STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Richard A. Bandstra, E. Thomas Fitzgerald, Helene N. White)

STELLA SIDUN,

Plaintiff-Appellant,

vs.

Docket No. 131905

WAYNE COUNTY TREASURER

Defendant-Appellee.

APPELLANT STELLA SIDUN'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

QUESTION PRESENTED

Although Stella Sidun's address was listed on the deed, Wayne County never attempted to mail notice to that address before selling her property at a tax sale. In addition to publication and posting, the County mailed notice to the old address of Ms. Sidun's mother, who was a co-owner of the property. But even after all of its mailed notices were returned undelivered, the County never sent a single letter to Ms. Sidun's last known address. Did Wayne County violate Ms. Sidun's right to due process under the United States and Michigan Constitutions?

Appellant Stella Sidun: Yes
Appellee Wayne County Treasurer: No
Court of Appeals: No
Circuit Court: No

STATEMENT OF THE CASE

Stella Sidun is a 75-year old woman who depended on a rental property for her retirement income. She lost that property in a tax sale because the Wayne County Treasurer did not provide her with adequate notice of the foreclosure proceeding until it was too late to redeem the property. The County identified Ms. Sidun's ownership interest by consulting the deed to the property, but never sent notice of the proceeding to Ms. Sidun's address, even though her address was listed on the deed. Instead, the County sent notices to the former address of Ms. Sidun's mother, who had been a co-owner of the property until her death, but those notices were returned to the County unclaimed. Even after receiving the unclaimed notices, the County failed to follow up by sending notice to Ms. Sidun's address. Although the County also published notice, tried unsuccessfully to contact the occupants, and posted notice on the property, those steps cannot excuse the County's failure to attempt to contact Ms. Sidun at her address, when that address was readily at hand.

Once she learned that the County had taken her property, Ms. Sidun brought this action to challenge the County's failure to send notice of the foreclosure proceeding to her last known address. Ms. Sidun alleged that the County had failed to comply with the notice provisions of the General Property Tax Act (GPTA) and had violated her constitutional right to due process. The trial court found that the County had provided adequate notice and granted summary judgment for the County. The Court of Appeals affirmed, with Judge White dissenting. This Court vacated the judgment of the Court of Appeals and

remanded the case for reconsideration in light of *Jones v Flowers*, 547 US 220, 126 S Ct 1708, 164 L Ed 2d 415 (2006), but the Court of Appeals did not change its previous opinion and continued to rely on precedent that was overruled by *Jones*. As explained below, the decision of the Court of Appeals conflicts with well-established due process principles and should be reversed.

A. Factual Background

In 1947, Ms. Sidun's mother, Helen Krist, purchased a two-unit property at 2691 Commor Street in Hamtramck, Michigan. Ms. Krist purchased the property with her husband and became the sole owner after her husband died in 1963. In November 1979, Ms. Krist conveyed the property by quitclaim deed to herself and Ms. Sidun as joint tenants with rights of survivorship, and the deed was recorded in Wayne County. (App. 18a). The deed listed Ms. Krist's address as 3233 Stolzenfeld Avenue in Warren, Michigan, and listed Ms. Sidun's address as 2681 Dorchester Road in Birmingham, Michigan. (App. 18a). Ms. Sidun has lived at the Birmingham address since 1962. (App. 21a, 68a-93a). Tax bills for the Hamtramck property were sent to Ms. Krist at her address in Warren. (App. 21a, 40a, 62a, 63a, 83a).

In about 1998, Ms. Krist began to show symptoms of Alzheimer's disease and, following a period of hospitalization and care in a nursing home, she moved from her home in Warren to Ms. Sidun's home in Birmingham. (App. 79a-80a, 100a-101a). In late 1999 or early 2000, Ms. Krist sold the house in Warren. (App. 133a). The tax bills for the Hamtramck property continued to be sent to the Warren address even after Ms. Krist had moved, and Ms. Krist failed to pay the county

property taxes for the Hamtramck property for tax years 2000 and 2001. (App. 21a, 40a, 45a, 62a, 63a, 83a). The property taxes for those years totaled $2,066.45.

On June 14, 2002, the County initiated proceedings to foreclose on the Hamtramck property. (App. 45a). The County attempted to provide notice of the foreclosure proceeding by sending two letters by certified mail to the Warren address. (App. 46a-47a, 105a). One letter was addressed to Ms. Krist, and the other was addressed to both Ms. Krist and Ms. Sidun, even though Ms. Sidun had never lived at the Warren address and nothing in the County's records indicated that she did. (App. 22a-24a, 116a-118a). Both letters were returned to the County unclaimed. (App. 22a-24a, 116a-118a). In addition to sending the two certified letters to the Warren address, the County posted a notice at the Hamtramck property, mailed a notice to the property's occupants, and published notice in a local newspaper. (App. 47a, 112a-115a). None of the County's efforts succeeded in providing notice to Ms. Sidun. Even though the County knew from the deed that Ms. Sidun was one of the owners of the property and knew that the notice mailed to the Warren address had failed to reach her, and even though Ms. Sidun's Birmingham address was listed on the deed, the County never attempted to contact Ms. Sidun at the Birmingham address. (App. 20a, 22a-24a, 44a-48a, 112a-118a).

