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STATE OF MICHIGAN
IN THE SUPREME COURT

NICK YONO,

Plaintiff-Appellee,

v

SC: 166791
COA: 362536
Ingham CC: 20-000697-CZ

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

Defendants-Appellants,

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

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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. As briefed by Appellants and certain other amici, MACT supports holdings from this Court that the Court of Appeals erred in: (1) holding that the plaintiff successfully established that the defendants violated the Takings Clause of the Michigan Constitution, Const 1963, art 10, § 2; and (2) directing the Ingham Circuit Court to calculate the "surplus" owed on the property by reference to the value of the property less what the plaintiff owed on it when the foreclosure occurred.

1. 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

[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 curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

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statute, MCL 211.78m, as are the other methods of transferring the property if there is no buyer at the auction.

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 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.

[2] *See Garcia v Title Check, LLC*, No. 21-1449, 2022 US App LEXIS 981, at *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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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 many 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 any remaining proceeds from foreclosure auctions, and to use those proceeds in a statutorily-defined manner.

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

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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 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***." 505 Mich at 461 (emphasis added). 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* (emphasis added). Only when a state's statutory scheme does nothing at all "to provide the divested property owner an avenue for recovering the surplus

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proceeds," such as the Minnesota statute in *Tyler v Hennepin County*, 598 US 631; 143 SCt 1369 (2023) and the previous GPTA in Michigan, is there an immediate federal takings claim. *Id.*

In response to *Rafaeli*, 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 this Court. 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)(emphasis added).

The statutory process for Plaintiff to claim surplus proceeds is therefore codified under MCL 211.78t ("Section 78t") of 2020 Public Act 256. Section 78t has already been challenged and upheld in the Michigan courts, including this Court. First, on October 26, 2023, the Court of Appeals upheld that, per Section 78t(11), Section 78t is the exclusive mechanism for a claimant to seek and obtain any remaining proceeds after a tax foreclosure under the GPTA. *In re Muskegon*, slip op p 4 (Docket No 363764), *application for leave to appeal denied*, 11 NW3d 474 (2024).[3] The Court of Appeals noted the principle that, "[s]o long as the statutory scheme adopted by our Legislature comports with due process—and MCL 211.78t does—whether such a scheme makes sense or not, or whether a 'better' scheme could be devised, are policy questions for the Legislature, not legal ones for the Judiciary." *Id.* at 9.

[3] After this Court denied leave to appeal, appellant filed a petition for writ of certiorari in the Supreme Court of the United States, which remains pending.

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The Court of Appeals also held that Section 78t(2) "imposes a reasonable, minimal burden on former owners to advise the FGU of their intent to exercise that right by claiming any remaining proceeds." *Id* at 7. This notice of intention must be submitted before the auction occurs. MCL 211.78m; MCL 211.78t. The court rejected the claimant's constitutional arguments, holding that Section 78t "satisfies due process." *Id* at 8.

Then, on July 29, 2024, this Court held that, not only does *Rafaeli* apply retroactively, but that Section 78t, by its plain terms, also applies retroactively and is the exclusive means for claimants to seek surplus proceeds after a tax foreclosure sale under the GPTA. *Schafer v Kent County* and *Hathon v. State*, __ Mich __, Nos 164975, 165219, 2024 Mich LEXIS 1438, at *5 (July 29, 2024) (Section 78t "established a structured and 'exclusive' process for individuals subject to tax-foreclosure proceedings to seek and obtain surplus proceeds from [foreclosing governmental units]."), *citing* MCL 211.78t.

As a result of its decisions in *Shafer* and *Hathon*, on October 23, 2024, this Court vacated parts II.B and II.C of the Michigan Court of Appeals' decision in *Proctor v Saginaw Cnty Bd of Comm'rs*, 340 Mich App 1 (2022), and remanded the case for consideration in light of *Schafer*/*Hathon*. 2024 Mich LEXIS 1938 (Oct. 23, 2024). The vacated portions of *Proctor* included the Court of Appeals' holdings that (1) inverse condemnation and unjust enrichment are viable state law claims based upon the taking of remaining proceeds after a tax foreclosure under the GPTA; and (2) plaintiffs are entitled to interest on the remaining proceeds under their federal takings claim.

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The Supreme Court of the United States has repeatedly upheld such statutory systems of the states which provide a mechanism for claiming remaining proceeds, most recently in May 2023 in *Tyler*, 143 S Ct at 1378-79, *citing Nelson*, 352 US 103 at 110, as an example where the Court upheld the constitutionality of an ordinance that "did not 'absolutely preclude an owner from obtaining the surplus proceeds of a judicial sale,' but instead simply defined the process through which the owner could claim the surplus."

