STATE OF MICHIGAN

IN THE SUPREME COURT
* * * * *

MATTHEW SCHAFER, an individual; HARRY HUCKLEBURY, an individual; and LILLY HUCKLEBURY, an individual, for themselves and all those similarly situated,

Plaintiffs/Appellees,

-vs-

KENT COUNTY, a Governmental Unit; PETER MACGREGOR, in his individual and official capacity; and KENNETH PARRISH, in his individual capacity,

Defendants/Appellants.

Supreme Court Case No. _____

COA Docket No. 356908
Trial Court No. 20-09502-CZ

****CLASS ACTION****

VISSER AND ASSOCIATES, PLLC
Donald R. Visser (P27961)
Donovan J. Visser (P70847)
Bria Adderley-Williams (P84876)
Attorneys for Respondents/Appellees
2480 - 44th Street, S.E., Suite 150
Kentwood, MI 49512
(616) 531-9860
donv@visserlegal.com

Matthew T. Nelson (P64768)
Conor B. Dugan (P66901)
Attorneys for Petitioner/Appellant
WARNER NORCROSS & JUDD, LLP
150 Ottawa Ave., Suite 1500
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com

Michael G. Brady (P57331)
WARNER NORCROSS & JUDD, LLP
Attorney for Petitioner/Appellant
2000 Town Center, Suite 2700
Southfield, MI 48075
(248)784-5000
mbrady@wnj.com

ANSWER TO PETITIONER/APPELLANT KENT COUNTY'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

On September 22, 2022, the Michigan Court of Appeals issued an Order affirming the Kent County Circuit Court's finding that *Rafaeli, LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020) applied with complete retroactivity. Petitioner-Appellant Kent County timely filed its Application for Leave to Appeal on this issue under MCR 7.305(B)(5) on November 3, 2022; thus the basis of jurisdiction in the Michigan Supreme Court is pursuant to MCR 7.303(B)(1).

QUESTION PRESENTED

I. DID THE COURT OF APPEALS ERR BY HOLDING THAT *RAFAELI, LLC V OAKLAND COUNTY*, 505 Mich 429; 952 NW 434 (2020) DID NOT ANNOUNCE A NEW RULE OF LAW AND, THEREFORE, APPLIES WITH COMPLETE RETROACTIVITY?

ANSWER:

Trial Court:	No
Court of Appeals:	No
Respondents/Appellees:	No
Petitioner/Appellant:	Yes

COUNTER STATEMENT OF FACTS

This case arises out of Kent County and the Kent County Treasurer's (Collectively, "Defendants") illegal retention of surplus proceeds generated from the tax foreclosure and sale of real properties formerly belonging to Matthew Schafer, Harry Hucklebury, and Lilly Hucklebury (Collectively, "Plaintiffs" or "Respondents").

As the Foreclosing Governmental Unit ("FGU"), Defendants seized Plaintiffs' property and foreclosed it—taking absolute title to the property. Defendants then sold the property for more than the delinquent taxes, interest, penalties, and fees due. Subsequently, this Court issued its opinion in *Rafaeli, LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020) ("*Rafaeli*") based upon a thorough discussion and analysis of long standing Michigan law. This Court held in pertinent part that "defendants were required to return the surplus proceeds to plaintiffs and that defendants' failure to do so constitutes a government taking under the Michigan Constitution entitling plaintiffs to just compensation." *Rafaeli*, 505 Mich at 479. There is no question that Plaintiffs are entitled to recover surplus proceeds from Defendants.

In contravention of this Court's clear ruling in *Rafaeli*, Defendants refused to turnover Plaintiffs' surplus proceeds and have instead raised numerous defenses to shield against their constitutional obligation. Among those defenses has been an unsubstantiated claim that *Rafaeli* does not apply to Plaintiffs because *Rafaeli* is not fully retroactive. In this regard, the Kent County Circuit Court and Michigan Court of Appeals have disagreed with Defendants' position.

Specifically, on September 22, 2022 in *Schafer v Kent County*, __Mich App__; __NW2d__ (2022) (attached as **Exhibit A**), the Michigan Court of Appeals found that this Court's decision in *Rafaeli* should receive full retroactive application. The court reasoned that *Rafaeli* did not create a new principle of law, and as such, neither limited retroactive nor prospective only application were

appropriate. Additionally, the *Schafer* court dismissed the idea that the Court of Appeals' decision in *Proctor v Saginaw County Bd of Comm'rs*, __Mich App__; __NW2d__ (2022) (attached as **Exhibit B**) stood for the proposition that *Rafaeli* should be applied with limited retroactivity. Thereafter, Defendant Kent County ("Petitioner") filed the present Application for Leave to Appeal as to the issue of retroactivity.

ARGUMENT

While a certain level of embellishment might be expected of an appealing party, Kent County's Application assembles convenient fragments from various cases and academic articles in its attempt to create a mirage of inconsistency in Michigan's retroactivity case law. Petitioner both improvidently claims that *Rafaeli* created a new principle of law —triggering the need to do a retroactive/prospective analysis—and erroneously claims that Michigan's developed case law is unclear and completely out of step with other jurisdictions.

A significant portion of Petitioner's arguments are rooted in selectively quoted segments of two law review articles to suggest that those articles support the need for this Court to provide some clarity. Instead, even those articles support the current state of the law in Michigan.

Despite Petitioner's machinations, in the end, Petitioner is simply arguing that the Court of Appeals wrongfully determined that *Rafaeli* did not announce a change in the law and that the County was justified in relying on the statute. That is a simple argument endorsing the current state of the law and asking this Court to be an error correcting court. Alternatively, it would appear that Petitioner is requesting that this Court make a carve-out for unconstitutional tax provisions based upon its assertions that its constitutional obligations are unfair.[1] In doing so, Petitioner has chosen to ignore the unfairness to the former taxpayers that have lost one of the most important assets of their lives. In short, Petitioner seeks an exception based upon equity without consideration of the equities of the victims.

