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STATE OF MICHIGAN

IN THE SUPREME COURT

MATTHEW SCHAFER, HARRY HUCKLEBURY, and LILLY HUCKLEBURY,

Plaintiffs-Appellees,

v

KENT COUNTY,

Defendant-Appellant,

and

KENT COUNTY TREASURER,

Defendant.
_____/

Supreme Court Case No. _____

Court of Appeals Case No. 346908

Kent County Circuit Court
Case No. 220-009502-CZ

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KENT COUNTY'S APPLICATION FOR LEAVE TO APPEAL

Oral Argument Requested

RECEIVED by MSC 11/3/2022 9:28:11 PM

TABLE OF CONTENTS

RECEIVED by MSC 11/3/2022 9:28:11 PM

Page

RECEIVED by MSC 11/3/2022 9:28:11 PM

TABLE OF AUTHORITIES

Page(s)

Cases

RECEIVED by MSC 11/3/2022 9:28:11 PM

Page(s)

RECEIVED by MSC 11/3/2022 9:28:11 PM

Page(s)

RECEIVED by MSC 11/3/2022 9:28:11 PM

Statutes

RECEIVED by MSC 11/3/2022 9:28:11 PM

Page(s)

Rules

Other Authorities

RECEIVED by MSC 11/3/2022 9:28:11 PM

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction under MCR 7.303(B)(1) to grant leave to appeal from the Court of Appeals' opinion entered on September 22, 2022.

ORDER APPEALED AND RELIEF SOUGHT

Defendant Kent County seeks leave to appeal the published September 22, 2022 Court of Appeals' opinion affirming the Kent County Circuit Court's denial of Kent County's motion to dismiss Plaintiffs' claims. Kent County argued that this Court's decision in *Rafaeli LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020), should not apply retroactively to Plaintiffs' claims that accrued before *Rafaeli*, but Plaintiffs did not file their claims until after *Rafaeli* was issued. The Court of Appeals held that *Rafaeli* must be given full retroactive effect. To reach that erroneous conclusion, the Court of Appeals had to disregard its own published decision from eight months earlier in *Proctor v Saginaw County Board of Commissioners*, __ Mich App __; __ NW2d __; 2022 WL 67248 (2022), where the Court of Appeals held that *Rafaeli* applies retroactively for named plaintiffs in cases pending at the time when *Rafaeli* was decided, but not to those, like the putative class members in *Proctor*, whose claims were not pending. *Proctor*, 2022 WL 67248 at *7, *15. Accordingly, Kent County respectfully requests that this Court grant leave to appeal, and reverse the Court of Appeals' decision.

RECEIVED by MSC 11/3/2022 9:28:11 PM

STATEMENT OF QUESTIONS PRESENTED

Whether this Court's decision in *Rafaeli LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020) applies to claims that accrued before *Rafaeli* was issued but were not filed until after *Rafaeli* was decided.

Plaintiffs/Appellees Answer:	Yes
Defendant/Appellant Answers:	No
Trial Court Answers:	Yes
Court of Appeals Answers:	Yes, but the Court reached a different conclusion in *Proctor v Saginaw County Board of Commissioners*, __ Mich App __; __ NW2d __ (2022).

RECEIVED by MSC 11/3/2022 9:28:11 PM

REASONS FOR GRANTING LEAVE TO APPEAL

This appeal raises a question of great public and jurisprudential significance left open by this Court's decision over two years ago in *Rafaeli, LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020): Does *Rafaeli* apply to tax-foreclosure sales before the *Rafaeli* decision came down? In *Rafaeli*, this Court held that the explicit provision of the General Property Tax Act (the GPTA), which mandated that counties after foreclosing and selling tax-delinquent properties retain any proceeds from the sale of such tax-foreclosed properties even if those proceeds exceeded unpaid taxes, violated the Michigan Constitution's taking provision. Since then, Michigan's lower courts have struggled with the question of whether *Rafaeli* should be applied with full retroactivity, with limited-retroactivity, or prospectively. Indeed, the Michigan Court of Appeals, in two published decisions issued just-over a half-year apart and authored by the same judge, has reached contradictory conclusions. In its first opinion, *Proctor v Saginaw County Board of Commissioners*, --- Mich App ---; --- NW2d ---; 2022 WL 67248 (2022), the Court of Appeals held that *Rafaeli* applied with limited retroactivity. In the second case, the Court of Appeals said that *Rafaeli* applied with *full* retroactivity. The Court of Appeals did not explain how the two decisions were compatible. The contradictory nature of the two published Court of Appeals' opinions is itself grounds for granting leave to appeal. MCR 7.305(B)(5)(B). But that is only the tip of the iceberg.

Whether *Rafaeli* applies with limited retroactivity is an issue of "significant public interest" involving the State (which acts as the foreclosing governmental unit for certain counties) and numerous "subdivisions" of the state, namely, Michigan's 75 counties that have served as foreclosing governing units under the GPTA. MCR 7.305(B)(2). The retroactive effect of *Rafaeli*, if any, is hugely significant for these 75 counties. If *Rafaeli* applies with *full*

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retroactivity, massive liability will be imposed on counties throughout Michigan, especially as class-action counsel assert that they are entitled to assert *Rafaeli* claims for foreclosure sales dating back to 2008. Moreover, the answer to the retroactivity question is significant because after the *Rafaeli* decision, the Michigan Legislature enacted an exclusive claims process for *Rafaeli* claims. That process is applied prospectively unless this Court gives *Rafaeli* retroactive application. Furthermore, the answer to the retroactivity question will also directly affect the more than two dozen ongoing state and federal putative class actions and other actions pending in state and federal courts.

The question of *Rafaeli*'s retroactivity also involves a "legal principle of major significance for the state's jurisprudence." MCR 7.305(B)(3). Michigan's limited retroactivity jurisprudence is a confusing warren of oft-contradictory caselaw. Sometimes courts apply a fulsome analysis considering various factors. Other times, they simply conclude without any analysis that a decision should apply with limited retroactivity or only prospectively. This case presents a clean vehicle for this Court to bring clarity to that retroactivity caselaw. The *Rafaeli* decision announced an unforeseen change in the law affecting a tax statute that was not foreshadowed by earlier decisions by the Michigan courts (and contrary to the rule adopted by courts in other states). In such circumstances, an overruling case's rule should apply, at most, with limited retroactivity. But the confusing state of Michigan's retroactivity jurisprudence invites errors regarding when limited retroactivity applies (where the change in the law unsettles significant reliance interests and undermines the administration of justice), what it applies to (claims that accrue before the overruling decision), and how it is applied (flexibly to address the specific case).

RECEIVED by MSC 11/3/2022 9:28:11 PM

The foregoing also highlights the clearly erroneous nature of the Court of Appeals' decision, a decision that will lead to material injustice. MCR 7.305(B)(5)(A). A new tax rule such as announced in *Rafaeli* should be applied, at most, with limited retroactivity. Analysis of Michigan caselaw and decisions from around the country demonstrate that tax cases are regularly applied with prospective-effect only precisely because they upend the legitimate reliance of public agencies on duly-enacted tax laws. For over 20 years, 75 Michigan counties simply did what they were *mandated* to do when they foreclosed upon tax-delinquent property. They had no power themselves to change the law. That is precisely a situation where Michigan courts have given a decision that changes the law limited retroactive or prospective-only effect. The Court of Appeals ignored these reliance interests. And given the Court of Appeals' erroneous decision here and contradictory decision in *Proctor*, Michigan's counties are facing enormous and—after the Sixth Circuit's rejection of this Court's reasoning in *Rafaeli* in its decision in *Hall v Meisner*, 51 F4th 185 (CA 6, 2022)—incalculable liability for simply following the mandates of a statutory provision that no one questioned for nearly 20 years and applying it to those who failed to pay their taxes.