Notably, and although this Court is not bound by Sixth Circuit decisions, Appellants' and MACT's position is consistent with the Sixth Circuit's decision in *Hall v Meisner*, which recognized a federal takings claim under the prior, pre-amended version of the GPTA precisely because the GPTA at that time, unlike the New York statute in *Nelson*, provided "no [ ] opportunity at all" for a plaintiff to seek any remaining proceeds. 51 F4th 185, 196 (6th Cir. 2022) (which is the same reason that this Court found a taking under the Michigan Constitution in *Rafaeli* under that prior statute). But now that the amended GPTA, via Sections 78m and 78t, provides such a mechanism, which is comparable to the New York statute in *Nelson*, there is no viable federal or Michigan takings claim because no taking without the opportunity for "just compensation" (as provided for under Section 78t) has occurred unless and until the government invalidly denies a properly asserted claim following the process of Section 78t.

Federal district courts in Michigan have therefore concluded that, "pursuant to the 2020 amendments to the GPTA," the "statute now provides the opportunity to

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claim the surplus proceeds which existed in *Nelson*," and "the availability of such an avenue forecloses" a federal takings claim. *Metro T Properties, LLC v Cnty of Wayne*, No 23-cv-11457, 2024 US Dist LEXIS 26689 (ED Mich Feb 15, 2024); *see also Howard v Cnty of Macomb*, No 1:23-cv-12595; 2024 US Dist LEXIS 139474, *10 (ED Mich Aug 6, 2024). *Howard* relied upon the Court of Appeals' decision in *In re Muskegon* as well as this Court's decision in *Schafer* in concluding:

> Indeed, as the Michigan Court of Appeals recognized in October 2023, former property owners may not seek to recover surplus proceeds under a state inverse-condemnation theory where the recovery procedure outlined in Mich. Comp. Laws § 211.78t is the exclusive means for recovering such proceeds. *In re Muskegon Cnty. Treasurer for Foreclosure*, No. 363764, 2023 Mich. App. LEXIS 7760, 2023 WL 7093961, at *4 (Mich. Ct. App. Oct. 26, 2023) . . . . And even if Plaintiff was able to pursue her inverse condemnation claim here under Michigan law, it would be dismissed for the same reason her federal takings claim will be dismissed: because Michigan law "now provides an opportunity for [Plaintiff] to recover the [surplus proceeds]," but Plaintiff did not follow that process, so she "did not suffer a compensable taking," 2023 Mich. App. LEXIS 7760, [WL] at *8-9 (citing *Nelson v. City of New York*, 352 U.S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956)). And the Michigan Supreme Court's recent decision in *Hathon* and *Schafer* did not disturb that conclusion. Accordingly, Plaintiff's Inverse Condemnation Claim must be dismissed, as well.

2024 US Dist LEXIS 139474, at *10. In addressing plaintiff's inverse condemnation claim, the *Howard* court also noted that, in *Schafer*, this Court "did appear to accept that the state prescribed procedure [under Section 78t] is the exclusive remedy for seeking surplus proceeds." *Id* at n2.

ARGUMENT

I. There Is No Taking When The Auction Produces No Bid Because There Are No Remaining Proceeds.

The enactment of Section 78t in 2020, as an amendment to the GPTA as it existed under PA 123 of 1999, provided all claimants with the opportunity to claim

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"any" remaining proceeds that might exist after a tax foreclosure and the satisfaction of the claimant's tax liability and recoverable costs pursuant to this Court's 2020 decision in *Rafaeli*. The GPTA sets forth an auction process to occur beginning no earlier than the third Tuesday in July following the March foreclosure. MCL 211.78m. Before the auction even occurs, the claimant is required under MCL 211.78t(2) to submit the claimant's Notice of Intention to claim "any" remaining proceeds by the July 1st following the March foreclosure. (For foreclosures that occurred prior to July 18, 2020, this Court held in *Schafer* that, under Section 78t, claimants still have until March 31, 2025, to submit their notice of intention to claim any remaining proceeds). Thus, under the typical process (and for every case where the foreclosure occurred after July 18, 2020), when the claimant submits this notice of intention by July 1, it is impossible to know yet whether and to what extent the future auction will yield any remaining proceeds. Accordingly, nothing about the Section 78t process, which has already passed constitutional muster, was ever meant to guaranty that there will be remaining proceeds or that there will be compensation to be had, nor could it.