Ms. Krist died on January 1, 2003, leaving Ms. Sidun as sole owner of the Hamtramck property. On March 10, 2003, a judgment of foreclosure was entered in favor of the County, and Ms. Sidun's redemption rights to the property expired

twenty-one days later. (App. 28a, 48a). The property had an appraised value of $85,000. (App. 30a-38a). On December 30, 2003, the County sold it Mohamed Madrahi for $52,000. (App. 48a). At the time that he purchased the Hamtramck property, Mr. Madrahi was residing at the address in Warren where Ms. Krist had previously lived and where the foreclosure notices had been sent.

B. Proceedings Below

Ms. Sidun filed this suit on December 23, 2004, alleging that the County had failed to comply with the notice requirements of the General Property Tax Act (GPTA) and had taken her property without due process because it failed to take reasonable steps to inform her of the forfeiture proceedings.[1] Ms. Sidun contended that the deed recorded with the County Register listed her mailing address and showed that she had an interest in the Hamtramck property, but the County never attempted to provide notice to her at her address of record. Because there was no dispute as to any material fact, Ms. Sidun moved for summary disposition. On August 4, 2005, the Circuit Court denied Ms. Sidun's motion and granted summary disposition for the County. (App. 157a-165a). The Circuit Court recognized that Ms. Sidun had a property interest and a constitutional right to due process, but

[1]Ms. Sidun brought this case as an action for money damages under MCL § 211.78*l*(1), which provided that the owner of a property interest extinguished through the foreclosure provisions of MCL § 211.78k, "who claims that he or she did not receive any notice required under this act . . . may only bring an action to recover money damages as provided in this section." This Court recently held that the statute's limited remedy provisions are unconstitutional, at least as to property owners who have been denied due process because of inadequate notice. *See In re Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 732 NW 2d 458 (2007).

found that the County's notice efforts were constitutionally sufficient. (App. 157a-165a).

Ms. Sidun appealed the Circuit Court's decision. On January 19, 2006, in a two-to-one decision, the Court of Appeals affirmed the Circuit Court's decision. (App. 166a-170a). The majority held that even though Ms. Sidun was entitled to notice of the forfeiture proceeding, and even though the County had failed to send notice to Ms. Sidun at the address listed on the deed, "placing notice on the Hamtramck property itself was reasonably calculated to apprise [Ms. Sidun] of the pending proceedings" and, thus, "[t]he minimal requirements of due process were satisfied[.]" (App. 166a-170a). Judge White dissented.

This Court vacated the judgment of the Court of Appeals and remanded this case for reconsideration in light of *Jones v Flowers*, 547 US 220, 126 S Ct 1708, 164 L Ed 2d 415 (2006), but the Court of Appeals adopted its prior holding and found "no reason to change [its] previous opinion." 2006 WL 2355506, at *4. (App. 174a-181a). Judge White reiterated her dissent. *Id.* at *5-6. On September 12, 2006, this Court granted leave to appeal the judgment of the Court of Appeals. (App. 182a).

SUMMARY OF ARGUMENT

The standard for evaluating the constitutional adequacy of notice was established over a half-century ago in *Mullane v Cent Hanover Bank & Trust Co*, 339 US 306, 313, 70 S Ct 652, 94 L Ed 865 (1950). Under that standard, the "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," that is, they must be

"reasonably certain to inform those affected." *Id.* at 315. Framed in terms of *Mullane*, the question here is this: Would a reasonable person who really wanted to let Stella Sidun know that her property was about to be taken have sent her a letter at her last known address, which was listed on the deed to the property?

Mullane supplies not only the question, but the answer as well: "[W]here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318. Similarly, in *Dow v Michigan*, 396 Mich 192, 211, 240 NW2d 450, 459 (1976), this Court held that due process under both the U.S. and Michigan Constitutions requires mailed notice that is "directed to an address reasonably calculated to reach the person entitled to notice." Because the County had Stella Sidun's address at hand, but failed to mail notice to her at that address, the County's efforts fell far short of what due process requires.

Last year, in *Jones v Flowers*, 547 US 220, 225, 70 S Ct 652, 94 L Ed 865 (2006), the U.S. Supreme Court supplied an additional gloss on *Mullane*, holding that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is reasonable to do so." *Jones* emphasized the need, in assessing the adequacy of notice, to balance the state's interest against the individual's interest. When the subject matter of the proceeding involves "such an important and irreversible prospect as the loss of a house," the need for adequate notice is especially great. *Id.* at 230. Under *Jones*, Wayne County's

failure to send Ms. Sidun a single letter before taking her property—even after the notices sent to the wrong address were returned—is indefensible.

The Court of Appeals held that the County had made a constitutionally adequate attempt at notice because it mailed notices to Ms. Krist's old address and resorted to notice by publication and posting. But because the County had Ms. Sidun's address "at hand," due process did not permit the County to "resort to means less likely" to apprise her of the pendency of the foreclosure action than mailing notice to her at that address. *Mullane*, 339 US at 318. Each of the steps taken by the County (mailing notice to a different owner, posting the property, and attempting to serve the occupants) have been recognized to be "less likely" to reach a property owner than mailing notice to the owner's last known address. Moreover, under *Jones*, the return of the certified-mail notices should have been a red flag to the County that its mailed notice had failed. 547 US at 225. Faced with the returned letters, a reasonable person who actually wanted to notify Ms. Sidun that her property was going to be sold would have sent at least one letter to her last known address. A glance at the deed to the property would have revealed the County's error, and a postage stamp would have been the cost of fixing it. When there is as much at stake as there is here, and when the government has reason to believe that its efforts at notice have failed, that is not too much to ask.

