

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

LADAWN DOUGLAS  
Petitioner

v.

KONDAUR CAPITAL CORPORATION  
Respondent

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ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME  
COURT

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PETITION FOR WRIT OF CERTIORARI

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**QUESTIONS PRESENTED**

Whether Michigan's foreclosure by advertisement statute, MCL § 600.3201 *et seq.*, as applied and enforced in the courts below, constitutes state action against Petitioner in violation of Petitioner's rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution?

## **PARTIES TO THE PROCEEDING**

Petitioner, who was Defendant-Appellant below, is: LaDawn Douglas, who was not named specifically as a party in the trial court but included as a defendant as an occupant of the Property.

Respondents, who were Plaintiffs-Appellees below, are: Kondaur Capital Corporation (“Kondaur”).

## **PROCEEDINGS BELOW**

The opinion and judgment of the 17<sup>th</sup> Judicial District Court of the State of Michigan was issued on June 28, 2017, the case number is 17-76348-LT. The 17<sup>th</sup> Judicial District Court’s order is attached as Appendix A and the court’s opinion is attached at Appendix B. The one-page order of the 3<sup>rd</sup> Judicial Circuit Court of the State of Michigan dismissing Petitioner’s appeal of right was issued on January 15, 2019, the case number is 17-010403-AV and the order is attached at Appendix C. The Michigan Court of Appeals one-page order denying review was issued on April 8, 2019, the case number is 347596 and the order is attached as Appendix D. The Michigan Supreme Court’s one-page order denying review, which is reported at 505 Mich. 941, 936 N.W.2d 295(Mem), was issued on December 23, 2019, the case number is 159632 and the order is attached at Appendix E.

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Petitioner, LaDawn Douglas, petitions the Court for a writ of certiorari to review the judgement of the Michigan Supreme Court.

## **JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). 28 U.S.C. §2403 may apply. The Michigan Supreme Court did not certify to the state of Michigan Attorney General the fact that the constitutionality of a statute of the state of Michigan was drawn into question. The Michigan Supreme Court order denying petitioner's timely petition for discretionary review was filed on December 23, 2019. This petition is timely filed within 150-days of the Michigan Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court and this Court's March 19, 2020 Order.

## **CONSTITUTIONAL AND STATUTORY RULES INVOLVED**

United States Constitution, Amendment 14 provides:

**All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. [Emphasis added]**

United States Constitution, Amendment 5 provides:

**No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for**



the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [emphasis added]

MCL § 600.3201 provides:

Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter. However, the procedures set forth in this chapter shall not apply to mortgages of real estate held by the Michigan state housing development authority.

CFPB Bulletin 2013-12 (October 15, 2013) provides, in pertinent part:

Starting on January 10, 2014, a servicer must have policies and procedures reasonably designed to ensure ... the servicer promptly identifies and facilitates communication with a successor in interest.” CFPB Bulletin 2013-12 (October 15, 2013), 2. “A successor in interest is the spouse, child, or heir of a deceased borrower or other party with an interest in the property. CFPB Bulletin 2013-12 (October 15, 2013), n. 7.

## STATEMENT OF THE CASE

### A. Background

This case presents a question concerning the relationship between the state of Michigan’s foreclosure by advertisement statute and the Due Process and Takings Clauses of the United States Constitution. Michigan common law permits a mortgagee to foreclose residential real property by nonjudicial foreclosure, also known as foreclosure by advertisement, if the mortgagee and mortgagor(s) contractually agree that the property may be foreclosed by nonjudicial foreclosure



sale. *Equitable Trust Co. v. Barlum Realty Co.*, 294 Mich. 167 (1940). In 1961, Michigan's legislature enacted the Revised Judicature Act of 1961, Act 236 of 1961 (the "Act"). Chapters 31 and 32 of the Act created two separate foreclosure processes. Chapter 31 provides the process for judicial foreclosure in MCL § 600.3101 *et seq.* Chapter 32 provides the process for foreclosure by advertisement in MCL § 600.3201 *et seq.* The state of Michigan codified the common law in its foreclosure by advertisement statute in Michigan Codified Laws ("MCL") § 600.3201 *et seq.* Michigan's foreclosure by advertisement statute (the "Statute"), MCL § 600.3201 *et seq.*, does not grant the right to foreclose a property by nonjudicial foreclosure. The Statute sets out the requirements and constraints of nonjudicial foreclosure sales. *National Airport Corp.*, 73 Mich.App. 572; 252 N.W.2d 519 (1977). "[I]t is clear that the statute under attack here did not create the power of sale foreclosure. Instead, the state, by enacting this statute, acted to regulate and standardize a recognized practice." *National Airport Corp.*, 73 Mich.App. 572, 577; 252 N.W.2d 519 (1977). The constitutionality of MCL § 600.3201 was challenged in 1977 in the case of *Cramer v. Metropolitan Savings and Loan Association*. *Cramer* stands for the proposition that "a mortgagee who exercises a foreclosure [by advertisement] option is relying on a contract remedy, not on a right created by the statute." *Cramer v. Metropolitan Sav. and Loan Ass'n*, 401 Mich. 252, 255 (1977).