To provide compensation even where the auction yields no bid would be to provide "unjust" compensation, to which no one is entitled. The opportunity afforded by Section 78t requires the claimant to follow the minimally burdensome statutory procedure for submitting a notice of intention to claim "any" proceeds, the amount of which, if any, will be identifiable after the auction. When the auction produces a top bid that still does not satisfy the tax debt or where, as here, the auction produces no bid at all, there are necessarily no remaining proceeds and, consequently, no taking.

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Section 78t is exactly the sort of process called for under US Supreme Court precedent in *Tyler* and *Nelson* and acknowledged by this Court in *Rafaeli* when noting that nothing about its decision prevented the Legislature from enacting such a process. The availability of this mechanism to seek "any" remaining proceeds after a tax foreclosure under Section 78t necessarily means that plaintiff failed to state a takings claim (state or federal).

There does not seem to be any debate that, when the auction *does garner* a third-party purchaser, but the highest bid does not yield enough to pay off the delinquent tax liability, then there are no remaining proceeds and the claimant will not be entitled to anything. This is not a taking because there was nothing to take. It is simply going to happen sometimes that there is not a willing buyer for a tax-foreclosed property. The fiction advanced by Appellant and held by the Court of Appeals is that, while it is constitutionally adequate for a low bid (but nevertheless the highest bid) at an auction to yield no remaining proceeds, it is nevertheless unconstitutional for the auction to yield *no bid at all*, also resulting in no remaining proceeds, but triggering an alternative transfer to a land bank rather than to a private buyer. Yet there is no practical difference for the claimant between the situation where the highest bid at auction still does not reach the amount of the delinquent tax liability and where there was no bid at all. The identity of the ultimate title holder does not change that there were no remaining proceeds for the claimant. This does not mean there has been a taking; it means there was nothing to take. The Court of Appeals' decision swings the pendulum too far, from there being no path to recover any remaining proceeds under

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the 1999 Act until this Court struck it down in *Rafaeli*, to now essentially *guaranteeing payment* to the defaulted tax payer when the auction (that the county bears the expense to conduct) yields no bidder under the Court of Appeals' holding.

MACT respectfully submits that this is erroneous and the Court of Appeals therefore erred in holding that the plaintiff successfully established that the defendants violated the Takings Clause of the Michigan Constitution, Const 1963, art 10, § 2. MACT respectfully submits that, in relying on cases like the Court of Appeals' decision in *Jackson v Southfield Neighborhood Revitalization Initiative*, ___ Mich App ___; ___ NW2d ___ (2023),[4] and the US Supreme Court's decision in *Lawton*, *supra*, the Court of Appeals erroneously focused on whether an *ultimate sale occurred* instead of properly focusing on whether there was a proper *auction with the opportunity for a sale*. There was no opportunity to generate remaining proceeds in *Jackson* or *Lawton* because there were no public auctions. *Jackson* involved the government's right of first refusal under the pre-amended GPTA and, similarly, in *Lawton*, the property was "bought in by the tax commissioners for the United States." 110 US at 149. In contrast, here, the opportunity was present but there were no remaining proceeds to be had after the public auction because no one bid.

Appellants in this case have thoroughly presented the applicable law in their briefs to this Court, which MACT does not aim to repeat here. Appellants have properly

[4] This Court granted argument on the application in *Jackson* and directed the Clerk to coordinate *Jackson* for hearing during the same future session as this case, which have been set for the upcoming April session. This Court's granting arguments on the applications in both cases as opposed to just one case is perhaps a recognition that they present different, not the same, issues, as erroneously applied by the Court of Appeals.

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focused upon what the protected property right is and what it is not. Although not binding on this Court, the Sixth Circuit very recently (November 2024) reiterated this Court's holding in *Rafaeli* in this respect, explaining:

> 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 v Sabree, 121 F4th 539, 549-550 (CA 6 2024) (emphasis added). Justice Viviano's concurring opinion in *Rafaeli* likewise addressed this point:

> The better view, under the law described above, is that the property taken is the taxpayer's equity and that this occurs when title vests in the government with no *opportunity* for redemption. . . . *If* the property is sold, *any* surplus represents the remaining equity in the property and is owed as the just compensation due the taxpayer. . . . .
>
> It is, of course, possible that the surplus *might not capture* the value of a taxpayer's property. But the "just compensation" requirement *does not require local governments to impoverish themselves*. Thus, taxpayers seeking some *speculative* value beyond the surplus realized in the tax sale might often lack meritorious claims. 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 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*.