[1] See Petitioner's Application for Leave at pg. 24-25.

I. THIS COURT SHOULD NOT GRANT LEAVE TO APPEAL

Despite the clarity the Michigan Court of Appeals provided on the issue of retroactivity as it relates to this Court's decision in *Rafaeli*, Petitioner insists on finding justification to interfere with Respondents' vested property interest in the Surplus Proceeds generated from their former properties. To this end, Petitioner claims that this Court should grant its Application for Leave to Appeal ("Application for Leave" or "Application") to address various issues with Michigan's retroactivity jurisprudence.

To achieve its goal of convincing this Court to grant leave, Petitioner has attempted to paint a picture of a problematic law that has escaped review despite calls for change. However, that is not an accurate representation of the law at issue here, and Petitioner has failed to provide sound legal support showing otherwise. Therefore, this case does not present wide range of issues that Petitioner suggests.

Despite Petitioner's attempted illusion, the applicable threshold issue in this case is clear: did this Court announce a new rule of law in *Rafaeli*? [2] The Court of Appeals properly found that the answer to that question is undoubtedly no, and Petitioner's broad jurisprudential challenge to retroactivity is no more than a poorly concealed disagreement with the Court of Appeals' answer to that threshold question.

As such, Petitioner's secondary analysis of limited retroactivity and prospective only application are not only unsubstantiated but are also an improper request that this Court hypothetically consider what the law would be **if** *Rafaeli* had announced a new rule of law. Moreover, even if this Court were to find that issues of limited retroactivity and prospective only application arise in this case, as outlined below, *Rafaeli* must apply with complete retroactivity.

[2] See Petitioner's Application at pg. page 30 stating that "*Rafaeli* announced a new rule of law that overturned a validly enacted statute that counties and taxpayers had relied upon for 21 years."

A. The Present Case Is an Inappropriate Vehicle to Address the Broad Spectrum of Retroactivity Law in Michigan.

As an initial matter, this case does not provide an appropriate vehicle for this Court to address the litany of issues Petitioner has raised regarding the overall condition of retroactivity jurisprudence in Michigan. Petitioner wishes to suggest that Michigan's retroactivity law has been unclear since at least 1982 (See Petitioner's Application for Leave at pg. 14) largely based on a Wayne Law Review article penned by Justice Blair Moody Jr. and a subsequent Michigan Bar Journal article by Timothy A. Baughman. However, well suited answers to the legitimacy of those questions cannot be gained through this case. As much as Petitioner, or others for that matter, may wish for this Court to provide a "Restatement of Retroactivity," that is not the function of this Court, and there are many sound legal reasons this Court should not accept Petitioner's invitation to do so.

Specifically, Petitioner has asked this Court to "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." (Petitioner's Application for Leave to Appeal at pg. 20). Additionally, Petitioner has asked this Court to "clarify that the focus of the application of limited retroactivity [is] 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." *Id*. Not only do these inquiries not compel this Court's review because Michigan courts have already provided clear and consistent answers on these issues, but the facts and circumstances of this case to do not trigger the application of limited retroactivity. Thus, any review of retroactivity in this matter would amount to an advisory opinion. As this Court is well aware, "[a]n advisory opinion constitutes the opinion of the several justices signatory based upon the bare words of the act and unadorned by any acts or

combination of facts; it is no more." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 461 n 1; 208 NW2d 469 (1973). It is well settled that Michigan's 1963 constitution only authorizes this Court to provide advisory opinions to legislature or the governor of this State. *In re Request for Advisory Opinion, Enrolled House Bill No 5250*, 395 Mich 148, 149; 235 NW2d 321 (1975); *See also People v Gonzales*, 349 Mich 572, 573; 84 NW2d 753 (1957) ("There is no constitutional authority for this Court to render advisory opinions…"). It would undoubtedly be inappropriate and unconstitutional for this Court to oblige Petitioner's request.

This matter arose from this Court's detailed and dogmatic decision in *Rafaeli*. *Rafaeli* represents a very unique decision within this State's jurisprudence. Unlike most cases that give rise to challenges regarding the application of retroactivity[3], *Rafaeli* did not overrule a previous decision of this Court that held an opposite ruling. Petitioner itself highlighted that "[n]o 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." (Petitioner's Application for Leave at pg. 28).

Prior to *Rafaeli*, Petitioner's "rights" were based on a now defunct statute that provided for unconstitutional behavior, and there was no case law stating that Petitioner's retention of Respondents' surplus proceeds was constitutional. It is, therefore, extremely clear that *Rafaeli* did not create a new rule of law. In fact, this Court expressly stated that Respondents' rights to collect surplus proceeds "was commonly understood to exist in the common law before the 1963

[3] Many of the prior cases Petitioner relies on discuss retroactive application as it relates to changes in statutes, court rules, or judicial interpretation of the former. Therefore, most of Petitioner's Application addresses factual situations (and consequently, retroactivity issues) very dissimilar to the case at bar.

ratification of our Constitution; and continues to exist after 1963…" *Rafaeli*, 505 Mich at 473. Moreover, this Court found that:

> [h]aving originated as far back as the Magna Carta, having ingratiated itself into English common law, and having been recognized both early in our state's jurisprudence and as late as our decision in *Dean* in 1976, a property owner's right to collect the surplus proceeds from the tax-foreclosure sale of his or her property has deep roots in Michigan common law.

Id. at 471. Consequently, this Court's decision in *Rafaeli* "does not announce a new rule of law, but rather returns our law to that which existed… and which has been mandated by our Constitution since it took effect in 1963." *Rowland v Washtenaw County Rd Com'n*, 477 Mich 197, 221; 731 NW2d 41 (2007). The fact that *Rafaeli* did not overrule prior case law and did not announce a new rule of law places the case squarely within the "general rule … that judicial decisions are to be given complete retroactive effect…" *Michigan Educ Employees Mut Ins Co v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999). An analysis of whether the limited retroactivity or prospective application exceptions apply is never addressed in this case because the "threshold question [of] whether the decision clearly established a new principle of law" (*Pohustki v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002)) has already been answered negatively by this Court within the *Rafaeli* opinion itself. [4]

Based on the facts of this case, the overhaul Petitioner requests for retroactivity law is nothing more than an inappropriate academic exercise. This Court should not grant leave.