In short, this case raises issues that are worthy of this Court's review. And, unlike *Proctor*, the other county tax-foreclosure case with an application pending in this Court, this case presents the retroactivity issue cleanly and without any other issues to muddy the waters. A decision that *Rafaeli* applies retroactively only in cases where challenges to the retention of surplus proceeds before *Rafaeli* were raised and preserved is dispositive here because the Plaintiffs did not initiate this action for pre-*Rafaeli* surplus proceeds until after that decision was issued. This Court should grant leave, reverse the Court of Appeals' decision here, and bring clarity to Michigan's retroactivity caselaw.

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BACKGROUND

The General Property Tax Act

Before 1999, the GPTA was a tax-lien statute. When a taxpayer was delinquent in paying property taxes, the county recorded a lien and, three years later, the lien would be offered at a tax-lien sale. Kevin T. Smith, *Foreclosure of Real Property Tax Liens Under Michigan's New Foreclosure Process*, 29 Mich Real Prop Rev 51, 51 (2002); see also *Rafaeli*, 505 Mich at 442 n 10. The process was cumbersome and "could extend many years, causing properties to deteriorate and become clouded with poor title." *Rafaeli*, 505 Mich at 442 n 10. As a result, counties suffered from chronic under- and non-payment of property taxes, and properties became blighted and burdened with excessive rehabilitation expenses.

In 1999, the Michigan Legislature revised the GPTA to "expedite[] the foreclosure process, thereby reducing the amount of abandoned, tax-delinquent properties within the state." *Id*. It converted the GPTA from a tax-lien statute to a tax-deed statute. As revised, the GPTA allowed for "the recovery of unpaid real-property taxes, penalties, interest, and fees through the foreclosure and sale of the property on which there is a tax delinquency." *Id.* at 441–442. Pursuant to this process, "tax-delinquent properties are forfeited to the county treasurers as the foreclosing governmental unit; foreclosed on after a judicial foreclosure hearing; and, if not timely redeemed, sold at a public auction." *Id*. at 442 (cleaned up). See MCL 211.44; MCL 211.45.

The 1999 version of the GPTA provided for a lengthy process whereby property owners were given repeated notices of tax delinquencies, property forfeiture, and foreclosure. When property taxes had remained unpaid for a year after notice was given of the delinquency, the properties were labeled delinquent. See MCL 211.78a(2). Tax-assessing governmental units—villages, townships, and cities—would receive a payment from their respective county's

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delinquent Property Tax Administration Fund to ensure that they received their expected and budgeted-for taxes. MCL 211.55–59. After another year of non-payment, tax-delinquent properties would be forfeited to the county treasurer.[1] See MCL 211.78g(1) (2015). Forfeiture under the GPTA simply means that "a foreclosing governmental unit may seek a judgment of foreclosure if the property is not redeemed; it does not affect title." *Rafaeli*, 505 Mich at 444.

After forfeiture, the foreclosing governmental unit would give notice to everyone with a recorded interest in the property that if the property was not redeemed by the payment of the delinquent taxes, title to the property would vest in the county treasurer. See *id.*; MCL 211.78g(2) (2015). If the owner still failed to pay the taxes, the foreclosing governmental unit would file a petition for foreclosure in the circuit court. See MCL 211.78h(1). Before the hearing, the foreclosing governmental unit was required to hold an administrative show-cause hearing where interest holders could show why the property should not be foreclosed. MCL 211.78j. The hearing would not be held until just before March 1 of the year *after* forfeiture. MCL 211.78h(5), i.e., after three years and numerous notices of non-payment of taxes. After a judicial foreclosure hearing, fee-simple title would vest in the county treasurer as the foreclosing governmental unit unless the tax delinquency and related sums were paid by March 31. See MCL 211.78k (2017).

After foreclosure, the GPTA required the foreclosing governmental unit to offer the tax-foreclosed properties for sale to the state, then the municipality where the property is located, then to the county where the property is located. See MCL 211.78m (2015). These governmental units could exercise a right of first refusal to purchase properties for the sum of the

[1] In Kent County and 74 other counties, the county treasurer acts as the foreclosing governmental unit. The state acts as the foreclosing governmental unit for the remaining nine counties.

RECEIVED by MSC 11/3/2022 9:28:11 PM

delinquent taxes, interest, penalties, and fees due on the property, plus all expenses of preparing for and administering the sale. MCL 211.78m(11) (2015). If a governmental unit did not purchase the property, the GPTA required the foreclosing governmental unit to try to sell the foreclosed property at auction. At an initial auction, the property could only be sold for an amount equal to or greater than the minimum bid—the same sum for which the properties were offered for sale to the units of government. If a property did not sell, it would be offered to the units of government, and then at a later auction with no minimum bid.

Auction proceeds would be placed into a delinquent-tax account and commingled with proceeds from other sales. The foreclosing governmental unit had an obligation to use the proceeds to reimburse taxing entities (i.e. school districts, special taxing districts, etc.) for delinquent taxes. *Rafaeli*, 505 Mich at 446; see also MCL 211.78m(2) (2015). Auction "sale proceeds were often insufficient to cover the full amount of the delinquent taxes, interest, penalties, and fees related to the foreclosure and sale of the property." *Rafaeli*, 505 Mich at 447 (cleaned up). However, if there were "excess proceeds . . . those proceeds were used to subsidize the costs for all foreclosure proceedings and sales for the year of the tax delinquency, as well as any years prior or subsequent to the delinquency." *Id.* (cleaned up). After that, any "surplus proceeds may be transferred to the county general fund in cases in which the county is the foreclosing governmental unit." *Id.* Under the 1999 GPTA, former property owners were not entitled to "any disbursement of the surplus proceeds" nor was there any mechanism to pay those proceeds to the former property owner. *Id.*

The GPTA foreclosure process responds to a practical necessity. Untimely and unpaid taxes create a hardship on local governments which depend on property taxes to finance public services. And in the absence of foreclosures, governments have little leverage to persuade to pay

RECEIVED by MSC 11/3/2022 9:28:11 PM

delinquent taxes. The GPTA's forfeiture, foreclosure, and sale process resulted in the recovery of more than 95% of delinquent property taxes in most years.

The Court of Appeals concludes that the GPTA's foreclosure-and-sale process does not give rise to a taking

Until July 2020, all challenges to the constitutionality of the GPTA had been rebuffed. See, e.g., *Wayside Church v Van Buren Co*, 847 F3d 812 (CA 6, 2017); *Rafaeli, LLC v Oakland Co*, No. 330696, 2017 WL 4803570 (Mich Ct App, Oct 24, 2017).

Most pertinent to this case, on October 24, 2017, the Court of Appeals issued its decision in *Rafaeli*, addressing claims that the GPTA "allows unconstitutional takings." 2017 WL 4803570 at *4. Looking to *Bennis v Michigan*, 516 US 442, 452 (1996), the Court of Appeals explained that the taking theory was "without merit" because the surplus proceeds were obtained "by way of a statutory scheme that did not violate due process." *Rafaeli*, 2017 WL 4803570 at *4. Because the GPTA provided for forfeiture "by way of a statutory scheme that did not violate due process, the Court of Appeals relied on *Bennis*' holding that a government need not pay just compensation for property 'lawfully acquired under the exercise of governmental authority other than the power of eminent domain.' " *Id.* (quoting *Bennis*, 516 US at 452).

Judge Shapiro concurred, but wrote separately because he thought that *Nelson v City of New York*, 352 US 103, 110 (1956) demonstrated that the U.S. Supreme Court's rejection of a constitutional challenge to statutes like the GPTA "appears clear and unequivocal." *Id.* at * 5. Judge Shapiro also explained that Michigan and ten other states in the country do not return surplus proceeds under their respective tax statutes and foreclosure processes—and "those states that do require the return of surplus value all do so as a result of legislation, not judicial action." *Id.* at *6 n 3.

