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STATE OF MICHIGAN
IN THE SUPREME COURT

LOUIS JACKSON, *et al*,

Plaintiffs-Appellees,

v

SOUTHFIELD NEIGHBORHOOD REVITALIZATION INITIATIVE, *et al*,

Defendants-Appellee,

and

OAKLAND COUNTY,

Defendant-Appellant,

and

ETOILE LIBBETT, *et al*,

Defendants.

SC: 166320
COA: 361397
Oakland CC: 2018-162877-NZ

BRIEF OF THE MICHIGAN ASSOCIATION OF COUNTY TREASURERS AS AMICUS CURIAE IN SUPPORT OF APPELLANT OAKLAND COUNTY

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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

This brief is submitted on behalf of the Michigan Association of County Treasurers (MACT). This Court invited MACT to submit a brief as amicus curiae in its order granting oral argument on the application in this matter. In response to the issues set forth in this Court's order granting argument on the application, MACT respectfully submits:

(1) The Court of Appeals erroneously concluded that both MCL 211.78t and MCL 211.78m apply retroactively because MCL 211.78m applies prospectively only pursuant to the plain language of the statute and this Court's analysis in *Schafer v Kent County* and *Hathon v State*, __ Mich __, Nos 164975, 165219, 2024 Mich LEXIS 1438, *5 (July 29, 2024) ("*Schafer*"), with respect to MCL 211.78*l*.

(2) No, plaintiffs' constitutional takings claims are not precluded by MCL 211.78t in the limited circumstances of a foreclosure that occurred before July 18, 2020, after which there was no auction because the right of first refusal was exercised;

(3) Yes, a violation of the Takings Clause of the Michigan Constitution, Const 1963, art 10, § 2, and of the Fifth Amendment of the United States Constitution occurs as to a tax foreclosure that occurred before July 18, 2020, when there is no public auction of the foreclosed property and a governmental unit retains or purchases the property under the right of first refusal as it existed under the GPTA, MCL 211.78m(1), prior to the 2020 amendment, resulting in no remaining proceeds;

[1] Pursuant to MCR 7.312(H)(5), amicus curiae affirms that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than amicus

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(4) The public entity exercising the right of first refusal (the City of Southfield) is the appropriate entity to be liable for the taking since neither Oakland County nor its treasurer, as the FGU, had any discretion under the GPTA but to honor the City's exercise of its right of first refusal;

(5) The just compensation to be paid by the liable party should be the fair market value of the property on April 1 of the year of foreclosure, less the minimum bid.

A. MACT was formed as a Michigan nonprofit corporation in 1934. Its members include the treasurers of each of Michigan's 83 counties. The treasurer of a county is considered the foreclosing governmental unit (FGU) under the Michigan General Property Tax Act, Michigan Compiled Law (MCL) 211.1, *et. seq* (GPTA), when the county opts to conduct foreclosure proceedings as an agent of the State of Michigan. After significant process and opportunities to redeem property foreclosed for nonpayment of taxes are provided to taxpayers, treasurers are tasked with conducting foreclosure auctions and distributing proceeds from the auctions in a manner mandated by state law under the GPTA. The manner of the auction is prescribed by statute, MCL 211.78m, as are the other methods of transferring the property if there is no buyer at the auction or if the right of first refusal is exercised.

2. In 77 of Michigan's 83 counties, the county's elected treasurer serves as the FGU. FGUs have the responsibility to foreclose property for unpaid delinquent real property taxes on behalf of all taxing jurisdictions within the county, take title to

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curiae, its members, or its counsel, has made a monetary contribution to the

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unredeemed properties, and to either sell the unredeemed parcels to generate revenue necessary to pay for unpaid property taxes and related collection expenses or transfer the property for a public purpose. Counties also have a role in administering the delinquent tax revolving fund under Michigan statutes.

3. Further, state and federal class action claims, which remain pending at the trial and appellate levels against all 83 Michigan counties, many of which name the county treasurers individually in their official (and in some cases, personal) capacities, assert claims that parallel those brought here.[2]

4. MACT's members have a direct interest in the outcome of this case. As FGUs, who are obligated to carry out Michigan statutory mandates, members have been named as defendants in many lawsuits seeking damages for an alleged unconstitutional taking or a refund of remaining proceeds collected at tax foreclosure auctions.