Our United States Constitution protects citizens' due process rights against a state's deprivation of property without due process of law. Michigan's foreclosure by advertisement statute has been upheld as constitutional solely on the basis that the

parties to the mortgage, not the state of Michigan, grant the right to foreclose the mortgage nonjudicially. *Cramer v. Metropolitan Savings and Loan Association*, 401 Mich. 252, 258 N.W.2d 20 (1977). Notably, Michigan's Legislature chose to cite *Cramer* with the text of the statute. MCL § 600.3201.

Respondent, Kondaur, prosecuted a nonjudicial foreclosure against Petitioner's Property and subsequently commenced an action in the 17<sup>th</sup> Judicial District Court of the State of Michigan (the "Trial Court"), to summarily evict the mortgagee, Clifford Douglas Jr., and all occupants from the Property. Petitioner, the sole title owner and sole occupant of the Property, appeared in Kondaur's summary proceeding as an occupant of the Property. Petitioner did not contest the validity of Kondaur's nonjudicial foreclosure sale as to Clifford Douglas Jr.'s purported interest in the property.<sup>1</sup> Petitioner only challenged the validity of Kondaur's nonjudicial foreclosure as to Petitioner's title interest in the Property. Petitioner argued that Kondaur's 2016 nonjudicial sheriff's sale of Petitioner's title interest in the Property violated Petitioner's due process rights because Petitioner was never a party to the mortgage and did not contractually grant Kondaur the power to sale the Property nonjudicially. In Petitioner's brief in opposition to Kondaur's motion for a judgment of possession, Petitioner pleaded,

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<sup>1</sup> Clifford Douglas, Jr. no longer owed an interest in the Subject Property at the time Kondaur initiated its nonjudicial foreclosure sale on August 25, 2016 because a Court of competent jurisdiction extinguished Clifford Douglas, Jr.'s interest in the Subject Property by a Divorce Decree dated August 2, 2011. Appendix H.

Kondaur's August 25, 2016 Sheriff's Deed unconstitutionally terminates Defendant's property interest in the subject property without due process of law. Defendants' Brief in Opposition to Kondaur's Motion for Possession at 11.

Petitioner prayed that the 17<sup>th</sup> Judicial District Court of the State of Michigan dismiss Kondaur's eviction proceedings as to Petitioner. Defendants' Answer and Affirmative Defenses, 7. The 17 Judicial Court for the State of Michigan did not provide a written opinion but provided an oral opinion. The Trial Court's opinion did not acknowledge or address Petitioner's due process argument and summarily found that Kondaur was legally authorized to invoke Michigan's foreclosure by advertisement statute against Petitioner's ownership interest in the Property. Summary Proceeding Hearing June 28, 2017 Tr. 11:3-5.

The 17<sup>th</sup> Judicial District Court Opinion and Order and subsequent Michigan appellate courts' decisions affirming that order conflict with the 5<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution and United States precedent which proscribes seizures of substantial property interest without notice and an opportunity to be heard before the deprivation.

## **B. Facts and Procedural History**

Petitioner is a citizen of the United States and a citizen of the state of Michigan who currently resides in Westland, Michigan. Petitioner's then husband, Clifford Douglas, Jr., purchased residential real property commonly known as 9567 Lenore, Redford, Michigan 48239 (the "Property") on or about January 9, 2009. To purchase

the Property, Clifford Douglas, Jr. obtained a mortgage loan from MVB Mortgage corporation, an Ohio corporation whose registered address in Michigan is 24400 Northwestern Highway, Suite 200, Southfield, Michigan 48075 according to the mortgage recorded in the Wayne County Register of Deeds at Liber 47905, Page 417-423 (the "Mortgage"). Clifford Douglas, Jr.'s Mortgage was secured by the Property. Petitioner and Clifford Douglas, Jr. resided in the Property as their primary residence until 2011 until Petitioner and Clifford Douglas Jr. were divorced by a Default Judgment of Divorce (the "Divorce Decree") dated August 2, 2011. The Divorce Decree awarded the Property to Petitioner. The transfer was to be effectuated by recording the Divorce Decree in the Wayne County Register of Deeds in the state of Michigan.

The Divorce Decree states, in pertinent part,

The real estate located at: 9567 Lenore Street, Redford, Michigan and described as follows: Lot 508 Dunning Park Sub T1S R10E L55 P27 WCR [s]hall be awarded to Plaintiff [Petitioner] who shall transfer the title of said property by recording the Judgment of Divorce with the Wayne County Register of Deeds office.<sup>2</sup>

Petitioner recorded the Divorce Decree in the Wayne County Register of Deeds on September 4, 2012, thereby, effectuating the order of Michigan's 3<sup>rd</sup> Judicial Circuit Court and transferring title ownership of the Property from Clifford Douglas, Jr. to Petitioner. The Divorce Decree is recorded in the Wayne County Register of Deeds at Liber 50077 Page 326.

