STATE OF MICHIGAN
IN THE SUPREME COURT

MORNINGSIDE COMMUNITY ORGANIZATION, a Michigan non-profit corporation; HISTORIC RUSSELL WOODS-SULLIVAN AREA ASSOCIATION, a Michigan non-profit corporation; OAKMAN BOULEVARD COMMUNITY ASSOCIATION, a Michigan non-profit corporation; NEIGHBORS BUILDING BRIGHTMOOR, a Michigan non-profit corporation; WALTER HICKS; SPIRLIN MOORE; DEWHANNEA FOX; DEAUNNA BLACK; and ROBERT LEWIS, on behalf of themselves and all those similarly situated,

Plaintiffs-Appellants,

EDWARD KNAPP; JULIA AIKENS; MATTHEW MOULDS; and MICHELLE MONCRIEF, on behalf of themselves and all those similarly situated,

Plaintiffs,

v.

ERIC SABREE, in his official capacity as Wayne County Treasurer; and WAYNE COUNTY, a municipal corporation,

Defendants-Appellees,

THE CITY OF DETROIT, a municipal corporation; and THE DETROIT CITIZENS BOARD OF REVIEW, a municipal entity,

Defendants.

Supreme Court Case No.

COA Case No. 336430

Wayne County Circuit Court
Case No. 16-008807-CH (Colombo, J.)

PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL

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***Pro hac vice application to be filed with
circuit court

November 1, 2017

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ORDER APPEALED FROM AND BASIS OF JURISDICTION

Plaintiffs-Appellants seek leave to appeal the Michigan Court of Appeals' decision dated September 21, 2017, affirming the October 17, 2016 order of the Wayne County Circuit Court (Colombo, J.) granting summary disposition to Defendants Eric Sabree and Wayne County ("Wayne County Defendants" or "Defendants").

This Court has jurisdiction to consider this application pursuant to MCR 7.303(B)(1) and MCR 7.305(C)(2)(a) because Plaintiffs seek leave to appeal a decision from the Court of Appeals and because this application was filed within 42 days after entry of the Court of Appeals' decision affirming the order of the circuit court.

INTRODUCTION

This case seeks to address Wayne County's tax foreclosure crisis, the most severe in Michigan since the Great Depression. Plaintiffs—consisting of individual homeowners and neighborhood associations—challenge the Wayne County Defendants' practice of executing tax foreclosures on properties regardless of the accuracy of underlying property value assessments and the resulting tax bill. Plaintiffs allege that Defendants' tax foreclosure practice has an unjustified disparate impact on African-American homeowners, in violation of the Fair Housing Act ("FHA" or "Act"), 42 USC 3601-3619.

In ruling on the Wayne County Defendants' motion for summary disposition, the circuit court agreed with Plaintiffs that Defendants' tax foreclosure policy qualifies as prohibited conduct under the FHA and found that Plaintiffs' Complaint adequately stated a claim. However, the circuit court granted Defendants' motion under MCR 2.116(C)(4) for lack of subject-matter jurisdiction, ruling that the Michigan Tax Tribunal ("Tax Tribunal" or "Tribunal") has exclusive jurisdiction over Plaintiffs' claim, which the court construed as a challenge to the county's duty to equalize tax assessments under Michigan law. Plaintiffs appealed the circuit

court's decision. The Court of Appeals affirmed the lower court's order, holding that Plaintiffs' claim falls within the jurisdiction of the Tribunal because it requires factual determinations regarding assessments and equalization.

The Court of Appeals' decision was contrary to federal and Michigan law. First, the court misinterpreted the statutory text of the FHA, which expressly grants Plaintiffs the right to file their claim by way of a "civil action" in a "State court" and is not merely an expression of concurrent federal and state jurisdiction. Requiring Plaintiffs to present their claim to the Tax Tribunal, which is an administrative agency and not a "court," undermines Plaintiffs' ability to enforce their federally-guaranteed rights. Second, the court erred in ruling that Michigan law requires Plaintiffs to present their FHA claim to the Tax Tribunal. Plaintiffs' claim falls outside the scope of the Tribunal's limited jurisdiction, turns on issues that exceed its narrow expertise, and could not be resolved or adjudicated by that administrative body. Michigan courts have broad powers, including the power to hear federal fair housing claims, and cannot shut the courthouse door to Plaintiffs' claim under the FHA simply because it relates to an issue of taxation.

In the 2017 foreclosure auctions, the Wayne County Defendants sold the homes of two named plaintiffs in this case. Due to Defendants' discriminatory foreclosure practice, tens of thousands of predominantly African-American homeowners throughout Wayne County have and will continue to face eviction due to their inability to pay unlawfully excessive property taxes. Through this case, Plaintiffs seek to regain title to their homes, but have been unable to litigate their claim on the merits while this jurisdictional matter remains unresolved. If the Court of Appeals' decision is not reversed by this Court, Plaintiffs will be entirely foreclosed from redressing Defendants' discriminatory conduct in any forum. Accordingly, Plaintiffs

respectfully request that this Court immediately grant leave to appeal or, in lieu of granting leave, peremptorily reverse the Court of Appeals' decision, reverse the circuit court's grant of summary disposition to the Wayne County Defendants, and remand.

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that the circuit court lacked subject-matter jurisdiction over Plaintiffs' FHA claim challenging discriminatory tax foreclosures, when the FHA provides an express right to file claims in state court and Plaintiffs' claim does not fall within the exclusive jurisdiction of the Tax Tribunal?

Plaintiffs-Appellants say: Yes
Defendants-Appellees say: No

STATEMENT OF FACTS AND PROCEEDINGS BELOW

I. Wayne County Defendants' Discriminatory Tax Foreclosure Practice

Plaintiffs filed their Complaint in Wayne County Circuit Court on July 13, 2016. In Count I, the subject of this appeal, Plaintiffs allege that the Wayne County Defendants' practice of proceeding with tax foreclosures regardless of the accuracy of the underlying tax assessments has a disproportionately adverse impact on African Americans, in violation of the FHA.[1]

Property taxes in Michigan are governed by the state Constitution, the General Property Tax Act, the Tax Tribunal Act, and local procedures. The Michigan Constitution requires property taxes to be based on a home's "true cash value." Const 1963, art 9, § 3. Pursuant to the General Property Tax Act, cities must perform annual assessments to determine the true cash value of properties and compile an assessment roll listing the assessed value of each property in

[1] Count II of Plaintiffs' Complaint, which is not at issue in the instant appeal, alleges that the unduly burdensome process for receiving a poverty exemption for property taxes and the general misadministration of the poverty exemption application process by the City of Detroit and Detroit Citizens Board of Review violates Plaintiffs' constitutional right to due process.

the city. MCL 211.10(1). After the cities complete their assessments, the county board of commissioners is required to review each city's assessments and make adjustments for any city-wide errors, a process known as "equalization." MCL 211.34(2). The county then certifies the assessment rolls. *Id.*

Generally, property owners in Michigan receive their tax assessments at the end of February each year. MCL 211.24c(1) and (4). Pursuant to the Tax Tribunal Act, when there is an assessment dispute regarding property valuation or an issue regarding equalization, the property owner must first file a petition with the Board of Review to protest the issue. MCL 205.735. In several cities in Wayne County, including Detroit, the taxpayer's petition must be made to the board before the second Monday of March for matters relating to the current assessment year.[2] Otherwise, the taxpayer loses the ability to petition the board regarding that year's assessment. Exhibit 1, State Tax Commission's Board of Review Handbook, pp 8-9. If a taxpayer receives a decision from the board that they wish to appeal, they must file a written petition to the Tax Tribunal on or before July 31 of the same tax assessment year. MCL 205.735a(6).

When a homeowner fails to pay property taxes, the county pays the city the full amount of the unpaid taxes, thereby obtaining the right to collect the unpaid taxes from the homeowner. MCL 211.55 and MCL 211.78a(2). For taxes that remain unpaid after three years, Michigan law permits the county to foreclose upon the home and sell it at auction, giving the purchaser the right to evict the homeowner. MCL 211.78h and MCL 211.78m.

[2] MCL 211.30(4); City of Detroit, *Property Assessment Board of Review Process* <http://www.detroitmi.gov/Government/Boards/Property-Assessment-Board-of-Review-Process> (accessed October 30, 2017).

Despite these constitutional and statutory requirements, cities within Wayne County, including the City of Detroit, failed to perform the mandated assessments of property values for years. Complaint, ¶ 35. The true cash value of homes in Wayne County fell precipitously during and after the financial crisis of 2008. In Detroit, for instance, the average sales price for homes fell 80 percent between 2008 and 2013, but the city did not reduce the assessed value of homes in the city to reflect this change. *Id.* at ¶¶ 4, 50; Exhibit 2, Affidavit of Gary Sands, ¶ 45. As of 2010, some homes were over-assessed by as much as 24 times their actual value, and lower-value homes were more likely to be over-assessed than higher value homes. Exhibit 2, ¶ 36. Preliminary evidence shows that these patterns continued in subsequent tax years, as average assessments lagged behind the declines in property values. *Id*. at ¶¶ 45-47.