RECEIVED by MSC 11/3/2022 9:28:11 PM

To sum it up, the Court of Appeals held that a takings claim for surplus proceeds was "without merit," with a concurrence agreeing that such claims were clearly and unequivocally rejected long ago by the U.S. Supreme Court. *Id.* And, as Judge Shapiro recognized, no other state court had ever provided for the return of surplus proceeds under comparable statutes. *Id.*

This Court announces a new rule in *Rafaeli*

This Court granted leave to appeal *Rafaeli*, but limited the scope of the appeal to whether the defendants violated the Michigan and/or federal Takings Clauses "by retaining proceeds from the sale of tax foreclosed property that exceeded the amount of the tax delinquency." *Rafaeli, LLC v Oakland Co*, 503 Mich 909; 919 NW2d 401 (2018).

The Court issued its opinion in July 2020, announcing that the GPTA violates the Michigan Constitution's taking provision because the GPTA did not provide for the return of any surplus proceeds from the sale of tax-foreclosed properties to the former property owners. *Rafaeli*, 505 Mich at 479. In particular, the Court held that "an owner of real or personal property has a right to any surplus proceeds that remain after property is sold to satisfy a tax debt" and that Michigan's Takings Clause "protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale." *Id*. at 463, 473. Notably, this Court determined that the property-tax foreclosure itself was not a taking. *Id.* at 474.

Additional, this Court invited the Legislature to "enact[] legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id*. at 473 n 108. The Court did not address whether its decision had retroactive application.

RECEIVED by MSC 11/3/2022 9:28:11 PM

The Legislature amends the GPTA following *Rafaeli*

The Legislature accepted this Court's invitation. It adopted Public Acts 255 and 256 of 2020 which, among other things, modified the GPTA's "procedures by which a person with an interest in that property could pursue an interest in proceeds from the sale or transfer." See HOUSE FISCAL AGENCY, Legislative Analysis, *Tax-Delinquent Foreclosed Properties*. Public Act 256 added a new section 78t to the GPTA to provide a mechanism for property-interest holders to claim surplus proceeds, MCL 211.78t. That section broadly includes as prospective claimants any person "with a legal interest in property immediately" before foreclosure, i.e., property owners as well as lienholders. MCL 211.78t(12)(a). And the revised law provides "the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state." MCL 211.78t(11).

Under the new statutory language, property-interest holders whose property was sold after the *Rafaeli* decision can make a claim for the surplus proceeds by following the procedure set forth in the statute. MCL 211.78t(1)(a)(2)–(5). But property-interest holders whose property was transferred or sold under section 78m before July 18, 2020 cannot make a claim for reimbursement unless this Court "orders that its decision in *Rafaeli* . . . applies retroactively." MCL 211.78t(1)(b)(i).

Plaintiffs fail to pay their taxes and lose their properties

Plaintiffs owned properties located within Kent County. (Compl ¶ 8.) They failed to pay taxes on their properties. (*Id.* ¶ 15.) Pursuant to the GPTA, Plaintiffs received notice after notice of their failure to pay delinquent property taxes and the looming foreclosure on their properties because of failure to pay their taxes. See MCL 211.78a; 211.78b; 211.78c; 211.78f. Plaintiffs still failed to pay their delinquent taxes. The County foreclosed upon the properties in

RECEIVED by MSC 11/3/2022 9:28:11 PM

accordance with the GPTA in 2017, about three years before the *Rafaeli* decision. (Compl ¶¶ 14–15 & Ex 1.) Later that year, the County sold the properties at auction as required by state statute. (*Id.* ¶ 16.)

The trial court concludes that *Rafaeli* applies retroactively

On December 14, 2020, Plaintiffs filed a putative class-action complaint in the Kent County Circuit Court against Kent County and its then-Treasurer Kenneth Parrish.[2] The properties were subject to mortgages and federal tax liens at the time of foreclosure. (See Tax Reversion Files, App 37-40.) Nonetheless, the Plaintiffs did not name the financing institutions nor the U.S. Department of Treasury as parties to their action. (See Compl.)

Kent County moved for summary disposition under MCR 2.116(C)(8), arguing that *Rafaeli* should not apply to claims that accrued before *Rafaeli* was decided. If *Rafaeli* does not have retroactive application, the County explained that all of the Plaintiffs' claims should be dismissed because they were all premised on the theory that the County's retention of surplus proceeds was an unconstitutional, uncompensated taking. (Defs' 2/15/2021 Br in Supp of Mot to Dismiss 16–18.)

The trial court denied the motion to dismiss. The court relied on *County of Wayne v Hathcock*, 471 Mich 445, 483; 684 NW2d 765 (2004) to conclude that the *Rafaeli* decision did not announce a new rule of law. (3/26/2021 Order 4–5, App 14-15.)

The County sought leave to appeal the issue of whether *Rafaeli* only has prospective effect. (7/30/21 Order, App 23.) The Court of Appeals granted leave.

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[2] The circuit court later concluded that Treasurer Parrish and his successor were immune from suit. (7/30/2021 Order 6–9, App 28–31 (citing *Arkona, LLC v Co of Cheboygan*, No. 19-CV-12372, 2021 WL 148006 (ED Mich, Jan 15, 2021); *Odom v Wayne Co*, 482 Mich 459, 461; 760 NW2d 217 (2008); MCL 691.1407(1)).)

RECEIVED by MSC 11/3/2022 9:28:11 PM

While the County's Application was pending, Plaintiffs sought leave to file an amended complaint. The trial court initially denied the motion as futile, but on reconsideration, granted in part. (6/14/2021 Order 6, App 22.) Defendants moved for partial summary disposition, and the trial court granted the motion in part. The court dismissed all claims against the Treasurers, but allowed inverse-condemnation, procedural-due-process, Fifth Amendment, unjust-enrichment, and constructive-trust claims to proceed against the County. (7/30/2021 Order, App 34.) After the Court of Appeals granted leave to appeal, the trial court stayed ordered the case. (8/19/21 Op & Order.)

The Michigan Court of Appeals holds that *Rafaeli* applies with limited-retroactive effect

While this case was pending in the Court of Appeals, that court addressed similar issues in *Proctor v Saginaw County*, a published decision. *Proctor* involved claims arising from three putative class actions. In each of those cases, the lower courts had rejected the Plaintiffs' claims based on the GPTA's plain language, and the Court of Appeals' *Rafaeli* decision.

While the appeals in *Proctor* were pending, this Court issued its decision in *Rafaeli*. The Court of Appeals requested supplemental briefing on how to apply *Rafaeli* to the claims pending in the *Proctor* cases, the Court of Appeals held that *Rafaeli* should apply retroactively in cases where a taking argument was raised and preserved at the time that *Rafaeli* was decided. The *Proctor* decision stated: "We hold that *Rafaeli*, . . . should be applied to pending cases, such as those of the named plaintiffs, in which a challenge has been raised and preserved." 2022 WL 67248, at *7 (cleaned up). The Court of Appeals then applied this rule, explaining, "we have concluded that the named plaintiffs, because their cases were pending on appeal at the time of the Supreme Court's *Rafaeli* decision and because their claims were made before the enactment of 2020 PA 256 and its effective date, should be allowed to pursue their claims." *Id.* at *15.

RECEIVED by MSC 11/3/2022 9:28:11 PM

The court's handling of the putative class claims demonstrated that it was not holding that claims under *Rafaeli*'s reasoning were available to all potential claimants. The *Proctor* court reasoned that because the "unnamed putative class members" in the *Proctor* cases had not "raised and preserved claims to surplus proceeds," those claimants were left to pursue claims under PA 256 (if that statute provided a vehicle for such claims). See *id.* In a footnote, the court reiterated that the putative class members "had no pending claims such that the rule from *Hathcock* [applying that decision retroactively only to cases where the issue had been raised and preserved] should be applied." *Id.* at *15 n 23. Thus, the Court of Appeals concluded that *Rafaeli* did not provide claims for some possible claimants whose claims accrued before *Rafaeli*.