SUMMARY OF THE ARGUMENT

This case regards the right of first refusal under the GPTA, which generally means that, instead of having an auction to sell the tax-foreclosed property, the state or another public entity such as a municipality may first choose to purchase the property. Under the old GPTA prior to this Court's decision in *Rafaeli, LLC v Oakland County,* 505 Mich 429; 952 NW2d 434 (2020), and prior to the resulting amendment to the GPTA in 2020, there was no right of the former property owner to collect anything.

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preparation or submission of this brief.

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Consequently, there was nothing in the statute that calculated or even contemplated a measure of compensation for the prior owner after a right of first refusal purchase. This, of course, was an unconstitutional taking without just compensation. *See Rafaeli*, 505 Mich at 483-484 (individuals have a property interest in the remaining "proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure sale of the property—no more, no less.").

The majority of cases and, consequently, the majority of case law, regard a plaintiff's claim to remaining proceeds from the tax-foreclosure sale *after an auction*. Those cases are now squarely governed by MCL 211.78t as a result of this Court's holding in *Schafer* that MCL 211.78t applies retroactively and claimants whose properties were foreclosed prior to July 18, 2020 still have until March 31, 2025, to submit their notices of intention to seek any remaining proceeds under MCL 211.78t(6). This case is different. There was no auction because the City of Southfield exercised its right of first refusal.

Under the new GPTA, as amended in 2020, this right of first refusal process takes account of the former property owner's personal property interest and right in the remaining proceeds as a result of this Court's decision in *Rafaeli*. Under the new GPTA, MCL 211.78m allows the public entity to know, when making the decision whether to exercise its right of first refusal, whether a claimant has submitted a notice of intention to seek remaining proceeds under MCL 211.78t(2). If a claimant has made

[2] *See Garcia v Title Check, LLC*, No. 21-1449, 2022 US App LEXIS 981 *1 (CA 6, Jan 12, 2022) (noting the "deluge of litigation" in state and federal courts regarding Michigan's tax foreclosure system).

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such a claim, the statute now provides generally for the measure of compensation to be "the greater of the minimum bid [meaning the amount of unpaid taxes, costs and other recoverable amounts] or its fair market value," which equates to two times the state equalized value (SEV). MCL 211.78m(1). If there was no notice of intention timely submitted by any claimant, the right of first refusal may be exercised for the minimum bid amount. *Id*. Thus, there is no Taking under this process for rights of first refusal exercised with respect to foreclosures that occurred ***after*** July 17, 2020, because MCL 211.78m(1) provides just compensation when the claimant follows the procedure of MCL 211.78t.

But this case regards properties that were foreclosed ***before*** July 18, 2020, and the right of first refusal was exercised by the City of Southfield prior to the amended GPTA. Oakland County's Treasurer, acting as the FGU, had no discretion but to honor the City of Southfield's exercise of its right and transfer the property to Southfield in the manner mandated by the GPTA. For its part, Southfield exercised that right of first refusal without contemplating a claim to remaining proceeds and without a notice of intention being submitted because no such process under MCL 211.78t existed yet. Southfield purchased the former property owner's right in any remaining proceeds that this Court found to be an unconstitutional taking without just compensation under *Rafaeli*.

So the questions become: (1) what claim and what remedy exist in this situation; and, (2) who is liable, where the foreclosure occurred under the old GPTA and the right of first refusal was exercised? MCL 211.78m cannot apply retroactively to this situation

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for the same reasons that this Court found that MCL 211.78*l* could not apply retroactively in *Schafer*. Statutes are presumed to apply prospectively only and nothing in the text of MCL 211.78m provides, let alone "unambiguously" provides, for retroactive application. In fact, the only times that MCL 211.78m(1) references MCL 211.78t, which this Court found applies retroactively in *Schafer*, are references to a singular provision, MCL 211.78t(2), which by its terms applies only to foreclosures occurring ***after*** July 17, 2020. And this statutory scheme makes sense because, as discussed above, a public entity could not have known or contemplated a claim for remaining proceeds prior to July 18, 2020, when deciding to exercise its right of first refusal. The result is that, in these limited circumstances of a pre-July 18, 2020 foreclosure in which the right of first refusal was exercised and therefore there was no auction, a plaintiff has a claim under the Takings Clauses of the state and federal constitutions that is not precluded by Section 78t.

