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STATE OF MICHIGAN
IN THE SUPREME COURT

NICK YONO,

Plaintiff-Appellee,

v

COUNTY OF INGHAM, INGHAM COUNTY TREASURER, and INGHAM COUNTY LAND BANK FAST TRACK AUTHORITY,

Defendants-Appellants.
_____/

Supreme Court No. 166791

Court of Appeals No. 362536

Ingham CC No. 20-000697-CZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

AMICUS BRIEF OF THE MICHIGAN DEPARTMENT OF TREASURY IN SUPPORT OF APPELLANT INGHAM COUNTY

ORAL ARGUMENT REQUESTED

Respectfully submitted,

/s/ *Matthew B. Hodges*
Matthew B. Hodges (P72193)
Assistant Attorney General
Attorney for Michigan
Department of Treasury
Revenue and Tax Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7584

Dated: February 18, 2025

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COUNTER-STATEMENT OF QUESTION PRESENTED

When a property is foreclosed for unpaid property taxes, then offered at a public sale under state foreclosure laws, *the result* of that offering is the best evidence of the property's value. Normal market transactions or understandings are not the relevant benchmark in deciding the value of a distressed, foreclosed property. The result of the public auction controls, even if the minimum bid was not met at the auction. Otherwise, the FGU does not recoup the delinquent taxes, *and* it may be sued for some indeterminate "value."

1. Did the Court of Appeals err when it held that a tax foreclosed property, offered at a public auction under MCL 211.78m but not sold for lack of a willing buyer, nevertheless had "inherent value" implicating a taking requiring just compensation?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Yes.

   Court of Appeals' answer: No.

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STATUTES INVOLVED

MCL 211.78m provides:

> (2) Subject to [a governmental exercise of the right of first refusal], beginning on the third Tuesday in July [following foreclosure] and ending on the immediately succeeding first Tuesday in November, the [FGU], or its authorized agent . . . shall hold 1 or more property sales at 1 or more convenient locations at which property . . . will be sold by auction sale, which may include an auction sale conducted via an internet website. Notice of the time and location of a sale must be published not less than 30 days before a sale in a notice publication circulated in the county in which the property is located, if there is one. If no notice publication is circulated in that county, publication must be made in a notice publication circulated in an adjoining county. Each sale must be completed before the first Tuesday in November [following foreclosure] . . . Except as provided in this subsection and subsection (5), property must be sold to the person bidding the minimum bid, or if a bid is greater than the minimum bid, the highest amount above the minimum bid. The [FGU] may sell properties individually or may offer 2 or more properties for sale as a group. The minimum bid for a group of properties must equal the sum of the minimum bid for each property included in the group. The [FGU] may adopt procedures governing the conduct of the sale and the payment for conveyance of properties under this section and may cancel the sale before the issuance of a deed under this subsection if authorized under the procedures. The [FGU] shall require full payment at the close of each day's bidding or by a date not more than 21 days after the sale. Before the [FGU] conveys a property sold at a sale, the purchaser shall provide the [FGU] with proof of payment to the local tax collecting unit in which the property is located of any property taxes owed on the property at the time of the sale. . . . If a sale is canceled under this subsection, the [FGU] may offer the property to the next highest bidder and convey the property to that bidder under this subsection, subject to the requirements of this subsection for the highest bidder. Not more than 14 days after payment to the [FGU] of all amounts required by the highest bidder or the next highest bidder under this subsection, the [FGU] shall convey the property by deed to the person bidding the minimum bid, or if a bid is greater than the minimum bid, the highest amount above the minimum bid, or the next highest bidder if the sale to the highest bidder is canceled and the next highest bidder pays the amount required under this section to purchase the property. The deed must vest fee simple title to the property in the person bidding the highest amount above the minimum bid, unless the [FGU] discovers a defect in the foreclosure of the property . . . .

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* * *

(6) On or before December 1 immediately succeeding [foreclosure], a list of all property not previously sold by the [FGU] under this section must be transferred to the clerk of the city, village, or township in which the property is located. The city, village, or township may object in writing to the transfer of 1 or more properties. On or before December 30 immediately succeeding the [foreclosure] all property not previously sold by the [FGU] under this section must be transferred to the city, village, or township in which the property is located, except those properties to which the city, village, or township has objected. . . . The city, village, or township may make the property available under the urban homestead act, 1999 PA 127, MCL 125.2701 to 125.2709, or for any other lawful purpose.

