taking occurs when the right to get title back by paying off full debt expires). Here, the bank had 28 days to redeem its property after the Board of Revision's foreclosure order. R.C. § 323.65(J). Therefore, until that 28-day period expired, the bank remained owner of the property. But, according to the lower court, the bank should have presented the takings claim with its appeal of the foreclosure order—even though the appeal must be filed only 14 days after the Board of Revision's order. That 14-day time period ended two weeks before the expiration of the bank's right to save its property by paying its debt. R.C. § 323.65(J). And only after the bank failed to redeem its property did it lose its title and was the property transferred to the County. Thus, it was only when the title transferred—after the time to appeal the foreclosure decision expired—that the taking occurred.

Accordingly, any rule mandating property owners to file an inverse condemnation action *before* foreclosure would require indebted owners to file takings claims before a potential taking occurs. This would be unreasonable, and it would create practical difficulties. *See United States v. Dickinson*, 331 U.S. 745, 749 (1947) (An owner is not required to file a takings claim "until the situation becomes stabilized." Moreover "procedural rigidities should be avoided" so that an "owner is not required to resort either to piecemeal or to premature litigation."). For example, when a county initiates a tax-foreclosure process, it is sometimes unclear whether a

county intends to employ the traditional sale process or whether it plans to engage in a taking.

Moreover, once the Board orders a foreclosure without sale, the owner may still find a buyer or otherwise acquire sufficient means through a loan or other assistance to redeem title within the month-long redemption period. A county may even voluntarily choose to abandon its plans to take the property without a sale and refund of the equity. But whatever the final outcome, no taking occurs until the government actually confiscates the former titleholder's property. *See Danforth*, 308 U.S. at 284 ("Until taking, the condemnor may discontinue or abandon his effort."). Requiring dispossessed owners to recognize and raise a takings claim before the taking occurs would be unworkable and promote needless and premature litigation.

B. Even if the taking would have happened at the foreclosure, the appellate deadline is unreasonably short for takings plaintiffs to identify and raise their constitutional claims

Even if the bank's takings claim had matured at the time of the administrative foreclosure decision (it did not), a 14-day deadline for debtors to recognize and assert their civil rights claims (as opposed to an administrative-type claim) would violate due process. *See Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 482 (1982) (*res judicata* does not apply where state proceeding violates due process); *Burnett v. Grattan*, 468 U.S. 42, 50–51 (1984) (rejecting six-month statute of limitations for federal employment discrimination claims as unreasonably short). "The practical

difficulties facing an aggrieved person who invokes administrative remedies are strikingly different" and less complex than one who seeks to raise a civil rights claim for violation of a constitutional right. *Id.* at 51. Unlike typical administrative proceedings, "[l]itigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel[,] . . . conduct enough investigation to draft pleadings that meet the requirements of federal rules[,] establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request to proceed *in forma pauperis*, and file and serve his complaint," and prepare for responsive pleadings. *Id.* at 50–51. Giving debtors only 14 days from an administrative-foreclosure decision to identify and raise a civil rights claim is an egregiously short period of time for unsophisticated owners to retain and coordinate with an attorney, gather information to prepare and identify her takings claim (which hasn't happened yet), and include that claim as part of the foreclosure appeal. *See Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 225 (2008) (34 days not reasonable amount of time for filing product liability suit); *Burnett*, 468 U.S. at 50–51 (rejecting six-month statute of limitations for federal employment discrimination claims). This Court should reject any interpretation of statutes that would impose such unreasonable filing deadlines on debtors.

The harm of such an unreasonable deadline will fall most heavily on unsophisticated property owners. Indeed, all owners are "generally ignorant of [tax sales] until [it is] too late to prevent it." *See Slater v. Maxwell*, 73 U.S. 268, 276 (1867); *see, e.g.*, *In re Application of the County Collector for Judgment v. Lowe*, 867 N.E.2d 941, 951 (Ill. 2007) (hospitalized woman lost home over $110); *In re Petition of Cass County Treasurer for Foreclosure*, No. 324519, 2016 WL 901700, at *2 (Mich. Ct. App. Mar. 8, 2016) (wealthy owner ignorant of a $14,743 delinquent tax debt on his $3.5 million vacation property that had just finished construction). Often property owners who lose their property to tax-related foreclosures suffer from illness, cognitive problems, simple poverty, or do not understand the consequences of allowing their property to be foreclosed on for delinquent taxes—results that are dramatically worse than the effects of other types of liens. *Tallage Lincoln, LLC v. Williams*, 151 N.E.3d 344, 350 (Mass. 2020) (delinquent property owners typically cannot afford counsel and the law is difficult even for "experienced attorneys" to understand, leading to "catastrophic" results for property owners). Elderly property owners are especially susceptible to losing their property to tax foreclosures because, as they move into senior living or medical facilities, children's homes, or are otherwise displaced, they often miss notices. *See* Jennifer C.H. Francis, Comment, *Redeeming What is Lost: The Need To Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 Geo. Mason U. Civ. Rts. L.J. 85 (2014). In *Coleman*,

an elderly veteran with dementia lost his $200,000 home over a $133 deficiency, plus approximately $5,200 in penalties, interest, fees, and costs. *Coleman through Bunn*, 70 F. Supp. 3d at 62, 64.

Takings plaintiffs must be given a reasonable opportunity to identify and raise their takings claims. Fourteen days is not sufficient and threatens significant due process violations.

CONCLUSION

This Court should reverse.

DATED: December 6, 2021.

Respectfully submitted,

/s/ Oliver J. Dunford

JAY R. CARSON
Ohio Bar No. 0068526
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
Telephone: (614) 224-4422
Email: j.carson@buckeyeinstitute.org
Counsel for Amicus Curiae
The Buckeye Institute

OLIVER J. DUNFORD
Ohio Bar No. 0073933
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: 916.503.9060
Email: ODunford@pacificlegal.org
Counsel for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I certify that on this 6th day of December, 2021, the foregoing was served upon all parties of record via the Court's e-filing system.

/s/ Oliver J. Dunford
OLIVER J. DUNFORD