IN THE SUPREME COURT OF ARKANSAS

TOMMY LAND **APPELLANT**

v. **Case No. CV-24-645**

BAS, LLC **APPELLEE**

AN APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY
CIVIL DIVISION
28CV-22-388
HONORABLE RICHARD LUSBY
CIRCUIT JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is being taken from the circuit court's denial of sovereign immunity in the matter of *BAS, LLC v. Tommy Land*, 28CV-22-388. Circuit Judge Richard Lusby issued his *"Revised" Order Denying Motion for Summary Judgment* on September 5, 2024. (RP 1267-1270). In that order, the circuit court ruled that defendant-appellant Tommy Land, Arkansas Commissioner of State Lands ("Commissioner"), was not entitled to sovereign immunity because plaintiff-appellee BAS, LLC ("BAS") stated an exception to that defense. (RP 1268-1269). The Arkansas Supreme Court has jurisdiction to hear this appeal pursuant to Ark. R. App. P. Civ. (2)(a)(10), which states that an appeal may be taken from a circuit court to the Arkansas Supreme Court from "[a]n order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official." The Commissioner filed his Notice of Appeal on September 5, 2024 (RP 1271-1273), which is timely under Ark. R. App. P. Civ. 4(a).

STATEMENT OF THE CASE AND THE FACTS

BAS, LLC ("BAS") is a California limited liability company that purchased commercial property in Paragould, Arkansas in October of 2016. (RP 414). The purchase documents, including the signed Purchaser's Statement (RP 770-772), Special Warranty Deed to BAS (RP 437-439), Estoppel Certificate (RP 723-726), and the Arkansas Real Estate Transfer Tax Receipt (RP 789) identified BAS's address as 3735 Winford Drive, Tarzana, California.

Tax statements were mailed to BAS at its Tarzana, California address in March of 2017 and 2018, informing it of the taxes due in October of those years, along with a final warning letter in June of 2020. (RP 761-764). The statements were not returned, and the taxes were never paid. (RP 761-764). BAS admitted to receiving the first notice of taxes due, but instead of paying them, forwarded the notice to its attorney for follow-up. (RP 761-764). On July 1, 2020, the property was certified by the Greene County Clerk to the Arkansas Commissioner of State Lands ("Commissioner") for non-payment of ad valorem property taxes. (RP 426, 777-778).

Ark. Code Ann. § 26-37-101(a)(1)(A) states that all lands upon which taxes have not been paid for one year following the date they are due "shall be forfeited to the state and transmitted by certification to the Commissioner of State Lands for collection or sale." Before the land can be sold, however, the Commissioner must

provide notice to the tax-delinquent landowner of their right to redeem the property, pursuant to the terms set forth in Ark. Code Ann. § 26-37-301. The statute provides that the Commissioner "shall notify the owner, at the owner's last known address as certified by the county, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs, including the cost of the notice." *Id*. at (a)(1). The statute requires no further pre-sale notice unless the certified mail is returned unclaimed or refused. (RP 416; *see also* § (a)(3)).

Tommy Land, the elected Commissioner, did a Records and Lien Search Request for the Property related to the certification from the Greene County Clerk. (RP 426). The search revealed that BAS was the record owner of the property at the Tarzana, California address. (RP 426, 441-444). On August 17, 2021, pursuant to A.C.A. § 26-37-301, the Commissioner sent a notice of delinquency and future tax sale to BAS at this address. (RP 427, 446). The August 2021 notice stated that the property would be sold on August 2, 2022, if BAS did not pay all taxes penalties, interest, and costs prior to that date. (RP 427, 446). The notice was sent via certified mail with return receipt requested. (RP 427).

USPS tracking records indicate that the August 2021 notice was delivered to a front desk, reception area, or mail room of the Tarzana address on August 24, 2021. (RP 427). The mailed notice was never returned "unclaimed" to the Commissioner. (RP 414). Unbeknownst to the Commissioner, neither BAS nor its representatives

resided at the Tarzana, California address at the time the notice was delivered (RP 427). This is because BAS never filed a change of address with the Greene County Clerk (RP 762), even though it was required by law. (*See* A.C.A. § 26-35-705(c)). Under no obligation, the Commissioner courteously sent a *second* notice of delinquency and future tax sale, this time to the property's physical address in Paragould, Arkansas, on June 27, 2022. (RP 428, 562). The June 2022 notice was returned to the Commissioner as "ATTEMPTED – NOT KNOWN UNABLE TO FORWARD." (RP 428, 563). The Commissioner made no further attempts to provide pre-sale notice to BAS. (RP 414). On August 2, 2022, the property was sold at public auction to Parcel Strategies, LLC, and Banyan Capital Investments. (RP 429). It is undisputed that the Commissioner complied with the notice statute prior to the tax sale. (RP 415-417). On August 3, 2022, the Commissioner sent a Notice of Delinquent Real Estate Taxes and Pending Sale letter to BAS, via regular mail, to both the Tarzana and Paragould addresses. (RP 792-793).