The failure of Detroit—and other municipalities in Wayne County—to meet their statutory obligations to properly assess property values on an annual basis is beyond dispute. Indeed, it has been widely acknowledged by city and county officials, including Wayne County Treasurer Eric Sabree. In a 2015 radio interview, Mr. Sabree stated, "It is true that the cities didn't keep up with the property value . . . the city, not just Detroit but all the cities—didn't keep up with their assessments. They didn't reflect the true market value." Complaint, ¶ 35. Nonetheless, homeowners in the county are, and were, taxed as if their homes were worth many times their actual true cash values. *Id.* at ¶ 4; Exhibit 2, ¶¶ 34, 37, 46, 50.

Despite specific knowledge that the homes were over-assessed and over-taxed in violation of Michigan law, the Wayne County Defendants have foreclosed on, seized, and sold homes within their jurisdiction for unpaid property tax bills. It is estimated that the Wayne

County Treasurer foreclosed on more than 100,000 homes between 2011 and 2015.[3] As recently as 2015, Detroit had one of the highest property-tax foreclosure rates in the nation, with 3,949 foreclosures per 100,000 people.[4] In 2016, the Wayne County Defendants foreclosed on thousands of homes for outstanding tax bills from 2013 and earlier, offering more than 14,000 properties at the annual tax foreclosure auctions that were held last fall.[5] In the 2017 foreclosure cycle, based on 2014 property tax bills, the Wayne County Defendants offered close to 7,000 properties in the annual auctions.[6] During these auctions, Defendants sold the home of Robert Lewis, one of the named plaintiffs for Count I of this action, and the home of Matthew Moulds, one of the named plaintiffs for Count II.[7] Many more homeowners narrowly escaped foreclosure sale only by entering payment plans that they are unlikely to be able to continue to afford. Exhibit 3, Affidavit of Deaunna Black, ¶¶ 11, 15-17; Exhibit 4, Affidavit of Walter Hicks, ¶¶ 12-18. This is because participants in the payment plans must pay all tax debts owed, including those based on illegal over-assessments, in addition to significant interest and penalties. Complaint, ¶ 69.

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[3] Bernadette Atuahene, The New York Times, *Don't Let Detroit's Revival Rest on an Injustice* <https://www.nytimes.com/2017/07/22/opinion/sunday/dont-let-detroits-revival-rest-on-an-injustice.html> (accessed October 26, 2017).

[4] Amy Dobson, The Washington Post, *Study: High assessments might have contributed to Detroit's foreclosure crisis* <https://www.washingtonpost.com/news/where-we-live/wp/2017/10/10/study-high-assessments-might-have-contributed-to-detroits-foreclosure-crisis/?utm_term=.19a36868309b> (accessed October 26, 2017).

[5] Complaint, ¶ 41; Kirk Pinho, Crain's Detroit, *Auction numbers swamp county treasurer's office* <http://www.crainsdetroit.com/article/20161016/NEWS/161019897/auction-numbers-swamp-county-treasurers-office> (accessed October 30, 2017).

[6] Loveland Technologies, *2017 Wayne County Tax Foreclosure Auction Update* <https://detroit.makeloveland.com/#b=neighborhoods> (accessed October 30, 2017).

[7] Loveland Technologies, *Preliminary 2017 Wayne County Tax Foreclosure Auction Results* <https://taxforeclosure.sitecontrol.us/m/preliminary-2017-wayne-county-tax-foreclosure-auction-results#b=neighborhoods> (accessed October 31, 2017).

Defendants' foreclosure practice has a substantial and unjustified discriminatory effect on African-American homeowners. Through statistical analyses of public data on foreclosed properties in Wayne County, Plaintiffs have determined that there are significant racial disparities in the rate at which owner-occupied homes in the county that have been foreclosed on are at risk of foreclosure sale due to unpaid property taxes. Exhibit 5, Expert Report of Allan Parnell, p 3. The analyses demonstrate that owner-occupied homes in Wayne County Census blocks where a majority of homeowners are African-American are far more likely to be at risk of tax foreclosure sale than owner-occupied homes in Wayne County Census blocks where a majority of homeowners are non-African-American. *Id.* at 4. For example, in February 2016, owner-occupied homes in Census blocks in Wayne County where a majority of the homeowners were African-American were 10 times more likely to be at risk of foreclosure sale than owner-occupied homes in Census blocks in the county where a majority of homeowners were non-African-American. *Id.* at 28. Similarly, in July 2016, even after many homeowners entered into payment plans with the Wayne County Treasurer, owner-occupied homes in Census blocks in Wayne County where a majority of the homeowners were African-American were still 8.4 times more likely to be at risk of foreclosure sale than owner-occupied homes in Census blocks in the county where a majority of homeowners were non-African-American. *Id.* at 23. Thus, because of Defendants' tax foreclosure practice, thousands of disproportionately African-American individuals and families have lost and will continue to lose their homes because of unlawfully high property taxes, in violation of the FHA. Complaint, ¶ 1. Absent a court order directing the Wayne County Defendants to change their foreclosure practice, these patterns are expected to continue.

In sum, Plaintiffs have demonstrated that Wayne County Defendants' knowing decision to foreclose and auction properties based upon inaccurate underlying tax debt has a disproportionate impact on African Americans in violation of the FHA. Indeed, the circuit court acknowledged that Plaintiffs' Complaint adequately stated a claim because Defendants' tax foreclosure practice qualifies as prohibited conduct under the FHA. October 17, 2016 Opinion, pp 16-17. Thus, if the jurisdictional question at issue is resolved in Plaintiffs' favor, they are likely to prevail on their FHA claim.

Plaintiffs seek declaratory and injunctive relief, which would require the Wayne County Defendants to take all appropriate steps to correct their discriminatory practice. Complaint, pp 48-49. Ultimately, Plaintiffs seek to regain title to and return to their homes. In fact, on August 12, 2016, Plaintiffs filed a motion for a preliminary injunction to halt the tax foreclosure auctions of owner-occupied homes scheduled for September and October 2016, so that they and similarly-situated homeowners could remain in their homes pending a final determination of their rights under the FHA. As explained below, that motion was denied.

II. The Proceedings Below

On August 9, 2016, the Wayne County Defendants filed a motion for summary disposition of Plaintiffs' FHA claim pursuant to MCR 2.116(C)(8) and (C)(10). Among other arguments, the Wayne County Defendants contended that the Tax Tribunal has exclusive jurisdiction over the case because the dispute relates to property assessments and because the Tribunal "has jurisdiction to hear claims that individual assessments were performed in a discriminatory manner and/or in violation of constitutional rights." Motion for Summary Disposition by Defendants Eric Sabree and Wayne County, p 3. In response, Plaintiffs argued that the Tax Tribunal lacks jurisdiction over this case based on (1) the statutory text of the FHA, which creates an express private right of action for enforcement in state court, and (2) the

inapplicability to this case of Michigan law granting exclusive jurisdiction over certain tax matters to the Tribunal. Plaintiffs' Opposition to Wayne County Defendants' Motion for Summary Disposition, pp 17-18.

On September 2, oral argument was held before the circuit court on the Wayne County Defendants' motion for summary disposition and Plaintiffs' motion for a preliminary injunction. At the hearing, the court denied Plaintiffs' motion for a preliminary injunction from the bench and took the Wayne County Defendants' motion for summary disposition under advisement. September 2, 2016 Order Denying Plaintiffs' Motion for a Preliminary Injunction; September 2, 2016 Order on Wayne County Defendants' Motion for Summary Disposition; September 2, 2016 Hearing Transcript, pp 90, 93, 95.

On October 17, the court granted the Wayne County Defendants' motion under MCR 2.116(C)(4). In its opinion, the court agreed with Plaintiffs that the Wayne County Defendants' tax foreclosure policy, as detailed in the Complaint, qualifies as prohibited conduct under the FHA. October 17, 2016 Opinion, p 16. The court also found that Plaintiffs' Complaint adequately stated a claim under the FHA. *Id.* at 17. The court further determined that under both Michigan and federal standing law, the allegations set forth in the Complaint establish that the neighborhood organizations have standing to sue both on behalf of their members and in their own capacities. *Id.* at 18-19. And the court's opinion rejected the Wayne County Defendants' contentions that Plaintiffs' FHA claim is barred by the Tax Injunction Act and by the doctrine of res judicata. *Id.* at 19-21.

However, the court found it lacked subject-matter jurisdiction over Plaintiffs' FHA claim. Relying on *Johnson v Michigan*, 113 Mich App 447, 459-60; 317 NW2d 652 (1982), the court ruled that the Tax Tribunal has exclusive jurisdiction over Plaintiffs' claim, which the court

construed as a challenge to the county's equalization process under MCL 211.34(2). October 17, 2016 Opinion, p 7. The court further reasoned that under *Haywood v Drown*, 556 US 729; 129 S Ct 2108; 173 L Ed 2d 920 (2009), a case involving a claim under the Federal Civil Rights Act, 42 USC 1983 ("Section 1983"), Michigan courts could decline jurisdiction over a federal cause of action because MCL 205.731 is a "neutral rule of judicial administration." October 17, 2016 Opinion, p 11.