(7) If property not previously sold is not transferred to the city, village, or township in which the property is located under subsection (6), the [FGU] shall retain possession of that property. If the [FGU] retains possession of the property and the [FGU] is this state, title to the property must vest in the land bank fast track authority . . . . If the [FGU] retains possession of the property and . . . is not this state, the [FGU] may do any of the following:

(a) Transfer the property to a land bank fast track authority . . . .

(b) Convey the property pursuant to section 78r.

(c) Offer the property for sale, including, but not limited to, a subsequent sale under this section.

* * *

16(c) "Minimum bid" is the minimum amount established by the foreclosing governmental unit for which property may be sold or transferred under subsections (1) to (3). The minimum bid must include all of the delinquent taxes, interest, penalties, and fees due on the property, and may include any additional expenses incurred by the foreclosing governmental unit in connection with the forfeiture, foreclosure, maintenance, repair, or remediation of the property or the administration of this act for the property, including, but not limited to, foreclosure avoidance, mailing, publication, personal service, legal, personnel, outside contractor, and auction expenses.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Department of Treasury has both direct and indirect interests in the outcome of this case. First, the State Treasurer serves as the Foreclosing Governmental Unit (FGU) in six Michigan Counties. As a result, like the Ingham County Treasurer and other FGUs, Treasury holds tax foreclosure sales each year, now must assist in administering any claims for remaining proceeds and must transfer title to properties that *do not sell* even though they are offered at one or more public auctions. Second, Treasury has the statutory responsibility to prepare various forms under MCL 211.78t and gives general guidance on application of the General Property Tax Act. Treasury has a significant interest in this litigation and has a unique perspective as FGU in more than one county.

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INTRODUCTION

When a property is foreclosed to recoup unpaid property taxes and later offered at a public sale to the highest bidder, the result of that sale offering is conclusive proof of the property's value under those circumstances. If the "minimum bid," which is set by statute to match the outstanding tax debt, at a tax foreclosure auction is not met, the property's exact value is not ascertained but its maximum value is known; the property's value is less than the minimum bid. In this context, that means market participants have determined the property is not worth more than the tax debt, and thus there can be no remainder or surplus subject to a takings claims. To hold otherwise, as the Court of Appeals did here, makes tax collection via foreclosure and sale unworkable. And foreclosure and sale is already the last resort in delinquent property tax collection.

The Court of Appeals acknowledged the county held a public auction and offered this property to the highest bidder, but did not properly consider the context—that this is a collection matter and involves the sale of a distressed property—when deciding whether the auction result sets the presumptive value in a subsequent takings action. The property did not sell because there was no willing buyer for the minimum bid. That unmet minimum bid is still the best market evidence identifying the maximum value in this context. The Court of Appeals' holding is contrary to economic principles and does significant harm to Michigan's delinquent property tax collection system. This Court should reverse.

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ARGUMENT

I. The result of a properly conducted public auction sets the property's "value" in this tax foreclosure context. The Court of Appeals erred when it disregarded the results of the sale offering and held the property had inherent value subject to additional valuation proofs.

When state laws provide for the foreclosure and public sale of property to collect a debt and those laws generally provide for a market-based disposition, a debtor must live with the result. The process looks to the market to decide what the seized property's value is, *as foreclosed*, not as if the foreclosure never occurred.

The lower court erred when it did not accept the result of the public auction, simply because there was no willing buyer. The market said this property, *in this context,* was worth less than the aggregate tax debt since no one was willing to meet the minimum bid price. This is consistent with debt collection principles generally, this Court's prior decision in *Rafaeli, LLC v Oakland County*, 505 Mich 429 (2020), and is in harmony with relevant federal case law. It is also consistent with property valuation principles that consider all relevant factors, including comparing distressed properties to similar distressed property sales—not properties sold under normal market conditions, free of duress. That context matters.

This is not the first time someone whose property was foreclosed for unpaid property taxes, has attempted to turn the collection process on its head to their own benefit. This Court rejected a similar attempt to ignore the debt-collection context in *Rafaeli*. ("We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties . . . . the property improperly taken was the surplus proceeds, not plaintiffs' real properties.") Facing a similar

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"equity" argument, the *Rafaeli* Court held that the only remaining property right is measured by the "proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less." 505 Mich at 483.

