STATE OF MICHIGAN
IN THE SUPREME COURT

LYNETTE HATHON AND AMY JO DENKINS, et al.,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN,

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 356850

Michigan Court of Claims No. 19-000023-MZ

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

STATE OF MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

The Michigan Court of Appeals entered its public decision on December 1, 2022, affirming the Court of Claims' order. This Court has jurisdiction over Appellant State of Michigan's application for leave to appeal under MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

On July 17, 2020, this Court held there is a separate property right in surplus proceeds after tax foreclosure and sale of that property. On December 22, 2020, Public Act 256 became law, which was unanimously passed and directly referenced *Rafaeli LLC v Oakland County*, 505 Mich 429 (2020), expressing the Legislature's intent to codify and provide the sole mechanism to make a claim for any right post-tax-foreclosure.

Public Act 256 sets the process to make claims based on tax foreclosure sales held after July 17, 2020. For properties sold or transferred before July 18, 2020, Public Act 256 provides there is no relief *unless* "the Michigan supreme court orders that its decision in *Rafaeli* [ ] applies retroactively" under MCL 211.78t(1)(b)(i). Either way, the new law is the only way to make a claim following a tax foreclosure.

1. Did the lower Court err when it held that Public Act 256 of 2020 does not control these claims, and thus that the Court of Claims had jurisdiction and could certify a class action under a takings theory, contrary to PA 256?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

2. Should *Rafaeli* apply such that the *Rafaeli* plaintiffs may make a claim, but all other sales before July 18, 2020, are not compensable because *Rafaeli* does not apply retroactively?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

3. Did the lower courts err in certifying a class?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

STATUTES INVOLVED

MCL 211.78l(1), as amended by 2020 PA 256, provides, in part:

> If a judgment for foreclosure is entered under section 78k . . . the owner of any extinguished recorded or unrecorded interest in that property shall not bring an action, including an action for possession or recovery of the property or any interests in the property or of any proceeds from the sale or transfer of the property . . . more than 2 years after the judgment of foreclosure of the property is effective under section 78k . . . . An action to recover any proceeds from the sale or transfer of property foreclosed for nonpayment of real property taxes under this act must be brought as provided under section 78t.

MCL 211.78t provides, in part:

> (1) A claimant may submit a notice of intention to claim an interest in any applicable remaining proceeds from the transfer or sale of foreclosed property under section 78m, subject to the following:
>
> > (a) For foreclosed property transferred or sold under section 78m after July 17, 2020, the notice of intention must be submitted pursuant to subsection (2).
> >
> > (b) For foreclosed property transferred or sold under section 78m before July 18, 2020, both of the following:
> >
> > > (i) A claim may be made only if the Michigan supreme court orders that its decision in *Rafaeli, LLC v Oakland County*, docket no. 156849, applies retroactively.
> > >
> > > (ii) Subject to subparagraph (i), the notice of intention must be submitted pursuant to subsection (6).
>
> (2) For foreclosed property transferred or sold . . . after July 17, 2020, . . . a claimant seeking remaining proceeds for the property must notify the foreclosing governmental unit using a form prescribed by the department of treasury.
>
> * * *
>
> (4) For a claimant seeking remaining proceeds from the transfer or sale of a foreclosed property transferred or sold under section 78m after July 17, 2020, after receipt of a notice under subsection (3), the claimant may file a motion with the circuit court in the same proceeding in which the judgment of foreclosure of the property was effective under section 78k to claim any portion of the remaining proceeds that the claimant is entitled to under this section.
>
> * * *

(6) For a claimant seeking remaining proceeds from the transfer or sale of a foreclosed property transferred or sold under section 78m pursuant to this subsection, the claimant must notify the foreclosing governmental unit using the form prescribed by the department of treasury. . . by the March 31 at least 180 days after any qualified order . . . . To claim any applicable remaining proceeds to which the claimant is entitled, the claimant must file a motion with the circuit court in the same proceeding in which a judgement of foreclosure was effective under section 78k by the following October 1.

* * *

(9) [T]he court shall set a hearing date and time for each property for which 1 or more claimants filed a motion under this section and notify each claimant . . . at least 21 days before the hearing date. At the hearing, the court shall determine the relative priority and value of the interest of each claimant in the foreclosed property immediately before the foreclosure was effective.