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<sup>2</sup> Although the Property was transferred to Petitioner through the recording of the Divorce Decree, the Divorce Decree was silent regarding Clifford Douglas Jr.'s mortgage on the Property. See Appendix J.



The Mortgage was purportedly transferred to Kondaur by an Assignment of Mortgage dated September 12, 2012 and recorded in the Wayne County Register of Deeds at Liber 50129, Page 232 on September 17, 2012. Kondaur is a corporation whose headquarters is located at 333 S. Anita Dr., Suite 400, Orange CA 92868. Kondaur is a “specialty loan servicer and residential asset manager”<sup>3</sup> that maintains a branch in Michigan at 39303 Country Club Drive, suite A-1, Farmington Hills, Michigan 48331. Pursuant to the recorded Divorce Decree, Petitioner was the sole title owner of the Property when Kondaur took ownership of the Mortgage on September 12, 2012. As such, Kondaur had constructive notice of Petitioner’s title ownership of the Property through the recorded Divorce Decree.

Although the Property was transferred to Petitioner through the recording of the Divorce Decree, the Divorce Decree was silent regarding Clifford Douglas Jr.’s mortgage on the Property. Petitioner began making the mortgage payments after the divorce. Upon information and belief, Petitioner drove to Kondaur’s branch located at 39255 Country Club Drive, Farmington Hills, Michigan 48331 to make the monthly mortgage payment in person until Petitioner was informed that the mortgage payment increased sometime in 2016. Further upon information and belief, Petitioner inquired as to why the mortgage payment increased, however, Kondaur refused to speak with Petitioner without third-party authorization from Clifford Douglas, Jr., the sole mortgagor. Further upon information and belief, Clifford Douglas Jr. refused to grant Petitioner the requested third-party authorization.

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<sup>3</sup> Available at [kondaur.com](http://kondaur.com).

Although the Mortgage was a 30-year fixed mortgage, the payment increased substantially per month until Petitioner could no longer afford the monthly mortgage payments. Kondaur alleged that the mortgage was in default and initiated nonjudicial foreclosure against Clifford Douglas, Jr.<sup>4</sup>, the sole mortgagor, and the Property. In 2016, Petitioner, by and through counsel, contacted Kondaur's foreclosure attorneys to obtain information about the alleged default, to find out why the mortgage payments increased, to determine whether the increase in the payment was a mistake and to cure any alleged default. Petitioner intended to work with Kondaur, by and through counsel, to either correct any mistake in the mortgage account or cure the alleged default. However, Kondaur's foreclosure counsel also refused to speak to Petitioner's counsel without third-party authorization from Mr. Clifford Douglas, Jr. even though Petitioner was the sole title owner of the Property. The request for the third-party authorization indicates that Kondaur and its foreclosure counsel were aware that Petitioner was not a party to the Mortgage. Therefore, Kondaur and its foreclosure counsel were aware that Petitioner did not grant the power to sale her title interest in the Property by nonjudicial foreclosure. Both Kondaur and its foreclosure counsel were also aware that Petitioner was the sole title owner of the Property.

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<sup>4</sup> The Sheriff's Deed granted to Kondaur on August 25, 2016 states, in pertinent part, CLIFFORD DOUGLAS JR., A MARRIED MAN, made a certain mortgage to MVB MORTGAGE CORPORATION, AN OHIO CORPORATION (hereinafter called the mortgagee), which was duly recorded in Liber 47905, on Page 417, and was assigned by said mortgagee to KONDAUR CAPITAL CORPORATION, as assignee, Wayne County Records.



On or about July 8, 2016, Kondaur commenced foreclosure by advertisement proceedings as to Clifford Douglas Jr. and the Property. Kondaur did not provide Petitioner with notice<sup>5</sup> of the nonjudicial foreclosure or an opportunity to be heard prior to the nonjudicial foreclosure. Upon information and belief, Petitioner learned of the foreclosure by advertisement through a neighbor. On August 25, 2016, a Deputy Sheriff in and for Wayne County, Michigan granted Kondaur a Sheriff's Deed for Petitioner's Property. The Sheriff's Deed only lists Clifford Douglas Jr. as the mortgagor. The Sheriff's Deed foreclosed the Property in the amount of \$51,984.59.