Except here, the property was offered at a public sale but did not find a willing buyer. Plaintiff posits the property's value is an open question subject to appraisal-type proofs. The "taking" is framed as the hypothetical property value minus the tax debt and collection costs, with the hypothetical remainder being surplus that must be made available to the former interest holder. The Court of Appeals agreed; it held that because the property did not sell and because it had "inherent value," the value for purposes of a takings claim should be determined by the trial court, on remand. *Yono v County of Ingham*, unpublished opinion of the Court of Appeals, issued December 28, 2023 (Docket No. 362536), 2023 WL 9007093 at *4.

That logic, like the market value damages argument this Court rejected in *Rafaeli*, jeopardizes the viability of collecting delinquent taxes at all. Tax collection via foreclosure is already a last resort; it takes years of delinquency, notices, and hearings to collect taxes local and county governments would much prefer to collect in cash. Allowing post-foreclosure recoveries that exceed what the FGU can actually achieve at a public sale makes tax collection a losing proposition; it is not just that the original property taxes are foregone (the minimum bid) but under the Court of Appeals' ruling, there could be additional FGU payouts. This is exactly the

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type of result this Court previously rejected: "If plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency." *Rafaeli*, 505 Mich at 483. The Court of Appeals' ruling reopens the door to exactly this type of perverse outcome.

Indeed, the lower court missed this context. This is not about awarding former owners "the fair market value of their properties so as to be put in as good of a position had their [real] properties not been taken at all." *Id.* at 465. The goal of the statute is to collect taxes by offering the properties on the market, with no misconceptions that the result will likely be less than a non-foreclosure sale transaction. That is what MCL 211.78m requires. That is what the County did, here. The result, although a non-sale, is still the market's answer for a distressed property. And that result controls, here.

A. The County held a sale under MCL 211.78m, which provides for notice, bidding, and sale to the highest bidder.

The Court of Appeals recognized that "the county and the treasurer," acting as FGU, "foreclosed [Plaintiff's former] property and held an auction for sale, but the property was not purchased." *Yono*, 2023 WL 9007093 at *1. Under Michigan's General Property Tax Act, specifically under its tax foreclosure provisions, such auctions require an opening "minimum bid" set by statute. See, e.g., current

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MCL 211.78m(2)[1]; § 78m(16)(c). This is akin to a circuit court judge in a mortgage or land contract foreclosure action setting a minimum bid at which a property can sell. MCL 600.3155. Only here, the minimum is set by Legislative directive. MCL 211.78m(16)(c).

That minimum coincides with the tax debt, such that only a bid above that amount would result in potential surplus. MCL 211.78m(16)(c). The price can only go up from the minimum bid through competitive bidding. The fact that the starting bid cannot go down at the initial auction does not change the analysis; a sale below the aggregate debt would result in a collection deficit, not a surplus.

For simplicity's sake, the starting bid is roughly the aggregate back taxes and fees, up through the date of sale. MCL 211.78m(16)(c). The sale itself must be held at "1 or more convenient locations" and properties must be offered "by auction sale" that "may include an auction sale conducted via an internet website." MCL 211.78m(2). At a minimum, the FGU must provide "[n]otice of the time and location of a sale" by publication made "not less than 30 days before a sale" and "in a notice publication circulated in the county in which the property is located, if there is one." *Id.* "If no notice publication is circulated in that county, publication must be made in a notice publication circulated in an adjoining county." *Id.*

[1] After the property is made available to various levels of government, the FGU "shall hold 1 or more property sales at 1 or more convenient locations at which property foreclosed by a judgment entered under section 78k will be sold by auction sale, which may include an auction sale conducted via an internet website."