(12) As used in this section:

> (a) "Claimant" means a person with a legal interest in property immediately before the effectiveness of a judgment of foreclosure of the property under section 78k who seeks pursuant to this section recognition of its interest in any remaining proceeds associated with the property.
>
> (b) "Remaining proceeds" means the amount equal to the difference between the amount paid to the foreclosing governmental unit for a property due to the sale or transfer of the property under section 78m and the sum of all of the following:
>
> > (i) The minimum bid under section 78m.
> >
> > (ii) All other fees and expenses incurred by the foreclosing governmental unit pursuant to section 78m in connection with the forfeiture, foreclosure, sale, maintenance, repair, and remediation of the property not included in the minimum bid.
> >
> > (iii) A sale commission payable to the foreclosing governmental unit equal to 5% of the amount paid to the foreclosing governmental unit for the property.

INTRODUCTION

This case involves property tax laws, real property laws, and municipal finance. The topics may lack pizzaz, but they impact every Michigan citizen. The questions raised in this application are matters of first order importance, with statewide implications directly affecting thousands of taxpayers and other lien holders and every county in the State. And the matter implicates millions of dollars for the counties, and local taxing authorities, throughout the State.

There are two other cases currently on application to this Court that raise some similar, if not overlapping, questions. Those cases are *Proctor v Saginaw,* Case No. 164266, and *Schafer v Kent County*, Case No. 164975. But this is the only known case that included briefing and argument on the constitutionality of Public Act 256, a law passed in 2020, in direct response to this Court's decision in *Rafaeli.* It is also the only known certified class action in Michigan's state courts on this topic.

The first question in common is *whether or not Public Act 256 of 2020 applies to all claims arising out of tax foreclosure, including this case where the lead Plaintiffs' foreclosed property was sold before July 18, 2020.* Under the new law's plain language, the answer is yes; the new law is the only method to make a claim.

The second question in common is *how this Court's decision in Rafaeli should be applied*. Specifically, for sales occurring before July 18, 2020, should only the *Rafaeli* plaintiffs have compensable claims? The Legislature has expressly identified this question in law, inviting this Court to rule on it. See

MCL 211.78t(1)(b)(i). Foreclosures and sales occurring after *Rafaeli* issued could implement this Court's holding through the new law's process.

But sales that happened before *Rafaeli* did not have any way to know its eventual outcome or avoid a taking. The plain language of the 1999 law and nearly two decades of statewide application of the law supported prior practices. *Rafaeli*'s holding should be employed as a course correction going forward, not a belated punishment decades after the law was enacted. Both *Proctor* and *Schafer* implicate these first two question, with *Schafer* likely the better vehicle to resolve them.

But the third question, and making this case unique, *is whether the stance of this case as an original action in the Court of Claims, and now certified, conflicts with Michigan law*? The new law requires each claimant file a motion in the underlying circuit court case, not an original class action in the Court of Claims. Even if PA 256 does not control, did the trial court still err in certifying the class given the myriad inconsistencies and shortcomings of litigating this kind of case as a class action? In short: yes, on all fronts, and this Court should grant leave and reverse.

The State asks that this Court grant the application and issue an order holding that:

- Public Act 256 applies to all proceeds claims after tax foreclosure;
- the rights recognized in *Rafaeli* are appropriate for very narrow retroactive application only, providing the *Rafaeli* litigants compensation for their sales that occurred before July 18, 2020, but otherwise, providing compensation only for sales that happened after July 17, 2020, when stakeholders were aware of the new reality under Michigan law;

- the trial court erred when it asserted jurisdiction and certified a class.

STATEMENT OF FACTS AND PROCEEDINGS

Public Act 123 of 1999 changed property tax collection in Michigan.

Michigan's property tax collection laws were rewritten in 1999. That year, Public Act 123 repealed the then existing notice, hearing, and tax lien sale process and created a new system to clear title and sell foreclosed properties, not tax liens, to collect unpaid property taxes. See Smith, *Foreclosure of Real Property Tax Liens Under Michigan's New Foreclosure Process*, 29 Mich Real Prop Rev 51, 51 (2002).

Because property taxes go from delinquent (one year late), to forfeited (two years late), to foreclosed (third year unpaid), there was a transition period; the pre-1999 law and process were not fully repealed until December 31, 2003. See Enacting Section 4, 1999 PA 123. While the old law first sought to sell tax liens, the 1999 law cut off all right, title, and interest in foreclosed property and sold the real property itself. After a lengthy redemption period, abundant notice, and a hearing, the law resembled strict foreclosure.