Finally, because Wayne County deprived Ms. Sidun of her property without due process of law, this Court should remand to the trial court so that Ms. Sidun can seek a remedy for the violation of her rights under both the U.S. and Michigan Constitutions. Although Ms. Sidun's complaint sought relief under the General

Property Tax Act, this Court recently struck down that statute's provision barring jurisdiction over claims for non-damages relief as it applies to cases where property owners have been denied due process. *In re Petition by Treasurer of Wayne County*, 478 Mich 1, 4, 732 NW2d 458, 459 (2007). In light of that decision, Ms. Sidun is no longer limited to a claim for damages and is entitled to request an order setting aside the foreclosure as well as other appropriate relief. That relief includes remedies available under 42 USC 1983 and 1988. State and federal appellate courts have uniformly held that where a plaintiff like Ms. Sidun alleges a violation of federal constitutional rights, that plaintiff is entitled to relief under sections 1983 and 1988, even when the plaintiff has not expressly cited either statute in the original complaint.

STANDARD OF REVIEW

This Court reviews questions of law, such as issues of constitutional and statutory construction, *de novo*. *In re Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 732 NW2d 458 (2007).

ARGUMENT

I. AT A MINIMUM, DUE PROCESS REQUIRES THE GOVERNMENT TO MAIL NOTICE TO EACH PROPERTY OWNER'S LAST KNOWN ADDRESS AND TO FOLLOW UP WHEN IT LEARNS ITS EFFORTS HAVE FAILED.

Due process, as guaranteed by the United States and the Michigan Constitutions, requires "at a minimum" that the "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v Cent Hanover Bank & Trust Co*, 339 US 306, 313, 70 S Ct 652, 94 L Ed 865 (1950); *see also Joint Anti-Fascist*

Comm v McGrath, 341 US 123, 170-72, 71 S Ct 624, 95 L Ed 817 (1951) (Frankfurter, J., concurring) ("[N]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."); US Const, am XIV; Const. 1963, art. 1, § 17.

In *Mullane*, the U.S. Supreme Court held that "[a]n elementary and fundamental requirement in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 US at 314 (emphasis added). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," that is, the means must be "reasonably certain to inform those affected." *Id.* at 315. The question in *Mullane* was whether publication was sufficient to provide notice to a large number of beneficiaries of a common trust. The answer, the Court held, depended on whether the names and addresses of the beneficiaries were at hand. If so, then only notice by mail directed to *each* of those beneficiaries' addresses would suffice. *Id.* at 318 ("Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."). Because the trustee in *Mullane* had "on its books the names and addresses" of the relevant beneficiaries, the Court could find "no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses." *Id.*

Mullane's insistence on personal notice by mail to the last known addresses of *all* interested parties whose names and addresses are at hand was consistently reaffirmed in subsequent decisions. *See*, *e.g.*, *Walker v Hutchinson*, 352 US 112, 77 S Ct 200, 1 L Ed 2d 178 (1956) (insisting on mailed notice of property condemnation proceedings where landowners' names and addresses are known to the city and on the official records); *Schroeder v New York*, 371 US 208, 83 S Ct 279, 9 L Ed 2d 255 (1962) (insisting on mailed notice of condemnation proceedings to property owners whose names and addresses are readily ascertainable on the deed); *Mennonite v Bd of Missions v Adams*, 462 US 791, 800, 103 S Ct 2706, 77 L Ed 2d 180 (1983) (holding, in the tax sale context, that the state must mail individual notice to *all* persons whose property interests may be affected, if their "name and address are reasonably ascertainable"); *cf. Eisen v Carlisle and Jacquelin*, 417 US 156, 94 S Ct 2140, 40 L Ed 2d 732 (1974) (requiring individualized mailed notice under class action rules, read in light of *Mullane*, even though there were 2,250,000 class members and their claims were relatively small).

This Court first applied the *Mullane* standard to the tax sale context in *Dow v Michigan*, 396 Mich 192, 240 NW2d 450 (1976). *Dow* held that notice by publication was inadequate under both the U.S. and Michigan Constitutions and went on to describe the kind of notice that would satisfy due process: "Mailed notice *must be directed to an address reasonably calculated to reach the person entitled to notice*. Mailing should be by registered or certified mail, return receipt requested, both because of the greater care in delivery and because of the record

of mailing and receipt or non-receipt provided." *Id.* at 211, 240 NW2d at 459 (emphasis added). These steps, this Court explained, "would be the efforts one desirous of actually informing another might reasonably employ." *Id.*

Mullane and *Dow*, however, left open a subsidiary question over which a conflict soon developed among the courts: What effort must the government make to find a property owner's address when its tax sale notices are returned undelivered by the post office? In *Smith v Cliffs on the Bay Condo Ass'n,* 463 Mich 420, 617 NW2d 536 (2000), a divided Court held that no additional efforts to find the owner's address are required when mailed notice is returned. The tax sale notices in *Cliffs on the Bay* were sent to the address of a corporation listed on a quitclaim deed, but the notices sent to that last known address were returned by the post office as undeliverable. The owner contended that the notice was inadequate because additional efforts should have been undertaken to ascertain its current address. This Court disagreed:

> In this case there is nothing to indicate that the township, county, or state had been informed of a new address for the association. Thus, it was appropriate for notices to be sent to the Birmingham address stated in the deed conveying the disputed parcel to the association. The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located.