### **C. How the Questions were Raised and Decided Below.**

#### **1. The 17<sup>th</sup> Judicial District Court for the state of Michigan.**

In March 2017, Kondaur filed a Summary Eviction Proceeding against Clifford Douglas, Jr. and all other occupants of the Property. In the summary proceeding, Respondent correctly alleged that Petitioner took ownership of the Property through the divorce decree or quit claim deed subject to the mortgage. Summary Proceeding Hearing June 28, 2019 Tr. 4:19-24. Respondent incorrectly alleged that its nonjudicial foreclosure sale was authorized by Michigan's foreclosure by advertisement statute, MCL § 600.3201 *et seq.*, and further alleged that its compliance with the requisites of the Statute deprived Petitioner of a legal defense to the eviction. Summary Proceeding Hearing June 28, 2019 Tr. 4:24-5:7. Petitioner filed an Answer asserting

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<sup>5</sup> Kondaur alleges in its Affidavit of Posting annexed to its August 25, 2016 Sheriff's Deed, "that on the 9<sup>th</sup> day of July, 2016 A.D., he/she posted a notice, a true copy of which is annexed hereto, in a conspicuous place upon the premises described in said notice by attaching the same in a secure manner to 9567 Lenore, Redford, MI 48239-1663. See Appendix G.

Kondaur lacked legal authority to terminate Petitioner's title interest in the Property by nonjudicial foreclosure sale and therefore, lacked legal authority to terminate Petitioner's occupancy of the Property. Defendant's Answer and Affirmative Defenses ¶¶3, 21. Petitioner argued that Kondaur's nonjudicial foreclosure sale violated her constitutional due process rights because she did not grant Kondaur the power to sale the Property by nonjudicial foreclosure sale. Defendants' Brief in Opposition to Kondaur's Motion for Judgment of Possession, 10. Petitioner pleaded that "Kondaur's August 25, 2016 Sheriff's Deed unconstitutionally terminates Defendant's [Petitioner's] property interest in the subject property without due process of law." Defendants' Brief in Opposition to Kondaur's Motion for Possession at 11.

Respondent moved the 17<sup>th</sup> Judicial District Court for the State of Michigan to effectively uphold Kondaur's nonjudicial foreclosure of Petitioner's Property, terminate Petitioner's occupancy and evict Petitioner from the Property. The Trial Court found there was "no issue of fact or ... law" and granted Kondaur's Motion for Possession. Summary Proceeding Hearing June 28, 2017 Tr. 9:2-3. The Trial Court effectively held that Michigan's Foreclosure by Advertisement Statute, MCL § 600.3201 *et seq.*, authorized Kondaur's nonjudicial foreclosure of Petitioner's title interest in the Property although it is undisputed that Petitioner never signed the Mortgage or granted Kondaur or its predecessor the power of sale. Summary Proceeding June 28, 2017 Tr. 11:3-4. The Trial Court's Judgment of Possession allowing Kondaur to evict Petitioner from her home constituted an unconstitutional

taking of Petitioner's Property in violation of Petitioner's due process rights under the 5<sup>th</sup> and 14<sup>th</sup> amendments of the United States Constitution as discussed below.

## 2. The 3<sup>rd</sup> Judicial Circuit Court of the State of Michigan

Petitioner timely appealed Michigan's 17<sup>th</sup> Judicial District Court's June 28, 2017 Judgment of Possession to the 3<sup>rd</sup> Judicial Circuit Court for the state of Michigan. Appellants sought reversal of the judgment of possession granted in favor of Kondaur. Appellants LaDawn Douglas' and all other Occupants' Brief on Appeal, 1. Petitioner argued that "Kondaur's action in refusing to communicate with LaDawn Douglas and thereby refusing to allow her any realistic opportunity to preserve her interest in the Property while electing to foreclose the Property by advertisement instead of judicially denies LaDawn Douglas even the basic hearing necessary to fulfil LaDawn Douglas' basic procedural due process rights and is patently inequitable." Appellants LaDawn Douglas' and all other Occupants' Brief on Appeal, 6.

Appellant prayed that the 3<sup>rd</sup> Judicial Circuit Court for the state of Michigan "set aside the voidable foreclosure by advertisement due to Kondaur's intentional and deliberate actions to prejudice LaDawn Douglas' ability to preserve her interest." Appellants' LaDawn Douglas and all other Occupants' Brief on Appeal, 7.

On January 15, 2019, the 3<sup>rd</sup> Judicial Circuit Court of the state of Michigan dismissed Petitioner's Appeal in a one-page order which states, "After giving the parties time and opportunity to resolve the matters and the parties proceeding on the appeal, the court concludes that relief in appellant's appeal is denied for the reasons stated in Appellee, Kondaur Capital Corporations, brief and the appeal is dismissed."

The reasons stated in Kondaur's appellate brief are the same misplaced justifications set forth by Michigan's 17<sup>th</sup> Judicial District Court in granting the Judgment of Possession in favor of Kondaur.

### 3. The Court of Appeals for the State of Michigan

Petitioner timely filed a delayed application for leave to appeal to Michigan's Court of Appeals (the "Court of Appeals") to appeal Michigan's 3<sup>rd</sup> Judicial Circuit Court's Order Dismissing Appeal. Petitioner moved the Court of Appeals for immediate consideration due to Petitioner's pending eviction in the 17<sup>th</sup> Judicial District Court for the state of Michigan.