The Court of Appeals in *Proctor* gave *Rafaeli* limited retroactive effect. And for that reason, it affirmed the circuit court's rejection of the class claims. *Id.* at * 16. The *Proctor* plaintiffs have since sought leave to appeal from this Court.

The Court of Appeals affirms the trial court and holds that *Rafaeli* applies with full-retroactivity

On September 22, 2022, the Court of Appeals issued a published decision in this case. Even though *Proctor* gave *Rafaeli* limited retroactive effect, the court here held that *Rafaeli* applied with *full* retroactivity. The decision was authored by the same judge who had authored *Proctor*.

The Court of Appeals sought to explain the conflict with *Proctor* by stating that "*Proctor* did not presume to address every possible case and circumstance nor did it limit its retroactivity to only the matters before the Court in that case." (COA Op 5, App 45.) But no one argued that *Proctor* addressed "every possible case" or that the decision limited *Rafaeli* to only the cases before the court in *Proctor*. Instead, Kent County explained that in *Proctor*, the court had employed the exact same language that Michigan courts consistently employ when deeming a

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decision applicable with *limited* retroactivity. And Kent County explained that the *Proctor* court's discussion of the class claims demonstrated that it intended to apply some form of limited retroactivity. The *Schafer* decision does not address those arguments. Instead, the court announced its holding that "*Rafaeli* did not announce a new rule of law but returned the law to that which was recognized at common law and by the ratifiers of the Michigan Constitution . . . and should be given *full retroactive effect*." *Id.* (emphasis added).

Immediately after reaching the categorical conclusion that *Rafaeli* applies to all claims for surplus proceeds regardless of whether those claims accrued before or after *Rafaeli* (i.e. full retroactivity), the Court of Appeals reasoned even if the court's conclusion "is incorrect as it relates to this case," *Rafaeli* does apply retroactively to the claims asserted here. (COA Op 5, App 45.) The court stated that "a case with limited retroactivity not only applies to pending cases in which the issue has been raised and preserved, but also 'in cases commenced after the overruling decision.' " (*Id.* (quoting *Stein v SE Mich Family Planning Project, Inc*, 432 Mich 198, 201; 438 NW2d 76 (1989)).) This led it to "conclude that *Rafaeli* applies to the instant case even if not given full retroactive effect because the instant case was filed after *Rafaeli* was decided." (*Id.*) The court believed that the "parties" were "under the misconception that *Rafaeli* would need retroactive effect in order to apply to the instance case, apparently because the foreclosure sale at issue in the instance case occurred before our Supreme Court's *Rafaeli* decision." (*Id.*) The court rejected the parties' mutual view that Plaintiffs' claims required *Rafaeli* to be retroactive and held that "for the purposes of this analysis, the relevant date is when plaintiff filed their complaint commencing the case, not when the underlying conduct at issue in the complaint occurred." (*Id.*)

RECEIVED by MSC 11/3/2022 9:28:11 PM

STANDARD OF REVIEW

Whether a judicial decision applies retroactively is a question of law reviewed de novo. *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008). A motion under MCR 2.116(C)(8) tests the factual sufficiency of the complaint based on the pleadings alone, and the court reviews a decision under this subrule de novo. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

ARGUMENT

I. The Court should grant leave to appeal to clarify Michigan's retroactivity law.

For more than 40 years, commentators, judges, and justices have lamented the disorder that characterizes Michigan law regarding when decisions of this Court apply with complete retroactivity, with limited retroactivity, and only prospectively. This confusion is most acute with regard to the concept of limited retroactivity. As the conflict between the Court of Appeals' decisions here and in *Proctor* demonstrate, the confusion extends from what language signals limited retroactivity, to what standard must be met for a court to give a decision limited retroactive effect, to what is being assessed when courts address limited retroactivity. The Court of Appeals' published decision only makes the problem worse.

A. General retroactivity principles.

The question of whether an overruling decision should be given retroactive effect first requires some assessment of what constitutes retroactive application. Most broadly, an overruling decision is given retroactive application where it is applied to control the legal consequences arising from factual events that occurred before the announcement of the overruling decision. 21 CJS Courts 196 (2022). A case has full or complete retroactive effect

RECEIVED by MSC 11/3/2022 9:28:11 PM

when it applies to all factual contexts that arose before the overruling decision is announced. Conversely, an overruling decision that applies only to facts occurring after the overruling decision has no retroactive effect and is purely prospective.

Anything between those two extremes is a form of limited retroactivity. And there are numerous variations of limited retroactivity—here are just a few: An overruling decision is applied only to the particular claims before the court, *Bolt v City of Lansing*, 238 Mich App 37; 60 NW2d 745 (1999). Or it might only apply to litigants filing suit after the overruling decision regardless of when the facts giving rise to the claim occurred. *Gladych v New Family Homes, Inc*, 468 Mich 594, 606 n6; 664 NW2d 705 (2003). Or it can apply to both the claim before the court and to litigants filing cases after the overruling decision without regard to when the facts giving rise to the claim occurred. *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240-241; 393 NW 847 (1986).

B. Four decades of calls for clarification of Michigan retroactivity law.

In 1982, the late-Michigan Supreme Court Justice Blair Moody, Jr., authored a law review article calling for this Court to "take a new and detailed look at both the factors which should enter into a retroactivity determination and the means by which this decision should be reached." Blair Moody, Jr., "Retroactive Application of Law-Changing Decisions in Michigan," 28 Wayne L Rev 439, 441 (1982). Justice Moody noted that in "spite of the significance" of the retroactivity questions, there had been "inconsistency in both analysis and result" in Michigan caselaw. *Id.* Although the article was favorably received, it had little effect.

In 2020, the Michigan Bar Journal documented the Michigan courts' lack of progress in responding to Justice Moody's clarion call. Timothy Baughman wrote that "Michigan retro-activity jurisprudence remains as 'inconsistent' and 'confused' as it was when Justice Moody"

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wrote and called upon this Court to "examine the state of its retroactivity jurisprudence." Timothy A. Baughman, "Justice Moody's Lament Unanswered: Michigan's Unprincipled Retroactivity Jurisprudence," 79 Mich BJ 664, 664 (2000) (quoting 28 Wayne L Rev at 509).

Fast forward 17 years, and the Michigan Court of Appeals called upon this Court to clarify its retroactivity jurisprudence, this time with specific emphasis on limited retroactivity. *W A Foote Mem'l Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 174; 909 NW2d 38 (2017), *aff'd in part, vacated in part*, 504 Mich 985; 934 NW2d 44 (2019). The Court of Appeals noted that this Court has at times referenced the "the 'usual' rule of retroactivity" but then "added language that is consistent with a holding of limited retroactivity." *Id.* at 174 (quoting *Hathcock*, 471 Mich at 484 ("[O]ur decision to overrule *Poletown* should have retroactive effect, applying to all pending cases in which a challenge to *Poletown* has been raised and preserved."); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587 & n 57; 702 NW2d 539 (2005) (the raised-and-preserved language connotes limited retroactivity)). The *W A Foote* decision noted that the lack of a precise framework has led to Court of Appeals decisions that confusingly state, " '[g]enerally, judicial decisions are given *full* retroactive effect, i.e., they are *applied to all pending cases in which the same challenge has been raised and preserved*.' " *Id.* (quoting *Paul v Wayne Co Dept of Pub Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006) (emphasis added in *W A Foote*) and citing *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015)). The Court of Appeals invited this Court to clarify the respective circumstances in which full retroactivity and limited retroactivity should apply.

Five years on, the confusion continues. The Court of Appeals panel here does not see any conflict between its published decision here and *Proctor*, even though *Proctor* adopts the language of limited retroactivity and the decision below holds that *Rafaeli* is fully retroactive.