Cliffs on the Bay, 463 Mich at 429, 617 NW2d 536. Although a few state courts followed the approach taken by this Court in *Cliffs on the Bay*,[2] the majority of state supreme courts and federal appeals courts rejected it.[3]

[2]*See, e.g., Dahn v Trownsell*, 576 NW2d 535 (S.D. 1998); *Elizondo v Read*, 588 NE2d 501, 504 (Ind, 1992); *Clark v Jones*, 519 NE2d 158, 160 (Ind Ct App,

In *Jones v Flowers*, the U.S. Supreme Court granted certiorari to resolve the conflict among the lower courts over whether reasonable follow-up efforts are required when a tax sale notice is returned undelivered. 547 US at 225. The Court specifically cited this Court's decision in *Cliffs on the Bay* as an example of the minority position requiring no follow-up efforts, and adopted the majority position instead: "We hold that when mailed notice of a tax sale is returned unclaimed, the

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1988); *Atlantic City v Block C-11, Lot 11*, 376 A2d 926 (NJ, 1977); *Hutchinson Island Realty, Inc. v Babcock Ventures, Inc.*, 867 So2d 528 (Fla Dist Ct, App. 2004); *see also Schmidt v. Langel*, 874 P2d 447 (Colo Ct App, 1994) ("[W]hen, as here, notice by mail has been sent but returned as undeliverable, if a diligent search of the county records would uncover no alternative address, neither constitutional due process concerns nor statutory requirements compel the county treasurer to follow up on information which she has no reason to believe would result in the discovery of a correct address"); *Kakris v. Montbleau*, 575 A2d 1293, 1299 (NH, 1990).

[3]*See*, *e.g.*, *Plemons v Gale*, 396 F3d 569, 576 (CA4, 2005) ("[W]hen prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient."); *Akey v Clinton County*, 375 F3d 231, 236 (CA2, 2004) ("Akey's claim raises the question of what due process obligations the County incurred when her notice of foreclosure was returned as undeliverable. In light of the notice's return, the County was required to use 'reasonably diligent efforts' to ascertain Akey's correct address."); *Hamilton v Renewed Hope, Inc*, 589 SE2d 81, 85 (Ga, 2003) ("[W]e adopt and apply the majority rule requiring the [party charged with notice], before resorting to publication, to make reasonably diligent efforts beyond the use of tax and real estate records to ascertain the address of the delinquent taxpayer."); *Kennedy v Mossafa*, 789 NE2d 607 (NY, 2003) ("[W]hen the notice is returned as undeliverable, the tax district should conduct a reasonable search of the public record."); *Malone v Robinson*, 614 A2d 33, 38 (DC, 1992) ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action."); *St George Antiochian Orthodox Christian Church v Aggarwal*, 604 A2d 484 (Md, 1992); *Wells Fargo Credit Corp v Ziegler*, 780 P2d 703 (Okla, 1989); *Rosenberg v Smidt*, 727 P2d 778, 781-83 (Alas, 1986); *Giacobbi v Hall*, 707 P2d 404 (Idaho, 1985).

State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is reasonable to do so." *Id.*

In addition to its rejection of *Cliffs on the Bay*—on which both Court of Appeals decisions in this case relied—two other aspects of *Jones* are relevant here. First, *Jones* emphasized that "assessing the adequacy of a particular form of notice requires balancing the 'interest of the State' against the 'individual interest sought to be protected by the Fourteenth Amendment.'" *Id.* at 229 (quoting *Mullane*, 339 US at 314). Accordingly, *Jones* holds that follow-up efforts are "especially" necessary "when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house." 547 US at 230. "In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know when the notice letter addressed to him is returned unclaimed." *Id.* at 239.

Second, *Jones* firmly rejected the notion (sometimes known as the "caretaker assumption") that it is reasonable for the government to assume that a property owner will look after his or her interests and that an owner's failure to do so may excuse the government's failure to provide adequate notice. Specifically, *Jones* reiterated that (1) "a party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation" to provide notice, *id.* at 232 (quoting *Mennonite*, 462 US at 799), (2) an interested party's "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending," *id.* at 233-34 (quoting *Mennonite*, 462 US at 800), and (3)

the government's conduct may not be excused because of the property owner's lack of diligence. *Id.* at 233 (*citing Mullane*, 339 US at 316). "Mr. Jones should have been more diligent about his property, no question," the Court said, but that did not change the fact that "before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking." *Id.* In light of *Jones*, the inadequacy of the County's notice procedures may not be justified by shifting the blame to the victim of those very procedures.