[4] *See e.g., W A Foote Mem Hosp v Mich Assigned Claims Plain*, 504 Mich 985; 934 NW2d 44, 45 (2019) (applying the decision in *Covenant* retroactively after finding that the decision not create a new principle of law and, therefore, did not satisfy the threshold question in the *Pohutski* test).

B. Petitioner Has Failed to Provide Sufficient Support for Its Claim that Michigan's Retroactivity Jurisprudence is Confusing or Contradictory.

Even if this Court were to somehow find that this case provides the appropriate forum to discuss Michigan's retroactivity jurisprudence, Petitioner's arguments are misguided. Petitioner has attempted to persuade this Court that the body of law governing retroactivity in this State presents a myriad of overly complex legal issues that render the law confusing and contradictory. However, Petitioner has failed to make a compelling argument with sufficient legal foundation to support its position. While complex, retroactivity law in Michigan is not confusing or contradictory, and there is nothing presented in Petitioner's brief that suggests otherwise. This Court has consistently presented and applied the same general rules and exceptions.

Pursuant to Michigan law, "the general rule is that judicial decisions are to be given complete retroactive effect…" *Michigan Educ Employees Mut Ins Co*, 460 Mich at 189 (internal quotation marks omitted). However, "[w]here injustice might result from full retroactivity, this Court has adopted a more flexible approach, giving holdings limited retroactive or prospective effect." *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997) (citing *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984)). "This flexibility is intended to accomplish the "maximum of justice" under varied circumstances." *Id*.

In determining whether an exception should apply, the "threshold question [is] whether the decision clearly established a new principle of law." *Pohustki*, 465 Mich at 696. Typically, if the Court determines that the threshold question is answered in the affirmative, this Court has set forth three factors which must be weighed in determining whether limited retroactivity or full prospective application is appropriate: "(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." *Id*. at 696 (citing *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971)). Ultimately, this

Court employs a balancing test analysis to determine what justice requires—limited retroactivity or prospective only application. *See e.g. Lindsey*, 455 Mich at 69 ("we do not find that the balance of justice demands prospective application in this case"); *See also People v Maxson*, 482 Mich 385, 399; 759 NW2d 817 (2008) ("the third prong weighs far more heavily against retroactive application than the second prong weighs for retroactive application").

In terms of prospective-only application, this Court has opined that the "extreme measure" (*Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005)) "is appropriate only in exigent circumstances" *Id*. (quotation marks omitted). Specifically, "[p]rospective 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*, 455 Mich at 68 (citing *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982). Thus, "prospective-only application of [Michigan Supreme Court] decisions is generally limited to decisions which overrule clear and uncontradicted case law." *Devillers*, 473 Mich at 587. However, this Court has found that "the fact that a decision may involve an issue of first impression does not in and of itself justify giving it prospective application where the decision does not announce a new rule of law or change existing law, but merely gives an interpretation that has not previously been the subject of an appellate court decision." *Lindsey*, 455 Mich at 68-69 (citing *Jahner v Dep't of Corr*, 197 Mich App 111, 114; 495 NW2d 168 (1992).

On the other hand, this Court has applied limited retroactivity when ***overruling prior case law*** (*Lesner v Liquid Disposal, Inc*, 466 Mich 95, 108-09; 643 NW2d 553 (2002) (emphasis added)) "where justified by the purpose of the new rule, the general reliance upon the old rule, and the effect of full retroactive application of the new rule on the administration of justice."

Buckeye Marketers, Inc v Finishing Servs, Inc, 213 Mich App 615, 618; 540 NW2d 757 (1995) (citing *People v West*, 159 Mich App 424, 426; 407 NW2d 19 (1987)).

Despite accurately laying out the relevant legal standards governing limited retroactivity with multiple examples of this Court's consistent application of those rules (See Petitioner's Application for Leave at pgs. 17, 20), Petitioner asserts that this Court's application of limited retroactivity has been inconsistent and confusing. (See Petitioner's Application for Leave at pgs. 2, 17). If Petitioner genuinely does find this area of law confusing or inconsistent, respectfully, the issue does not lie with the law itself.

In support of its position, Petitioner has cited to a footnote contained in *W A Foote Mem'l Hosp v Michigan Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017) which discusses this Court's application of the principles of full and limited retroactivity in various cases. *W A Foote Mem'l Hosp*, 321 Mich App at 197 n 9. The *W A Foote* court explained that based on this Court's language in those cases, the Court of Appeals has opined that "[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*. (emphasis in original); *Paul*, 271 Mich App at 620. It is clear that the *Paul* court conflated the general rule of full retroactivity with the usual rule of limited retroactivity where a judicial decision overrules prior law.[5] While this Court has similarly expressed those positions in terms of the use of the words "general" and "usual," they are different and this Court has applied them in separate circumstances. *See e.g. Rowland v Washtenaw County Rd Com'n*, 477 Mich 197, 220; 731 NW2d 41 (2007) (noting that the **general** rule is that judicial decisions are given full retroactive effect and finding that the court's decision

[5] This is supported by the fact that the Court of Appeals has property stated the rules in other cases. *See e.g. Buckeye Marketers, Inc v Finishing Servs, Inc*, 213 Mich App 615, 618; 540 NW2d 757 (1995).

is fully retroactive); *Devillers*, 473 Mich at 587 (applying its decision retroactively after finding that "our decision in this case is to be given retroactive effect **as usual**").