BAS filed a lawsuit claiming that the Commissioner failed to satisfy due process requirements when he attempted to notify BAS of the impending tax sale and wants injunctive relief in the form of the tax sale being set aside. (*See* RP 16-26; 424-435). BAS argues that the Commissioner's notice was invalid since the Commissioner never received a physically signed "green card / return receipt", but instead relied upon USPS tracking records for confirmation of delivery. (RP 418).

The Commissioner's counter-argument is that their compliance with the notice statute proves that they satisfied due process, and therefore, BAS has failed to state a constitutional violation to surmount the Commissioner's sovereign immunity.

The circuit court issued its *Revised Order Denying Motion for Summary Judgment* on September 5, 2024. (RP 1267-1270). The circuit court *correctly* held that BAS can only defeat COSL's claim of sovereign immunity if it can prove one of three exceptions, namely, showing that COSL committed a constitutional violation. (RP 1268). The circuit court *incorrectly* held, however, that "issues of fact" remain in dispute. (RP 1268-1269). The circuit court wants a trial to determine whether the notice provided was "reasonably calculated, under all the circumstances" to satisfy due process requirements. (RP 1268-1269). This is a pure legal question, not a factual one. Erroneously, the circuit court declined to apply the facts to determine whether BAS could prove an exception to the sovereign immunity doctrine. The circuit court should be reversed. Not only was the circuit court required to make this legal determination prior to trial, but if it had, the facts clearly demonstrate that this case must *not* proceed to trial due to the Commissioner's entitlement to sovereign immunity. The Commissioner filed his Notice of Appeal on September 5, 2024. (RP 1271).

STANDARD OF REVIEW

Denial of summary judgment is ordinarily not a final, appealable order. *Convent Corporation v. City of North Little Rock*, 2016 Ark. 212, 6, 492 S.W.3d 498, 502. However, an appeal may be taken from a circuit court to the Arkansas Supreme Court from an order denying a motion for summary judgment based on the defense of sovereign immunity. *See* Ark. R. App. P. Civ. 2(a)(10). "The rationale for this exception is that the right to immunity from suit is effectively lost if the case is permitted to go to trial without review." *See Arkansas Game and Fish Comm'n v. Eddings*, 2011 Ark. 47, 3, 378 S.W.3d 694, 696. The issue of whether a party is immune from suit is purely a question of law and is reviewed de novo. *Arkansas Community Correction v. Barnes*, 2018 Ark. 122, 2, 542 S.W.3d 841, 842.

ARGUMENT

I. The circuit court erred by failing to apply material facts to determine whether the Commissioner was entitled to sovereign immunity.

The doctrine of sovereign immunity is provided under Article 5, Section 20 of the Arkansas Constitution. It reads: "[t]he State of Arkansas shall never be made defendant in any of her courts." The Arkansas Supreme Court has extended this doctrine to include state agencies. *Arkansas Dept. of Community Correction v. City of Pine Bluff*, 2013 Ark. 36, 3, 425 S.W.3d 731, 733. "Where the pleadings show that the action is, in effect, one against the State, the circuit court acquires no jurisdiction." *Id*. A suit against the State is barred by sovereign immunity if a judgment for the plaintiff will operate to control the action of the State or subject it to liability. *See Board of Trustees of University of Arkansas v. Andrews*, 2018 Ark. 12, 5, 535 S.W.3d 616, 619.

The Arkansas Supreme Court recognizes three exceptions to this doctrine. Sovereign immunity may be surmounted (1) when the State is the moving party seeking relief; (2) when an act of the legislature has created a specific waiver of sovereign immunity; or (3) when the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute. *Andrews*, at 5, 619.

Here, the circuit court denied the Commissioner's defense of sovereign immunity pursuant to the third exception. The circuit court simultaneously held that

the Commissioner complied with the statutory notice requirements under A.C.A. § 26-37-301, yet also concluded that there are disputed issues of fact as to whether the Commissioner violated BAS's right to due process (which would invoke an "illegal action" exception). This ruling is incompatible because compliance with the statute *is* due process. The circuit court erred by assigning a factual dispute where none exists. For this reason, the circuit court's denial of sovereign immunity should be reversed.