II. THE COUNTY VIOLATED MS. SIDUN'S RIGHT TO DUE PROCESS BY TAKING HER PROPERTY WITHOUT MAILING NOTICE TO HER LAST KNOWN ADDRESS.

In this case, the County never attempted to mail notice to Ms. Sidun at her last known address, even though the address was listed at the top of the deed to the property. The County consulted the deed and saw Ms. Sidun's name, and therefore should have seen the Birmingham address corresponding to her name, but inexplicably did not mail a single notice to that address—neither initially nor even after its notices sent to Ms. Krist's old address were returned undelivered.

Under both the United States and Michigan Constitutions, the County's efforts to notify Ms. Sidun fell far short of what due process requires. To paraphrase the U.S. Supreme Court's decision in *Jones*, in this case the County is exerting extraordinary power against Ms. Sidun—taking and selling a house she owns. It is not too much to insist that the County should have spent 37 cents in postage to mail Ms. Sidun a single letter at her address of record before it sold her $85,000 house to collect on a $2,000 property tax debt. *Jones*, 547 US at 239.

The County's failure to send proper mailed notice to Ms. Sidun was not a mere technical error. Rather, the County failed to comply with the basic requirements of the General Property Tax Act, which is intended to "satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States." MCL 211.78(2). Although the "failure of [the County] to follow a requirement" of the statute does not give rise to a claim against the County "unless the minimum requirements of due process" are violated, *id.*, a failure to follow the statute's most basic requirements is itself indicative of a constitutional violation. *See In re Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 22, 732 NW2d 458, 469 (2007) (Kelly, J., concurring) (Wayne County's failure to mail notice of a tax sale to the owner at the address listed on the deed, as required by the statute, demonstrated that "the government has not made a reasonable effort to provide notice").

Before initiating foreclosure proceedings, the County was required to conduct "a search of records"—including "land title records in the office of the county register of deeds"—"to identify the owners of a property interest in the property who are entitled to notice." MCL 211.78i(1), (6). Based on that search, the County was required to "determine the address reasonably calculated to apprise" each owner and send a certified-mail notice to each such address. MCL 211.78i(2). If, for any reason, the County could not "determine an address reasonably calculated to inform a person with an interest in a forfeited property" or if the County discovered a deficiency in the notice procedures, it was required to conduct additional records searches and "take reasonable steps in good faith to

correct that deficiency." MCL 211.78i(2), (4). The County failed on both accounts—it failed to use the address most reasonably calculated to reach Ms. Sidun, and it failed to undertake any follow-up steps when the mail sent to her at the wrong address was returned.

The facts here are strikingly similar to the facts in a case decided by this Court earlier this year, also involving the defective notice procedures employed by Wayne County in a tax sale proceeding. *See In re Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 732 NW2d 458. There, a church purchased two separate parcels, which were transferred in a single deed. The Wayne County Treasurer initiated foreclosure proceedings on the two parcels separately, but inexplicably mailed notice of the foreclosure proceedings against the second parcel to the *previous* owner of the land and never sent mailed notice to the church, even though the church's address was listed on the deed. *Id.* at 5, 732 NW2d at 460. Because the County should have sent mailed notice to the address listed on the deed, this Court held that "the county deprived the church of its property without providing due process" and affirmed the circuit's order restoring the church's title to the property. *Id.* at 5, 732 NW2d at 460.

Here, as in *Wayne County Treasurer*, the County's efforts were inadequate under both *Mullane* and *Dow* because the County failed to take the most basic step required by those cases—mailed notice to each owner of the property at his or her last known address: "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Mullane*, 339 US at 318;

see *Dow*, 396 Mich at 211, 240 NW2d at 459 (requiring "[m]ailed notice . . . directed to an address reasonably calculated to reach the person entitled to notice."). As a co-owner listed on the deed, Ms. Sidun was a person entitled to notice. Mail would have been reasonably calculated to reach her at her address, which was listed on the deed. Under those circumstances, the County's inexplicable failure to even attempt to send a notice to that address renders its efforts inadequate under both *Mullane* and *Dow*. Indeed, even if the applicable standard were this Court's now-overruled decision in *Cliffs on the Bay*, on which the Court of Appeals relied, notice would still have been inadequate because, even though "it was appropriate for notices to be sent to the Birmingham address stated in the deed," the County did not do so. *Cliffs on the Bay*, 463 Mich at 429, 617 NW2d at 536.

III. THE STEPS TAKEN BY THE COUNTY DO NOT EXCUSE ITS FAILURE TO SEND NOTICE TO MS. SIDUN AT HER LAST KNOWN ADDRESS.

The County argued below, and the Court of Appeals held, that the County had made a constitutionally adequate attempt at notice, even though it never attempted to mail notice to Ms. Sidun at her last known address, because the County "mailed notices to plaintiff's mother's address of record, published notice on three occasions, and also resorted to posting notice on the property." 2006 WL 2355506, at *5.