Property sale proceeds were deposited in a specific fund to first cover all unpaid taxes and associated costs for that year's foreclosure action, then if there was excess, for transfer to a county general fund or, if the State was the Foreclosing Governmental Unit (FGU), to the land reutilization fund created by statute. MCL 211.78m(8). If a property sold for more than the tax debt, the statute required

those proceeds be used to cover the shortfall on the bulk of the properties that did not sell for enough to cover the tax and tax collection debts. See MCL 211.78m(8)(a).

The subject property was foreclosed under Public Act 123 in 2018

Named Plaintiffs Lynette Hathon and Amy Jo Denkins are the former owners of real property commonly known as 835 Michigan Ave, Owosso, MI (Property). (Ex A, Compl, ¶ 5.) The Department of Treasury was the FGU for Shiawassee County. (Ex A, ¶ 6.) The delinquent property taxes totaled approximately $5,200, and on February 9, 2018, the Shiawassee County Circuit Court entered a Judgment of Foreclosure in case number 17-9804-CZ. (Ex A, Compl, Ex B.) The judgment required redemption by April 2, 2018.

Plaintiffs did not redeem, and title vested in the State of Michigan, which sold the Property at public auction for $28,250.00 in 2018. (Ex A, Compl, Ex C.) None of the class litigants in this case, as plead, dispute notice; these foreclosures were the result of a statutory tax collection process that satisfied due process. The 2018 tax sale proceeds were distributed under MCL 211.78m(8).

By way of example using the Hathon parcel, the $28,250 proceeds first reimbursed the county treasurer for the tax debt for the parcel (funds it had prepaid to the local tax collecting units on behalf of the delinquent owners in 2015, 2016, and 2017) and associated collection costs. Next, any remainder was used to cover shortfalls for other properties in Shiawassee County that year that did not sell for enough to cover their own debt. Then, any remainder was used to cover shortfalls

in other counties where Treasury was FGU. If every county was made whole, any balance was deposited in the land reutilization fund under MCL 211.78m.

Plaintiffs file a putative class action in the Court of Claims.

On January 9, 2019, Plaintiffs filed a notice of intent in the Michigan Court of Claims, asserting an unconstitutional taking, excessive fines, and other claims. (Ex B, January 9, 2019 Notice of Intent.) Only Hathon and Denkins filed a notice of intent.

On January 26, 2019, Hathon and Denkins filed a putative class action seeking relief based on tax foreclosures in the counties where the State of Michigan was at one time the FGU, but without specifying the alleged years at issue.[1]

On June 7, 2019, the Court of Claims certified a class, defined as:

> All property owners formerly owning property from within the counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch who, since June 30, 2013, had said property seized by Defendants State of Michigan and Patricia A. Simon via the General Property Tax Act, which was worth more and was sold at tax auction for more than the total tax delinquency and was not refunded the excess/surplus equity. [Ex C, June 7, 2019 Op and Order at 14.]

The parties then briefed whether there was a valid takings claim under this taxing statute when adequate notice prior to foreclosure was admitted. The Court of Claims held that Plaintiffs' taking theory was viable. (Ex D, August 13, 2019 Op and Order.) The case was held in abeyance while this Court considered *Rafaeli*.

[1] MCL 211.78 provides an option: counties can choose to serve as the FGU, and nearly all the State's 83 counties have made that election. Since this case was filed, one more county has elected to serve as FGU, leaving the State, through its Department of Treasury, as FGU in just six counties.

This Court holds surplus proceeds are a separate surviving property right.

On July 17, 2020, seventeen years after Public Act 123 of 1999 became fully effective, this Court dramatically changed understanding of the law, holding that the plaintiffs had a separate property right in sale proceeds, to the extent the "properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties." *Rafaeli*, 505 Mich at 474–475.

This Court also held that "[n]othing in our holding today prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id.* at 473 n 108. The law did not provide such a mechanism because it did not anticipate such a property right once foreclosure was final.