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C. Michigan's inconsistent limited retroactivity jurisprudence.

Since Justice Moody's tenure, the Court has clarified the generally applicable rule of retroactivity and when a decision should be given effect only prospectively. The Court has explained that "The general rule is that judicial decisions are given full retroactive effect." *Pohutski v City of Allen Park*, 465 Mich 675, 695–696; 641 NW2d 219 (2002) (cleaned up). Nonetheless, from time to time, justice requires that a judicial decision be given only prospective effect. *E.g., Washtenaw Co v State Tax Comm*, 422 Mich 346; 373 NW2d 697 (1985) (applying new rule of law to future factual occurrences only). "Prospective application of a holding is appropriate when the holding overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed." *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997) (cleaned up).

The Court has adopted a three-factor test to determine whether prospective-only application of a decision is warranted. "[F]actors to be weighed in determining when a decision should not have retroactive application" are: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Pohutski*, 465 Mich at 696 (citing *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971)). These second and third factors are also analyzed together as equitable considerations. Courts are to "weigh[] the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' " *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999) (quoting *Chevron Oil Co v Huson*, 404 US 97, 106–107 (1971)). An "additional threshold question" is "whether the decision clearly established a new principle of law." *Pohutski*, 465 Mich at 696. A new principle of law can be established where a statute is

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overruled. See *League of Women Voters of Mich v Sec'y of State*, 508 Mich 520, 566; 975 NW2d 840 (2022).

The jurisprudence of limited retroactivity remains a dog's breakfast. The confusion is evident in the Court of Appeals opinion here. The court said *Rafaeli* is fully retroactive and suggests that its decision is consistent with *Proctor*. (COA Op 5, App 45.) In *Proctor*, the court held "that *Rafaeli* . . . should be applied to pending cases . . . in which a challenge has been raised and preserved." *Proctor*, 2022 WL 67248, at *7. The raised-and-preserved language connotes limited retroactivity. *Devillers*, 473 Mich at 587 & n 57. This is not the first time that the Court of Appeals has mis-labelled the raised-and-preserved language as full retroactivity. See, *e.g.*, *Paul*, 271 Mich App at 620; *Clay*, 311 Mich App at 362.

The effect of the raised-and-preserved language is equally hazy. As the panel noted, this Court has stated that decisions given limited retroactivity can be applied " 'in cases commenced after the overruling decision.' " (COA Op 5, App 45 (quoting *Stein*, 432 Mich at 201).) This approach is not immediately apparent from the raised-and-preserved language. It also arbitrarily distinguishes between persons who have claims based on the overruling decision who already have lawsuits pending (claims are barred unless the claim was raised and preserved) and those who do not (claims can be asserted after the overruling decision) even if the operative facts occurred at the same time. The principal problem with this approach is its focus on the time the action was filed and not the timing of the operative facts giving rise to the legal consequences identified in the overruling decision.

Even the initial question of when limited retroactivity should be applied is also subject to contradictory opinions. As the Court of Appeals noted here, this Court has required that the overruling decision have announced a new principle of law. (COA Op 6 n 3, App 46 (citing

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People v Phillips, 416 Mich 63, 68; 330 NW2d 366 (1982)).) But in *Hathcock*, this Court returned Michigan law "to that which existed before *Poletown* and which ha[d] been mandated by our Constitution since it took effect in 1963," but applied the decision to all pending cases in which a challenge to *Poletown* has been raised and preserved." *Hathcock*, 471 Mich at 484 (cleaned up). In other words, *Hathcock* did not establish a new principle of law but was given *limited* retroactive effect. The Court did the same thing in *Devillers*—it expressly stated that the overruling decision did not create a new rule of law but then gave the decision only limited retroactive effect and expressly provided that the legal effect of actions taken pursuant to the overruled decision could not be reversed. 473 Mich at 587 n57. See also *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002) (concluding without analysis that "decision in this case is to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved"); *Lindsey*, 455 Mich at 69 (concluding that "the balance of justice demands prospective application in this case"); *Lowe v Estate Motors Ltd*, 428 Mich 439, 475; 410 NW2d 706 (1987) (concluding without analysis that "decision in this case is to be given limited retroactive effect, applying to cases tried after the date this opinion is issued and those cases pending on appeal in which issues . . . have been properly preserved").

D. A clarified jurisprudence of limited retroactivity.

It is difficult to identify another area of Michigan law that is as confused as the jurisprudence of limited retroactivity. Some of this confusion arises from the lack of a clear framework as to when limited retroactivity might be appropriate. The County submits that the Court should grant leave to clarify and refine Michigan law regarding limited retroactivity so as to preserve the judiciary's flexibility to tailor the retroactive effect of overruling decisions like *Rafaeli* to avoid injustice.

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First, the Court should clarify that limited retroactive effect may be applied if there was extensive reliance on the overruled principle of law and where giving complete retroactive effect to the overruling decision would undermine the administration of justice. *See Gladych*, 468 Mich at 607. Such an approach maintains the judiciary's flexibility to avoid injustice that may result from giving a decision full retroactive effect. See *Lindsey*, 455 Mich at 68. This approach is consistent with many of the more recent decisions that limited retroactivity is warranted if full retroactivity would cause chaos. E.g., *Devillers*, 473 Mich at 587 & n 57 (giving decision limited retroactive effect even though decision was "not a declaration of a new rule"); *Hathcock*, 471 Mich at 484 (same where decision did "not announce a new rule of law"); *Jahner v Dep't of Corr*, 197 Mich App 111, 114; 495 NW2d 168 (1992) (giving limited retroactive application to this Court's decision in *Martin v Department of Corrections*, 424 Mich 553; 384 NW2d 392 (1986), even though it "did not announce a new rule of law or a reversal of settled prior precedent," because "full retroactive application . . . could result in chaos"). See also *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984) (explaining that flexibility in this Court's retroactivity jurisprudence is required to prevent "chaos").

Second, the Court should also clarify that the focus of the application of limited retroactivity on events pre-dating the overruling decision that give rise to legal consequences affected by the overruling decision, and not primarily upon the timing of a lawsuit. By focusing on the timing of the underlying events, courts can avoid the inequity of disparate treatment of similarly situated individuals. Such inequity is a considerable drawback of the raised-and-preserved limited retroactivity that is most frequently referenced in recent cases which seemingly bars litigants in pending cases from obtaining the advantage of an overruling decision if they did not foresee the result and preserve the issue while allowing litigants who file suit after the overruling

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decision to obtain that advantage even if the facts giving rise to the claims in each instance occurred at the same time.

II. The Court should grant leave to address whether the *Rafaeli* decision has limited retroactive effect.

As discussed above, the Court of Appeals has adopted divergent conclusions regarding whether *Rafaeli* is fully retroactive or only has limited retroactive application. The Michigan Legislature has conditioned the availability of a statutory remedy under MCL 211.78t for those whose interests in property were foreclosed for the non-payment of delinquent property taxes on this Court's determination that *Rafaeli* has retroactive effect. MCL 211.78t(1)(b)(*i*). In the absence of decisions from this Court, the federal courts have taken it upon themselves to define Michigan property law to resolve the chaos left in *Rafaeli*'s wake (although they seem to have only added to the chaos). See *Hall v Meisner*, 51 F4th 185 (CA 6, 2022) (en banc pet pending) (largely ignoring *Rafaeli* and federalizing the underlying the scope of the property interest subject to a taking); *Bowles v Sabree*, 2014 WL 141666, at *10 (ED Mich, Jan 14, 2022) (concluding that *Proctor* gave full retroactive effect to *Rafaeli*). Accordingly, the Court's intervention is necessary to define the retroactive effect of *Rafaeli*.

A. The Court of Appeals erred when it failed to follow the published decision in *Proctor* which properly determined that *Rafaeli* should be given limited retroactive effect.