On November 7, Plaintiffs moved for reconsideration of the circuit court's decision with respect to its jurisdiction, pursuant to MCR 2.119(F)(3). Plaintiffs argued that the court erred by failing to consider the statutory text of the FHA, which expressly grants Plaintiffs the right to "commence a civil action" in a "State court." Plaintiffs' Motion for Reconsideration, pp 8-10. Because the Tax Tribunal is an administrative forum and not a "court," it does not have exclusive jurisdiction over Plaintiffs' claim. *Id.* at 10-14.

On December 15, the court denied Plaintiffs' motion for reconsideration. The court disagreed with Plaintiffs' interpretation of the statutory text of the FHA, holding that the language cited by Plaintiffs simply expresses the existence of concurrent state and federal jurisdiction. December 15, 2016 Opinion, p 3. According to the court, this concurrent jurisdiction does not require a state court to entertain a claim under a federal statute when it is prohibited from doing so due to a neutral state rule regarding the administration of the courts. *Id.* at 5, citing *Howlett By and Through Howlett v Rose*, 496 US 356, 372; 110 S Ct 2430; 110 L Ed 2d 332 (1990). Thus, the court concluded, because Michigan law provides that the Tax Tribunal has exclusive jurisdiction over matters challenging the intra-county equalization process, and because the court deemed this law to be a neutral rule of judicial administration, it has no jurisdiction over Plaintiffs' claim. *Id.* at 6.

On January 5, 2017, Plaintiffs filed an application for interlocutory leave to appeal the circuit court's order granting summary disposition to the Defendants and moved for immediate consideration and peremptory reversal, or, in the alternative, to expedite the appeal. The Court of Appeals denied peremptory reversal, but granted the application and the motion to expedite. Briefing on the appeal was completed on May 8, and oral argument was heard on August 1.

On September 21, the Court of Appeals affirmed the circuit court's order. First, the court held that the Tax Tribunal has exclusive jurisdiction over Plaintiffs' claim. September 21, 2017 Opinion, p 2. While acknowledging that Plaintiffs are not seeking a refund of taxes paid or asking the circuit court to enjoin Defendants' equalization process, the court found that Plaintiffs' FHA claim requires factual determinations as to whether the properties were over-assessed and whether Wayne County complied with its equalization duty. *Id.* at 3-4. The court also rejected Plaintiffs' arguments under the FHA, finding that the statutory language of the Act merely expresses concurrent federal and state court jurisdiction. *Id.* at 4. It also noted that a state court is not required to hear a claim under a federal statute when it is prohibited from doing so because of a neutral state rule regarding the administration of the court, although it did not expressly hold that the Michigan law is a neutral rule. *Id.*

Plaintiffs now seek reversal of the Court of Appeals' decision and the circuit court's order dismissing their FHA claim for lack of subject-matter jurisdiction.

GROUNDS FOR GRANTING THE APPLICATION

The issues presented by this application are of significant public interest and involve legal principles of major significance to Michigan jurisprudence. MCR 7.305(B)(2)-(3). Additionally, the Court of Appeals' decision in this matter conflicts with other appellate decisions from that court. *Id.* at (B)(5).

First, the issues presented by this application are of significant public interest, which the Court of Appeals recognized by granting Plaintiffs' application for interlocutory review and request for expedited consideration of the appeal. *Id.* at (B)(2). As a result of Defendants' foreclosure practice, tens of thousands of disproportionately African-American individuals and families have lost and will continue to lose their homes because of unlawfully high property taxes. Complaint at ¶ 1. As noted above, Wayne County has foreclosed on more than 100,000 homes since 2011, and has auctioned more than 21,000 homes since this lawsuit was filed, including two homes owned by named plaintiffs in this case. The next cycle of foreclosure-seizure-sale-eviction by the Wayne County Defendants will begin in February 2018 based on 2015 tax bills, and will continue to impact Wayne County homeowners unless and until the practice challenged by this lawsuit is enjoined.

The far-reaching effects of Defendants' foreclosure practice are also a matter of public interest. Tax foreclosures have a destabilizing effect on neighborhoods throughout Wayne County, as many of the sold properties in each neighborhood become nuisances and contribute to difficult-to-eradicate blight.[8] For example, when homeowners in the Detroit neighborhood of Russell Woods have been evicted from homes sold in tax foreclosure auctions, many of the homes have remained unoccupied after the auctions. Exhibit 7, Affidavit of Errol Jennings, ¶ 14. These homes have then been prime targets for home strippers, who remove the fixtures, wiring, plumbing, and other valuable elements of a home in as little as a day. *Id.* at ¶ 10. After a house in Russell Woods is stripped, it becomes a magnet for squatters and criminal activity. *Id.*

[8] Exhibit 6, Lincoln Institute of Land Policy, *Detroit and the Property Tax: Strategies to Improve Equity and Enhance Revenue*, p 11, <https://www.lincolninst.edu/sites/default/files/pubfiles/detroit-and-the-property-tax-full_0.pdf> (accessed October 26, 2017).

If property is purchased through a tax foreclosure auction by the Detroit Land Bank, the City of Detroit, or investors who do not live, interact, or participate in the community, it is often neglected. *Id.* Homes that remain vacant quickly fall into visible disrepair, leading to depressed property values for the rest of the neighborhood. *Id.* at ¶¶ 11-12. The more Russell Woods homes that are sold at the fall foreclosure auctions each year—and subsequently allowed to fall into disrepair—the more expensive, difficult, and burdensome it is for the remaining Russell Woods residents to preserve the character of their community. *Id.* at ¶ 15. Similar issues have affected and distressed the neighborhoods of Plaintiffs Neighbors Building Brightmoor, MorningSide Community Organization, and Oakman Boulevard Community Association. Exhibit 8, Affidavit of Cynthia Dorman, ¶ 9; Exhibit 9, Affidavit of Paul Phillips, ¶ 10; Exhibit 10, Affidavit of Charles Smith, ¶ 9. In fact, the circuit court acknowledged that the neighborhood associations may suffer harm from an increase in blighted property in empty and unmaintained homes. September 2, 2016 Hearing Transcript, pp 92-93.

This case also provides this Court with the opportunity to address important legal principles of major significance to Michigan jurisprudence and to rectify a conflict between the Court of Appeals' decision in this case and other cases from that court. MCR 7.203(B)(2), (5). Under the plain language of the FHA, aggrieved persons are entitled to commence a civil action in state court. This Court should determine whether Michigan's jurisdictional rules and Tribunal procedures, as applied in this case, undermine the purposes and objectives of the FHA, and thus whether the circuit court and Court of Appeals disregarded the supremacy of federal law. The decisions below conflict with other cases from the Michigan Court of Appeals recognizing that the preemption doctrine must be applied when federal law takes precedence over a state law, as described further below. Accordingly, this Court's consideration is required to both recognize

Plaintiffs' rights under the FHA and to ensure uniformity in Michigan decisional law involving a conflict between federal and state law.

Additionally, this case presents the Court with the opportunity to clarify the proper scope of the jurisdiction and expertise of the Tax Tribunal, another legal principle of major significance to Michigan jurisprudence. MCR 7.203(B)(3). The Court of Appeals and circuit court determined that the Tribunal has exclusive jurisdiction over Plaintiffs' claim because it involves Detroit's assessment responsibilities and Wayne County's equalization duty. But this belies the true nature of Plaintiffs' claim, which challenges Defendants' practice of foreclosing on homes, selling them at auction, and ultimately evicting homeowners—not the failure to assess properties or equalize the assessments. Importantly, resolution of Plaintiffs' claim does not require individualized determinations as to whether each class member's property was over-assessed or a calculation about the precise amount of taxes any homeowner owed—issues squarely within the Tribunal's jurisdiction and expertise. Nor does Plaintiffs' claim turn on the county's failure to equalize the properties. Instead, it requires a determination as to whether African-American homeowners were disparately impacted by Defendants' foreclosure practice and whether the practice was justified under federal law. There is no indication that the Tribunal has the expertise to adjudicate a claim regarding the disparate impact of tax foreclosures. This Court should make clear that a claim does not automatically trigger the Tribunal's exclusive jurisdiction merely because it has some relationship to taxation.

For these reasons, this Court should grant leave, or peremptorily reverse, to clarify (1) that aggrieved persons under the FHA are entitled to commence an action in state court even if their claim involves issues of taxation and (2) the proper scope of the Tax Tribunal's jurisdiction

and expertise in cases alleging that tax foreclosures violate federal law by having a disparate adverse impact on African-American homeowners.

STANDARD OF REVIEW

The trial court's decision concerning a motion for summary disposition is reviewed de novo on appeal. *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016). Similarly, issues of statutory interpretation are reviewed de novo. *Highland-Howell Dev Co, LLC v Marion Twp*, 469 Mich 673, 675; 677 NW2d 810 (2004).