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The sale must be completed after potential proceeds claimants provide any notice of intention to make a claim and after various levels of government have an opportunity to exercise their right of first refusal. See MCL 211.78m(2); MCL 211.78t(1)-(2). One or more auction sales must be held between "the third Tuesday in July" and the "first Tuesday in November," following foreclosure. MCL 211.78m(2). The properties "must be sold to the person bidding the minimum bid, or if a bid is greater than the minimum bid, the highest amount above the minimum bid." *Id.* The FGU may develop "procedures governing the conduct of the sale and the payment for conveyance of properties under this section and may cancel the sale before the issuance of a deed under this subsection if authorized under the procedures." *Id.* The statute requires "full payment at the close of each day's bidding or by a date not more than 21 days after the sale," and before any property is deeded to a bidder, requires proof that the purchaser also paid "to the local tax collecting unit in which the property is located . . . any property taxes owed on the property at the time of the sale," i.e., that current year's taxes, in order to secure a deed. *Id.*

The statute also provides for contingency or backup bids; if the highest bidder does not timely pay or the sale is otherwise cancelled, the next highest bidder is contacted. *Id.* If there is no buyer, "[o]n or before December 1 . . . a list of all property not previously sold by the foreclosing governmental unit under this section must be transferred to the clerk of the city, village, or township in which the

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property is located." MCL 211.78m(6). Those units of government may timely reject such a transfer, and if that occurs, the property is transferred to the FGU.

B. A property that is offered for sale but does not find a willing buyer cannot have a value above the minimum bid. If the property's value does not exceed the minimum bid, there is no taking requiring just compensation.

Properties that are offered at auction under § 78m but do not sell for more than the opening bid, by definition, do not have remaining proceeds. Barring an allegation of fraud or collusion or substantial irregularity in the sale process, that should end the inquiry. The Court of Appeals, at least implicitly, seemed to think a non-sale meant zero value. While that *could* be the case, here the only known result is that the property's upper end of value is less than the minimum bid. That is not surprising because the property was distressed. The Court of Appeals should not have disregarded the result of the public auction based on its opinion that the property had to be worth more.

This Court, the Sixth Circuit Court of Appeals, and the US Supreme Court have rejected arguments that seek to apply normal market conditions to distressed transactions, like this one.

1. In *Rafaeli* and *Schafer*, this Court affirmed that collection principles must be considered in determining the rights of the parties.

Under *Rafaeli*, and more recently *Schafer*, this Court held that former property owners were entitled to seek remaining sale proceeds. *Rafaeli*, 505 Mich at 484; *Schafer v Kent Co*, __ Mich __ (2024), 2024 WL 3573500. The reasoning

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behind that holding seems readily apparent; allowing litigants to seek *more* than the FGU secured as part of the tax collection action would disregard the context in which the claims arose and, equitably, punish the public fisc for the former owner's delinquency.

In *Rafaeli*, the plaintiffs argued that "a full remedy . . . requires property owners to be put in as good of a position [as] had their properties not been taken at all." *Rafaeli*, 505 Mich at 482. This Court rejected that argument based on context; "plaintiffs are largely responsible for the loss of *their properties' value,*" i.e., for any difference between the property's market value before foreclosure and its auction value as foreclosed, "by failing to pay their taxes on time and in full." *Id*. at 483 (emphasis added). This Court went on to note that, to allow "damages" based on a fair market value determination without considering foreclosure—akin to what the Court of Appeals seems to require, here—would implicate more money than the FGU actually received via public auction. *Id*. This Court rejected that theory; "not only would [former property owners] be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency." *Id*. at 483. In short: this type of collection action is only necessary because people do not willingly and timely pay their property taxes by other means. A debtor cannot force collection via circuit court litigation, foreclosure, and sale and then seek to enrich themselves for an alleged taking after foreclosure. Finally, as noted by the concurrence in *Rafaeli*, "It is also worth noting, in this regard, that the taxpayers would be free to conduct a private sale of the property during the redemption period

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prior to title vesting in the government and, by failing to do so, might be considered to have agreed to the value produced by the tax-foreclosure sale." *Id.* at 520 (VIVIANO, J., concurring). The same is true about the alleged shortcomings of the FGU's public offering here; the former owner could have bid, directly or through a proxy, at the County's auction at a price they believed to be appropriate value. Not even the former owner wanted the property back at the minimum bid.