The final issues that remain, then, are the measure of compensation in such cases and who should rightfully bear the liability. Although not binding on this Court, the Sixth Circuit decided a federal takings case that tracked this case factually. Like this case, *Hall v Meisner* came out of Oakland County based upon the exercise of the right of first refusal by the City of Southfield following a pre-July 18, 2020 foreclosure under the old GPTA. *See* 51 F4th 185 (CA 6 2022). With respect to one of the properties at issue in *Hall*, the tax deficiency was $22,642; Oakland County then conveyed the property to the City of Southfield for that same amount; and the City in turn conveyed the property for $1 to a for-profit entity, the Southfield Neighborhood Revitalization

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Initiative, which later sold it for $308,000. *Id.* at 189. For another property, Oakland County foreclosed on a property that had a tax delinquency of $30,547; after the same series of conveyances, the Southfield Neighborhood Revitalization Initiative sold it for $155,000. *Id*.

As the *Hall* court summarized:

> The State then had a "right of first refusal" to buy the property for "the minimum bid" (i.e., the amount of the tax delinquency) or "its fair market value." If the State declined, the city or town in which the property was located could purchase the property for merely the "minimum bid." The governmental body that ended up with the property was then free to sell it at a public auction. No matter what the sale price, however, under the Act the property's former owner had no right to any of the proceeds. *See Rafaeli*, 505 Mich. at 448 (noting that the Act "does not provide for any disbursement of the surplus proceeds to the former property owner, nor does it provide former owners a right to make a claim for these surplus proceeds").

Id. at 188. The *Hall* court declined to decide whether there was a taking under the Michigan Constitution, but decided that there was a taking under the federal Takings Clause, and Oakland "County alone [wa]s responsible for the taking of the plaintiffs' property." *Id* at 196.

In this case, Oakland County argued in its December 5, 2024 supplemental brief to this Court that the appropriate compensation to be paid for the taking that occurred in this case is "[t]he fair market value of the property on April 1 of the year of foreclosure, less the minimum bid." MACT agrees with and supports this measure of compensation. It is consistent with the *Hall* federal measure of damages for such a Taking: it appropriately values the property at the time of the foreclosure; and it compensates former property owners commensurate with their personal property

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interest in the remaining proceeds as held by this Court in *Rafaeli* when there is no auction from which to otherwise determine whether and to what extent there are any remaining proceeds from such a sale.

Finally, *Hall* determined that the county "alone" bears liability in this circumstances, 51 F4th at 196, and Oakland County appears to abide by this holding in its supplemental brief. MACT respectfully submits that, as this Court is not bound by *Hall*, it should independently assess the proper allocation of liability. As the *Hall* background makes abundantly clear, it was not the County that realized hundreds of thousands of dollars of profit from selling the properties; it was a for-profit entity, the Southfield Neighborhood Revitalization Initiative, after receiving a conveyance from the City of Southfield, to whom the Oakland County treasurer had no discretionary authority but to transfer the property after the City exercised its right of first refusal under MCL 211.78m(1). *City of Bay City v Bay Cnty Treasurer*, 292 Mich App 156, 168; 807 NW2d 892 (2011) (treasurer-FGU had no discretionary authority to not convey the property to the municipality once it exercised its right of first refusal).

As such, liability should follow the taken proceeds and should not invade the public coffers of a county that never held or used the proceeds. This is especially true since the county, via the FGU, is actually seeking to collect the unpaid property taxes assessed by local municipalities and townships. *See Charter Twp. of Pittsfield v. Washtenaw Cnty Treasurer*, 338 Mich App 440, 441-57; 980 NW2d 119 (2021)(explaining the role of the FGU to collect unpaid property taxes under the statutory tax foreclosure process set forth in the GPTA). The compensation to be paid

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under the SEV approach (less the minimum bid) proposed by Oakland County and MACT may still amount to less compensation to be paid than what the Southfield Neighborhood Revitalization Initiative realized from its sale (as occurred with respect to at least one of the properties in *Hall* that was "worth close to $300,000," but sold for $308,000 (51 F4th at 187, 189), putting the state or the municipality that exercised the right of first refusal in the superior and (fair) position to return that which was taken.