A. There is no dispute that the Commissioner complied with the statutory requirements under A.C.A. § 26-37-301.

The crux of this case hinges on whether the Commissioner satisfied due process requirements when it completed the steps taken to comply with the notice requirements found in A.C.A. § 26-37-301. (RP 1269-1270). The Commissioner's compliance with the statute is undisputed.

In its *Order Denying the Summary Judgment Motion of BAS and Granting in Part and Denying in Part the Counter-Motions of Parcel Strategies and Banyan*, the circuit court ruled, as a matter of law, that the Commissioner complied:

> "There is no dispute that BAS furnished the county the address of 3735 Winford Drive, Tarzana, California 91356 which is the address the county certified to the Commissioner. Per Exhibit 3 to MSJ of BAS, the Commissioner sent notice of the tax sale to BAS by certified letter dated August 17, 2021. The [notice] statute requires no further pre-sale notice unless the certified mail '…is returned unclaimed or refused…' in which case, notice is to be sent again by regular mail.

BAS does not dispute that the Commissioner mailed a certified letter to the address certified by the county. However, BAS contends the statutory certified mail

requirement has not been met unless the Commissioner receives proof that the mail has been signed for. In essence, BAS urges the court to go beyond the statutory requirement that notice be sent via certified mail and add return receipt requested as an additional requirement. BAS is unable to cite any statutory or case law authority explicitly supporting this argument. The statute simply requires that the Commissioner send notice via certified mail to the last known address as certified by the county. That this was done here is beyond dispute…" (RP 415-16).

The circuit court reiterates that the statutory requirements were met in its order denying the Commissioner's motion for summary judgment. (RP 1268, n.2). It is clear that the material facts of this case have long been decided, thus, only a legal question remains: whether the Commissioner's compliance with the notice statute, absent receiving a signed return receipt, satisfies constitutional due process. Inexplicably, however, the circuit court held that there are "issues of fact which must be resolved in order to determine whether notice provided by [the Commissioner] met due process requirements…[w]hat is and is not 'reasonably calculated' and the nature of 'all the circumstances' and inferences which can be drawn therefrom are matters to be determined by the trier of fact." (RP 1269). The circuit court erred because these are legal questions, not factual ones.

B. Whether compliance with Arkansas' tax-sale notice statute satisfies due process is a question of law.

The circuit court cited *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306 (1950) and *Jones v. Flowers*, 547 U.S. 220 (2006) in its decision (RP 1268-69). In *Mullane*, the US Supreme Court held that notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the

action and afford them an opportunity to present their objections." 339 U.S. 306, 314. This early opinion from 1950 was cited heavily by the Court in *Jones*, a case that is factually similar (yet critically distinguishable) to the one before us.

In *Jones*, the Arkansas Commissioner of State Lands attempted to notify Jones, the petitioner, via certified letter in April 2000 of his tax delinquency and right to redeem his property. 547 U.S. 220, 223. This notice was mailed to an address that Jones provided and was legally obligated to update (*id.* at 231), yet Jones moved out in 1997 and did not update his address (*id.* at 223). Nobody was home to sign for the letter, and eventually the post office returned the unopened packet to the Commissioner marked "unclaimed". *Id*. at 223-24. In analyzing whether Jones received adequate Fourteenth Amendment due process under these facts, the Court emphasized that while a property owner need not receive "actual notice" before the government may take his property and sell it for unpaid taxes (*see id.* at 226), the Due Process Clause does require that an owner receive "notice and opportunity for hearing appropriate to the nature of the case", before the State may do so. *See id.* at 223.

The US Supreme Court found that the notice provided by the Commissioner to Jones was insufficient to satisfy due process. "It is not too much to insist that the State do a bit more to attempt to let [a property owner] know about [a pending tax sale] when the notice letter addressed to him is returned unclaimed." 547 U.S. 220,

239. "We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id*. at 225. The Court contemplated several options the State of Arkansas could take to remedy this scenario (Arkansas' tax sale notice at the time only required notice via certified mail, with no instruction for how to proceed if the letter came back unclaimed; *see id.* at 223 (referencing the 1997 version of A.C.A. § 26-37-301). The Court opined that "following up with regular mail" might be prudent. *See id.* at 235. Likewise, a posted notice on the front door of the property might suffice. *Id*. A newspaper ad listed a few weeks before the sale is not enough. *Id.* at 237. Requiring the State to search a phonebook or income tax rolls, however, would be too burdensome. *Id*. at 235-36. Ultimately, the Court found that "it is not our responsibility to prescribe the form of service that the government should adopt." *Id*. at 238.