And in *Schafer*, the concurrence discussed federal case law developments and flagged the very question raised by the Court of Appeals here: "*Tyler* [*v Hennepin County*] did not explain how the amount of surplus proceeds to be returned to the taxpayer must be calculated." *Schafer,* __ Mich __; 2024 WL 3573500 at * 24 (VIVIANO, J., concurring, citing *The Curious Case of Tyler v Hennepin Co*, 43 Va Tax Rev 131, 138.) "Should the surplus proceeds be calculated on the basis of the sale price of the property after the foreclosure or the market value of the property at the time of the foreclosure?" *Id.* at *24. And "what, if anything, [is] the taxpayer . . . entitled to if there is no public sale," specifically citing " 'cases in which the government purchased the property for the minimum bid' " before any public sale could be held. *Id.*, quoting *Rafaeli*, 505 Mich at 520-521 (VIVIANO J. concurring).

But there is a difference between holding *"no public sale*" at all and a foreclosed property being offered at a public sale but finding no willing buyer. That difference is crucial. Where the property is offered for public sale but there is no buyer, as is the case here, there are no surplus proceeds, and the former property owner has no surplus to seek via a takings claim or otherwise.

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2. The United States Court of Appeals for the Sixth Circuit has held similarly: the best evidence of a foreclosed property's value is determined by public sale.

When collecting debt via foreclosure "a 'public sale [is] the truest test of the value' of the landowner's equitable interest in the land; and thus, a sale was 'the best mode of disposing of the property, for the interest of both' " *Hall v Meisner*, 51 F4th 185, 193 (CA 6, 2022), quoting *BFP v Resol Tr Corp*, 511 US 531, 541 (1994). If, upon public sale offering "the [foreclosed] land was worth at least as much as the debt, its proceeds afforded the lender full payment and thus the 'full effect' of his security; and if the land was worth more than the debt, the 'surplus' would compensate the landowner for the loss of his equitable interest, as the new buyer took legal and equitable title alike." *Hall*, 51 F4th at 193, quoting *Lansing v Goelet*, 9 COW 346 at 353, 356 (NY, 1827). If it did *not* sell for at least the debt it did not afford the creditor full payment, and as a logical consequence, did not offer the former owner any surplus to claim. (In such instances involving mortgage foreclosures, for instance, there might even be a deficiency judgment against the debtor. No such personal tax liability or deficiency exists under this tax statute.)

In *Freed v Thomas*, the Sixth Circuit applied a similar analysis. Although the Court did not grapple with a sale offering that did not result in a sale transaction, the *Freed* Court recognized that proceeds (property value less tax and collection debts) is not a hypothetical exercise when there is a sale. ("the best evidence of a foreclosed property's value is the property's sales price, not what it was worth before the foreclosure." *Freed v Thomas*, 81 F4th 655, 659 (CA 6, 2023), citing *BFP*, 511 US at 548–549.

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In *Freed*, the County foreclosed on real property under MCL 211.78 *et seq*, after several years of tax delinquency. *Freed v Thomas*, 976 F3d 729, 732 (CA 6, 2020). The County sold the property at public auction, and Freed first filed a state court action, and then a federal court action, seeking relief. In the interim, this Court decided *Rafaeli*, and soon after the Sixth Circuit held that *Freed* had a valid takings claim and remanded to the federal district court. *Id*. at 741. *Freed* prevailed in district court on remand consistent with *Rafaeli*—he was awarded the proceeds from the sale, less the debts. "Although Plaintiff Donald *Freed* prevailed on his Fifth Amendment claim before the district court [on remand]," he immediately appealed again "because the district court declined to award him the fair market value of his property minus his debt." *Freed*, 81 F4th at 657.

Freed's second appeal "argue[d] that the district court erred by (1) violating his Fifth or Eighth Amendment rights by awarding him 'the difference between the foreclosure sale and [his] debt' instead of the fair market value of his property." *Id*. at 657. The Circuit Court of Appeals rejected that argument.

Specifically, "neither this court nor the Supreme Court has ever held that a plaintiff whose property is foreclosed and sold at a public auction for failure to pay taxes is entitled to recoup the fair market value of the property. *Cf. United States v Davis*, 815 F3d 253, 260 (6th Cir 2016) (holding that the government does not violate the Fifth Amendment by selling a property at a public auction, even if the property sells for less than its fair market value)." *Freed*, 81 F4th at 658–659. "Furthermore, the best evidence of a foreclosed property's value is the property's

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sales price, not what it was worth before the foreclosure." *Id*. at 659, citing *BFP*, 511 US at 548–549. Under this same rationale, when a property is offered at a public sale but does not sell because there is no willing buyer at the "minimum bid" that market response still represents the best evidence of the property's upper end of value, *as foreclosed*.