Notwithstanding the Court of Appeals' misunderstanding in *Paul*, Petitioner has failed to produce any opinion issued from this Court—or any other opinion from the Court of Appeals for that matter—that has stated the Court was applying complete retroactivity but instead applied limited retroactivity. Further the *Paul* decision does not negate this Court's clear and consistent application of the retroactivity rules. There is no genuine confusion surrounding the application of Michigan's retroactivity law; Petitioner simply seeks to distort the rules to fit its flawed narrative.[6]

Petitioner also contends that there are "numerous variations of limited retroactivity." (Petitioner's Application for Leave at pg. 15). However, the cases Petitioner referenced either did not contain an element of limited retroactivity, or there were distinguishable facts which necessitated different outcomes as it relates to limited retroactivity. Petitioner cited to *Bolt v City of Lansing*, 238 Mich App 37; 604 NW2d 745 (1999) and misrepresented to this Court that the *Bolt* court conducted a limited retroactivity analysis and applied the relevant decision only to the plaintiff in that case. That is startlingly untrue. On remand from this Court, the *Bolt* court completed an in-depth analysis on prospective application and ultimately decided to apply this Court's decision prospectively. *Bolt*, 238 Mich App 37 at 45, 48. The opinion never states that the plaintiff was the beneficiary of any kind of retroactivity. Instead, it is clear that the plaintiff filed a case seeking relief for himself only and subsequently, on remand, attempted to broaden the application of his success on the merits to other potential claimants. *Id*. at 40. To that end, the plaintiff in *Bolt* attempted to use retroactivity as a vehicle to accomplish his goal leading the court

[6] Conveniently, Petitioner neglected to mention that this Court issued a subsequent order in *W A Foote Mem Hosp v Mich Assigned Claims Plain*, 504 Mich 985; 934 NW2d 44, 45 (2019) which confirmed the validity of the retroactivity test under Michigan case law.

to hold that this Court's decision was prospective. *Id*. at 48. The *Bolt* case unequivocally fails to support Petitioner's theory of varying limited retroactive application.

As for Petitioner's citations to *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223; 393 NW2d 847 (1986) (applying Supreme Court decision with limited retroactivity because it announced a new rule of law) and *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003) (applying Supreme Court decision with limited retroactivity because it announced a new rule of law and due to reliance interests) both of these cases highlight consistent application of the rules. Petitioner has failed to show multiple decisions from this Court with similar facts that have produced inconsistent results.

C. The Michigan Court of Appeals' Decision in *Proctor* Does Not Conflict with Its Decision in *Schafer*.

Notwithstanding Petitioner's assertions to the contrary, there is obvious coherence between the Court of Appeals' decisions in *Proctor* and *Schafer*, and Petitioner's inability to see that connection does not make those decisions inconsistent. *Proctor* is a narrowly decided case that the Court of Appeals "looked at individually on its facts and merits through the lens of judicial restraint, common sense, and fairness." *See Bezeau v Palace Sports & Entertainment*, Inc, 487 Mich 455, 476; 795 NW2d 797 (2010) (Weaver, J. concurring). The plaintiffs in *Proctor* represent only a small subset of taxpayers affected by the unconstitutional retention of surplus proceeds throughout the State of Michigan, and as such, the ruling in *"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." **Exhibit A** at *4. By contrast, Respondents in this case have presented a broader and more comprehensive view of the issues and interests involved which gave the lower court the

facts it needed to provide clarification of its *Proctor* decision by way of *Schafer*.[7] Despite that clarification, Petitioner still insists that its rejected argument has merit.

Petitioner's claim of incongruence is based largely on its desire to read the word "only"[8] into the *Proctor* opinion as to restrict the retroactivity of *Rafaeli* exclusively to claims that were pending at the time *Rafaeli* was issued. (See Petitioner's Application for Leave at pg. 12). However, the Court of Appeals has already dismissed the idea that such a purported limitation exists[9] and has recently reiterated its position that *Rafaeli* is fully retroactive in its December 1, 2022 published decision in *Hathon v State of Michigan*, __Mich App__ ; __ NW2d__ (2022). (Attached as **Exhibit C**). Furthermore, beyond the Court of Appeals' highly persuasive and consistent stance on this issue, *Proctor* does not stand for the proposition that Petitioner suggests. Therefore, *Proctor* is not inconsistent with *Schafer*, and Petitioner's attempt to misrepresent *Proctor* fails.

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[7] "To remove uncertainty, we hold *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 of 1963…and should be given full retroactive effect." *Id*. (citing *Rafaeli*, 505 Mich at 472). The *Schafer* panel was uniquely situated to provide clarification of the *Proctor* opinion since the *Schafer* opinion "was authored by the same judge" who authored the *Proctor* opinion. (See Petitioner's Application for Leave at pg. 1).

[8] As Respondents pointed out at the Court of Appeals, Petitioner was forced to use the word "only" 6 times and the word 'limited" 2 times to covey its restricted retroactivity position to the Court of Appeals, whereas neither *Proctor* nor *Hathcock* ever used those terms while discussing retroactivity. Now, in its Application to this Court, Petitioner resorts to the use of the term "only" 90 tines and "limited at least 35 times. *Proctor* and *Hathcock* still do not use either of those terms.

[9] "What the *Proctor* Court ***actually*** held was… *Rafaeli*, like *Hathcock*, should be applied to pending cases, such as those of the named plaintiffs, in which a challenge has been raised and preserved." **Exhibit A** at *4 (emphasis added).

i. *Proctor* Is Narrowly Tailored and Does Not Foreclose Respondents' Claims.

Respondents represent to this Court that *Proctor* "held that *Rafaeli* has limited retroactive effect." (Petitioner's Application for Leave at pg. 21). But *Proctor* did not impose such a limitation on the application of *Rafaeli* and the Petitioner's attempt to self-impose any such limitation must fail. In describing which claimants *Rafaeli* would apply to, *Proctor* never used the word "only" nor did *Proctor* give any other indication that its retroactivity determination should not be expanded to apply to all potential claimants as Petitioner suggests. (Petitioner's Application for Leave at pgs. 11-12).