Under *Mullane*, however, because the County had Ms. Sidun's address "at hand," due process did not permit the County to "resort to means less likely" to apprise her of the pendency of the foreclosure action than mailing notice to her at

that address. *Mullane*, 339 US at 318. As explained below, each of the steps taken by the County (mailing notice to a different owner, posting the property, and attempting to serve the occupants) have been recognized to be "less likely" to reach a property owner than mailing notice to the owner's last known address. Moreover, under *Jones v Flowers*, the return of the certified-mail notices should have been a red flag to the County that its mailed notice had failed. *Jones*, 547 US at 225. Had the County checked the records at hand, it would have quickly discovered that the notice had been mailed to the wrong address. Faced with the returned letters, a reasonable person who actually wanted to notify Ms. Sidun that her property was going to be sold would have sent at least one letter to her last known address. Anything less was insufficient to satisfy due process.

1. Sending notices addressed to Ms. Sidun at her mother's former address, when Ms. Sidun's true address was listed on the deed, satisfied neither Michigan's statutory scheme nor the minimum requirements of due process. As discussed above, the County was required by statute to consult the deed and mail notice to an address reasonably calculated to reach Ms. Sidun. Due process likewise required the County to send notice reasonably calculated to reach each property owner whose address could be readily ascertained. The County cannot excuse its failure to do so by arguing that the mail sent to Ms. Krist's address was reasonably calculated to reach Ms. Sidun. Ms. Sidun never lived at the Warren address to which the notices were sent and none of the County's records indicated otherwise. Simply put, sending notice addressed to A at the last known address of B is not reasonably calculated to provide notice to A when the government knows or has

reason to believe that A lives at a different address from B. That is particularly so when the government has A's last known address at hand but simply chooses not to use it.

The Supreme Court has repeatedly held that notice fails to satisfy due process where, as here, the government either knows or should know that it has sent mailed notice to an address other than the one best calculated to reach the recipient. In *Robinson v Hanrahan*, 409 US 38, 93 S Ct 30, 34 L Ed 2d 47 (1972), for example, the State initiated proceedings to forfeit Ms. Robinson's car while he was in jail awaiting trial. Instead of mailing the forfeiture notice to the jail, the State mailed the notice to Mr. Robinson's home address. *Id.* at 38. As a result, Mr. Robinson did not receive notice until the proceeding was over. *Id.* at 39. The Court held that the State had failed to comply with *Mullane* because "the State knew that [Mr. Robinson] was not at the address to which the notice was mailed." *Id.* at 40. The Court found that "[u]nder these circumstances, it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise [Mr. Robinson] of the pendency of the forfeiture proceedings." *Id.; see also Covey v Town of Somers*, 351 US 141, 147, 76 S Ct 724, 100 L Ed 1021 (1956) (notice by mail, posting, and publication inadequate where state knew its notice efforts were ineffective due to owner's incompetency). Here, as in *Robinson*, because the County knew that Ms. Sidun lived at a different address, and had that address at hand, it was not reasonable for the County to sell Ms. Sidun's house without so much as mailing a single letter to her at that address.

In light of *Jones v Flowers*, the County's reliance on notice mailed to the wrong address is flawed for another, independent reason. Once the County's certified letters were returned unclaimed, the County had an obligation—both under Michigan statute (MCL 211.78i(4)) and under due process—to check its records and resend the letters to Ms. Sidun at the correct address. *See Jones*, 547 US at 230 ("[W]hen a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house.") (citation omitted). Even if the County had "made a reasonable calculation of how to reach" Ms. Sidun in the first place (which, unlike the State in *Jones*, it did not), "it had good reason to suspect when the notice was returned that [Ms. Sidun] was 'no better off than if the notice had never been sent.'" *Jones*, 547 US at 230 (emphasis added) (quoting *Malone v Robinson*, 614 A2d 33, 38 (DC, 1992)).

2. In addition to the returned letters sent to Ms. Krist's old address, the Court of Appeals concluded that the County's efforts were adequate because the County relied on notice by publication and posting and tried unsuccessfully to reach the occupants of the property. 2006 WL 2355506, at *5. The U.S. Supreme Court, however, has consistently held that such methods are an adequate means of notice only when it is impossible or impractical to mail notice to or personally serve the owner—such, as for example, "when the name, interests and address of persons are unknown." *New York v New York, NH & HR Co,* 344 US 293, 296, 73 S Ct 299, 97 L Ed 333 (1953). "No such excuse exist[s]" here. *Id.*

Jones reiterated the longstanding rule that "notice by publication is adequate only where 'it is not reasonably possible or practicable to give more adequate warning.'" *Jones*, 547 US at 237 (quoting *Mullane*, 339 US at 317); *accord Mennonite*, 462 US at 798 (holding that if a mortgagee of a property subject to a tax sale "is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service"); *Schroeder v New York*, 371 US 208, 212-13, 83 S Ct 279, 9 L Ed 2d 255 (1962) (observing that "[n]otice by publication is a poor and sometimes a hopeless substitute" for mailed notice and, accordingly, "is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."). Similarly, in *Greene v Lindsay*, 456 US 455, 102 S Ct 1874, 72 L Ed 2d 249 (1982), the Court held that notice of eviction proceedings by means of posting the subject property was constitutionally inadequate where service by mail to the tenants was available as an additional, more reliable measure.