STATUTORY BACKGROUND

The property tax foreclosure system in Michigan is vital to the operation and sustainability of its counties and its local governments and public schools. As Michigan's legislature recognized when reforming the system decades ago, absent a mechanism to enforce property tax collection, Michigan's municipalities face revenue shortfalls, increased blight, abandoned housing, health and safety issues, and increased taxes spread among those in the community who do timely pay taxes. In this regard, the GPTA was enacted to "strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes." MCL 211.78(1).

Property tax foreclosure is a last resort that arises when a property owner fails to comply with numerous notices of deficiency and fails to redeem the property within a statutory timeframe. When a property owner fails to make payments after numerous chances to do so and fails to take advantage of opportunities for financial hardship support provided under the GPTA, *see, e.g.*, MCL 211.78h and 78k, the FGUs are often left no choice but to foreclose. And prior to 2020, the GPTA required FGUs to retain

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any remaining proceeds from foreclosure auctions, and to use those proceeds in a statutorily-defined manner.

Under the GPTA prior to the 2020 amendment, the state of Michigan had a right of first refusal to purchase any tax-foreclosed properties in the state. Prior MCL 211.78m(1); *Bay City*, 292 Mich App at 157. If the state declined to purchase a property, the city, village, or township within whose limits the property is located could purchase it. *Id.* The price of purchase (referred to as the "minimum bid") was set at what the minimum bid would be if the property were being auctioned off, which is determined by adding all taxes, interest, and fees owed on the property, so that the foreclosing governmental unit (FGU) breaks even on the property. Prior MCL 211.78m(11); *Bay City*, 292 Mich App at 157. Before 1999, the state administered the tax-foreclosure scheme in every Michigan county. *Bay City*, 292 Mich App at 157. In 1999, the Legislature passed Public Act 123, which allowed counties to "opt-in" and replace the state as the FGU, administering foreclosures within their jurisdictions. Prior MCL 211.78(3), as amended by 1999 PA 123; *Bay City*, 292 Mich App at 157.

In 2020, however, this Court decided *Rafaeli, LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020), holding that individuals have a property interest in remaining proceeds of a tax sale. This Court concluded that the FGUs' statutorily-mandated retention of excess proceeds following a tax foreclosure violates the Michigan Constitution's Takings Clause. *Rafaeli* held that the property owner's right is to the excess proceeds, which consist of the "proceeds from the tax-foreclosure sale in excess of

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the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure sale of the property—no more, no less." *Id.* at 483-484.

In so holding, and taking guidance from the US Supreme Court's decision in *Nelson v City of New York*, 352 US 103, 110; 77 S Ct 195 (1956), this Court noted that "[n]othing in [*Rafaeli*] prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id.* at 461 n108, *citing Nelson*, 352 US at 110 & n 10. In *Rafaeli*, this Court also explained the interplay between an unconstitutional taking, on the one hand, and a statutory path to recovery of surplus proceeds, such as the path provided under the New York statute in *Nelson*, on the other hand. This Court understood the *Nelson* decision to "inform [it] that no federal Takings Clause claim will exist when there is a statutory path to recover the surplus proceeds, but the property owners fail to avail themselves of that procedure." *Id.* at 461. This Court in *Rafaeli* continued that, when reading *Nelson* together with *United States v Lawton*, 110 US 146 (1884), precedent establishes "that the Takings Clause under the United States Constitution may afford former property owners a remedy when a tax-sale statute provides the divested property owner an interest in the surplus proceeds and the government does not honor that statutory interest." *Id.* It is only when a state's statutory scheme does nothing at all "to provide the divested property owner an avenue for recovering the surplus proceeds," such as the Minnesota statute in *Tyler v Hennepin County*, 598 US 631; 143 SCt 1369 (2023) and the GPTA in Michigan before

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the 2020 amendment at issue in *Rafaeli*, that "would produce" a federal takings claim immediately. *Id.*

In response, the Michigan Legislature adopted 2020 Public Acts 255 and 256, which provide a process for former interest holders in tax foreclosed property to claim an interest in remaining proceeds as defined by *Rafaeli*. The Legislature's express intention was to "codify and give full effect to the right . . . recognized by the Michigan [S]upreme [C]ourt in *Rafaeli*[.]" 2020 Mich Legis Serv PA 256 (SB 1137).