Proctor addressed the retroactivity of *Rafaeli* in the context of a very specific subset of plaintiffs—namely those who had raised and preserved their claims by filing a lawsuit (1) **before *Rafaeli* was decided** and (2) **before the enactment of 2020 Public Act 256** ("PA 256"), As to that very fact specific scenario where those two conditions had been met, the *Proctor* court stated:

> As discussed in this opinion, 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.

Exhibit B at *15. The scenario the court addressed in *Proctor* does nor address Respondents who made their claims **after** *Rafaeli* was decided but **before** the enactment of PA 256. Moreover, the court's language does not use the word "only" as to limit retroactivity to those who fit within the subset the court describes.

It follows that the Court of Appeals' decision in *Proctor* was narrowly tailored to apply only to the plaintiffs before it and those similarly situated. *See* **Exhibit A** at *4. The Respondents in this case present a completely different factual scenario than those addressed in *Proctor*. As a result, *Proctor* does not foreclose Respondents' claims.

Notably, even in addressing the unnamed class members that *Proctor* found has been dismissed, the Court noted that those class members could pursue remedies under PA 256—something that could only be done if *Rafaeli* was retroactive since application of the Act to class members' claims is triggered only if this Court finds *Rafaeli* to be retroactive. See MCL 211.78t(1)(b)(i).[10]

In overreaching to make *Proctor* applicable to Respondents, Petitioner has drawn a weirdly inaccurate parallel between Respondents in this case and the unnamed class members discussed in the *Proctor* opinion. (See Petitioner's Application for Leave at pg. 12). Petitioner's claim that the "court's handling of the putative class demonstrated that it was not holding that claims under *Rafaeli*'s reasoning were available to all potential claims." (Petitioner's Application for Leave at pg. 12). As previously mentioned, not only is this contrary to the court's holding and analysis in *Schafer*, but the Court of Appeals has also firmly rejected Petitioner's position in its recent decision in *Hathon* stating:

> Judicial decisions generally apply retroactively, Davis, 272 Mich App at 155, and the state concedes that Proctor held that Rafaeli applies retroactively. The state nonetheless argues that Rafaeli should be applied prospectively. Alternatively, the state suggests (supported by amicus curiae Michigan Association of County Treasurers) that any retroactive application of Rafaeli should be limited. **However, the language from Proctor on which the state relies is not found in its discussion of Rafaeli's retroactivity, but rather in a discussion about whether the never-certified claims of putative class members**—unlike those of the Hathon plaintiffs in this case—were properly raised and preserved. See Proctor, __ Mich App at ___; slip op at 15. Moreover, this Court has recently held that "Rafaeli should be given full retroactive effect." Schafer v Kent Co, ___ Mich App ___; ___; ___ NW2d ___ (2022), lv pending, slip op at 5. Both Proctor and Schafer have applications for leave to appeal pending in our Supreme Court; unless and until the Court determines the issue of Rafaeli's retroactivity, Schafer conclusively resolves this issue, and we will not revisit it. See MCR 7.215(C)(2) and (J)(1).

[10] Significantly, the *Proctor* court was not aware of the significant constitutional infirmities of PA 256 because the parties did not address it in their pleadings.

Exhibit C at pg. 11 n 6 (emphasis added). *Hathon* completely eviscerates Petitioner's efforts to claim the language somehow constitutes language limiting retroactivity. Therefore, not only are Respondents not included in nor comparable to the unnamed class described, but *Proctor* also does not foreclose Respondents' access to relief or contradict *Schafer*. Standing alone, the language in *Proctor* (or in *Hathcock*) are reminiscent of judicial restraint rather than limitation or restriction.

II. *RAFAELI* IS FULLY RETROACTIVE

Despite Petitioner's attempt to use its challenge to Michigan's retroactivity law to shield the County from its constitutional obligation to honor Respondents' vested property interests as announced in *Rafaeli*, its true motives are clear. Petitioner's entire Application is based mostly on its argument that this Court should determine that *Rafaeli* is not applicable to this case. But Petitioner's argument is directly contrary to well-established Michigan law that the Supreme Court of Michigan's decision are generally given retroactive effect. *Pohutski*, 465 Mich at 695. Blinded by its own self-interest, Petitioner has neglected the most important aspect of this litigation: *Rafaeli* invalided unconstitutional portions of the General Property Tax Act ("GPTA") and unambiguously announced Respondents' vested interest in the surplus proceeds generated from the tax foreclosure sale of their former real properties. It is nonsensical to suggest that an unconstitutional statute should apply to some litigants and not others; yet that is exactly what Petitioner has asked this Court to do without providing any sound legal reasons for doing so. Petitioner's arguments attempting to persuade this Court that *Rafaeli* is an exception to the general rule of retroactivity are at best unconvincing.

A. This Court Has Suggested that *Rafaeli* Is to Apply with Complete Retroactively.

As an initial matter, it is worth noting that the text of the *Rafaeli* decision itself suggests it should be given full retroactive effect. In *Rafaeli*, the Michigan Supreme Court stated:

> We hold that plaintiffs, former property owners whose properties were foreclosed and sold to satisfy delinquent real-property taxes, have a cognizable, vested property right to the surplus proceeds resulting from the tax-foreclosure sale of their properties. This right continued to exist even after fee simple title to plaintiffs' properties vested with defendants, and therefore, defendants' retention and subsequent transfer of those proceeds into the county general fund amounted to a taking of plaintiffs' properties under Article 10, § 2 of our 1963 Constitution. Therefore, plaintiffs are entitled to just compensation, which in the context of a tax-foreclosure sale is commonly understood as the surplus proceeds.

Rafaeli, 505 Mich at 484. Notably absent from the *Rafaeli* decision is any indication that this Court intended its ruling to be applied with limited retroactivity or prospectively only. Had this Court intended its ruling to be an exception to the general rule of retroactivity, it was perfectly capable of and would have clearly stated the same.