The *Rafaeli* decision upturned nearly two decades of tax collection practices and court decisions under the 1999 law. The decision identified a state common-law right in excess proceeds, which was silently incorporated in Michigan's 1963 Constitution, Article 10, § 2. But prior to this Court's decision taxpayers, municipal treasurers, county treasurers, the State Treasurer, and courts throughout the State relied on the statute's plain language and cases like *Nelson v City of New York*, 352 US 103 (1956) and *Bennis v Michigan*, 516 US 442 (1996), as well as a body of state court decisions that appeared to hold that Public Act 123 was constitutional so long as due process was satisfied in the lead up to foreclosure. Former property owners also treated the law as valid; until *Rafaeli*, very few claims of this type were filed

under the 1999 law, and trial courts rarely showed sympathy. For the few that did succeed in getting relief from the trial court, each was reversed on appeal.

On December 22, 2020, Public Act 256 became law with immediate effect.

Within six months of this Court's *Rafaeli* decision, the Legislature passed Public Acts 255 and 256 with immediate effect, which bills were signed into law four days later. Public Act 255 modified notice and auction procedures. Public Act 256 clarified the statute of limitations (MCL 211.78l), defined "claimants" able to make claims for remaining sale proceeds (MCL 211.78t(12)) and provided how a claim must be made (MCL 211.78*l*(1); 211.78t(4), (6)).

The trial court holds Public Act 256 does not apply, recertifying a class.

On February 22, 2021, the Court of Claims held that Public Act 256 does not apply to this case. (Ex E, February 22, 2021 Op and Order.) The Court of Claims ruled it had jurisdiction, re-certified a class that excluded lienholders but included claims arising from sale held after PA 256 became law, including:

> All persons and entities who, from January 15, 2018, through the final order in this matter, had real property in the counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch that was foreclosed upon by the State of Michigan under the General Property Tax Act, MCL 211.78, which was then subsequently sold at tax auction for an amount exceeding the minimum bid and who were not refunded the excess/surplus equity as described by the Michigan Supreme Court in *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020). [Ex E, February 22, 2021 Op and Order p 9.]

The State sought reconsideration of that decision on March 12, 2021, which the lower court denied. (Ex F, March 19, 2021 Order.)

On April 9, 2021, the State filed an application for leave to appeal in the Michigan Court of Appeals from the March 19, 2021, ruling. The State filed a bypass application in this Court, which was denied because the Court was "not persuaded that the question presented should be reviewed by this Court before consideration by the Court of Appeals." (Ex G, June 11, 2021 Order.)

The Court of Appeals granted the State's application on August 31, 2021, and Plaintiffs-Appellees filed a cross application as to the constitutionality of PA 256. The parties fully briefed the issues, provided oral argument, and the lower court issued its published decision on December 1, 2022, affirming the trial court's rulings. This application for leave to appeal timely followed.

STANDARD OF REVIEW

"Matters of constitutional and statutory interpretation are reviewed de novo." *People v Skinner*, 502 Mich 89, 99 (2018). In determining the validity of a statute, "[e]very reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution, that a court will refuse to sustain its validity." *Cady v Detroit,* 289 Mich 499, 505 (1939). "Questions concerning the retroactivity of earlier judicial decisions are for this Court to decide de novo." *Lincoln v General Motors Corp*, 461 Mich 483, 490 (2000).

ARGUMENT

I. Public Act 256 of 2020 controls all claims for surplus arising from tax foreclosure, uniformly, statewide. It presumes that sales held before July 18, 2020, are not compensable, unless this Court rules that *Rafaeli* was intended to provide such relief.

The Legislature acted swiftly *and unanimously* passing Public Act 256 of 2020, a uniform method to seek surplus ("remaining") sale proceeds as recognized by this Court's decision in *Rafaeli*. Without this law, the State's 83 circuit courts and the Court of Claims would be left to craft their own processes, timelines, and requirements. But the Legislature appropriately enacted "legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id*. at 473 n 108.

This case has delayed implementation of that law and process, resulting in substantial harm to litigants and filling state and federal courts with overlapping and conflicting litigation. Rather than one clear law setting the standard, there is now the real potential for inconsistent results. It may also result in some "claimants," like vested lienholders, being excluded, or FGUs paying twice in separate litigation.