505 Mich at 519-520 (Viviano, J, concurring) (emphasis added). On that last point, it could also be said that a former owner who does not conduct a private sale before or during the redemption period acquiesces to the possibility that the auction conducted by the FGU will result in no bidder and no sale. When focusing on the property right being the *personal property* right in remaining proceeds, it is evident that there is no

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taking when the government did not obtain anything. In other words, for the government to "take" it is axiomatic that one must be able to trace what was taken back to the government, yet the government did not obtain, deposit, or transfer any remaining proceeds. The transfer of the *real* property to the land bank due to the lack of a bidder at the auction is not a transfer of any personal property belonging to Appellee.

The GPTA's auction process itself is fair and constitutional, which does not appear to be at issue. It is a statutorily-mandated process that is not subject to manipulation by the FGUs in any way that could materially undermine the auction procedure or a claimant's right to "any" remaining proceeds that the auction may or may not yield. In other words, and as the members of MACT are uniquely interested, the county treasurers, acting as the FGUs, have no special interest in trying to make an auction fail; it is completely a matter of statutory process and market appetite. MACT's members are charged with carrying out their statutory duties. *See 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 with respect to the tax foreclosure). They do so when facilitating the required statutory auction and then following the statutory requirements thereafter, whether the auction did or did not result in a sale to a third-party private purchaser. A claimant has a right to due "process." It is the process, not the result, that matters. It logically follows that a constitutionally adequate auction process does not yield an unconstitutional result simply because

there are no remaining proceeds after the auction, regardless of whether that is because the top bid did not meet the tax deficiency or because there was no bid.

Accordingly, MACT respectfully supports Appellants' position because no taking occurs when, despite the FGU's effort to sell the property in the statutorily prescribed manner at auction, the property does not yield any bidders, resulting in no remaining proceeds.

II. "Value" of the Property is Not a Proper Basis for Calculation.

As a result of the above discussion, there is no need to determine how to calculate an amount to pay the claimant where there is no bid at the auction because there was no taking and any award would only constitute an unearned windfall to the financial detriment of the municipality. The reason the Court of Appeals seemingly struggled to craft an alternative calculation and why no good calculation or test seems to exist is *precisely because the auction is the best and true test for remaining proceeds* based upon what a willing buyer will pay, which, in this case, was nothing. *See Bowles*, 121 F4th at 548 ("'the best evidence of a foreclosed property's value is the property's sales price, not what it was worth before the foreclosure'"), *quoting Freed v. Thomas*, 81 F.4th 655, 659 (6th Cir. 2023). Therefore, MACT respectfully submits that the Court of Appeals also erred in directing the Ingham Circuit Court to calculate the "surplus" owed on the property by reference to the value of the property less what the plaintiff owed on it when the foreclosure occurred (and even putting aside the practical impossibilities of this approach as briefed by Appellants).

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If this Court were to find a taking occurred, this measure of payment held by the Court of Appeals is erroneous. It would produce the anomalous result that a claimant whose former property does not even sell at auction gets the *extra benefit* of a calculation based on the "value" of the property, whereas a claimant who owned a property that was at least desirous enough to fetch a bid at auction receives *remaining proceeds* based only on the bid amount, not property value, which is often less than value and might be less than the tax liability. Using property "value" to calculate payment is also contrary to this Court's holding in *Rafaeli* that a claimant is entitled to the "return [of] any 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 484; *see also Bowles,* 121 F4th at 449-550, *citing Rafaeli*, and *Rafaeli*, 505 Mich at 519-520 (Viviano, J, concurring). In this case, there was no "excess," so the claimant had no entitlement, but the Court of Appeals' holding would award him "more" than even other claimants whose former properties sold at auction based on a property value calculation.

CONCLUSION

For the foregoing reasons, the Michigan Association of County Treasurers, as amicus curiae in support of Appellants, respectfully submits that the Court of Appeals erred because no taking occurs when, despite the FGU's effort to sell the property in the statutorily prescribed manner at auction, the property does not yield any bidders, resulting in no remaining proceeds. Even if there was a taking, just compensation is

not achieved with reference to the value of the property less what the claimant owed on it when the foreclosure occurred.

Respectfully submitted

DYKEMA GOSSETT PLLC

Dated: February 28, 2025

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