The Court of Appeals here erred when it determined that *Rafaeli* should have full retroactive effect. In *Proctor*, the Court of Appeals held that *Rafaeli* has limited retroactive effect. Michigan Court Rule 7.215(C)(2) provides that "a published decision of the Court of Appeals has precedential effect under the rule of stare decisis." (cleaned up). Because *Proctor* was the earlier published decision, the Court of Appeals panel here was required to follow it.

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In *Proctor*, the Court of Appeals held that *Rafaeli* should apply retroactively in cases where a taking argument was raised and preserved at the time that *Rafaeli* was decided. The *Proctor* decision stated: "We hold that *Rafaeli*, . . . should be applied to pending cases, such as those of the named plaintiffs, in which a challenge has been raised and preserved." 2022 WL 67248, at * 7 (cleaned up). The Court of Appeals then applied this rule, explaining, "we have concluded that the named plaintiffs, because their cases were pending on appeal at the time of the Supreme Court's *Rafaeli* decision and because their claims were made before the enactment of 2020 PA 256 and its effective date, should be allowed to pursue their claims." *Id.* at *15. Conversely, the court concluded that the "unnamed putative class members" in the *Proctor* cases had not "raised and preserved claims to surplus proceeds," so those claimants should be excluded from the *Proctor* cases.

The Court of Appeals panel here was bound by the *Proctor* decision's application of limited retroactive effect to *Rafaeli*. Instead of acknowledging that *Proctor* was binding precedent, the Court of Appeals declared the *Rafaeli* had full retroactive effect, and attempted to limit *Proctor* to the facts of that case even though *Proctor* announced a generally applicable rule. (See COA Op 5, App 45.) The decision below sought to avoid the conflict between its decision and *Proctor* by eliding discussion of how the *Proctor* court applied limited retroactivity to strip away the putative class claimants.

Over a few months, the Court of Appeals has issued two published decisions authored by the same judge reaching conflicting results decisions on a single issue—what is the scope of the retroactive application of *Rafaeli*. This conflict on so important issue warrants this Court's resolution.

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B. The *Proctor* decision correctly gave *Rafaeli* limited retroactive effect because of the extensive reliance on the General Property Tax Act's provisions and the burden to the court system posed by waves of tax-foreclosure actions.

The *Proctor* court was correct that, at most, *Rafaeli*'s application to tax-foreclosure sales that generated surplus proceeds before *Rafaeli* was issued should be limited to claimants who had already raised and preserved those claims. Indeed, given that *Rafaeli* ruled that a provision in a tax statute is unconstitutional, precedent from this Court and courts around the country suggest that prospective only application would be warranted. Counties, local governments, and the State of Michigan all relied on the GPTA's long-standing process for handling tax foreclosures to ensure that local governments could confidently rely upon property taxes to fund essential government services. If applied with full retroactivity, *Rafaeli* creates a significant, unexpected liability that some plaintiffs' lawyers are arguing goes back to 2008. Indeed, the accumulated liability of all Michigan counties for which county treasurers act as foreclosing governmental units is conservatively estimated to exceed $150 million.

1. The reliance interests involved in tax cases like Rafaeli *regularly necessitate limited retroactive or even purely prospective application.*

Decisions invalidating tax states are particularly likely to cause chaotic disruption to governmental operations. Local governments like the County are entitled to presume that state statutes are valid, and that "presumption of constitutionality is especially strong with respect to taxing statutes." *Caterpillar, Inc v Dep't of Treasury, Revenue Div*, 440 Mich 400, 413; 488 NW2d 182 (1992). Indeed, such a presumption is necessary for them to function. The County and the taxing bodies within the various counties which rely on the counties to collect delinquent taxes depend on the timely collection of tax revenues to operate, they cannot afford to wait for judicial rulings to vindicate tax statutes.

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If a judicial decision later invalidates a tax statute, giving retroactive effect to that decision creates significant reliance and policy problems. See *Washtenaw Co*, 422 Mich at 379; *LCI Int'l Telecom Corp v Dep't of Treasury*, 227 Mich App 196, 208; 574 NW2d 710 (1997). Doing so effectively "holds those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there is an authoritative judicial determination that the governing legislation is constitutional." *Lemon v Kurtzman*, 411 US 192, 205 (1973) (cleaned up). Accordingly, courts nationwide—including this one—have repeatedly recognized that it is appropriate to give purely prospective or limited retroactive application to decisions invalidating tax statutes.

For example, this Court gave prospective-only effect to its decision in *Washtenaw County v State Tax Commission*, 422 Mich 346. There, the issue was a method of establishing the state-equalized valuation under the GPTA. This Court concluded that its holding should apply prospectively because of the financial harm to local governments given their reliance on the GPTA and the "considerable administrative burden" of recalculating past valuations. *Id.* at 378–379. See also *Penn Mutual Life Ins v Dep't of Licensing & Regulation*, 162 Mich App 123, 133–134; 412 NW2d 668 (1987) ("Refunds of the magnitude involved here would place undue hardship on the people of this state."); *Caterpillar, Inc v Dep't of Treasury*, 188 Mich App 621, 629–630; 470 NW2d 80 (1991) (giving prospective-only effect to a tax decision because retroactive application "could be potentially devastating for the state, both financially and administratively"), rev'd on other grounds, 440 Mich 400.

Courts in other jurisdictions have also given decisions invalidating tax statutes prospective-only effect because of "the need to preserve the financial solvency of local government units, the great financial and administrative hardship that would be entailed if

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general retroactive effect were allowed, and the tax authorities' justifiable reliance on the statute, which is presumptively constitutional." *Rio Algom Corp v San Juan Co*, 681 P2d 184, 196 (Utah, 1984) (collecting cases). See also, e.g., *Beaver Excavating Co v Testa*, 134 Ohio St 3d 565, 577; 983 NE2d 1317 (2012); *Weaver v Recreation Dist*, 328 SC 83, 87–88; 492 SE2d 79 (1997); *Foss v City of Rochester*, 65 NY2d 247, 260; 480 NE2d 717 (1985). Indeed, these interests are so strong that Pennsylvania has adopted a prospective-only rule for tax cases: "With respect to tax statutes, [we hold] that a decision of this Court invalidating a tax statute takes effect as of the date of the decision and is not to be applied retroactively." *Oz Gas, Ltd v Warren Area Sch Dist*, 595 Pa 128, 146; 938 A2d 274 (2007). And Arizona courts "have not hesitated" to do the same given the hardships that would otherwise be imposed on counties. *S Pac Co v Cochise Co*, 92 Ariz 395, 407; 377 P2d 770 (1963).

The U.S. Supreme Court has also recognized the interests that necessitate giving tax decisions a prospective or limited retroactive effect. The Court has noted that, before a judicial decision invalidating a tax statute is announced, "tax collection authorities would have been justified in relying on state enactments valid under then-current precedents." *Am Trucking Ass'n v Smith*, 496 US 167, 182 (1990). To give retroactive effect to a decision overturning a tax law creates "apparent" inequities: it can have "potentially disruptive consequences" for the taxing government and its citizens, deplete treasuries, and threaten "current operations and future plans." *Id.* at 182–183. In short, when a decision invalidates a tax statute, reliance interests weigh substantially in favor of limited retroactive or even prospective-only application.

Rafaeli should, at most, be applied with limited retroactive effect because it announced a change in the law that was not clearly foreshadowed and thus reasonably relied upon by the counties, and because full retroactivity would beget chaos.