ARGUMENT

The Court of Appeals erred in affirming the circuit court's dismissal of Plaintiffs' FHA claim challenging discriminatory tax foreclosures for two independent reasons. First, Plaintiffs are entitled to enforce the FHA in circuit court. The statutory text of the Act expressly authorizes private parties to file a civil action in a "State court," which the Tax Tribunal is not, and requiring Plaintiffs to present their claim to the Tribunal undermines their ability to enforce their federally-guaranteed civil rights. Second, Michigan law establishes that Plaintiffs' claim does not fall within the exclusive jurisdiction of the Tax Tribunal. This Court need only find in Plaintiffs' favor on one of these two issues in order to reverse the Court of Appeals' decision.

I. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE PLAINTIFFS ARE ENTITLED TO ENFORCE THE FAIR HOUSING ACT IN STATE COURT.

The FHA was enacted to eliminate housing discrimination and residential segregation. See 42 USC 3601 ("It is the policy of the United States to provide, with constitutional limitations, for fair housing throughout the United States."); *Texas Dep't of Hous & Cmty Affairs v Inclusive Cmtys Project, Inc.*, 135 S Ct 2507, 2513; 192 L Ed 2d 514 (2015) (stating that the purpose of the FHA is "to eradicate discriminatory practices within a sector of our Nation's economy"). The statute expressly authorizes private persons to enforce its provisions by

"commenc[ing] a civil action in an appropriate United States district court or State court." 42 USC 3613(a)(1)(A); see, e.g., *Fenton v Dudley*, 761 F3d 770, 779 (CA 7, 2014) (stating that FHA claims "can, and must, be heard and remedied in [state] courts"); *Sierra v City of New York*, 528 F Supp 2d 465, 468 (SDNY, 2008) (noting that the FHA is "expressly enforceable" in state court). Private enforcement through civil litigation in court is the key means by which Congress intended the FHA to be enforced because, when enacted, the FHA "*only* provided for private enforcement" through a "civil cause of action in either State or Federal court." *Mitchell v Cellone*, 389 F3d 86, 90 (CA 3, 2004) (emphasis added). The FHA was later amended to allow plaintiffs to seek "administrative enforcement" through federal and state administrative bodies, but the right to pursue administrative enforcement does not displace the right to privately enforce the FHA through civil litigation in a state court. See *id.*

The circuit court correctly noted that Defendants' tax foreclosure policy "can be classified as prohibited conduct under Section 3604(a)" of the FHA. October 17, 2016 Opinion, p 16. It also properly found that Plaintiffs stated a claim under the FHA by "identif[ying] the Wayne County policy which allegedly results in a higher foreclosure rate among African-American homeowners in the county and alleg[ing] statistical data to support a disparate impact finding." *Id.* at 16-17. These findings notwithstanding, the court dismissed Plaintiffs' FHA claim based on its determination that, under Michigan law, the Tax Tribunal had exclusive jurisdiction over Plaintiffs' claim—an order that was erroneously affirmed by the Court of Appeals. *Id.* at 9; September 21, 2017 Opinion, pp 2, 5. Even if these courts properly construed Michigan's jurisdictional rules—and, as explained in Section II *infra*, they did not—state jurisdictional rules cannot displace Plaintiffs' right to enforce the FHA by filing a "civil action"

in a "State court," particularly where, as here, doing so would substantially undermine the FHA's enforcement provisions.

A. The FHA's Express Statutory Language Authorizes Plaintiffs to File Their Claim in Circuit Court.

The FHA's private-enforcement provision, § 3613, does not simply acknowledge the existence of concurrent federal and state jurisdiction, as the Court of Appeals and circuit court determined. September 21, 2017 Opinion, p 5; December 15, 2016 Opinion, pp 3-4. Instead, the plain language of the provision demonstrates that Plaintiffs have the right to privately enforce the FHA in Michigan state court. As the United States Supreme Court has recognized, § 3613 confers a right to "immediate judicial review" of FHA claims. *Gladstone Realtors v Vill of Bellwood*, 441 US 91, 106; 99 S Ct 1601; 60 L Ed 2d 66 (1979); *id.* at 125-26 (Rehnquist, J., dissenting) (examining the legislative history of the FHA and finding that Congress "carefully chose[] language" allowing immediate access to judicial power to individuals "directly victimized by a discriminatory housing practice"). This aligns with the general presumption that civil rights complainants should have access to the courts. In *Burnett v Grattan*, the Supreme Court noted that the "dominant characteristic of civil rights actions" is that "they belong in court." 468 US 42, 50; 104 S Ct 2924; 82 L Ed 2d 36 (1984). The right to enforce civil rights in court "exist[s] independent of any other legal or administrative relief that may be available as a matter of federal or state law" and these actions are "judicially enforceable *in the first instance*." *Id.* (emphasis added).

As a general rule of statutory construction, where the terms of a statute are unambiguous, judicial inquiry is complete. *Adams Fruit Co v Barrett*, 494 US 638, 642; 110 S Ct 1384; 108 L Ed 2d 585 (1990). Accordingly, various courts have recognized that the express language of the FHA permits plaintiffs to bypass state administrative procedures in order to enforce their rights

in court. See, e.g., *Huntington Branch NAACP v Huntington*, 689 F2d 391, 393 n 3 (CA 2, 1982) (noting that the purpose of allowing "immediate judicial review" of FHA claims would be undercut if plaintiffs were required to first exhaust state administrative remedies, quoting *Gladstone*, 441 US at 106); *Borum v Brentwood Vill, LLC*, No 16-1723 (RC), 218 F Supp 3d 1, 14 (D DC, 2016) (holding that individuals seeking relief from an imminent violation of their federal rights through the FHA are not required to proceed through state-level administrative avenues such as a local zoning commission, as this would defeat the purpose of the remedy that Congress provided through the statute); *Milsap v Cornerstone Residential Mgmt, Inc*, unpublished opinion of United States District Court for the Southern District of Florida, issued February 1, 2010 (Docket No. 05-60033-CIV), 2010 WL 427436, p *3 (recognizing that the "clear import" of the statutory language of the FHA permits plaintiffs to commence a civil action in court).

Judicial review may be accomplished only in a court, not an administrative forum. Supporting this view, one state court—after noting that § 3613 "provid[es] that '[a]n aggrieved person *may commence a civil action*'" in state court—stated that the FHA "specifically requires a lawsuit to be filed *in court* to obtain relief," rejecting the argument that proceedings before an administrative body met that requirement. *Human Dev of Erie, Inc v Zoning Hearing Bd of Millcreek Twp*, 143 Pa Cmwlth 675, 682 n 10; 600 A2d 658 (1991) (first emphasis in original, second emphasis added). Thus, the FHA explicitly grants Plaintiffs the right to enforce the statute through a civil action filed in state court.

Here, the Court of Appeals' ruling that Plaintiffs are required to bring their claim before the Tax Tribunal cannot be reconciled with the Act's clear statutory text, because the Tribunal is not a "court." Michigan law is clear that the Tax Tribunal is a "quasi-judicial agency" or

"administrative agency." See, e.g., MCL 205.721; *Wikman v Novi*, 413 Mich 617, 647; 322 NW2d 103 (1982). The Tribunal itself acknowledges that it is not a "court" and that it lacks the judicial power of a court. *Flanigan v Dep't of Treasury*, unpublished opinion of the Tax Tribunal, issued January 17, 1990 (Docket No. 120463), 1990 WL 443938, p *2.[9] Additionally, the legislative history surrounding the creation of the Tax Tribunal demonstrates that it is not, and was never intended to function as, a "court." See Exhibit 11, Proposed Final Report to the Advisory Board Michigan Tax Procedure Project, pp D-5 to D-6, citing Const 1963, art 6, §§ 1, 8 (emphasizing that the Tribunal must be formed as an administrative agency and not a "court" to avoid violating the Michigan Constitution). Indeed, neither the Court of Appeals nor the circuit court disputed Plaintiffs' contention that the Tribunal is not a court.

Accordingly, because the Tax Tribunal is a quasi-judicial administrative agency and not a court, MCL 205.721, one cannot come before it to commence a civil action as Plaintiffs have the right to do under § 3613 of the FHA. See *Tenbusch v Dep't of Civil Serv*, 172 Mich App 282, 297; 431 NW2d 485 (1988) (holding that a proceeding arising before a state administrative agency like the Tax Tribunal "is not a civil action"); MCR 2.101(B) (under the Michigan Court Rules, a "civil action" may be initiated only "by filing a complaint with a court").

B. The Circuit Court's Refusal to Accept Jurisdiction Over Plaintiffs' FHA Claim Burdens Their Federally-Guaranteed Rights.

Despite the clear statutory text of the FHA authorizing Plaintiffs to commence a civil action in state court, the Court of Appeals and circuit court determined that jurisdiction over Plaintiffs' FHA claim may be declined because the Tax Tribunal Act and its accompanying

[9] Plaintiffs cite this unpublished opinion of the Tax Tribunal because, to Plaintiffs' knowledge, there are no published opinions specifically demonstrating the Tax Tribunal's own understanding of its limited jurisdiction as relevant to the issues presented here. See MCR 7.215(C).

procedures function as a "neutral rule of judicial administration." September 21, 2017 Opinion, p 5; December 15, 2016 Opinion, pp 3, 5-6; October 17, 2016 Opinion, p 11. This is incorrect.