In the legislative session that followed the *Jones* decision, the Arkansas legislature added provisions to A.C.A. 26-37-301, enumerating additional reasonable steps that that must be taken if a tax-sale notice is returned unclaimed. *See* Act 706 of 2007, § 4. In the wake of the revised statute, the Arkansas Court of Appeals heard *Esterosto, LLC v. Kinsey*, 2010 Ark. App. 429, 374 S.W.3d 907.

In *Esterosto*, the Commissioner fully complied with the notice statute and mailed notice to the tax-delinquent owners at their residence by certified mail. 2010

Ark. App. 429, 3-4. The signature on the return receipt was not legible, and the circuit court found credible the testimony of the owners that they did not receive the letter and therefore concluded that the owners "did not receive actual notice of the tax sale." *Id*. Esterosto (the LLC that purchased the property and moved to quiet title) argued that the Commissioner strictly complied with the statute and satisfied constitutional due process requirements. *Id*. The Court held that these facts were distinguishable from *Jones*. The notice was not returned "unclaimed"; therefore, the Commissioner was not aware that the notice had failed. *Id*. at 6-7. The *Esterosto* court reiterated that "actual notice was not required and the failure of notice in a specific case does not establish the inadequacy of the attempted notice." *Id*. at 7, 911 (citing *Jones*, 547 U.S. 220, 231). The Court of Appeals held that due process was satisfied under these circumstances. *Id*.

No matter which set of undisputed facts were before them, these appellate courts answered whether the dictates of Fourteenth Amendment due process were satisfied based on compliance with the notice statute, clearly delineating this a question of law. *See also Morris v. LandNpulaski, LLC*, 2009 Ark. App. 356, 10, 309 S.W.3d 212, 218 ("In sum, we hold that the Commissioner strictly complied with the notice requirements set forth in [A.C.A. §] 26-37-301 and that the notice provided by the Commissioner met federal due-process constraints"); *Metro Empire Land Ass'n, LLC v. Arlands, LLC*, 2012 Ark. App. 350, 5, 415 S.W.3d 594, 597

("The issue of notice given to a party with an interest in tax-delinquent land is a matter of statutory interpretation, which we review de novo on the record"); *Dickey v. Lillard*, 2020 Ark. App. 447, 9, 607 S.W.3d 531, 536 ("The Commissioner's acts herein complied with the statutory requirements and with constitutional due process"). Here, the circuit court clearly erred by mistaking law for fact.

II. The undisputed material facts clearly demonstrate that BAS cannot state an exception to sovereign immunity, therefore, the circuit court erred by denying sovereign immunity to the Commissioner.

The circuit court asserts that it has not ruled that A.C.A. § 26-37-301 (the notice statute) is unconstitutional. (RP 1269-70). Although the circuit court has already ruled that the Commissioner fully complied with the notice procedures under the statute, it opined that a trier of fact is necessary to resolve whether the "execution" of the procedures met due process requirements. *Id*. at 3-4. This is erroneous because there are no disputes of material fact that would preclude a ruling on this question.

The circuit court held that BAS's *allegations* of due process violations, if proven, bring this action for injunctive relief squarely within a recognized exception. (RP 1269, citing *Harmon v. Payne*, 2020 Ark. 17, 592 S.W.3d 619). The circuit court's error here is two-fold: (1) the mere allegation of a constitutional violation does not invoke an exception to sovereign immunity, and (2) even if all material

facts in BAS's complaint are taken as true, BAS has not stated a constitutional violation.

A. The mere allegation of a constitutional violation does not invoke an exception to sovereign immunity.

Actions that are illegal, unconstitutional, or *ultra vires* may be enjoined. *See Martin v. Haas*, 2018 Ark. 283, 7-8, 556 S.W.3d 509, 514-15. BAS argues that the Commissioner's method of providing notice unconstitutionally deprived them of due process and the tax sale should therefore be set aside. (RP 429-432). While it is undisputed that the Commissioner followed the statute by delivering notice via certified mail to the listed address of BAS and that the mail didn't return "unclaimed", BAS claims the method was nonetheless insufficient because COSL requested a return receipt but did not receive one. (RP 432). Based solely on this flawed legal allegation by BAS, the circuit court held that an exception to sovereign immunity has been met.