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2. *The counties' reliance on the GPTA's foreclosure provisions was all-the-more reasonable because* Rafaeli *decision's rule was not foreshadowed.*

Rafaeli announced a rule of law that was not foreshadowed by earlier decisions. The foreclosure-and-sale process set forth in the GPTA was in place for two decades—and similar statutes in other states for far longer. Until *Rafaeli*, every challenge to the constitutionality of the GPTA's foreclosure-and-sale process was rejected. And comparable statutes in other jurisdictions had been challenged since at least the mid 1960's, but time and again, courts rejected the various takings claims and other constitutional challenges. Indeed, a sister state's supreme court and a federal appellate court have rejected similar challenges to the Nebraska and Minnesota tax-foreclosure processes after the Court's decision in *Rafaeli*. *Continental Res v Fair*, 311 Neb 184; 971 NW2d 313 (2022) (cert pet pending); *Tyler v Hennepin Co*, 26 F4th 789 (CA 8, 2022) (cert pet pending). Thus, this Court's ruling was not foreshadowed.

The GPTA provisions converting Michigan from a tax-lien to a tax-deed state were enacted in 1999. For 21 years, the state government and 75 Michigan counties relied on the GPTA's plain language to handle tax-delinquent properties, the payment of tax delinquencies, and how tax-delinquent properties were returned to productive use. Never in those 21 years did a Michigan court suggest that the GPTA's foreclosure-and-sale provisions were unconstitutional. This even though every property forfeiture resulted in a circuit court action (and uncounted appeals). MCL 211.78k. See, e.g., *In re Berrien Co Treasurer*, 323 Mich App 600; 919 NW2d 288 (2018); *In re Petition of Tuscola Co Treasurer for Foreclosure*, 317 Mich App 688; 895 NW2d 569 (2016). Indeed, the Michigan Court of Appeals upheld the forfeiture-and-sale provisions from other constitutional challenges. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 517; 866 NW2d 817 (2014). And the counties acted with the

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assurance that the GPTA's provisions had an especially strong presumption of constitutionality. *Caterpillar*, 440 Mich at 413.

Moreover, there was ample authority suggesting that the GPTA's tax-foreclosure scheme was constitutional. The U.S. Supreme Court held that a city did not violate the Constitution when it retained excess proceeds from the sale of tax-foreclosed properties. *Nelson v City of New York*, 352 US 103, 110 (1956). Although the statute might be "harsh," the Court stated that "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed." *Id.* at 110–111.

More recently, the U.S. Supreme Court held that a Michigan governmental entity was "not required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority *other* than the power of eminent domain." *Bennis v Michigan*, 516 US 442, 452 (1996) (emphasis added). *Bennis* involved the forfeiture of a car that had been used as a criminal instrumentality, which the car's former owner argued "was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment." *Id.* The Supreme Court held that "if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile *was transferred by virtue of that proceeding* from petitioner to the State." *Id.* (emphasis added). Accordingly, the rule established in *Bennis* is that where the government provides due process when property is forfeited to the state, there is no taking.

Then, in 2015, a federal court in Michigan rejected a federal takings claim based on Van Buren County's retention of surplus proceeds. *Wayside Church v Co of Van Buren*, 2015 WL 13308900, at *6–*8 (WD Mich, Nov 9, 2015). Although the Sixth Circuit later vacated the district court's decision, it did so because the court concluded that the federal courts lacked

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jurisdiction to hear the case. *Wayside Church v Van Buren Co*, 847 F3d 812, 822–823 (CA 6, 2017), abrogated in part by *Knick*, 139 S Ct at 2168. Around the same time, the Michigan Court of Appeals affirmed the GPTA's forfeiture-and-sale process against various constitutional challenges, including a takings claim. *Rafaeli, LLC v Oakland Co*, 2017 WL 4803570, at *4 (Mich Ct App, Oct 24, 2017). That was the state of the law before the Court's *Rafaeli* decision.

This Court's decision in *Rafaeli* brought about a radical change. The Court held that even though the initial foreclosure upon and forfeiture of a tax-delinquent property is not a taking, a foreclosing governmental unit's retention of sale proceeds greater than the unpaid taxes, fees, interest, and penalties is a taking. This ruling is remarkable because the GPTA provides that upon entry of a foreclosure judgment by a court, fee simple title "will vest absolutely in the foreclosing government . . . without any further rights of redemption." MCL 211.78k(5)(b). Nothing in the GPTA or constitutional jurisprudence indicated that former property owners retained an interest in the proceeds generated by the sale of properties as to which they no longer had any interest whatsoever. Indeed, well before the enactment of the GPTA's tax-deed amendments, it was "the settled law of this State that as between the State and the original owner, the title to the land sold for nonpayment of taxes becomes absolute in the State and a third-party purchaser under a tax deed acquired a clear and unencumbered title." *Jacobsen v Nieboer*, 299 Mich 116, 129; 299 NW 830 (1941).

No Michigan court had previously suggested the unconstitutionality of the GPTA's relevant tax-foreclosure provisions or otherwise found that a filament of a contingent interest in surplus proceeds would survive the "absolute" vesting in a government. This was not an application of a tried-and-true rule of law to new facts; it was an "issue of first impression whose resolution was not clearly foreshadowed." *Lindsey*, 455 Mich at 68.

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3. *Holdings in other jurisdictions further demonstrate that* Rafaeli *announced an unforeseen rule of law.*

Decisions from outside Michigan likewise provided no "foretoken that Michigan law on this issue would be deemed anachronistic or out of synch with the prevailing law in other jurisdictions." *Bolt v City of Lansing*, 238 Mich App 37, 47; 604 NW2d 745 (1999). When Michigan overhauled the GPTA, nine other states had tax-deed statutes that provided no mechanism for a former property owner to obtain surplus proceeds from a tax foreclosure sale. Many of these statutes in other states had been challenged regarding the government's retention of surplus proceeds. The statutes were upheld every time. See, e.g., *Sheehan v Suffolk Co*, 67 NY2d 52; 490 NE2d 523 (1986); *City of Auburn v Mandarelli*, 320 A2d 22, 30–32 (Me, 1974); *Ritter v Ross*, 207 Wis 2d 476, 486; 558 NW2d 909 (1996); *Balthazar v Mari, Ltd*, 301 F Supp 103, 106 (ND Ill, 1969), *aff'd* 396 US 114 (1969); *Spurgias v Morrissette*, 109 NH 275, 278; 249 A2d 685 (1969). See also *Reinmiller v Marion Co, Oregon*, No. 05-1926-PK, 2006 WL 2987707, at *3 (D Or, Oct 16, 2006); *Automatic Art, LLC v Maricopa Co*, No. CV 08-1484-PHX-SRB, 2010 WL 11515708, at *5–*6 (D Ariz, Mar 18, 2010); *Miner v Clinton Co, NY*, 541 F3d 464, 475 (CA 2, 2008). Even after *Rafaeli*, the Eight Circuit upheld Minnesota's tax-foreclosure-and-sale process against a takings challenge even though Minnesota law provides no opportunity for a former property owner to claim any surplus proceeds. *Tyler*, 26 F4th at 790, 792–794.

Rafaeli cited decisions from Vermont and New Hampshire that "recognized the government's obligation to return any surplus proceeds to the former owner after a tax-foreclosure sale and that the failure to return those proceeds is a taking under their state constitutions." 505 Mich at 478. But neither of those cases foretold the *Rafaeli* decision. The statute in Vermont did not authorize the retention of surplus proceeds; instead, "a sale of more land than necessary" was a

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violation of the tax sale statute. *Bogie v Town of Barnet*, 129 Vt 46, 55; 270 A2d 898 (1970) (citing *Peterson v Moulton*, 120 Vt 439, 441; 144 A2d 717 (1958) (discussing Vt Stat 47 § 865)). The New Hampshire decision came out on April 24, 2020—a mere three months before *Rafaeli* and after the Court of Appeals' rejection of the takings theories in *Rafaeli*. See *Polonsky v Town of Bedford*, 173 NH 226; 238 A3d 1102 (2020).