Here, because the County can articulate no reason why it was not practicable to send notice to Ms. Sidun's last known address, the steps taken by the County—publication, posting, and attempted notice to the occupants—were not constitutionally adequate substitutes for mailed notice. *See New York, NH & HR Co,* 344 US at 296 (failure to mail notice to last known address violated due process where there was no "excuse" such as a lack of address information, and "there was at least as much reason to serve a mailed notice" on one interested

party as another); *Mennonite*, 462 US at 799 (explaining that "publication and posting" are inadequate because, unlike mailed notice, "they are designed primarily to attract prospective purchasers to the tax sale"). In this case, "[t]he County's use of these less reliable forms of notice is not reasonable where, as here, 'an inexpensive and efficient mechanism such as mail service [was] available.'" *Id.*, 462 US at 799 (quoting *Greene*, 456 US at 455)).

3. One final justification of the County's procedures can be easily dispensed with. On remand from this Court for reconsideration in light of *Jones v Flowers*, the Court of Appeals reiterated its previous decision concluding that the notice to Ms. Sidun was adequate and appended a brief discussion of *Jones*. 2006 WL 2355506, at *5. The Court of Appeals read *Jones* as tolerating the County's notice procedures based on the Supreme Court's discussion of the reasonable follow-up steps that the Arkansas Land Commissioner could have taken in response to the return of unclaimed certified letters—resending the notice by regular mail to Jones's last known address, posting notice on the front door, addressing mail to "occupant," or some combination of these methods or others. *Jones*, 547 US at 235. Specifically, the Court of Appeals read *Jones* as standing for the proposition that "[w]here mailed notice is returned undelivered, the government need not consult other government records, or a local phonebook, to find a better address." 2006 WL 2355506, at *5.

But in *Jones*, the Court rejected the suggestion that the Commissioner, under the circumstances of that case, "should have searched for [Jones's] new address in the Little Rock phonebook and other government records such as

income tax rolls" because (1) there was no reason to believe that the address to which the mailed notice was sent—an address that was indisputably Jones's last known address according to the tax records—was not the correct address, and (2) an "open-ended search for a new address" would impose "burdens on the State significantly greater than the several relatively easy options" outlined by the Court, such as sending regular mail to Jones's last known address. 547 US at 235-36. Neither reason justifies Wayne County's failure to send notice to Ms. Sidun's last known address.

Here, unlike in *Jones*, the initial notice was *not* sent to the property owner's last known address. And there *was* good reason to believe that the address to which the notice was sent was not the correct address because the very document that the County consulted to determine Ms. Sidun's ownership interest—the deed to the property itself—listed a different address for her. Ms. Sidun, moreover, does not suggest that the County should have engaged in an "open-ended search" of the phonebook or far-flung government records. Rather, the County should simply have followed the procedures required by the applicable Michigan statute to determine an address reasonably calculated to reach Ms. Sidun and to conduct a further inquiry because there was reason to believe that the notice provided was deficient.

A glance at the deed to the property would have revealed the County's error, and a 37-cent postage stamp would have been the cost of fixing it. When there is as much at stake as there is here, and when the government has reason

to believe that its efforts at notice have failed, that is not too much to ask. *See Jones*, 547 US at 239.

IV. THE COURT SHOULD REMAND THIS CASE TO ALLOW MS. SIDUN TO SEEK APPROPRIATE REDRESS FOR THE VIOLATION OF HER CONSTITUTIONAL RIGHTS, INCLUDING REMEDIES UNDER 42 USC 1983 AND 1988.

Because Wayne County deprived Ms. Sidun of her property without due process of law, this Court should remand to the trial court so that Ms. Sidun can seek a remedy for the violation of her rights under both the U.S. and Michigan Constitutions.

Ms. Sidun's complaint sought relief for the violation of her right to constitutional due process on the basis of the remedy provisions of General Property Tax Act (GPTA), MCL 211.1. Under that statute, a property owner could seek redress for a violation of due process "under the state constitution of 1963 or the constitution of the United States," but only for money damages. MCL 211.78(2). The Act specifically withdrew from the trial court the jurisdiction to set aside a foreclosure. *See* MCL 211.78*l*(1), 211.78k(6).

While this case was on appeal, this Court struck down those provisions of the GPTA as applied to property owners who have been denied due process in tax foreclosure proceedings. *In re Petition by Treasurer of Wayne County*, 478 Mich at 4, 732 NW2d at 459. Specifically, the Court concluded that the GPTA provision withdrawing jurisdiction over an action seeking to set aside a foreclosure was unconstitutional because it "insulate[d] violations of the Due Process Clause of the United States Constitution and of the Michigan Constitution from judicial review

and redress, thereby completely denying the property owner procedural due process." *Id.*

In light of the Court's decision in *In re Petition by Treasurer of Wayne County*, Ms. Sidun is no longer limited to a claim for damages under the GPTA, but is entitled to request an order setting aside the foreclosure and other appropriate relief. That relief includes remedies other than money damages available for the redress of her constitutional rights under 42 USC 1983, including attorneys' fees under 42 USC 1988. Section 1983 does not create substantive rights; rather, it authorizes state or federal courts to grant relief for violations of federal constitutional rights by state, county, or municipal officers. *Chapman v Houston Welfare Rights Org*, 441 US 600, 617, 99 S Ct 1905, 60 L Ed 2d 508 (1979); *see also Gomez v Toledo*, 446 US 635, 640, 100 S Ct 1920, 64 L Ed 2d 572 (1980) ("By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.").