Furthermore, on February 2, 2021, this Court issued an Order in *Jackson et al v Southfield Neighborhood Revitalization Initiative* vacating the Michigan Court of Appeals' judgment and remanding that case to Oakland County Circuit Court "for reconsideration of defendants' motions for summary judgment in light of *Rafaeli v Oakland County*." (*See Jackson*, Mich Ct. of App., Docket No. 344058 (December 19, 2019) and *Jackson*, Mich Sup. Ct. Docket No. 160888 (February 2, 2021) collectively attached as **Exhibit D**). The Court of Appeals' ruling in *Jackson* occurred before the Michigan Supreme Court's ruling in *Rafaeli* on July 17, 2020. By vacating this judgment based upon *Rafaeli*, the Michigan Supreme Court made it abundantly clear that it intended for its ruling in *Rafaeli* to be applied retroactively—otherwise, there would have been no reason to remand *Jackson*.

B. *Rafaeli* Did Not Establish a New Principle of Law. *Rafaeli* Invalidated an Unconstitutional Statute and Represents a Return to a Constitutional Mandate.

Petitioner proceeds to mischaracterize *Rafaeli* as establishing a new principle of law and argue that it therefore fits within this narrow exception to the general rule of complete retroactivity. (See Petitioner's Application for Leave at pgs. 23, 30). However, the Michigan Supreme Court has been clear that returning to a constitutional mandate is not considered a "new rule" of law. *See Wayne County v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004) (rejecting the idea that the Court's holding represented a "new rule" when the Court's decision "return[ed] our law to that which . . . has been mandated by our Constitution since it took effect in 1963."). That is precisely what has occurred here. There is nothing new about the law established in *Rafaeli*; in fact, in its decision, the Michigan Supreme Court traced the Plaintiffs' property right to surplus proceeds back centuries. *Rafaeli,* 505 Mich at 463-464.[11] Moreover, the effect [of retroactivity] is not that the former decision is bad law, but that it was never the law." *Spectrum Health Hosp v Farm Bureau Mutual Ins Co of Michigan*, 294 Mich 503, 536; 821 NW 2d 117 (2012). That is especially true here where a state statute has been deemed unconstitutional.

At best, rather than announcing a new rule, *Rafaeli* simply "reaffirmed the existing law, which was misinterpreted by the Court of Appeals" in prior decisions. *See Michigan Educ Employees Mut Ins Co*, 460 Mich at 192; *See also W A Foote Mem Hosp v Michigan Assigned Claims Plain*, 504 Mich 985; 934 NW2d 44 (2019) (concluding that *Covenant*, which overruled decades of apparently erroneous Court of Appeals caselaw, should be given retroactive effect

[11] Markedly, the United States Supreme Court has also long-established the existence of a vested property right in surplus proceeds, stating that "[t]o withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation." *US v. Lawton*, 110 US 146, 150; S Ct 545 (1884).

because it did not clearly establish a new principle of law). As such, Petitioner's argument fails, and the general rule of complete retroactivity must be applied.

Most persuasively, The Michigan Court of Claims, in addition to *Schafer*, has already flatly rejected Petitioner's argument noting that *Rafaeli* does not create a new law as the Court in *Rafaeli* traced its findings all the way back to the Magna Carta. The Michigan Court of Claims stated in pertinent part:

> Defendant acknowledges the holding in *Rafaeli* and that it is contrary to the position defendant originally asserted in this case. Defendant then argues that plaintiffs' claims should be barred because the *Rafaeli* decision should not be applied retroactively, and that, although the Supreme Court did not state so in the decision, that *Rafaeli* should be limited to prospective-only application. Defendant asks the Court to dismiss this matter as a result.
>
> The Court disagrees with defendant's position regarding prospective-only application of *Rafaeli*. **Initially, the retroactivity argument is a curious one given that this Court issued an opinion and order recognizing a viable takings claim with respect to surplus proceeds *before* the *Rafaeli* decision was issued.** Defendant has asked the Court to decide that a subsequently issued decision that reached the same result as this Court's decision somehow invalidates this Court's prior decision. Moreover, and even overlooking the same, the concerns defendant cites do not warrant prospective-only application of *Rafaeli*. In general, judicial decisions are given full retroactive effect, but that general rule might not apply "where injustice might result from full retroactivity." *Pohutski v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). A court should consider the following factors when determining whether a decision should be given retroactive effect: "(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." *Id*. The threshold question is whether the decision announces a *new rule*. "A judicial decision's rule is considered to be new if it breaks new ground or imposes a new obligation on the States or the Federal Government." *People v Walker*, 328 Mich App 429, 437-438; 938 NW2d 31 (2019) (citation and quotation marks omitted). Or stated differently, "a case announces a new rule if the result was not *dictated* by precedent existing at the time . . . ." *Id*. (citation and quotation marks omitted). See also *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004) (rejecting the idea that the Court's holding represented a "new rule" when the Court's decision "return[ed] our law to that which . . . has been mandated by our Constitution since it took effect in 1963."). Here, a careful review of *Rafaeli* reveals that the decision did not, contrary to defendant's assertions, create a "new" rule of law. Instead, there was no published authority on point, and the Supreme Court traced its rationale for finding a protected property right in surplus proceeds all the way back to the Magna Carta, continuing through this state's Common Law, and recognizing the same right

> under this state's Constitution. *Rafaeli*, __Mich at __, slip op at 27-35. Indeed, it was for this reason—that the right to surplus proceeds was protected by this State's constitution—that this Court was able to issue the decision it did prior to *Rafaeli*. Defendant's arguments about prospective-only application of *Rafaeli* fall flat as a result. See *Pohutski*, 465 Mich at 696 (explaining that whether the decision "clearly established a new principle of law" was a "threshold question" to any retroactivity issue).

(*Hathon v State of Michigan*, December 4, 2020 Opinion and Order Regarding Various Motions attached as **Exhibit E** at pgs. 4-6) (emphasis added). The Michigan Court of Claims subsequently reaffirmed that decision and further held that the December 2020 amendments to the GPTA did not alter that analysis stating:

> [N]othing in PA 256 precludes this Court from concluding that *Rafaeli* applies retroactively. And this Court has already done so in its December 4, 2020 opinion and order. Seeing no reason to revisit that decision now, the Court concludes that plaintiffs can state claims under art 10, 2, regardless of whether PA 256 applies or not.