The statutory process for a claimant to claim surplus proceeds is therefore codified under MCL 211.78t ("Section 78t") of 2020 Public Act 256.[3] Under MCL 211.78t(2), a claimant seeking remaining proceeds must notify the FGU using a form prescribed by the department of treasury by the July 1st immediately following the foreclosure, but this applies only to a "foreclosed property transferred or sold under section 78m *after* July 17, 2020[.]" (emphasis added). In turn, the *only* reference to Section 78t in Section 78m is to Section "78t(2)," which, again, applies only to foreclosures that occurred ***after*** July 17, 2020. The process for claimants to seek remaining proceeds if the foreclosure occurred ***before*** July 18, 2020 is set forth in MCL 211.78t(6), which has an upcoming deadline of March 31, 2025, for claimants to submit their notices of intention as held by this Court in *Schafer*, but that process is not referenced and does not apply to rights of first refusal under MCL 211.78m(1).

[3] Section 78t has already been challenged, upheld, and applied retroactively by this Court. *See In re Muskegon*, slip op p 4 (Docket No 363764), *application for leave to appeal denied*, 11 NW3d 474 (2024) (petition for writ of certiorari pending in the US Supreme Court); *Schafer*, 2024 Mich LEXIS 1438, at *5.

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As a result of this Court's holdings, Section 78t is the exclusive mechanism for a claimant to seek remaining proceeds after an auction. This case presents the small class of properties to which the Section 78t process, by the terms of the GPTA, does not apply, i.e., where the tax foreclosure occurred before July 18, 2020, and there was no auction because the state or a municipality exercised the right of first refusal of MCL 211.78m(1).

ARGUMENT

I. MCL 211.78m Applies Prospectively Only, So Plaintiffs' Constitutional Claims Are Not Precluded By MCL 211.78t.

The first three issues presented by this Court's November 1, 2024 order granting argument on the application are resolved if holding, as MACT respectfully submits is legally correct, that MCL 211.78m applies prospectively only. Since the procedure for compensation outlined in MCL 211.78m when the right of first refusal is exercised by a municipality does not apply to tax foreclosures that occurred before July 18, 2020, MCL 211.78t does not preclude constitutional claims, which are viable under both the state and federal Takings Clauses.

"In determining whether a statute should be applied retroactively or prospectively only, the primary and overriding rule is that legislative intent governs." *Schafer*, 2024 Mich LEXIS 1438, at *30, *quoting Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). "All other rules of construction and operation are subservient to this principle.'" *Id*. But absent unambiguous statutory language making it apply retroactively, "'statutes and statutory amendments are presumed to operate prospectively.'" *Schafer*, 2024 Mich

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LEXIS 1438, at *31, *quoting Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155; 725 NW2d 56 (2006); *id* at *35 ("[s]tatutes are generally presumed to apply prospectively").

Under the current MCL 211.78(1), as amended in 2020, the state may exercise the right of first refusal to purchase foreclosed property at the greater of the minimum bid or its fair market value by paying that amount to the FGU if the FGU is not this state. If the state elects not to purchase the property under its right of first refusal and 1 or more claimants "*have filed a claim for remaining proceeds from the foreclosed property under section 78t(2)*, a city, village, township, or city authority may" exercise the right of first refusal. *Id* (emphasis added). In this situation, the price is "the greater of the minimum bid or the fair market value of the property." *Id*. But if "no claimant has filed a claim for remaining proceeds from the foreclosed property *under section 78t(2)*," the price is "the minimum bid." *Id* (emphasis added). The county is next in line to have the right of first refusal under the same purchase terms if not already exercised, followed by the county authority. *Id*.