3. The United States Supreme Court has held that foreclosure sales conducted under state laws, free of irregularity, are the best indication of the foreclosed property's value.

In *BFP*, the debtors' home was subject to a mortgage foreclosure under California law and sold for $433,000. *BFP,* 511 US at 534, 541–542, 545–546. The debtor sought to have the bankruptcy court avoid the sale under a provision of the bankruptcy code that allows cancellation of prior asset transfers if deemed to have provided the debtor insufficient consideration for the asset. *Id*. The debtor argued the $433,000 mortgage sale amount under California law was far below the "fair market value" which the debtors alleged was in excess of $725,000. *Id.* at 534.

The *BFP* Court rejected the debtor's argument because the mortgage sale was conducted consistent with state law requirements, and thus the actual amount received was conclusively sufficient to satisfy "reasonably equivalent value" inquiries. *Id*. at 545–546. The Court noted that, historically:

> When these [state mortgage foreclosure law] procedures have been followed, however, it is "black letter" law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside, though it may be set aside (under state foreclosure law, rather than fraudulent transfer law) if the price is so low as to "shock the conscience or raise a

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> presumption of fraud or unfairness." [*Id*. at 542 (additional citations omitted)].

But the Court went on to note that "to our knowledge no prior decision had ever applied the 'grossly inadequate price' badge of fraud under fraudulent transfer law to set aside a foreclosure sale." *Id.* at 542. Federal courts had refused to set any exact formula or ratio to determine reasonableness of a sale price in a forced sale, i.e., foreclosure sale context when deciding whether the result represented fair value. The *BFP* Court held:

> We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with. [*Id*. at 545.]

It is true that the *BFP* Court addressed only the issue before it: the use of a state's mortgage foreclosure laws and the conclusive effect of an actual sale price in light of a challenge under 11 USC 548(a)(2). That is, "[t]he considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." *Id*. at 537, n 3. But the case addressed a foreclosure action under state laws, resulting in a public sale, and held that the result of that public sale was controlling for purposes of deciding if the former property owner, turned bankruptcy debtor, had received sufficient value in the foreclosure.

That is strikingly similar to asking if plaintiffs, as former property owners, have a valid "takings" claim when their former property was offered at a public sale, but found no willing buyer at the minimum bid. That is: did Michigan's tax foreclosure law requiring a public sale sufficiently reflect the market, *under the circumstances,* so that the result of the sale offering is the best evidence of the

property's value? The Court of Appeals appears to believe a public sale offering is not reliable if there is no willing buyer, because the property must have a value higher than the minimum bid. Or the Court of Appeals mistakenly understood cases like *Hall* to literally require a willing buyer be ensured, i.e., that every foreclosed property must always sell. Either way, the Court of Appeals was wrong because it failed to consider the context of debt collection via foreclosure and auction sale. *BFP* provided substantial guidance on why context matters, and why the distressed nature of a foreclosed property undercuts the Court of Appeals' belief in inherent value.

BFP recognized that a property's "market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value." *Id.* at 537. Citing Black's Law, *BFP* held that "[t]he market value of . . . a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner." *Id.* at 538. Typical market conditions would reflect "a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property." *Id.* But forced sales have none of those conditions. "In short, 'fair market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale." *Id.* (additional citations omitted.) Thus, "[m]arket value cannot be the criterion of

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equivalence in the foreclosure-sale context," and courts should not supplant their understandings of normal market value for market data derived from the actual post-foreclosure, forced sale market. *Id.*

The Court of Appeals' concurring judge raised valid questions about timing of the valuation question on remand that follow from the panel's decision. ("It would be improper to use the fair market value of the current year, but the parties did not litigate whether the fair market value would be determined as of the time of the unpaid taxes (2014 and 2015), the time the certificates of forfeiture were recorded (2016 and 2017), or the time of the foreclosure sale (2017).") See slip op, p *7 __. By indicating that the property's value was an open question subject to market proofs—from an unspecific time period which might include before foreclosure—the Court of Appeals failed to consider this Court's holding in *Rafaeli*; the aim is *not* to "put [Plaintiff] in as good of a position [as if] their properties not been taken at all." *Rafaeli,* 505 Mich at 465 (emphasis added). Courts must consider the foreclosure as a condition of value, not value the property as if no tax foreclosure occurred.