Fortunately, Public Act 256 passed swiftly and with immediate effect, explicitly referencing the *Rafaeli* decision and employing retroactive language and mechanisms. Under MCL 211.78*l*, the only way to make a claim is via § 78t. That provision allows a "claimant" (defined in § 78t(12)(a) to include not just "owners" but any "person with a legal interest in property immediately before the effectiveness of a judgment of foreclosure of the property") to file a motion under

§ 78t(4) in the appropriate circuit court in the "proceeding" in which the property was foreclosed. The new law covers all claims arising from tax foreclosure and seeking money left over after sale.

A. In MCL 211.78*l*, the Legislature required that all claims for surplus proceeds be made under MCL 211.78t.

Public Act 256 of 2020 is comprehensive in scope and clear in its intended application. There is no void for the lower courts to fill and thus no need for some other remedy. Public Act 256 occupies this entire space.

In the new law, the Legislature amended three sections of the General Property Tax Act, MCL 211.1 *et seq*., and created an entirely new claims provision.[2] This Court recently reviewed the prior version of MCL 211.78*l*. See *2 Crooked Creek, LLC v Cass Co Treasurer*, 507 Mich 1 (2020). The old law provided a two-year statute of limitations to make a claim for damages based on a due process violation, a constitutional claim arising from tax foreclosure.

The new law left the existing statute of limitations intact, but clarified it applies to all claims, including "an action for . . . any proceeds from the sale or transfer of the property under this act," what would be a constitutional claim but for the new right to make a claim thus avoiding any "taking." MCL 211.78*l*(1). Section 78*l* also provides that "nothing in this section authorizes an action not otherwise authorized under the laws of this state." *Id*. Finally, it provides that "[a]n action to

[2] Public Act 256 of 2020 amended GPTA §§ 78g, 78i, and 78*l* and created § 78t. The same day, the Legislature passed Public Act 255 with immediate effect, which amended GPTA § 78m addressing property sale and proceeds procedures.

recover any proceeds from the sale or transfer of property foreclosed for nonpayment of real property taxes under this act must be brought as provided under section 78t." *Id.*

B. Applying PA 256 retroactively does not impair substantive rights because it addresses only procedure.

Statutes are presumed to apply prospectively, absent evidence to the contrary. *Hansen-Snyder Co v General Motors Corp*, 371 Mich 480, 484 (1963). Evidence of contrary intent comes in two forms: (1) when the Legislature makes it clear that a law is to apply retroactively, or (2) when the law is remedial, i.e., procedural. *Id.* at 571–572. If either applies and no other right is violated by retroactively applying the new law, then such application is required in all pending cases. Both exceptions apply here, and the law does not impair any vested right.

As to the first exception, the Legislature's references to events and mechanisms for relief leave no doubt that this law applies to *all* claims like this. The Legislature required that "an action to recover any proceeds from the sale or transfer of property foreclosed for nonpayment of real property taxes under this act must be brought as provided under section 78t." MCL 211.78*l*. And § 78t creates a uniform process to secure remaining sale proceeds after tax foreclosure. See, e.g., MCL 211.78t(2); § 78t(4). That is true if the claim arose from a foreclosure *before* July 17, 2020, or if the claim arose from a foreclosure sale *after* that date. It is also true whether the foreclosed property was in Ogemaw County or Iosco, and whether the County Treasurer was FGU or the State Treasurer conducted the circuit court

hearing and sale. The law covers the duration of the potential claims period, operating forward and backward from *Rafaeli*.

As to the second exception, the new law clarifies existing statutory requirements and codifies remedial and curative provisions implementing the property right identified in *Rafaeli*. It thus applies retroactively, as it is a " 'statute related to remedies or modes of procedure,' " and which:

> [does] not create new or take away vested rights, but only operate[s] in furtherance of a remedy or confirmation of rights already existing [thus] will in the absence of language clearly showing a contrary intention, be held to operate retrospectively and apply to all actions accrued, pending or future, there being no vested right to keep a statutory procedural law unchanged and free from amendment. [*In re Certified Questions from U.S. Court of Appeals for the Sixth Circuit*, 416 Mich 558, 572 (1982), quoting *Hansen-Snyder Co v General Motors Corp,* 371 Mich 480 284-85 (1963) (internal citations omitted).]