Petitioner prayed that Michigan's Court of Appeals "set aside Kondaur's August 25, 2016 sheriff's sale of the Property for prejudice and violation of LaDawn Douglas' procedural due process rights." Appellants' LaDawn Douglas and all other Occupants' Brief on Appeal, 13. Petitioner also moved Michigan's Court of Appeals to remand the proceeding to the 17<sup>th</sup> Judicial District Court (the "Trial Court") to rule on,

Whether Kondaur denied Petitioner's state and federal constitutional right to due process when Kondaur enforced its lien against Ms. Douglas' [Petitioner's] property using Michigan's state issued foreclosure by advertisement statute, MCL § 600.3201 *et seq.*, without first providing Ms. Douglas with actual notice and an opportunity to be heard at a hearing prior to the [nonjudicial] foreclosure sale?" Appellants' Motion for Remand, 3.

Petitioner prayed that Michigan's Court of Appeals "remand the case to the Trial Court with instructions to determine whether there was a defect or irregularity in the sale procedure, whether any defect or irregularity violated Ms. Douglas'



constitutional due process rights as guaranteed by the United States Constitution.” Appellants’ Motion to Remand, 4. The Court of Appeal granted petitioner’s motion for immediate consideration, denied Petitioner’s motion to remand and denied Petitioner’s delayed application for appeal in a one-page order “for lack of merit on the grounds presented” on April 8, 2019.

#### 4. The Michigan Supreme Court

Petitioner timely filed an application for leave to appeal the Court of Appeals’ April 8, 2019 Order. Petitioner argued, “Without contractual authorization, the foreclosure by advertisement statute constitutes state action that violates LaDawn Douglas’ [Petitioner’s] constitutional due process right to a hearing and opportunity to be heard before being deprived of her interest in the Property. See *National Airport Corp. v. Wayne Bank*, 73 Mich. App. 572, 576 (1977).” Appellant’s Brief in Support of Application for Leave to Appeal to Supreme Court, 9. Petitioner further argued, “the unconstitutional sheriff’s sale by advertisement was an unconstitutional taking of her [Petitioner’s] property without due process under Michigan’s constitution, Const. 1963, art.1 § 17, and the United States Constitution, Const. Amend. 14.” Appellant’s Brief in Support of Application for Leave to Appeal to Supreme Court, 10.

On December 23, 2019, the Michigan Supreme Court denied Petitioner’s application for leave to appeal in a one-page order because it was “not persuaded that the questions presented should be reviewed by this Court.” Michigan’s Supreme Court did not certify to the Michigan Attorney General the fact that the

constitutionality of a statute of that State was drawn into question pursuant to 28 U.S.C. § 2403(b).

## REASONS FOR GRANTING THE PETITION

### A. The decision below is inconsistent with United States Supreme Court Precedent.

The lower court decisions are manifestly inconsistent with the United States Supreme Court's fundamental tenets of due process. The lower courts ignored the constitutional protections built into Michigan's foreclosure laws and ignored Petitioner's right to due process under the 5<sup>th</sup> and 14<sup>th</sup> amendments to the United States Constitution. Both the 5<sup>th</sup> and 14<sup>th</sup> amendments require notice and an opportunity to be heard prior to the deprivation of a substantial property interest. *Fuentes v. Shevin*, 407 U.S. 67, 92; 92 S.Ct. 1983; 32 L.Ed.2d 556 (1972); *American Surety Co. v. Baldwin*, 287 U.S. 156, 168; 53 S.Ct. 98, 102; 77 L.Ed. 231 (1932); *Boddie v. Connecticut*, 401 U.S. 371, 379; 91 S. Ct. 780, 786; *American Surety Co. v. Baldwin*, 287 U.S. 156, 168; 53 S.Ct. 98, 102; 77 L.Ed. 231 (1932); *Snaidach v. Family Finance Corp.*, 395 U.S. 337, 343; 89 S.Ct. 1820, 1823; and *D.H. Overmeyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d. 124 (1972). The Trial Court reconstrued Petitioner's legal argument and the main issue in the case stating "the issue that she [Petitioner] isn't subject to the mortgage because she didn't sign the mortgage, doesn't stand in terms of matter of law." Summary Proceeding Hearing June 28, 2017 Tr. 9:12-14. Petitioner made two main arguments. First, that the nonjudicial foreclosure was void as a matter of law for lack of contractual authority