(*Hathon v State of Michigan*, February 22, 2021 Opinion and Order Certifying Class attached as **Exhibit F** at pg. 5). For these reasons, Petitioner has failed to establish that *Rafaeli* establishes a new principle of law; as such, the inquiry ends here, and the general rule of complete retroactivity must be applied.

C. *Rafaeli* Did Not Create an Unforeseen Change in the Law.

Petitioner has stated that "*Rafaeli* announced a rule of law that was not foreshadowed by earlier decisions," (Petitioner's Application for Leave at pg. 26) and that there was "ample authority suggesting that the GPTA's tax-foreclosure scheme was constitutional." (Petitioner's Application for Leave at pg. 27). In truth, this an unsubstantiated, alternative way for Petitioner to argue that *Rafaeli* creates a new principle of law. Petitioner referenced multiple decisions that discuss the validity of "the GPTA's foreclosure-and-sale process" (Petitioner's Application for Leave at pg. 26). But again, Petitioner seems to lose focus of the true nature of this case.

Respondents have never challenged the validity of the tax foreclosure or sale of their former properties. Instead, this case is solely about Petitioner's unconstitutional retention of the surplus proceeds generated from those sales.[12] Petitioner has failed to cite any binding case law validating the retention of surplus proceeds as to make this Court's decision in *Rafaeli* a surprise. Thus, Petitioner has failed to identify the prior "rule of law" it relied on. No such rule of law existed. Rather, Petitioner continuously cites to losing positions such as *Wayside Church v County of Van Buren*, 2015 WL 13308900 (WD Mich, Nov 9, 2015) and *Rafaeli, LLC v Oakland County*, 2017 WL 4803570 (Mich Ct App, Oct 24, 2017). (Petitioner's Application for Leave at pgs. 27, 28). In reality, the Sixth Circuit vacated the very *Wayside* decision Petitioner refers to and foreshadowed this Court's decision in *Rafaeli* in Judge Kethledge's dissenting opinion. *Wayside Church v Van Buren County*, 847 F3d 812, 823 (6th Cir 2017).[13] Furthermore, the *Rafaeli* opinion itself acknowledged that its decision was foreshadowed by *Dean v Michigan Dep't of Nat Res*, 399 Mich 87; 247 NW2d 876 (1976). *Rafaeli*, 505 Mich at 458 (stating "[i]n sum, *Dean* supports the proposition that a property owner has a recognized common-law property right to the surplus proceeds from a tax-foreclosure sale"). Petitioner's failure to provide any prior rule of law—that this Court announced—solidifying its position coupled with its failure to show that *Rafaeli* was "not adumbrated by any earlier appellate decision" makes Petitioner's argument a non-starter. *See*

[12] This distinction is clearly recognized in *Rafaeli*: "Nothing in this opinion impedes defendants' right to hold citizens accountable for failing to pay property taxes by taking citizens' properties in satisfaction of their tax debts," but "[w]hat defendants may not do under the guise of tax collection is seize property far in excess of the amount owed in unpaid taxes, penalties, interest, and fees and convert that surplus into a public benefit." *Rafaeli*, 505 Mich at 480.

[13] In a case that primarily focused on the ability of federal courts to hear cases where state courts have yet to provide an avenue for relief, Judge Kethledge in his dissent recognized the "gross injustice–both equitably and from the standpoint of the interests protected by takings law–caused by the kind of governmental action on display here." *Id*. at 823-24.

League of Women Voters of Michigan v Secretary of State, 508 Mich 520, 566; 975 NW2d 840 (2022) (citing *Phillips*, 416 Mich at 68).

In further support of its claim, Petitioner cited *Nelson v City of New York*, 352 US 103 (1956) which this Court already acknowledged and found to be inapposite to its decision in *Rafaeli* (*Rafaeli*, 505 Mich at 460-61) and *Bennis v Michigan*, 516 UD 442, 452 (1996) which involved significantly different facts. Petitioner also cited multiple cases from other jurisdictions that Petitioner somehow finds have persuasive value despite clear indications within Michigan case law disputing Petitioner's position.[14] These cases are neither binding on this Court or dispositive of the issue. *Rafaeli* has already addressed the deference this Court ought to give foreign authority, stating "we are unmoved by caselaw from other states that have addressed the disposition of surplus proceeds." *Rafaeli,* 505 Mich at 477. Petitioner's argument fails.

As a final matter it is important to address Petitioner's suggestion that there was a legally sound reliance interest on the unconstitutional provisions of the GPTA (See Petitioner's Application for Leave at pg. 26). This Court has rejected such a notion by holding that:

> an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed.

Stanton v Lloyd Hamond Produce Farms, 400 Mich 135, 144-145; 253 NW2d 114 (1977). Consequently, it follows that "the effect [of retroactivity] is not that the former decision is bad law, but that ***it was never the law.***" *Spectrum Health Hosp*, 492 Mich at 536 (emphasis added). Petitioner's reliance upon the portions of the GPTA which have now been declared

[14] It also seems as though Petitioner is advocating for the overturn of *Rafaeli*. (See Petitioner's Application for Leave at pg. 29).

unconstitutional cannot justify its actions since the statute itself has been void since its enactment and "inoperative as if it had never been passed." *Stanton*, 400 Mich at 145. Moreover, any such reliance was neither reasonable nor justified since *Rafaeli* did not decide an issue of first impression and the decision was clearly foreshadowed.