In *Rafaeli*, this Court provided the *what*: surplus sale proceeds are a separate property right apart from the foreclosed real property, which right survives tax foreclosure. In PA 256, the Legislature codified the who, when, where, and how:

- **Who**: claimants are defined in MCL 211.78t(12)(a) as persons with an interest in the foreclosed property prior to foreclosure.
- **When**: claims must be made within the same two-year time period for all damages actions under this law as provided in MCL 211.78*l* (which two-year requirement was part of the law both before and after Public Act 256 revised § 78*l*) via notices and motions satisfying MCL 211.78t.
- **Where**: claims must be filed in the circuit court proceeding in which the underlying real property was foreclosed. MCL 211.78t(4).
- **How**: claimants must file a notice that they intend to seek remaining sale proceeds under MCL 211.78t(2) and then, upon sale resulting in a surplus, must timely file a motion seeking their share of funds vis-à-vis any other claimants for that property, under MCL 211.78t(4).

Through Public Act 256 of 2020, it is true the Legislature clarified the statute of limitations for tax foreclosure claims as the same two years provided under the prior version of § 78*l* for a constitutional claim. It is also true that courts have recognized statutes of limitation as procedural mechanisms that nevertheless may impact substantive rights. (See e.g., *Rzadkowolski v Pefley*, 237 Mich App 405, 411 (1999)). But as it applies here, the period is unchanged (two years) and the context (tax foreclosure) and triggering event (alleged constitutional violation) are also unchanged.

Public Act 256 rewrote portions of § 78*l* but maintained the two-year period that applied to claims arising from tax foreclosure as it existed prior to amendment. "The rule is: 'Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there.' " *Rookledge v Garwood*, 340 Mich 444, 455 (1954) (citations omitted). "[T]he old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not from the former." *Id.* Such legislative action serves to "abolish[ ] the prior section" and the Legislature "must, therefore, have intended that the amendment to the act would have sufficient retroactive effect to apply to claims which had arisen prior to the enactment." *Id.* at 454. Here, the two-year provision is not new and did not cut short some longer period under this law.

Nor does application of the new law to pending cases violate any other alleged vested right. State and federal courts recognize that laws passed during the

pendency of a dispute, when that dispute is not subject to a final order, apply so long as the statute is intended for retroactive application. See, e.g., *Bank Markazi v Peterson*, 136 S Ct 1310, 1325 (2016), reaffirming that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." *Id.*, citing *Landgraf v USI Film Products,* 511 US 244, 267–268 (1994); and *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226 (1995). This Court has held the same:

> The statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then pending . . . . No vested right can exist to keep statutory procedural law unchanged [or] free from amendment. [*Cichecki v City of Hamtramck Police Dept,* 382 Mich 428, 436 (1969), quoting *Hansen-Snyder Co v General Motors Corporation*, 371 Mich 480, 485 (1963).]

That standard applies here. Only a final court order would excuse current litigants from the requirements of Public Act 256, and even then, only insofar as the new law conflicted with the Court's holding in that final order. Only the *Rafaeli* plaintiffs have such an order. For everyone else, Public Act 256 controls.

The law itself does not eliminate any vested property right. Instead, the new law sets forth how claims must be made but preserved for this Court a right it already had—to decide how *Rafaeli* applies. For some tax foreclosures, a remedy is available only if this Court holds that retroactive relief is available. Absent that trigger for compensation, the law still applies; it simply provides that there is no relief for those older sales based on this Court's determination.

That a new law might apply to an existing case is far from novel.

In *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394 (2015), the Court of Appeals addressed a similar situation in which the lead litigant, IBM, got relief through a final order issued by this Court, but held that other pending litigants' claims, including Gillette's, were subject to a law passed in the interim. The Court of Appeals explained:

> An appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly . . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. [*Id.*, quoting *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226–227 (1995).]

This Court denied *Gillette's* application for leave to appeal. *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 499 Mich 960 (2016). At that time, dozens of other cases like *Gillette* were pending and were subject to the new law; they had pending litigation but did not achieve the same results as IBM. While the *Gillette* line of cases and that Public Act addressed a statutory right, not a common law or constitutional right, the outcome is still instructive since the instant law is remedial and does not destroy any cause of action or vested claim.

Rather, Public Act 256 applies to *all* potential claims, possible, pending, and future, by clarifying and setting the process to make such claims. The "conditional" language in § 78t(2) addresses whether potential claims are compensable, not whether the new law applies at all. That provision, in application, operates as a

presumption that sales occurring before a certain date are not compensable which is the same result as if this Court holds that *Rafaeli* is for limited retroactive (*Rafaeli* litigants only) or even purely prospective relief.