In sum, neither the Legislature nor the County (nor any county or the State) reasonably could be expected to anticipate *Rafaeli*. When the County followed and relied upon the GPTA's mandated procedures, it was not merely supported by the validly enacted law passed by the Legislature and signed by the Governor. The County could also take comfort in decades of comparable statutes that had been upheld and applied by other jurisdictions. To be sure, this Court said that a right to surplus proceeds "has deep roots in Michigan common law." *Rafaeli*, 505 Mich at 471. But the question is whether *Rafaeli* was "clearly foreshadowed." *Lindsey*, 455 Mich at 68. "Deep roots" are, by their very nature, not readily apparent being buried under ground—here, by decades of contrary precedents.

Rafaeli announced a new rule of law that overturned a validly enacted statute that counties and taxpayers had relied upon for 21 years. The GPTA was supported by judicial decisions in other jurisdictions. The rule in *Rafaeli* is new, and it should be applied to surplus proceeds generated by pre-*Rafaeli* sales in, at most, a limited fashion to situations where the claims were raised and the issue preserved in litigation before *Rafaeli* was decided.

* * * * *

For more than two decades, Michigan's counties (and the State of Michigan) assumed—as they should have—that the GPTA's tax-foreclosure sale provisions were constitutional. They relied on this assumption in handling tax-delinquent properties, in reimbursing cities and

townships for the tax delinquencies, and in keeping the properties within their jurisdictions in productive use. This reliance was extensive. And it was entirely reasonable. *Caterpillar*, 440 Mich at 413.

Moreover, as discussed above, this reliance was justified based on the long-standing statutes in other jurisdictions and on the limited case law did exist. Michigan courts had not suggested any constitutional infirmities with the GPTA's tax-foreclosure sale provisions. And U.S. Supreme Court decisions strongly suggested that such provisions were constitutional. See *Rafaeli*, 2017 WL 4803570 at *4 (applying *Bennis*, 516 US at 452); see also *id.* at *5 (Shapiro, J., concurring) (applying *Nelson*, 352 US at 110). The law of numerous states and federal district courts likewise supported this reliance. The County fairly relied on the clear and unambiguous language of the GPTA for decades before *Rafaeli*. Applying *Rafaeli* with full retroactivity, as the Court of Appeals did below, would unsettle these justified expectations.

4. The administration of justice also favors prospective or limited retroactive application.

There are other administration of justice and equitable issues that favor limited-retroactive or even prospective-only application of *Rafaeli*. Giving that decision full retroactive application could wreak havoc on the finances and administration of numerous local governmental bodies—and "the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result." *Tebo*, 418 Mich at 360 (cleaned up). The prospect of full retroactivity has spawned dozens of actions in state and federal courts, including numerous putative class actions like this one. In those cases, plaintiffs are attempting to force counties to go back as far as 2008—13 years—to identify every parcel sold at auction for more than the unpaid taxes, costs, and fees. A

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significant number of these properties were encumbered with mortgages, IRS liens, judgment liens, and other creditor interests, none of which the Plaintiffs here wish to honor.

The potential administrative headache caused for tightly staffed counties is staggering, and it is eclipsed by the counties' potential liability, which is conservatively estimated at more than $150 million statewide. And this because the GPTA prohibited counties from returning surplus proceeds. MCL 211.78m(8) (2015). Rather, the GPTA required that the surplus proceeds first be used to pay the unpaid property taxes on other properties that were foreclosed but were either not sold or were not sold for a price sufficient to pay the unpaid taxes. *Id.*; *Rafaeli*, 505 Mich at 447.

The reason for this requirement is straightforward: local taxing bodies are dependent on collecting all levied property taxes in a timely manner to support essential services. The counties advance funds to pay the delinquent taxes to the local taxing bodies while pursuing the unpaid taxes. If the counties are unsuccessful, they foreclose on the property and seek to sell it to recoup the tax delinquencies. If the counties fail to fully recoup the funds advanced to local units, then the counties charge back those funds to the local taxing entities. And if counties are unexpectedly liable under *Rafaeli* for surplus proceeds going back to 2008, then they will charge back the local taxing units. The result will be that cities, villages, townships, school districts, library districts, etc. will face significant derivative liability. Chaos will result.

These concerns are precisely why courts refuse to apply tax decisions retroactively. In weighing the equities here, the burdens foisted onto counties and their taxpayers under a full retroactive application of *Rafaeli* would be unreasonable and unjust. The Court of Appeals in *Proctor* correctly declined to give full retroactive effect to the *Rafaeli* decision. The decision below is in error.

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Because of the reliance and administration of justice problems associated with giving the *Rafaeli* decision full retroactive effect, the Court should grant leave to clarify that the *Rafaeli* decision has limited retroactive application. For purposes of this case, limited retroactivity should mean that *Rafaeli* does not apply to the claims made by Plaintiffs here because those claims were not raised and preserved at the time *Rafaeli* was decided.

III. The *Rafaeli* decision could also be limited to prospective-only application.

Below, the County has argued that *Rafaeli* should only be applied prospectively, an argument also advanced by other counties and the State of Michigan in the application briefing in *Proctor*. The County continues to believe that *Rafaeli* meets the requirements for prospective-only application. But the prospective-only application is unnecessary here because limited retroactivity would bar the Plaintiffs' claims, and because any decision that meets the requirements of prospective-only application must also meet the requirements for limited retroactive application. This has the additional benefit of avoiding the justiciability objections sometimes made to prospective-only application. *See, e.g.*, *League of Women Voters*, 508 Mich at 623 (Clement J, concurring in part and dissenting in part); *Hathcock*, 471 Mich at 485 n 98.

Nonetheless, for the sake of completeness, the County will address the remaining *Pohutski* factor—whether prospective only application serves the purpose of the new rule adopted in *Rafaeli*. In *Pohutski*, the purpose of the new rule was straightforward: "to correct an error in the interpretation . . . of the governmental tort liability act." 465 Mich at 697. This purpose was furthered by prospective-only application. *Id.* *Rafaeli*'s purpose is similarly straightforward: to declare a portion of the GPTA unconstitutional and allow taxpayers to vindicate their common-law right to surplus proceeds from the sale of their former properties.

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This purpose too is furthered by prospective application. Going forward, Michigan counties—and the Legislature—are on notice that retaining surplus proceeds from tax-foreclosure sales under the GPTA without giving the former property owners a mechanism by which to claim their common-law right in the excess proceeds violates the Michigan Constitution. The Michigan Legislature and Governor have already responded to *Rafaeli* by amending the GPTA to provide a process for property-interest holders to claim surplus proceeds. MCL 211.78t. That is what *Rafaeli* called on the Legislature to do. 505 Mich at 473 n 108. Thus, *Rafaeli*'s purpose is realized through prospective application and no or limited retroactive application.

CONCLUSION AND REQUESTED RELIEF

The Court of Appeals' decision warrants this Courts review because it raises a question of great public importance and jurisprudential significance that will affect the State and sub-divisions of the state, involves a conflict between published Court of Appeals' decisions, provides this Court a clean vehicle to bring clarity to Michigan's retroactivity jurisprudence, and involves a clearly erroneous decision that will have severe deleterious effects on the State of Michigan and 75 Michigan counties. There was considerable reliance on the tax-foreclosure provisions of the GPTA that this Court declared unconstitutional in *Rafaeli*, and giving that decision full retroactive effect undermines the administration of justice. That is the very sort of decision that should be given only limited retroactive application. But the law of limited retroactivity is greatly confused and itself needs clarification. The Court of Appeals' decision below illustrates that confusion. The Court should grant leave to appeal, clarify the law regarding limited retroactivity, hold that *Rafaeli* should be given, at most, limited retroactive effect, and reverse.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation pursuant to MCR 7.212(B). The Brief contains 10,691 words of Times New Roman 12-point proportional type and 2.0 spacing. The word processing software used to prepare this brief was Microsoft 2016.

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