The *BFP* Court made the same observation: "An appraiser's reconstruction of 'fair market value' could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that *must* be sold within those strictures is simply *worth less.*" *Id.* at 539. Thus, "it is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact

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that state zoning law permits the owner of the neighboring lot to open a gas station)." *Id.* True, this guidance came during review of a bankruptcy dispute and determination of "reasonably equivalent value" under the bankruptcy code. But the Court's analysis is compelling and equally applicable here, too.

The real question is whether state law procedures try to approximate market conditions, however distorted the result may end up being because of the distressed nature of the property and conditions often seen for foreclosure sales. The *BFP* Court noted that some foreclosures, including tax foreclosures under varying state laws, may require additional analysis. And several federal circuit courts have undertaken such state law specific analyses and held that if the foreclosure law provides for sale via a competitive market offering, *BFP* should apply. The Fifth, Ninth, and Tenth Circuits have applied *BFP*'s analysis to tax foreclosure sales. See, e.g., *Matter of TF Stone Co Inc*, 72 F3d 466, 471–472 (CA 5, Cir 1995); *In Re Tracht Gut, LLC*, 836 F3d 1146, 1153 (CA 9, 2016); *In re Grandote County Club Company Ltd*, 252 F3d 1146 (CA 10, 2001). One such court held "the decisive factor in determining whether a transfer pursuant to a tax sale constitutes 'reasonably equivalent value' is a state's procedure for tax sales, in particular, statutes requiring that tax sales take place publicly under a competitive bidding procedure." *In re Grandote,* 252 F3d at 1152.

This Court recognized a similar foundational principle in *Rafaeli*. If a tax foreclosed property is sold, the former owner is not allowed to seek fair market value based "surplus" but must abide by the result of the public auction. *Rafaeli,*

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505 Mich at 465–466. Litigants cannot disregard that any such claim arises from a debt collection case providing for foreclosure and sale, which the debtor forced. Likewise, Plaintiff cannot divorce his claim from the reality from which it arose; this began as a collection action and the FGU took the appropriate steps under the tax collection law to offer the property at public sale. What the FGU cannot do is guarantee a willing buyer.

This Court should adopt the *BFP* analysis, recognizing collection actions involve distressed properties, which properties are not valued as if no foreclosure occurred or based on general understandings of non-distressed market transactions. The result of a public offering following tax foreclosure, if conducted consistent with Michigan law, should be deemed conclusive evidence of the property's value for purposes of any claim for surplus. That includes properties offered, but never sold, because there was no willing buyer at or above the minimum bid.

CONCLUSION AND RELIEF REQUESTED

When a property is foreclosed and offered at public sale to satisfy a property tax debt, presuming the statutory requirements for the sale are satisfied, the result of the public auction controls. That includes when a property is offered at a properly noticed public sale but does not transact because there is no willing buyer at the minimum statutory bid, where the minimum amount also marks whether there could be any surplus or remaining proceeds. Either way, a forced sale almost always results in a value that is less than what might be expected under normal market conditions. Distressed properties involve greater risk—as to condition,

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warrant of title, decreased marketing time, as-is where-is sale terms, and other factors that are not present in normal market transactions. This process does not involve a willing buyer and willing seller under normal market conditions; it is a collection sale that does its best under the circumstances, all things considered.

This Court should grant leave and reverse the Court of Appeals' decision, and in doing so confirm that the result of a properly conducted tax foreclosure and public auction is conclusive evidence of that property's value under the circumstances, including if there is no willing buyer at or above the minimum bid as provided by the controlling statute.

Respectfully submitted,

/s/ *Matthew B. Hodges*
Matthew B. Hodges (P72193)
Assistant Attorney General
Attorney for Michigan
Department of Treasury
Revenue and Tax Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7584

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Respectfully submitted,

/s/ *Matthew B. Hodges*

Matthew B. Hodges (P72193)
Assistant Attorney General
Attorney for Michigan
Department of Treasury
Revenue and Tax Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7584