But the statutory presumption does not conclusively preclude compensating older sales. Both the *Schafer* application and this application provide an opportunity to affirm, or rebut, this presumption. Once resolved, claims that accrued prior to July 18, 2020, may begin the claims process "by the March 31 at least 180 days after any qualified order." MCL 211.78t(6).

Or, those older claims may not be compensable. But if that is the outcome, it will be because they were not compensable in the first instance because this Court determines *Rafaeli* should apply going forward, with the benefit and knowledge of the new rule, but that it should not result in compensation for sales before *Rafaeli*.

This Court has held that a statute providing a "conclusive presumption" may "actually [operate as] a substantive rule of law." *Kidd v General Motors*, 414 Mich 578, 587–588 (1982). But this presumption is not conclusive. The interim limitation is tied to this Court's inherent authority to announce that a new rule of law is for prospective application only.[3] This Court has exercised that authority before, without violating any state or federal law or right.

[3] " 'Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law cannot extend to their interpretations of federal law.' " *W.A. Foote Mem Hosp v Michigan Assigned Claims Plan*, 31 Mich App 159, 181 (2017) (aff'd in part, rev'd in part on other grounds), quoting *Haper v Virginia Dep't of Taxation*, 509 US 86, 100 (1993) in turn citing *Great Northern Ry Co v Sunburst Oil & Refining Co,* 287 US 358, 364–366 (1932).

When "a [state] court refused to make a ruling retroactive," and a "novel stand was taken [in federal court] that the Constitution of the United States is infringed by such refusal," the U.S. Supreme Court held that "the Federal Constitution has no voice upon the subject." *Great Northern Ry Co v Sunburst Oil & Refining Co*, 287 US 358, 364 (1932). That makes sense; whether a state court's prior ruling deciding a matter of state law should be applied retroactively or prospectively is a matter of state law best left to state courts. Ultimately, and explicitly under Public Act 256, that is a question for this Court.

Here, Public Act 256 not only shows retroactive intent, but is also both clarifying and procedural. It reaffirms that the two-year statute of limitations for damages claims that existed prior to the 2020 amendment applies to *all* claims arising out of a tax foreclosure. [4] It also directs claimants that the only way to make the claim set forth in *Rafaeli*, for "surplus" ("remaining proceeds" under the statute), is through § 78t. The law "codif[ies]" and gives "full effect" to potential claimants with the exact type of claim identified in *Rafaeli*. 2020 PA 256 Enacting Section 3. It sets forth the procedural mechanisms and claim requirements to support the right identified in *Rafaeli* that were missing from the prior statute.

This Court has held that "if a statute or amendment is 'designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good', it will be regarded as remedial in nature." *Rookledge*, 340 Mich at

[4] Before, § 78*l* provided "[a]n action to recover monetary damages under this section shall not be brought more than 2 years after a judgment for foreclosure is entered under section 78k."

453, quoting *In re School Dist No 6, Paris and Wyoming Twps, Kent Co*, 284 Mich 132, 144 (1938). Here, the Legislature addressed just such a grievance when it amended the prior law. Indeed, it called the provisions "curative" and described the law as one to give force and effect to this Court's decision in *Rafaeli*. 2020 PA 256 Enacting Section 3.

This Court has also held that "[s]tatutes which operate in furtherance of a remedy already existing" are considered remedial. *Selk v Detroit Plastic Prods*, 419 Mich 1, 10 (1984). While there was no statutory remedy for this type of claim under the GPTA prior to Public Act 256, as this Court noted in *Rafaeli*,[5] this Court has also held that remedial laws "neither create new rights nor destroy existing rights" and thus "are held to operate retrospectively, unless a contrary legislative intention is manifested." *Selk*, 419 Mich at 10. See also *Frank W. Lunch & Co v Flex Tech Inc*, 463 Mich 578 (2001), quoting *Franks v White Pine Copper Div*, 422 Mich 636, 670 (1985) (superseded by statute) (holding that " '[t]he primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle.' ").

Finally, the Legislature explicitly described its purpose: "to codify and give full effect to the right . . . to any remaining proceeds . . . as recognized . . . in *Rafaeli*":

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[5] "Michigan's statutory scheme under the GPTA does not recognize a former property owner's statutory right to collect these surplus proceeds. Therefore, we must determine whether plaintiffs have a vested property right to these surplus proceeds through some other legal source, such as the common law." *Rafaeli*, 505 Mich at 461–462.