As explained in Section II *infra*, Plaintiffs do not agree that Michigan law vests exclusive jurisdiction over Plaintiffs' FHA claim with the Tax Tribunal. But even if it did, such a jurisdictional rule under state law cannot displace Plaintiffs' federal rights under the FHA to present their claim to a state court. Generally, state courts have a duty to enforce federal law according to their regular modes of procedure. See *Howlett*, 496 US at 367; *Claflin v Houseman*, 93 US 130, 136-37; 23 L Ed 833 (1876). Accordingly, a state court may not deny a federal right in the absence of a "valid excuse." *Howlett*, 496 US at 369, citing *Douglas v New York, NH & HR Co*, 279 US 377, 387-88; 49 S Ct 355, 356-57; 73 L Ed 747 (1929); *Mondou v New York, NH & HR Co*, 223 US 1, 58; 32 S Ct 169, 178; 56 L Ed 327 (1912). There are only two narrowly defined circumstances that give rise to a valid excuse: when Congress expressly ousts state courts of jurisdiction or when a state court refuses jurisdiction due to a neutral state rule regarding the administration of the courts. *Haywood*, 556 US at 735; *Howlett*, 496 US at 372. Neither applies here. First, there is no relevant congressional authority ousting Michigan circuit courts of jurisdiction over FHA claims; in fact, as described above, there is explicit congressional authority authorizing such claims. Second, for the reasons explained below, Tribunal procedures cannot be considered a "neutral rule of judicial administration."

The Supreme Court has made clear that a rule of judicial administration is not "neutral" if it burdens or undermines federal law. See, e.g., *Haywood*, 556 US at 739 ("A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear."); *Howlett*, 496 US at 371 (stating that "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse" for a state to decline jurisdiction over a federal claim); *Felder v*

Casey, 487 US 131, 144; 108 S Ct 2302; 101 L Ed 2d 123 (1988) (a burdening of a federal right "is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule"). In *Felder*, the Court was clear that federal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'" 487 US at 150, citing *Brown v Western R Co of Alabama*, 338 US 294, 298-99; 70 S Ct 105, 108; 94 L Ed 100 (1949); see also *Howlett*, 496 US at 372 (citing *Felder* for the proposition that states "may apply their own neutral procedural rules to federal claims unless those rules are preempted by federal law"). A state rule burdens or undermines federal law—and is thus nullified—if the two conflict. See *Fid Fed Sav & Loan Ass'n v de la Cuesta*, 458 US 141, 153; 102 S Ct 3014; 73 L Ed 2d 664 (1982). A conflict arises when (1) "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc v Paul*, 373 US 132, 142-43; 83 S Ct 1210; 10 L Ed 2d 248 (1963); or (2) when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v Davidowitz*, 312 US 52, 67; 61 S Ct 399; 83 L Ed 581 (1941).

In other contexts, Michigan courts have agreed, finding that state law must often yield to federal law. In *Kraft v Detroit Entertainment, LLC*, the Court of Appeals acknowledged that "when a federal law takes precedence over a state law," "the preemption doctrine is traditionally applied." 261 Mich App 534, 543; 683 NW2d 200 (2004); see also *Abela v General Motors Corp*, 257 Mich App 513, 525; 669 NW2d 271 (2003), aff'd 469 Mich 603 (2004) (state courts are bound, under the Supremacy Clause, to enforce the provisions of federal law); *Martinez v Ford Motor Co*, 224 Mich App 247, 254; 568 NW2d 396 (1997) (noting that "[i]mplied

preemption exists where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

The Court of Appeals and circuit court disregarded these precedents. Although both courts cited *Howlett*, recognizing that a neutral rule of judicial administration may justify a state court's refusal to hear a federal claim, they failed to acknowledge that a state jurisdictional rule is not "neutral" if it burdens or undermines a federal right. September 21, 2017 Opinion, p 5; December 15, 2016 Opinion, p 5. As detailed below, requiring Plaintiffs to present their claim to the Tax Tribunal burdens their federal rights in several ways. Accordingly, the circuit court may not decline to hear their claim.

1. Requiring Plaintiffs to Present their Claim to the Tax Tribunal Conflicts with the FHA's Express Statutory Text.

First, and most plainly, requiring Plaintiffs to present their claim to the Tax Tribunal directly conflicts with the FHA's provision authorizing private parties to "commence a civil action . . . in a State court." 42 USC 3613(a)(1)(A). This clear statutory language distinguishes Plaintiffs' claim from others brought under Section 1983 or similar federal statutes that do not expressly authorize plaintiffs to bring an action in state court. The text of the FHA thus distinguishes this case from *Howlett*, a Section 1983 case that the lower courts relied on in holding that Tribunal procedures function as a neutral rule. In cases where a federal statute or regulation grants a party an unqualified right to enforce a claim in court, numerous courts have found that the conflicting state law is preempted. See, e.g., *Adams Fruit*, 494 US at 648; *Fid Fed Sav & Loan Ass'n*, 458 US at 155-56 (federal bank regulation permitting savings and loan associations to enforce contractual clause trumped conflicting state law); *Brown v Cassens Transp Co*, 675 F3d 946, 957 (CA 6, 2012) (state workers' compensation statute was preempted

by federal conspiracy statute that provided private right of action to plaintiffs), overruled in part on other grounds by *Jackson v Sedgwich Claims Mgmt Servs Inc*, 731 F3d 556 (CA 6, 2013).

The Supreme Court's decision in *Adams Fruit* illustrates the deference that states must give to federal statutes that contain an express private right of action for aggrieved persons. There, the plaintiffs, migrant farmworkers who suffered severe injuries from an automobile accident while traveling to work in their employer's van, recovered benefits pursuant to Florida's workers' compensation law and then filed suit against the employer in federal district court under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), seeking damages. 494 US at 640-41. Although AWPA contains an express private right of action for aggrieved persons, the employer argued that the plaintiffs could not recover damages under the statute because the Florida law provided that its workers' compensation remedy "shall be exclusive and in place of all other liability" to employees. *Id.* at 641. The Supreme Court rejected this argument, finding that a congressional authorization to vindicate a federal right through a private cause of action is not conditioned on the unavailability of a state remedy. *Id.* at 646. Instead, the Court noted, "it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *Id.*, quoting *NLRB v Natural Gas Utility District of Hawkins Cty*, 402 US 600, 603; 91 S Ct 1746; 29 L Ed 2d 206 (1971). "While Congress may *choose* to establish state remedies as adequate alternatives to federal relief," "federal rights should be regarded as supplementing state-created rights unless otherwise indicated." *Id.* at 646 (emphasis in original). In enacting the FHA, Congress clearly intended for aggrieved persons to be able to vindicate their fair housing rights by commencing an action in state court, regardless of any other remedies at state law, including those available under Tribunal procedures. Further, Plaintiffs are unaware of *any* case in which a state court has been allowed to refuse jurisdiction

over a federal cause of action in the face of an express statutory right of access to that court. Accordingly, requiring Plaintiffs to litigate their claim in the Tax Tribunal conflicts with their express rights under the FHA.

2. Tribunal Procedures Contravene the FHA's Two-Year Statute of Limitations.

Second, forcing Plaintiffs to present their claim to the Tax Tribunal impermissibly burdens their federal rights by changing the statutory deadline for pursuing their claim from two years after the Wayne County Defendants have foreclosed on their homes to approximately *two weeks* after receipt of their tax bill. Section 3613 of the FHA provides that aggrieved persons may commence their suit in state or federal court within "2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 USC 3613(a)(1)(A); *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 691; 599 NW2d 546 (1999). However, as described above, Tax Tribunal procedures require a property owner to file a petition with the Board of Review to dispute a tax assessment within a few weeks of receiving their annual bill, a process required before the Tribunal can acquire jurisdiction. Thus, if the Tax Tribunal does possess exclusive jurisdiction over FHA claims challenging discriminatory tax foreclosures, homeowners who were discriminated against have mere *days* from the receipt of their bill to put together a complaint and file a petition—and this must take place three *years* prior to any potential foreclosure action by the Wayne County Defendants.

This time limitation makes it effectively impossible for Plaintiffs to present their claim to the Tax Tribunal. Plaintiffs' claim, challenging the annual cycle of foreclosure-seizure-sale-eviction by the Wayne County Defendants, requires data on properties that have been foreclosed on and are at risk of foreclosure sale—which is not available until three years after the tax bills are sent to homeowners. Exhibit 5, pp 2-3. It also requires an expert analysis of the racial

composition of the Census blocks in which the homes are located and a determination of whether African-American homeowners are disparately impacted. *Id.* at 3-4. This type of claim simply could not be brought within the time allotted under Tribunal procedures to file a claim with the Board of Review after receiving an annual assessment. This burdens Plaintiffs' ability to exercise their rights under the FHA and conflicts with the statute's remedial objectives.