and second, that the void foreclosure sale violated Petitioner's due process rights. Defendant's Brief in Opposition to Kondaur's Motion for Judgment of Possession. Instead of acknowledging that Petitioner was not a party to the mortgage contract, the Trial Court and subsequent appellate courts equivocated that Petitioner's title interest became subject to the power of sale provision of the Mortgage she never signed by virtue of the Divorce Decree and 2014 quit claim deed executed by Clifford Douglas, Jr. in favor of Petitioner. Summary Proceeding Hearing June 28, 2017 Tr. 9:4-18. The Trial Court's legal reasoning mischaracterized the Divorce Decree and Quit Claim deed as instruments of assumption<sup>6</sup> as if Petitioner assumed the subject mortgage instead of Petitioner owning the Property "subject to"<sup>7</sup> the Mortgage. Summary Proceeding Hearing June 28, 2019 Tr. 4:19-24. In doing so, the Trial Court ignored Michigan's long-standing foreclosure law and violated Petitioner's due process rights regarding Petitioner's competing title interest in the Property. By granting Kondaur a Judgment of Possession on June 28, 2017, thereby upholding Kondaur's unauthorized and unconstitutional nonjudicial foreclosure sale, the courts of the state of Michigan authorized Kondaur to evict Petitioner from her home with no meaningful opportunity to challenge the unlawful foreclosure.<sup>8</sup>

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<sup>6</sup> "[A]n assumption of the mortgage debt by a grantee of the mortgaged premises constitutes an original absolute promise to pay, enforceable by the mortgagee." 55 Am. Jur. 2d Mortgages § 1144. "An agreement merely to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance." *Shepherd v. May*, 115 U.S. 505, 510 (1885) quoting *Elliott v. Sackett*, 108 U.S. 132, 139; 2 S.Ct. 375, 379.

<sup>7</sup> *Shepherd v. May*, 115 U.S. 505, 510 (1885); *Elliott v. Sackett*, 108 U.S. 132, 139; 2 S.Ct. 375, 379.

<sup>8</sup> A majority of Michigan courts have ruled that a plaintiff loses standing once the redemption period purportedly expires, even when a plaintiff files suit prior to the expiration of the redemption period. *Bryan v. JPMorgan Chase Bank*, 304 Mich.App. 708, 715; 848 N.W.2d 482 (2014).

Michigan's courts provided no legal authority justifying the State sanctioned seizure of Petitioner's property without an opportunity for a prior hearing. There are limited "extraordinary situations" in which seizure without an opportunity for a prior hearing is justified. *Boddie v. Connecticut*, 401 U.S. 371, 379; 91 S. Ct. 780, 786. "The Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of bank failures, and to protect the public from misbranded drugs and contaminated food." *Fuentes v. Shevin*, 407 U.S. 67, 92; 92 S.Ct. 1983; 32 L.Ed.2d 556 (1972). Michigan's foreclosure by advertisement statute does not serve such important governmental or general public interests. In fact, no more than Kondaur's private gain and administrative convenience was directly at stake.

Even at this stage in the case, long after the unconstitutional seizure of Petitioner's property, Petitioner has yet to receive a meaningful opportunity to present every available defense to Kondaur's nonjudicial foreclosure although "[d]ue process requires that there be an opportunity to present every available defense." *American Surety Co. v. Baldwin*, 287 U.S. 156, 168; 53 S.Ct. 98, 102; 77 L.Ed. 231 (1932). Even assuming arguendo that Petitioner had the basic opportunity to and did present available defenses to the unconstitutional taking in the courts below, none of the lower courts evaluated Petitioner's legal defenses or the constitutionality of the nonjudicial foreclosure sale in the context of the relevant facts and circumstances of the case – namely the fact that Petitioner did not contractually grant Kondaur the

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power to sale the Property nonjudicially. Not one of Michigan's courts provides even a cursory mention of Petitioner's due process rights or the constitutionality of the nonjudicial foreclosure. None of the hearings that occurred after the seizure provided a real test of the constitutionality of the nonjudicial foreclosure sale. "Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivation of property, however, it is axiomatic that the hearing must provide a real test." *Fuentes v. Shevin*, 407 U.S. 67, 97; 92 S.Ct. 1983; 32 L.Ed.2d 556 (1972). "Due process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property...." *Snaidach v. Family Finance Corp.*, 395 U.S. 337, 343; 89 S.Ct. 1820, 1823. Petitioner never received the opportunity for a hearing in which she had a true and meaningful opportunity to challenge the validity and constitutionality of Kondaur's nonjudicial foreclosure as to Petitioner's interest in the Property. It is notable that a majority of Michigan courts have consistently held that mortgagors and individuals wishing to challenge a nonjudicial foreclosure lack standing to do so in a suit the mortgagor or the challenging party initiates. See *supra* n. 7. Therefore, Petitioner had no meaningful opportunity to request a hearing prior to Kondaur's sheriff's sale. For this reason, Petitioner waited for Kondaur to initiate its own summary proceeding after the expiration of the purported redemption period and challenged the nonjudicial foreclosure as an occupant of the Property – to ensure that Petitioner had standing to assert her defenses. Instead of evaluating Petitioner's defenses, the Trial Court