The circuit court misapplied the law. This mere *allegation* of a constitutional violation is not enough to invoke an exception to sovereign immunity. Instead, the circuit court must look to see if BAS has alleged *facts* that would overcome sovereign immunity. "[A] complaint alleging an exception to sovereign immunity is not exempt from our fact pleading requirements. The complaint must plead sufficient facts establishing an unconstitutional or unlawful act that would avoid application of sovereign immunity." *Harmon*, 2020 Ark. 17, 4. In other words, sovereign

immunity is not determined by a trier of fact. The facts in a plaintiff's complaint are presumed true, and from there the court must determine if the facts pled would amount to a constitutional violation.

In *Williams v. McCoy*, a nursing student was suspended from Arkansas State University after she was allegedly caught cheating on an exam. 2018 Ark. 17, 1-2, 535 S.W.3d 266, 267. She was given notice via email and letter informing her of her misconduct, as well as a hearing, prior to suspension. *Id*. The student's appeal was denied by the university, along with a FOIA request for documents. *Id*. She sued, alleging that her due process was denied and petitioned for declaratory judgment, an injunction clearing her name, and an order reinstating her to the nursing program. *Id*. The lower court denied the university's motion to dismiss under sovereign immunity. The Arkansas Supreme Court reversed and held that "McCoy's complaint fails to plead facts that, if proven, would demonstrate a due process violation that she can argue was an illegal or unconstitutional act sufficient to avoid sovereign immunity." *Id*. at 4.

Even if the circuit court here intended to include factual analysis, rather than a mere allegation, as part of its reasoning for denial of sovereign immunity, they have misapplied the "if proven" clause. As the Arkansas Supreme Court demonstrated in *McCoy*, the courts do not wait to see if the plaintiff's facts have *actually* been proven by a trier of fact. Rather, they presuppose the facts *will be*

proven. This is no different than the standard the courts use when reviewing a denial of a motion to dismiss or summary judgment. Would the material facts, as alleged by the plaintiff, lead to a constitutional violation if proven at trial? If yes, sovereign immunity is denied. If not, then sovereign immunity must be granted. The whole point of sovereign immunity is that it must be decided *prior* to trial for it to be effective. *See Arkansas Game and Fish Comm'n v. Eddings*, at 3.

B. Even if all material facts in BAS's complaint are taken as true, BAS has not stated a constitutional violation.

All parties agree that the Commissioner sent notice of the impending tax sale to BAS's listed address via certified mail and the mail was not returned "unclaimed". BAS claims, however, that service was improper because the Commissioner did not physically receive a return receipt, even though they requested one from the US Postal Service. (RP 427). And, of course, BAS argues that it did not receive *actual notice* because the owner no longer lived at the residence that had been filed with the county. (RP 427).

These additional facts are irrelevant. The court in *Esterosto* referenced that the address on file in that case was undisputably correct and that there was a signed return receipt given to the Commissioner, clearly evidencing that no further steps were needed to satisfy due process. *Id.* at 7. However, the court also emphasized that a return receipt was not statutorily required (*id*. at 4); actual notice is not required (*id*. at 5,); and that, "notice has been deemed constitutionally sufficient if it was

reasonably calculated to reach the intended recipient when sent…the failure of notice in a specific case does not establish the inadequacy of the attempted notice." *Id*. at 6; citing *Jones v. Flowers*, at 226-31. "In other words, the Court made it clear that the constitutionality of a particular notice procedure is to be assessed *ex ante* rather than *post hoc*."[1] *Id*.

Here, the Commissioner satisfied due process under the material facts provided by BAS. The tax-sale notice was reasonably calculated to reach BAS because it was sent via certified mail on August 17, 2021, to the record owner's address on file with the county (as mandated under Arkansas' post-*Jones* statute, § 26-37-301 (2021)). The mail was not returned unclaimed; therefore, the Commissioner had no reason to suspect that it did not reach its target.[2] In fact, the Commissioner received notification from USPS Tracking that the package was

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[1] *ex ante*: [Latin "from before"] Based on assumption and prediction, on how things appeared beforehand, rather than in hindsight. Black's Law Dictionary (12th ed. 2024).

post hoc: [Latin fr. *post hoc, ergo propter hoc* "after this, therefore because of this"] (1) *adv*. After this; subsequently. (2) *adj*. Of, relating to, or involving the fallacy of assuming causality from temporal sequence; confusing sequence with consequence. Black's Law Dictionary (12th ed. 2024).