Section 78t(2) is referenced six times in MCL 211.78m(1) with respect to the right of first refusal, and it is the *only* the provision of Section 78t that is referenced in MCL 211.78m(1). The references to Section 78t(2) control the purchase price under the right of first refusal. If any claimant has submitted a notice of intention to seek remaining proceeds under Section 78t(2), then the purchase price is the "greater" of the minimum bid or fair market value of the property. If no such notice under Section 78t(2) exists, the purchase price is the minimum bid amount.

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Thus, since this Court determined in *Schafer* that Section 78t applies retroactively, it necessarily must analyze these references to Section "78t(2)" in MCL 211.78m(1) to determine whether Section 211.78m evinces unambiguous statutory language that it applies retroactively. It does not.

Under Section "78t(2)," as referenced in MCL 211.78m(1), a claimant seeking remaining proceeds must notify the FGU using a form prescribed by the department of treasury by the July 1st immediately following the foreclosure, but this applies *only* to a "foreclosed property transferred or sold under section 78m *after* July 17, 2020[.]" (emphasis added). In contrast, the process for claimants to seek remaining proceeds with a notice of intention if the foreclosure occurred *before* July 18, 2020 is set forth in MCL 211.*78t(6)* (which has an upcoming deadline of March 31, 2025, as held by this Court in *Schafer*), but that process *is not referenced in and does not apply to rights of first refusal* under the plain language of MCL 211.78m(1). And after concluding that the references to Section "78t(2)" do not support retroactive application of MCL 211.78m(1), there is no other indicia of retroactive application in MCL 211.78m(1).

In *Schafer*, this Court concluded that MCL 211.78t applies retroactively but MCL 211.78*l* applies prospectively only. 2024 Mich LEXIS 1438, at *35 ("By contrast to MCL 211.78t, MCL 211.78*l* includes no similar language expressly identifying and applying its standard to actions and events prior to enactment."). The same reasoning and analysis, as applied to the language of MCL 211.78m, demands the result that, like MCL 211.78*l*, MCL 211.78m(1) with respect to the right of first refusal applies prospectively only. *See id* at *34 ("Although MCL 211.78t is retroactive under its plain

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text, significant issues surrounding the retroactivity of relevant provisions of 2020 PA 256 remain.").

As to issues number 2 and 3 presented in this Court's November 1, 2024 order, the result of MCL 211.78m(1) applying prospectively only is that, in the limited circumstance presented by this case (a pre-July 18, 2020 foreclosure in which the right of first refusal was exercised and therefore there was no auction), a plaintiff has a claim under the Takings Clauses of the state and/or federal constitution, which is not precluded by Section 78t. *See Rafaeli*, 505 Mich at 479; *Hall*, 51 F4th at 196; *Bowles v Sabree*, 121 F4th 539, 547 (CA 6 2024) (discussing *Hall*); *Tyler*, 598 US at 639.

II. Oakland County's FGU Had No Discretion But To Honor Southfield's Exercise of Its Right of Refusal.

In *Hall*, the Sixth Circuit concluded that Oakland "County alone [wa]s responsible for the taking of the plaintiffs' property" under the federal Takings Clause. 51 F4th at 196. MACT respectfully submits that this conclusion was erroneous and should not be adopted or followed by this Court. Oakland County, by its treasurer-FGU, had no discretion under MCL 211.78m but to convey the property to the City of Southfield upon the City's exercise of its right of first refusal. *Bay City*, 292 Mich App at 168; *see also Bowles v Sabree*, No 22-1912, 2024 US App LEXIS 8879, at *7-8 (CA 6 April 10, 2024) (defendant treasurer-FGU was entitled to sovereign immunity because he was "duty bound" to follow the requirements of the GPTA).

Further, it is important to focus upon the actual property right that is at issue. The Sixth Circuit very recently (November 2024) reiterated this Court's holding in *Rafaeli* in this respect, explaining:

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> As the Michigan Supreme Court recognized in *Rafaeli*, the right to collect surplus proceeds from a tax sale is a "cognizable, vested property right." *Rafaeli*, 952 N.W.2d at 461. The "vesting of fee simple title to the real property" in the county "does not extinguish [the right]." *Id*. It "is a separate property right that survives the foreclosure process." *Id*. But while the right flows from the sale of real property, *it is not itself an interest in real property. It's personal property*.