The Supreme Court's ruling in *Felder* makes clear that states cannot impose such restrictions on an injured party's ability to enforce their federally-guaranteed civil rights. In *Felder*, the Court considered a Wisconsin state law that imposed certain notice and filing requirements on plaintiffs in Section 1983 actions brought in state court against state or local governmental entities or officers. 487 US at 134. The Wisconsin statute required plaintiffs to provide written notice of their claim within 120 days of the alleged injury or otherwise demonstrate that the relevant government entity had actual notice of the claim and was not prejudiced by the lack of written notice. *Id*. at 136. This reduced the amount of time that aggrieved persons had to recognize that they had been deprived of a federal constitutional or statutory right from two years to four months. *Id.* at 141-42. The Court noted that many civil rights victims would fail to appreciate the compensable nature of their injuries within the four-month window and thus would be barred from asserting their federal right to recovery in state court unless they could demonstrate that the defendant had actual notice of the claim, a showing "not easily made." *Id.* at 146. The Court found that this burden, "entirely absent from civil rights litigation in federal courts," [10] was "inconsistent in both design and effect with the

[10] In *Felder*, the Court also noted its disapproval with *federal* courts' application of state statutes of limitation that truncate the amount of time a plaintiff has to file suit, because such statutes "inadequately accommodate the complexities of civil rights litigation and are thus inconsistent with Congress's compensatory aims." 487 US at 140-41, citing *Burnett*, 468 US at 50-55. This

compensatory aims of the civil rights laws," *id.* at 141, and thus the state law "must give way when a party asserts a federal right in state court." *Id.* at 151. Similarly, this Court should determine that Tribunal procedures contravene the FHA by limiting the amount of time that aggrieved persons have to file a claim.

3. The Tribunal Cannot Grant Aggrieved Persons the Full Scope of Relief Permitted Under the FHA.

Third, Tribunal procedures unlawfully limit the scope of relief that Plaintiffs can obtain for Defendants' discriminatory foreclosure practice. Under the FHA, an aggrieved person may file a lawsuit up to two years after the occurrence or termination of an allegedly discriminatory housing practice to "obtain appropriate relief," including actual and punitive damages and injunctive relief. 42 USC 3613(a)(1)(A), (c). While an award under the FHA must be proportional to the actual injury incurred, *Hetzel v Cty of Prince William*, 89 F3d 169, 173 (CA 4, 1996), there is no other express limitation on a plaintiff's right of recovery under the statute. See *Curtis v Loether*, 415 US 189, 197; 94 S Ct 1005; 39 L Ed 2d 260 (1974) ("[I]f a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount.").

But the Board of Review, by its own rules, can only make adjustments to tax bills for the current assessment year in which a homeowner files a claim. Exhibit 1, p 9 ("the March Board of Review DOES NOT have the authority to make any change to any assessments for any prior year") (emphasis in original). The Tax Tribunal has the same limited authority. See *Michigan Prop v Meridian Twp*, 491 Mich 518, 541, 543; 817 NW2d 548 (2012) (finding that the Tribunal has the same power as the Board of Review and implicitly holding that the Tribunal's authority did not extend to adjusting taxable value for years in which property owner did not file appeal);

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further demonstrates the significant burden of Tribunal procedures on Plaintiffs' rights under the FHA, regardless of whether their claim was filed in federal or state court.

Johns Family Ltd P'ship v Charter Twp Of Chesterfield, unpublished opinion of the Court of Appeals, issued August 2, 2016 (Docket No 326649), 2016 WL 4129292, p *1 (noting that the Tax Tribunal had no authority to grant plaintiffs relief for prior assessment years that were not appealed to the Board of Review in the time frame provided by Tribunal procedures); *Slade Dev, LLC v Michigan Twp of Springfield*, unpublished opinion of the Court of Appeals, issued February 11, 2014 (Docket No. 312207), 2014 WL 547615, p *3 (finding that the Tribunal only has the authority to adjust the taxable value of property in previous years for the purpose of making corrections for tax years that were previously appealed). Thus, a homeowner challenging discriminatory tax foreclosures through the Tax Tribunal cannot recover the full scope of relief contemplated by the FHA. For example, Plaintiffs' Second Amended Complaint, filed in March 2017, alleges that Defendants' discriminatory foreclosure practice continued into 2017. However, if Plaintiffs had filed a petition with the Board of Review in 2017 to challenge their 2014 assessments, they would not have been able to recover relief for the 2016 foreclosures, although they can obtain relief for both tax years under the FHA.

Additionally, neither the Board of Review nor the Tax Tribunal can issue injunctions, which is the primary form of relief Plaintiffs have requested in their Complaint as authorized under the FHA. See 42 USC 3613(c)(1); MCL 205.732; Complaint, p 48. Both the Court of Appeals and circuit court recognized that the Tax Tribunal cannot issue injunctions, but found a request for an injunction does not take claims out of the exclusive jurisdiction of the Tribunal where it otherwise has jurisdiction. September 21, 2017 Opinion, p 5; October 17, 2016 Opinion, p 12. Even if that is true, this presents an additional, burdensome procedural hurdle faced by plaintiffs seeking to enforce their rights under the FHA.

The Supreme Court's holding in *Haywood* demonstrates that limiting the type of relief that plaintiffs can obtain under a federal statute is an impermissible burdening of a congressionally-authorized right. There, the Court considered a New York statute that placed limitations on Section 1983 claims filed by prisoners against state correction officers. In addition to removing such claims to a court of limited jurisdiction, the statute limited the type of relief that a plaintiff could receive by barring punitive damages and injunctive relief, although these remedies are available to Section 1983 plaintiffs in other contexts. 556 US at 734. The Court determined that the state law was not a neutral rule of judicial administration and violated the Supremacy Clause because, "although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Id.* at 736. The Court found that the state's decision to limit a class of Section 1983 claims, "whatever its merits, is contrary to Congress's judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages." *Id.* at 736-37 (emphasis in original). Likewise, in enacting the FHA, Congress intended that aggrieved persons would be able to obtain all forms of relief provided by the statute. Thus, Tax Tribunal procedures burden Plaintiffs' rights under the federal statute by limiting the type of relief they can seek.

4. Plaintiffs Are Not Required to Exhaust Administrative Procedures Under the FHA.

Finally, Tribunal procedures, which require a property owner to proceed through the Board of Review and Tax Tribunal before they can present an appeal to the Court of Appeals, function as a mandatory administrative exhaustion requirement in violation of the FHA. As discussed above, the Tax Tribunal is a quasi-judicial, administrative agency that lacks the judicial powers of a state court. It therefore falls into the realm of "administrative enforcement"

of the FHA that is intended to be concurrent with, and non-exclusive of, private enforcement through litigation in court. Courts have held that plaintiffs cannot be forced to have their FHA claims heard by an administrative agency because doing so would undermine the statute's "dual enforcement scheme," which is intended to allow "an aggrieved party to pursue *both* private and administrative enforcement until such time as either avenue has achieved resolution of the claim." *Mitchell*, 389 F3d at 90 (emphasis added). Under the FHA, "an aggrieved person is not required to exhaust the administrative process before filing a civil action." *Id*. at 91 (quoting House Report (Judiciary Committee), Fair Housing Amendments Act of 1988, PL 100-430, 1998 USCCAN 2173, 2200); *Warner v Perrino*, 585 F2d 171, 176 (CA 6, 1978) ("There is no requirement in [the FHA] that a plaintiff exhaust his administrative remedies before coming to court . . . ."). Congress designed the statute so that an "administrative proceeding" would be one, "*but not [the] exclusive*, method for persons aggrieved by discriminatory housing practices to seek redress." *Id*. (quoting House Report (Judiciary Committee) at 2200) (emphasis added); see also *Gladstone*, 441 US at 106 (finding that the FHA's administrative remedies were provided only as an alternative option to those who desired to use them). As numerous courts have recognized and as noted above, the FHA's purpose of allowing plaintiffs to commence an action in state court as an alternative to local remedies would be seriously undercut if prior exhaustion of state administrative remedies was required, as it is under Michigan's rules for Tax Tribunal proceedings. See, e.g., *Huntington Branch NAACP*, 689 F2d at 393 n 3.

In *Felder*, the Supreme Court held that a provision of the Wisconsin statute at issue functioned as an impermissible administrative exhaustion requirement because it forced plaintiffs to wait to file their Section 1983 claim in state court until the government had an opportunity to investigate and settle it. 487 US at 146-49. The Court noted that plaintiffs need not exhaust

administrative remedies before instituting Section 1983 claims in federal court and found that such a state law requirement was inconsistent with and would frustrate the congressional objective of remedying deprivations of civil rights. *Id.* at 147, 149. "Given the evil at which the federal civil rights legislation was aimed," the Court reasoned, "there is simply no reason to suppose that Congress meant 'to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary.'" *Id.*, citing *Patsy v Board of Regents of Florida*, 457 US 496, 504; 102 S Ct 2557; 73 L Ed 2d 172 (1982). Given the scope and nature of Plaintiffs' claim, they have opted against administrative enforcement, as is their right. Requiring Plaintiffs to seek relief from the Tax Tribunal, an administrative forum, thus contravenes a core element of the FHA's remedial scheme.