and the appellate courts that affirmed the Trial Court's ruling, essentially argued that Petitioner waived her due process rights because she owned the Property subject to Kondaur's mortgage. While it is true that Petitioner owned the Property subject to Kondaur's mortgage, Petitioner did not grant Kondaur the power of sale and did not waive her right to due process. Although due process rights to notice and a hearing prior to deprivation of property are subject to waiver in civil and criminal cases, *D.H. Overmeyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d. 124 (1972); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311; 84 S.Ct. 411; 11 L.Ed.2d 354 (1964). Petitioner never waived her due process rights as to the Property. Even in cases where notice and a hearing were waived, a waiver must be "voluntary, knowing, and intelligently made," *Brady v. United States*, 397 U.S. 742, 748; 90 S.Ct. 1463, 1468; 25 L.Ed. 2d 747 (1970) or "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464; 58 S.Ct. 1019; 1023; 82 L.Ed. 1461 (1938); *Fay v. Noia*, 372 U.S. 391, 439; 83 S.Ct. 822, 849. "We do not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307; 57 S.Ct. 724, 731; 81 L.Ed. 1093 (1937). Petitioner is not a party to the contract that granted the power of sale and Petitioner never "voluntarily, intelligently, and knowingly" waived her right to notice or a meaningful opportunity to be heard before Kondaur conducted its nonjudicial foreclosure sale and seized Petitioner's home. *D.H. Overmeyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 187; 92 S.Ct. 775; 31 L.Ed.2d. 124 (1972).



This great country was founded on the notion of democracy and freedom for all citizens. Our founding fathers painstakingly wrote and ratified the Constitution of our United States and the Bill of Rights to engrain these basic tenets in our legal system. The state of Michigan has blatantly ignored these tenets. “[I]t is clear that the Due Process Clause applies to a creditor’s effort to enforce its lien through judicial proceedings or other state action against a defaulting debtor.” *Dow v. State of Michigan*, 396 Mich. 192 (1976). State action occurs when a creditor utilizes process issued by state officials to enforce its claim. *Snaidach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969). Furthermore, “[w]here a creditor utilizes process issued by the state to enforce his claim against the defaulting debtor, we heartily agree with our Supreme Court that there is such state action so as to warrant due process application to such procedures.” *National Airport Corp. v. Wayne Bank*, 73 Mich.App. 572, 577 (1977). Without contractual authorization, the foreclosure by advertisement statute constitutes state action that violates Petitioner’s constitutional due process right to a hearing and opportunity to be heard before being deprived of her interest in the Property. See *National Airport Corp. v. Wayne Bank*, 73 Mich. App. at 576 (1977). “A procedural rule that may satisfy due process for attachments in general, see *McKay v. McInnes*, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975, does not necessarily satisfy procedural due process in every case.” *Snaidach v. Family Finance Corp.*, 395 U.S. at 340 (1969).

Petitioner challenged the constitutionality of the foreclosure by advertisement as to her interest in the Property in the Trial Court in pleading:

Kondaur's August 25, 2016 Sheriff's Deed unconstitutionally terminates Plaintiff's property interest in the subject property without due process of law. See LaDawn Douglas' and all other occupants Response to Kondaur's Motion for Possession at 11.

Ms. Douglas pleaded in the Trial Court:

Kondaur falsely obtained and recorded a sheriff's deed [by advertisement] against LaDawn Douglas' [Petitioner's] ownership interest in the Property without due process of law and without any contractual right or remedy against LaDawn Douglas. [Kondaur's] recording and publication of the sheriff's deed falsely leads one to contemplate that the Sheriff's Deed terminated all ownership interest in the subject property, however, LaDawn Douglas' [Petitioner] interest in the property may only be terminated by a judicial foreclosure of the subject property because [LaDawn Douglas] is not a party to the subject mortgage.

Michigan's foreclosure by advertisement statute was issued by Michigan's legislature, who are state officials. Therefore, a foreclosure by advertisement against a party that did not sign the subject mortgage constitutes state action by enforcing the laws of the state of Michigan to deprive a citizen of the United States of a property interest without due process. *Snaidach v. Family Finance Corp.*, 395 U.S. at 342 (1969). As such, Kondaur and the lower courts, as state actors, have violated Petitioner's constitutional due process rights absent waiver or justification as discussed above.

A Sheriff receives its power and authority to confer a sheriff's deed by nonjudicial foreclosure from the laws of the state. Without Petitioner's contractual consent to the nonjudicial sale, Kondaur's sheriff's sale and the sheriff granting Kondaur a sheriff's deed to Petitioner's Property constituted state action. *Snaidach*



v. *Family Finance Corp.*, 395 U.S. at 342 (1969) (for the general proposition that state action constitutes a taking in violation of fundamental principles of due process when there is a deprivation of property without notice and a prior hearing). “[T]he sheriff’s authority to sell in this country is in the nature of a naked power conferred by statute; he takes no title in land by levy as he does in goods and can confer none on purchaser if power to sell is wanting.” *Gantly’s Lessee v. Ewing*, 44 U.S. 707, 714; 11 L.Ed 794. It is undisputed that Petitioner did not grant Kondaur or its predecessor the power to sale the Property nonjudicially. Accordingly, the Sheriff’s Deed issued to Kondaur lacked the required contractual authority to rely on Michigan’s foreclosure by advertisement statute to confer authority to issue a sheriff’s deed or transfer Petitioner’s title interest in the Property to Kondaur. Because the sheriff lacked authority to confer the Property to Kondaur, the Sheriff’s Deed did not terminate Petitioner’s interest in the property. *Gantly’s Lessee v. Ewing*, 44 U.S. at 714. At the least, the equity of redemption remains until the mortgage is foreclosed by judicial foreclosure or some mode of transfer recognized by law. *Shillaber v. Robinson*, 97 U.S. 68, 78; 1877 WL 18595.