Bowles, 121 F4th at 449-550 (emphasis added). And although this right and interest might exist prior to the foreclosure, *see Hall*, 51 F4th at 196, it is a personal property right to proceeds that may be traced to its actual beneficiary. When focusing on the property right being the *personal property* right in remaining proceeds, it is evident that there was no taking *by* Oakland County when it did not obtain anything. In other words, for Oakland County to "take" it is axiomatic that one must be able to trace what was taken back to Oakland County, yet it did not obtain or deposit any remaining proceeds. Rather, it was statutorily mandated (with no discretion) to transfer this right to the City of Southfield upon the City's exercise of its right of first refusal and it was the subsequent transferee, the Initiative, who realized the actual monetary gain consisting in large part of the proceeds belonging to plaintiff from subsequent the sale of the property.

Accordingly, liability in the right of first refusal context should follow the taken proceeds to the last public entity that obtained them—in this case the City of Southfield and/or its transferee, but liability should not rest with Oakland County, which never held or used the proceeds. The "**just compensation" requirement "does not require local governments to impoverish themselves**," *Rafaeli*, 505 Mich at 519-520 (emphasis added), and holding Oakland County liable instead of the

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public entity that unjustly benefited from the plaintiff's (or other former interest holder(s) in the foreclosed property) proceeds—as a result of the City of Southfield's own voluntary exercise of the right of first refusal— would be similarly unjust.

III. Just Compensation.

As stated, Oakland County argued in its December 5, 2024 supplemental brief to this Court that the appropriate compensation to be paid for the taking that occurred in this case at the time the deed was transferred to the FGU, pursuant GPTA Section 211.78k, is "[t]he fair market value of the property on April 1 of the year of foreclosure, less the minimum bid," and MACT agrees with and supports this measure of compensation.

This measure is consistent with federal law. Whereas the measure of just compensation when there *is an auction* is any remaining or "surplus" proceeds under both Michigan and federal law, *see Rafaeli*, 505 Mich at 483-484; *Freed v Thomas*, 81 F4th 655, 658-659 (CA 6 2023), the Sixth Circuit has held, for purpose of a federal Takings claim, that "[a] plaintiff can sue for surplus equity when there's no public auction[.]" *Bowles*, 121 F4th at 548, *citing Hall*. "Surplus equity" is "the difference between the fair market value and the tax debt." *Id*. at 547.

This measure also appropriately values the property at the time of the foreclosure—when the *Hall* court held the federal Fifth Amendment Takings takes place. 51 F4th at 196 (taking occurs when a county takes absolute title of the property). And, it also compensates former property interest holders commensurate with their respective personal property interest(s) in the remaining proceeds, as held

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by this Court in *Rafaeli* when, like in *Hall*—there is no auction from which to otherwise determine whether and to what extent there are any remaining proceeds from such a sale.

CONCLUSION

For the foregoing reasons, the Michigan Association of County Treasurers, as amicus curiae in support of Appellant Oakland County, respectfully submits that: (1) MCL 211.78m(1) does not apply retroactively; (2) MCL 211.78t therefore does not preclude plaintiffs' constitutional claims in these limited circumstances of a foreclosure that occurred before July 18, 2020, after which there was no auction because the right of first refusal was exercised; (3) such limited claims are viable under the state and/or federal Takings Clauses; (4) the public entity exercising the right of first refusal is the appropriate entity to be liable for the taking; and (5) the measure of compensation should be the fair market value of the property on April 1 of the year of foreclosure, less the minimum bid.

Respectfully submitted

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Dated: February 28, 2025

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CERTIFICATE OF COMPLIANCE

I certify that the Brief of the Michigan Association of County Treasurers as Amicus Curiae in Support of Appellant Oakland County complies with the type-volume limitation set forth in MCR 7.212(B). This brief uses a 12-point proportional font (Century Schoolbook), and the word count, based on the word count of the word-processing system used to produce this document, for this brief is 5,310.

Dated: February 28, 2025

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