* * *

The Court of Appeals' ruling that Plaintiffs must present their claim to the Tax Tribunal conflicts with the remedial purposes and objectives of the FHA and renders the promise of the statute hollow. Throughout our nation's history, access to the courts has always been a critical vehicle for securing civil rights. The Tax Tribunal serves a useful purpose in overseeing complex tax administrative appeals but, as Michigan courts and the Tribunal itself have repeatedly found, it is not a court. Having created courts of general jurisdiction with broad powers, including the power to hear FHA claims, see Section II *infra*, Michigan cannot shut the courthouse door to Plaintiffs' claim under the FHA simply because it relates to an issue of taxation. See *Haywood*, 556 US at 740 (New York was "not at liberty to shut the courthouse door" to certain types of Section 1983 claims, having created courts of general jurisdiction that regularly sit to entertain analogous suits). The Court of Appeals erred in affirming the grant of summary disposition to the Wayne County Defendants, because relegating Plaintiffs' claim to

the Tax Tribunal contravenes their guaranteed right, created by federal law, to commence a civil action in state court.

II. THE COURT OF APPEALS IMPROPERLY AFFIRMED THE GRANT OF SUMMARY DISPOSITION TO DEFENDANTS BECAUSE THE MICHIGAN TAX TRIBUNAL DOES NOT HAVE EXCLUSIVE JURISDICTION OVER PLAINTIFFS' CLAIM.

There is a second and independent reason why the Court of Appeals' order must be reversed: as a matter of state law, the Tax Tribunal does not have exclusive jurisdiction over Plaintiffs' FHA claim.

Michigan's Constitution and statutes dictate that the circuit courts have broad power. *Ashley Ann Arbor, LLC v Pittsfield Charter Twp*, 299 Mich App 138, 147; 829 NW2d 299 (2012), citing Const 1963, art 6, § 13. "Circuit courts are courts of general jurisdiction, and have original jurisdiction over all civil claims and remedies except where exclusive jurisdiction is given by the constitution or statutes of this state." *Cherry Growers, Inc v Agric Mktg & Bargaining Bd*, 240 Mich App 153, 160; 610 NW2d 613 (2000). Indeed, this Court has recognized that the divestiture of jurisdiction from the circuit court is an extreme undertaking, and statutes doing so are to be strictly construed. *Wikman*, 413 Mich at 645. Such divestiture cannot be accomplished except under clear mandate of law. *Id.*, citing *Leo v Atlas Indus, Inc*, 370 Mich 400, 402; 121 NW2d 926 (1963) and *Crane v Reeder*, 28 Mich 527, 532-33 (1874).

Prior to the creation of the Tax Tribunal, all tax matters fell within the purview of the circuit courts. *Ashley Ann Arbor*, 299 Mich App at 147. The creation of the Tribunal divested *some* of this jurisdiction from the circuit courts in order to create statutory procedures for taxpayers to utilize in contesting the legality of their taxes. *Wikman*, 413 Mich at 644-45. However, where a plaintiff's claim does not fall within the narrow jurisdiction of the Tax Tribunal, the circuit court retains general jurisdiction over the civil action. *Id.* at 645.

The Tax Tribunal acquires jurisdiction over a claim related to residential property taxes under very limited circumstances. This Court has clarified that the Tribunal has original and exclusive jurisdiction over "(1) a proceeding for direct review of a final decision, finding, ruling, determination, or order; (2) of an agency; (3) relating to an assessment, valuation, rate, special assessment, allocation, or equalization; (4) under the property tax laws." *Hillsdale Co Senior Servs v Hillsdale Co*, 494 Mich 46, 53; 832 NW2d 728 (2013); see also MCL 205.731. To determine if the Tribunal has jurisdiction over a matter, a court must look to the true nature of a plaintiff's complaint—in other words, the underlying basis of the claim and the relief sought. See *Johnson*, 113 Mich App at 459; *Zaher v Nickerson*, unpublished opinion of the Court of Appeals, issued June 23, 2009 (Docket No. 285736), 2009 WL 1782806, p *2; *Betley v City of Linden*, unpublished opinion of the Court of Appeals, issued April 15, 2003 (Docket No. 238385), 2003 WL 1878803, p *3.

A close examination of the nature of Plaintiffs' claim—challenging Defendants' foreclosure practice—demonstrates that the Tax Tribunal does not have jurisdiction here. Resolution of this claim does not require any particularized determination regarding assessment or equalization. Additionally, Plaintiffs' claim falls outside of the specialized expertise of the Tax Tribunal and could not be resolved or adjudicated by that administrative body.

A. Resolution of Plaintiffs' FHA Claim Does Not Require Any Particularized Determination Regarding Assessments or Equalization.

The Court of Appeals concluded that Plaintiffs' claim is within the exclusive jurisdiction of the Tax Tribunal because, in the court's view, it requires factual determinations regarding assessments and equalization. September 21, 2017 Opinion at p 4. Plaintiffs strongly disagree with that premise. Resolution of Plaintiffs' FHA claim does not require either the Tax Tribunal

or the circuit court to make any particular, individualized determination about assessments or equalization.

As explained above, Plaintiffs contend that the foreclosure practice of the Wayne County Defendants violates the FHA based on its unjustified disparate impact on African-American homeowners. Specifically, Plaintiffs allege that Defendants' policy of foreclosing on properties, without regard to the accuracy of a property's assessment and tax bill, causes African-American homeowners in the county to lose their homes through tax foreclosure at a disproportionately higher rate than non-African-American homeowners in the county. Complaint at ¶¶ 255-56. They further allege that Defendants have no legitimate justification for foreclosing on properties based on inaccurate and inflated tax bills, and, even if there was a legitimate justification, there are less discriminatory alternatives available to Defendants that would achieve the same interests as the current policy. *Id.* at ¶ 257. Thus, as alleged in the Complaint, the Wayne County Defendants' policy constitutes discrimination in violation of the FHA. *Id.* at ¶ 258.

Although the policy challenged by Plaintiffs has some relationship to the assessments themselves, the Complaint does *not* seek relief from, or direct review of, the assessments, which are performed by the City of Detroit. Plaintiffs' claim does not rest on a showing that each and every class member's property was over-assessed or on the magnitude of any particular over-assessment. In fact, Plaintiffs do not allege that every assessment was inaccurate. Instead, Plaintiffs contend that properties in the county as a whole are over-assessed and that the Wayne County Defendants have proceeded to foreclose on homes despite their knowledge of these over-assessments. Complaint, ¶¶ 35-37. These facts are widely known and undisputed—even by the circuit court—and if Plaintiffs are able to litigate their claim, they will be able to provide ample evidence to prove their allegations regarding the county-wide over-assessments. September 2,

2016 Hearing Transcript, p 90 ("I'm not disputing that assessments in Detroit were higher than they should be as a result of the Great Recession"); see also Complaint, ¶ 57; Exhibit 2, ¶¶ 4, 28-34, 48 (examining data provided by the City of Detroit to conclude that the average assessment was 4.4 times greater than it should have been, doubling the average tax bill). Individual determinations as to the specific amount of any particular over-assessment will not be required to resolve Plaintiffs' claim.[11]

Further, Plaintiffs do not seek a refund of taxes paid and have not asked the circuit court to declare that their taxes were over-assessed. Instead, Plaintiffs request that the circuit court enjoin Defendants from continuing their discriminatory foreclosure practice and require them to take all appropriate steps to correct its continuing effects. Complaint, pp 48-49. Plaintiffs ultimately seek to regain title to their homes, which can be accomplished solely through changes to the Wayne County Defendants' foreclosure practice, not through retroactive review of the City of Detroit's assessments.

Nor can the relief Plaintiffs seek be accomplished through a review of Wayne County's equalization process. The Court of Appeals erroneously stated that the circuit court could not consider whether Defendants' foreclosure practice disparately impacts African-American homeowners until after the Tribunal determined whether Defendants properly equalized the

[11] Defendants have argued that an FHA claim would *never* arise out of their tax foreclosure practice if individual homeowners each challenged their property tax assessments before the Board of Review and Tax Tribunal. This argument both strains credulity and misses the point. Putting aside Defendants' assumption that each affected homeowner would receive a favorable ruling through these administrative procedures, Plaintiffs have an express right to challenge Defendants' foreclosure practice under the FHA in a state court. See Section I *supra*. In enacting the FHA to combat widespread housing discrimination at the local level, Congress determined that homeowners must have direct access to courts, not just administrative procedures, to enforce their rights. *Id.*

properties. September 21, 2017 Opinion, p 4.[12] Not only does this reflect a misunderstanding about Tribunal procedures—which do not permit a plaintiff to file a claim in circuit court after receiving an initial factual determination from the Tribunal for matters within its exclusive jurisdiction—but it also misapprehends the nature of Plaintiffs' claim. Intra-county equalization requires each county board of commissioners to determine whether the taxing units within their respective counties have equally and uniformly assessed property at fifty percent of its true cash value. MCL 211.34(2); *Fairplains Twp v Montcalm Bd of Comm'rs*, 214 Mich App 365, 369; 542 NW2d 897 (1995). To be sure, Plaintiffs' Complaint mentions this requirement in its general description of the property tax assessment and foreclosure process, Complaint, ¶ 45, and alleges that the Wayne County Defendants should have complied with this duty, *id.* at ¶ 67. Plaintiffs also generally allege that Defendants unlawfully carried out the tax foreclosures without regard to the accuracy of a property's assessment and tax bill. *Id.* at ¶ 65. However, Plaintiffs' alleged injuries are not simply the result of the Wayne County Defendants' failure to comply with their equalization duty, and Plaintiffs assert that Defendants' responsibilities under the FHA extend *beyond* the equalization process.