[2] This is easily contrastable from the classic "forewarning" example offered in *Jones*, where the Commissioner would be in violation if they failed to follow up after "prepar[ing] a stack of letters to mail to delinquent taxpayers, hand[ing] them to the postman, and then watch[ing] as the departing postman accidentally dropped the letters down a storm drain…" *See* 547 U.S. 220, 229.

delivered. (RP 427). Furthermore, BAS had a duty to keep its address updated (A.C.A. § 26-35-705(c)); and even though it was not obligated to do so by statute, the Commissioner still took the *additional* step of mailing a second notice via certified mail to the physical address of the property in Paragould, Arkansas on June 27, 2022. (RP 428). This second notice returned "unclaimed", with no additional steps from the Commissioner, but that is of no consequence as the Commissioner had gone above and beyond his duty at that point.

It is also worth noting that the original return receipt (from the August 2021 notice) was, in fact, signed and accepted by an unknown recipient. (RP 756-759). The receipt was uploaded to a digital database, rather than physically returned to the Commissioner. *Id*. It is true that knowledge of the signed receipt (by an unknown recipient) was not known by the Commissioner prior to the tax sale, but this is also inconsequential because, (1) the notice statute and *Jones* precedent only requires that additional steps be taken if the mail is returned unclaimed, which would have been impossible here because the mail *was* claimed; and (2) it does not matter if the signature on the receipt did not belong to the record owner because the Commissioner is not required "to investigate every signature to insure [*sic*] it is in fact the signature of the property owner" (*Esterosto*, at 7; 911).

1. Even if the August 2021 notice was somehow improper, the Commissioner satisfied due process with the June 2022 notice.

There are no defects or deficiencies in the August 2021 pre-sale notice sent to BAS at the Tarzana, California address. Even if there *were*, however, the Commissioner still satisfied due process by taking additional steps.

Metro Empire Land Ass'n, LLC v. Arlands, LLC is a post-*Jones* case where a former Arkansas Commissioner twice sent notice to the record owner's certified address and the mail was returned unclaimed both times. 2012 Ark. App. 350, 7. The former Commissioner then sent a third notice to *the current residents of the property*. *Id*. (emphasis added). The Court held that due process was satisfied since the former Commissioner took this additional step after the original notices were returned unclaimed. *Id*. at 7-9. This is significant to the instant case because the [current] Commissioner completed the exact same additional step as the one in *Metro*. On June 27, 2022, the Commissioner mailed another copy of the pre-sale notice to BAS, this time to their property's physical location at 1100 Country Club, Paragould, AR 72450. (RP 562). Though it was returned unclaimed (RP 563), it was still an additional step that clearly demonstrated the Commissioner's desire to inform BAS of the pending tax sale. *See Jones*, 547 U.S. 220, 238 (citing *Mullane*, 339 U.S., at 315) ("[W]hen notice is a person's due…the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.").

The Commissioner took every reasonable step necessary to ensure that the notice of tax sale was delivered to BAS. Notice was sent to BAS to the only two addresses it had on record with Greene County. Accordingly, the circuit court should have held that the Commissioner was entitled to sovereign immunity. All material facts asserted by BAS, if proven, lead to only one conclusion: the Commissioner satisfied its due process requirements and therefore no exception to sovereign immunity applies.

CONCLUSION

The right to immunity from suit is effectively lost if a case is permitted to go to trial without review. *See Eddings*, 2011 Ark. 47, 3. The circuit court was required to determine whether the Commissioner was entitled to sovereign immunity prior to trial. It should have analyzed the undisputed material facts at the summary judgment stage. The circuit court failed to do this. Instead, the circuit court relied on the *mere allegation* of a constitutional violation to rule that BAS properly invoked an exception to the sovereign immunity doctrine. The Arkansas Supreme Court should reverse and find that, as a matter of law, the Commissioner is entitled to sovereign immunity and remand this case back to the circuit court to proceed in accordance with its holding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Julius J. Gerard, hereby certify that on November 12, 2024, I electronically filed the foregoing with the Clerk of the Court using the eFlex filing system, which will notify and provide copies of the foregoing to all counsel of record.

Julius J. Gerard

CERTIFICATE OF COMPLIANCE

This brief complies with Administrative Order No. 19's requirements concerning confidential information, Administrative Order No. 21, § 9's requirement that briefs not contain hyperlinks to external papers or websites, and with the word-count limitation in Arkansas Supreme Court Rule 4-2(d), in that it contains 5,665 words.

Julius J. Gerard