The state of Michigan’s ratification and enforcement of Kondaur’s unauthorized nonjudicial foreclosure sale, through its sheriff officer and courts, constitutes an unconstitutional taking of Petitioner’s Property. It is noteworthy that the mortgage at issue was insured by the Federal Housing Administration (“FHA”). Immediately upon obtaining possession of the Property through the 17<sup>th</sup> Judicial District Court’s Judgment of Possession, Kondaur filed a claim with the United

States Department of Housing and Urban Development (“HUD”) and transferred the Property to HUD.

**B. This Question is of Significant National Importance.**

Not only did Kondaur violate the 5<sup>th</sup> and 14<sup>th</sup> amendments to the United States Constitution, Kondaur also violated federal regulations set in place by the United States Consumer Financial Protection Bureau (“CFPB”) to resolve the very issue in this case. Effective January 10, 2014, servicers were required to institute policies and procedures “reasonably designed to ensure that ... the servicer promptly identifies and facilitates communication with a successor in interest.” CFPB Bulletin 2013-12 (October 15, 2013), 2. “A successor in interest is the spouse, child, or heir of a deceased borrower or other party with an interest in the property.” *Id.* n. 7.

Petitioner, as the former spouse of the mortgagor, Clifford Douglas, Jr., qualifies as a successor in interest under CFPB Bulletin 2013-12.

The CFPB adopted the successor in interest provision of the Policies and Procedures Rule after learning about difficulties that some surviving spouses, children, or other successors in interest experienced in attempting to communicate with servicers. (footnote omitted). The CFPB has received reports of servicers either outright refusing to speak to a successor in interest or demanding documents to prove the successor in interest’s claim that do not exist (*e.g.* probate court documents for an estate that is not required to go through probate) or are not reasonably available. These practices often prevent a successor in interest from pursuing assumption of the mortgage loan and, if applicable, loss mitigation options - potentially resulting in the avoidable loss of the home. In applying the Policies and Procedures Rule, the CFPB seeks to reduce the number of unnecessary defaults and foreclosures, including those following the death of a borrower. CFPB Bulletin 2013-12 (October 15, 2013).

Notably, the CFPB amended the Real Estate Settlement Procedures Act, 12 C.F.R. § 1024, effective April 19, 2018 and expanding on CFPB Bulletin 2013-12, to require mortgage servicers, such as Kondaaur, to communicate with successors in interest, such as Petitioner, to prevent divorced spouses who receive title to property divorce decree from being caught in the situation Kondaaur created in this case.<sup>9</sup>

Had Kondaaur complied with the CFPB's Policies and Procedures Rule, which the CFPB found to be an issue of significant national importance, Petitioner would have at least had the opportunity to protect her home from Kondaaur's onerous and unreasonable conduct. In refusing to communicate with Petitioner in violation of CFPB Bulletin 2013-1 2while simultaneously circumventing Petitioner's due process rights through Michigan's foreclosure by advertisement statute further denied Petitioner the any meaningful opportunity to be heard and prejudiced her ability to have her title interest reviewed in a meaningful way before she was deprived of the Property.

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<sup>9</sup> 12 CFR § 1024.31 provides: Successor in interest means a person to whom an ownership interest in a property securing a mortgage loan subject to this subpart is transferred from borrower, provided that the transfer is:

- (1) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- (2) A transfer to a relative resulting from the death of a borrower;
- (3) A transfer where spouses or children of the borrower become an owner of the property'
- (4) A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or
- (5) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property. [Emphasis added]

Had any of the court's below set aside Kondaur's August 25, 2016 sheriff's sale, Kondaur's mortgage would have been reinstated by operation of law and Kondaur would have been legally required to communicate with Petitioner, as a successor in interest, to resolve the underlying issues that led to the alleged mortgage default. Then Petitioner would have had a meaningful opportunity to preserve her title interest in the Property and Kondaur would have retained its right to file a judicial action to foreclose the property.


### **CONCLUSION AND PRAYER FOR RELIEF**

Absent this Court's intervention, unscrupulous servicers and the state of Michigan will be at liberty to deprive United States citizens of substantial property interests without due process of law, thereby abridging the rights and immunities of said citizens.

This Court should grant certiorari to review the Michigan Supreme Court's judgment denying review of the nationally significant and constitutional issues set out in this case.

May 21, 2020

Respectfully submitted,



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