D. *Rafaeli* is Not a Tax Case; Petitioner's Citations to Tax Cases are Neither Relevant Nor Persuasive.

Petitioner vehemently argues that the interests involved in tax cases regularly necessitate limited retroactive or prospective-only application. (Petitioner's Application for Leave at pg. 23). However, Petitioner's argument in this regard is completely misleading and entirely without merit since the ***Rafaeli* case is not a tax case** and therefore, unlike the many "tax" cases Petitioner has cited. The *Rafaeli* decision never challenged the underlying taxes collected via the foreclosure process; to the contrary, the plaintiffs in *Rafaeli* clearly and consistently sought redress only for the County's unlawful retention of the surplus proceeds generated from the foreclosure[15], which this Court has now clearly identified as plaintiffs' property. *Rafaeli,* 505 Mich at 472. Surplus Proceeds are not a tax but are property, and as such, Petitioner's plethora of citations supporting its position that tax cases necessitate prospective only application are neither relevant nor persuasive.

Most concerning is Petitioner's attempt to compare *Rafaeli* to taxes cases essentially ignores this Court's holding and reasoning in *Rafaeli*. The *Rafaeli* court approved of the

[15] Persuasively, the United States Court of Appeals for the Sixth Circuit found that a plaintiff seeking turnover of surplus proceeds "does not challenge Michigan's taxing authority or the validity of Michigan's tax system," and "[a] favorable outcome . . . will not prevent Michigan from foreclosing on and selling property to recover delinquent taxes." *Freed v Thomas*, 976 F3d 729, 737 (6th Cir 2020).

foreclosure process itself, [16] but set forth that a taxpayer's right to surplus proceeds is established at the time the surplus is created. *Id.* at 461. Thus, *Rafaeli* addresses **property rights** existing after the tax foreclosure process and does not interfere with the County's ability to collect delinquent taxes. Additionally, beyond the fact that *Rafaeli* is not a tax case, the tax cases cited by the Appellant have a multitude of additional distinctions from *Rafaeli* which eliminate any possible persuasive value. Petitioner's argument is misplaced.

Even if this were a tax case, the equitable claims (through reliance[17]) that Petitioner has asserted must succumb to constitutional concerns as the Sixth Circuit made clear recently in *Hall v Meisner*, __F3d__ (6th Cir 2022) (attached as **Exhibit G**):

> Second, the Michigan Attorney General, as an intervenor, warns about the "serious fiscal consequences" of a decision in the plaintiffs' favor here. But in this case we sit as a court of law, not equity; and meanwhile the equities run very much the other way. The County forcibly took property worth vastly more than the debts these plaintiffs owed, and failed to refund any of the difference. "In some legal precincts that sort of behavior is called theft." *Wayside Church v. Van Buren County,* 847 F.3d 812, 823 (6th Cir. 2017) (dissenting opinion). And meanwhile the Takings Clause bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Webb's Fabulous Pharmacies, Inc.,* 449 U.S. at 163.

Exhibit G at pgs. 14-15. Respondents' constitutional interests are paramount here.

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[16] "In this case, the property improperly taken was the surplus proceeds, not plaintiffs' real properties. ..." *Id.* at 483.

"Nothing in this opinion impedes defendants' right to hold citizens accountable for failing to pay property taxes by taking citizens' properties in satisfaction of their tax debts. What defendants may not do under the guise of tax collection is seize property valued far in excess of the amount owed in unpaid taxes, penalties, interest, and fees and convert that surplus into a public benefit…" *Id.* at 479-480.

[17] It is important to note that *Rafaeli* briefly outlined the true extent of Petitioner's reliance interest. This Court recognized "the municipalities rely heavily on their citizens to timely pay real-property taxes so that local governments have a source of revenue for their operating costs." *Id.* at 479. This Court did not recognize a reliance interest in maintaining surplus proceeds.

E. The Effect of Retroactivity on the Administration of Justice.

As a final matter, Petitioner's claim that "[t]here are other administration of justice and equitable issues that favor limited-retroactive or even prospectively application of *Rafaeli*." (Petitioner's Application for Leave at pg. 31). However, in making such an argument, Petitioner makes certain claims that are not, at this point, supported by the record including the retroactive application of *Rafaeli* "could wreak havoc on the finances and administration of numerous local governmental bodies," and "the counties' potential liability… is conservatively estimated at more than $150 million statewide." (Petitioner's Application for Leave at pgs. 31-32). Petitioner's statements are not supported by any evidence. Notably, Respondents sought discovery of Petitioner Kent County's finances, but received much resistance. Respondents even filed a Motion to Compel the same which Petitioner vigorously opposed. The Kent County Circuit Court granted Respondents' Motion and ordered Petitioner to turn over the requested financial information, but Petitioner's production was deficient and the information which has been provided to date is still not sufficient to support its claims. Had Petitioner wished to inject such claims into its appeal, it was incumbent upon the County to develop an adequate record before seeking interlocutory appeal. Petitioner's attempt to convert this factor into a legal determination fails as it inevitably is a factual determination which must be made, based upon verifiable evidence, by the trier of fact. *See Walen v Dep't of Corr,* 443 Mich 240, 249; 505 NW2d 519 (1993) (suggesting that whether there is an onerous burden is a factual determination made upon consideration of the course of action the department would be required to take). Thus, the effect of retroactivity on the administration of justice is a factual determination which is unsupported by the record and any determination as to this factor would be premature at this point in litigation.

Furthermore, beyond the lack of factual support on the record, the Sixth Circuit recently decided in *Hall* which party ought to bear any such burdens.[18]

REQUESTED RELIEF

For the reasons discussed in this Brief, this Honorable Court should deny Kent County's Application for Leave to Appeal and enter an Order reflecting the same.

Respectfully Submitted,

VISSER AND ASSOCIATES, PLLC

Dated: December 7, 2022

/s/Donald R. Visser
Donald R. Visser (P27961)
Donovan Visser (P70847)
Bria Adderley-Williams (P84876)
Attorneys for Respondents-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2022, the foregoing document was served on all parties of record via electronic mail through the Court's electronic filing system.

/s/Kate Haverdink
Kate Haverdink
VISSER AND ASSOCIATES, PLLC

[18] See comment on pg. 21, supra.