State and federal appellate courts have uniformly held that where a plaintiff alleges a violation of his or her federal constitutional rights, that plaintiff is entitled to relief under sections 1983 and 1988, even when the plaintiff has not explicitly cited either statute in the complaint. *See, e.g., Goss v City of Little Rock, Ark*, 151 F3d 861, 864-65 (CA8, 1998) (holding that property owner who sought remedy for violation of due process, although he "did not cite § 1983 in his complaint or in any

argument before the District Court," had properly brought a "proceeding to enforce § 1983" and could seek relief including attorneys' fees under § 1988); *Americans United for Separation of Church & State v School Dist of Grand Rapids*, 835 F2d 627, 631 (CA6, 1987) ("[S]ection 1983 is concerned with the substance of the prevailing party's action, rather than the form in which it is presented. The mere failure to plead or argue reliance on § 1983 is not fatal to a claim for attorney's fees if the pleadings and evidence do present a substantial Fourteenth Amendment claim for which § 1983 provides a remedy, and this claim is related to plaintiffs' ultimate success."); *Haley v Pataki*, 106 F3d 478, 481-82 (CA2, 1997); *Thorstenn v Barnard*, 883 F2d 217 (CA3, 1989); *Cabrera v Martin*, 973 F2d 735, 744 (CA9, 1992) ("[A] plaintiff [must] plead the facts underlying their § 1983 claim, not the statute itself"). Every state court of last resort to have reached the question has arrived at the same conclusion. *See Fairbanks Correctional Center Inmates v Williamson*, 600 P2d 743, 747 (Alas, 1979); *Gumbhir v Kansas State Bd. of Pharmacy*, 646 P2d 1078, 1084-85 (Kan, 1982); *LK v Gregg*, 425 NW2d 813, 818-820 (Minn, 1988); *Marx v Truck Renting & Leasing Ass'n*, 520 So2d 1333, 1346 (Miss, 1988); *Bloomingdale's By Mail Ltd v Huddleston*, 848 SW2d 52 (Tenn, 1992); *Boldt v State*, 305 NW2d 133, 143 (Wis, 1981).

Accordingly, because the County has violated Ms. Sidun's right to due process of law under both the United States and Michigan Constitutions, this Court should remand to the circuit court to permit Ms. Sidun to seek all appropriate relief to redress that violation, including relief under section 1983 and 1988.

CONCLUSION

Because the County deprived Ms. Sidun of her property without due process of law, this Court should reverse the Court of Appeals and remand this case to allow Ms. Sidun to seek all appropriate relief, including remedies under 42 USC 1983 and 1988.

Respectfully submitted,

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APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS

Article 1, section 17 of the Michigan Constitution of 1963 provides:

> "No person shall be . . . deprived of life, liberty or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

MCL 211.78(2) provides:

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

MCL 211.7 provides:

> Sec. 78c. Except as otherwise provided in section 79 for certified abandoned property, not later than the February 1 immediately succeeding the date that unpaid taxes were returned to the county treasurer for forfeiture, foreclosure, and sale under section 60a(1) or (2) or returned to the county treasurer as delinquent under section 78a, the county treasurer shall send a notice by certified mail, return receipt requested, to the person to whom a tax bill for property returned for delinquent taxes was last sent and, if different, to the person identified as the owner of property returned for delinquent taxes as shown on the current records of the county treasurer and to those persons identified under section 78e(2)
>
> Sec. 78f. (1) Except as otherwise provided in section 79 for certified abandoned property, not later than the February 1

immediately succeeding the date that unpaid taxes were returned to the county treasurer for forfeiture, foreclosure, and sale under section 60a(1) or(2) or returned to the county treasurer as delinquent under section 78a, the county treasurer shall send a notice by certified mail, return receipt requested, to the person to whom a tax bill for property returned for delinquent taxes was last sent and, if different, to the person identified as the owner of the property returned for delinquent taxes as shown on the current records of the county treasurer and to those persons identified under section 78e(2).

MCL 211.78i provides:

(1) Not later than May 1 immediately succeeding the forfeiture of property to the county treasurer under subsection g, the foreclosing governmental unit shall initiate a search of records identified in subsection (6) to identify the owners of a property interest in the property who are entitled to notice under this section of the show cause hearing under section 78j and the foreclosure hearing under section 78k . . . .

(2) The foreclosing governmental unit . . . shall determine the address reasonably calculated to apprise those owners of a property interest of the pendency of the show cause hearing . . . and the foreclosure hearing . . . and shall send notice . . . to those owners ... by certified mail, return receipt requested, not less than 30 days before the show cause hearing. . . . . The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States.

* * *

(6) The owner of a property interest is entitled to notice under this section of the show cause hearing under section 78(j) and the foreclosure section of 78(k) if that owners interest was identifiable by reference to any of the following sources before the date that the county treasurer records that the certificate required under 78(g)(2):

(a) Land title records in the office of the county register of deeds.
(b) Tax records in the office of the county treasurer.
(c) Tax records in the office of the local assessor.
(d) Tax records in the office of the local treasurer.