As an initial matter, county equalization, when conducted properly, does not rectify unequal assessment levels within a class of property within the same taxing district, which is part of the inequality targeted by Plaintiffs' Complaint. As described by the Michigan Supreme Court in *Shaughnesy v Michigan Tax Tribunal*, 420 Mich 246; 362 NW2d 219 (1984), the county equalization process "is designed to remedy the potential for unequal assessment levels *among* different taxing districts and *among* different classes of property within the same taxing

[12] The circuit court also incorrectly characterized Plaintiffs' claim as a challenge to the county's duty to equalize. October 17, 2016 Opinion, p 7.

district. County equalization will not remedy unequal assessment levels *within* a given class of property in a single taxing district." *Id.* at 249-50. Thus, even if the Wayne County Defendants had equalized the properties properly, this would not have, by itself, eliminated the problem of inaccurate assessments.

Further, equalization is unrelated to the actual practice upon which Plaintiffs' FHA claim is based—*i.e.*, Wayne County's practice of foreclosing on properties without regard to the accuracy of their assessments and tax bills, which places African-American homeowners in Wayne County at a significantly greater risk of tax foreclosure and sale than similarly situated non-African-American or white homeowners. Importantly, Plaintiffs contend that Defendants' responsibilities under the FHA extend beyond the duty to equalize. The most significant harm attributable to the Wayne County Defendants' alleged FHA violation arises from the annual cycle of foreclosure-seizure-sale-eviction, not from the failure to equalize. In their briefing supporting a preliminary injunction, Plaintiffs set forth a number of less discriminatory alternative measures other than foreclosing upon over-assessed homes that would achieve the Wayne County Defendants' interest in collecting tax revenue, to demonstrate how Defendants could have complied with their responsibilities under the FHA. Plaintiffs' Motion for Preliminary Injunction, pp 17-18. For example, Defendants could decline to foreclose upon homes in the absence of a warranty by the relevant municipality that it has fulfilled its statutory assessment duties by basing its assessment on the home's true cash value rather than a grossly inflated valuation. *Id.* at 18. Alternatively, Defendants could elect not to foreclose on occupied residential properties located in municipalities in which declines in the aggregate assessed values do not match aggregate declines in market value, at least during times when property values are known to be falling dramatically. *Id.* Or, rather than foreclose on those properties, the Wayne

County Treasurer could revamp the payment plan process to require the homeowner to pay a fraction of the tax debt while properties are being reassessed. *Id.* Given Plaintiffs' comprehensive allegations regarding Defendants' foreclosure practice, their FHA claim cannot be viewed as merely a challenge to Defendants' failure to comply with their duty to equalize.

B. Plaintiffs' Claim Falls Outside of the Specialized Expertise of the Tax Tribunal.

Further, the Tax Tribunal does not have the expertise necessary to adjudicate Plaintiffs' disparate impact claim under the FHA, contrary to the holding of the Court of Appeals. See September 21, 2017 Opinion, pp 4-5. Nor could Plaintiffs' disparate impact claim be brought in that administrative body.

Michigan courts have recognized that "[t]he need to preserve the tribunal's exclusive jurisdiction is especially great where . . . factual issues requiring the tribunal's expertise are present." *Mich Consol Gas Co*, 114 Mich App at 403. For example, the Tax Tribunal's specialized expertise is required to resolve tax issues that involve the accuracy and methodology of the property tax assessment. *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989); see also *Romulus City Treasurer v Wayne Cty Drain Comm'r*, 413 Mich 728, 737; 322 NW2d 152 (1982) ("The expertise of the tribunal members can be seen to relate primarily to questions concerning the factual underpinnings of taxes."). But the Tribunal itself has repeatedly confirmed that issues unrelated to the law of taxation—such as a claim that a taxpayer's due process rights were violated—are outside the scope of its expertise and thus outside of its jurisdiction. See, e.g., *Cygan v Mich Dep't of Treasury*, unpublished opinion of the Tax Tribunal, issued August 28, 1995 (Docket No. 135626), 1995 WL 606082, p *2 (refusing to

consider taxpayer's claim that statute violated his "due process rights" because it raised a question "not within the expertise of the [Tax] Tribunal").[13]

A comparison between Plaintiffs' claim and other cases that have raised the question of Tribunal jurisdiction, such as *Johnston*, *Johnson*, and *Johns Family*, demonstrate that the Tribunal does not have the expertise to adjudicate this case. In stark contrast to Plaintiffs' claim, these cases each required a factual determination squarely within the specific expertise of the Tribunal: each involved a plaintiff seeking a ruling that it did not owe a particular tax or that the amount levied was incorrect. In *Johnston*, the plaintiff challenged the defendant city's refusal to partition a property for purposes of tax assessments and asked the court to order separate assessments for two parts of the property and award money damages for taxes that should not have been paid. 177 Mich App at 203-204. The plaintiff framed her claim in constitutional terms, asserting that the city's refusal to partition her property deprived her of its use and enjoyment without due process of law in violation of the Fourteenth Amendment. *Id.* at 203. The Court of Appeals determined that the claim was within the jurisdiction of the Tax Tribunal because it required a factual determination of the accuracy of the particular assessment and the method of assessing the plaintiff's property. *Id.* at 208.

Similarly, in *Johnson*, the plaintiffs filed constitutional due process and equal protection claims regarding their tax assessments, claiming that there was a conspiracy to assess their properties at unconstitutionally high rates. 113 Mich App at 450. Plaintiffs sought monetary damages and a refund for these violations. *Id.* at 450-51, 461. After examining the nature of the plaintiffs' claim, the Court of Appeals determined that the Tax Tribunal had jurisdiction because

[13] Plaintiffs cite this unpublished opinion of the Tax Tribunal because, to Plaintiffs' knowledge, there are no published opinions specifically demonstrating the Tax Tribunal's own understanding of its limited jurisdiction as relevant to the issues presented here. See MCR 7.215(C).

the plaintiffs were challenging assessments "based upon improper data" in violation of Michigan state law. *Id.* at 459-60, 462. And in *Johns Family*, the plaintiffs sought reimbursement for taxes levied on a property that were improperly calculated. 2016 WL 4129292, p *2. There, the Court of Appeals determined that resolution of plaintiffs' constitutional claim required a factual determination regarding the accuracy of the taxable values and the method of calculating them, which was "solidly within" the Tax Tribunal's area of expertise. *Id.* at *4.

Although the plaintiffs in *Johnston*, *Johnson*, and *Johns Family* asserted constitutional and civil rights causes of action, the factual issues on which these claims were based were matters that fell entirely within the scope of the Tax Tribunal's expertise, including the correct assessment for a given property and the magnitude of alleged over-assessments. Such expertise is not required here. Plaintiffs are *not* challenging the validity of any individual, particular property tax assessment, and the Wayne County Defendants have not identified any other factual issue that is within the limited and specific scope of the Tribunal's expertise. Resolution of Plaintiffs' FHA claim in this case would require the Tax Tribunal to determine, as a factual matter, whether the Wayne County Defendants' foreclosure practice has a discriminatory impact on African-American homeowners and does not serve a legitimate government interest. There is no reason to believe that the Tribunal has the expertise to adjudicate these factual questions.

Indeed, such questions could not even be fully addressed until the identity of those properties subject to foreclosure are known and analyzed, which is long after the time for presenting a claim to the Tribunal has passed. As explained above, all petitions for review of assessment or equalization decisions must be presented to the Tax Tribunal, following petition to the Board of Review, by July 31 of the relevant tax year. However, it is not until three years later that a property is subject to *foreclosure* due to nonpayment of taxes for a given tax year.

Thus, Plaintiffs could not bring a claim based on the disparate impact of Defendants' foreclosure practice until, at a minimum, there is available information on which property owners have been unable to pay their taxes such that their homes are likely to be foreclosed upon by Wayne County. As a result, Plaintiffs' claim could not properly be marshaled in the time allotted for seeking review of an assessment or equalization decision by the Tax Tribunal. This is especially problematic in light of the circuit court's determination that Plaintiffs stated a *prima facie* violation of the FHA based on the Wayne County Defendants' foreclosure policy. Because of the time limitations on initiating proceedings in the Board of Review and the Tax Tribunal, a determination that the Tax Tribunal has exclusive jurisdiction over Plaintiffs' claim means that Plaintiffs are likely precluded from *ever* bringing their facially valid claim in *any* state forum.

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above, Plaintiffs respectfully request that this Court immediately grant leave to appeal or, in lieu of granting leave, peremptorily reverse the Court of Appeals' decision, reverse the circuit court's grant of summary disposition to the Wayne County Defendants, and remand.

Respectfully submitted,

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