> This amendatory act is curative and is intended to codify and give full effect to the right of a former holder of a legal interest in property to any remaining proceeds resulting from the foreclosure and sale of the property to satisfy delinquent real property taxes under the general property tax act, 1893 PA 206, MCL 211.1 to 211.155, as recognized by the Michigan supreme court in *Rafaeli, LLC v Oakland County*, docket no. 156849, consistent with the legislative findings and intent under section 78 of the general property tax act, 1893 PA 206, MCL 211.78. [Enacting section 3 of Act 256 of 2020.]

The Legislature could not have been clearer in stating its purpose: this law is *the* method that must be used to make these claims.

C. The lower courts erred in holding that Public Act 256 left an opportunity for courts to provide relief outside the requirements of the statute and with regard sales held before July 18, 2020, before this Court ruled on retroactivity.

The trial court held the law's provision leaving for this Court to decide how *Rafaeli* applies, MCL 211.78t(1)(b), meant the law does not apply at all. It served as an unmet condition precedent, allowing the Court of Claims to assert jurisdiction and create its own remedy outside the statute. Independent of the trial court's reasoning, the lower court affirmed the result, holding that those with pending litigation when *Rafaeli* was decided were entitled to proceed in those courts, under those theories, citing *Proctor v Saginaw County Board of Commissioners,* ___ Mich App ___ (January 6, 2022) (slip copy attached as Ex H).

Specifically, the lower court cited another Court of Appeals panel's conclusion "that '[a]pplying MCL 211.78t(1)(b)(i) to deny plaintiffs an avenue for relief under *Rafaeli* would be denying them existing rights.' " *Hathon*, slip at 11, quoting *Proctor* slip at 15. Again, citing *Proctor*, the lower court noted that its sister panel "further concluded that 'our Supreme Court has indicated its intent that *Rafaeli* be

applied to cases in which the parties are similarly situated to the named plaintiffs' claims in these cases.' " *Hathon,* slip at 11, citing *Proctor*, slip at 16.

Under the *Hathon* lower court's reasoning:

> The *Hathon* plaintiffs made their claims and raised and preserved the pertinent issue before the *Rafaeli* decision and before the enactment of 2020 PA 256. Even before the *Rafaeli* decision, the Court of Claims in this case had concluded that the *Hathon* plaintiffs could pursue an action for the taking of their real property. In light of *Proctor*, the Court of Claims properly concluded that PA 256 did not apply to the claims of the *Hathon* plaintiffs and the class as certified. [Slip at 11.]

That ruling is wrong. Regardless of the answer to the *Rafaeli* retroactivity question, there is no doubt the new statute applies to all claims, including those in pending cases and based on sales prior to July 18, 2020 *that do not have a final court order*. Otherwise, the detailed mechanisms and language in § 78t are rendered nugatory. Worse, such a holding requires the illogical conclusion that the Legislature intended inconsistent outcomes across this State rather than consistent application of a standard statewide claims process under its newly passed law that addresses these exact facts and circumstances.

It also presumes that a statute that specifically cites a court decision and provides a process for making claims based on that decision, regardless of when the events giving rise to claim occurred, does not apply. The lower court's reliance on *Proctor* also fails to reconcile the more recent decision in *Schafer v Kent County*, ___ Mich App ___ (September 22, 2022), (slip copy attached as Ex I), which is published and also on application to this Court. *Proctor* and *Schafer* seem to conflict, although no conflict panel was instituted.

And the *Hathon* Court failed to address the fact that Public Act 256 expressly considers the rights of other lienholders by defining "claimants" as "a person with a legal interest in property immediately before the effectiveness of a judgment of foreclosure of the property under section 78k who seeks pursuant to this section recognition of its interest in any remaining proceeds associated with the property." MCL 211.78t(12)(a). The Act does not just address the rights of the property owner who was subject to the foreclosure, but other lienholders. The decision in *Hathon* to allow a certified class action to proceed in the Court of Claims fails to ensure a process that includes all stakeholders. See Issue III below.

Finally, the argument that the new law divests a right is a bogeyman and based on a false premise. The new statute *fills the void* identified in *Rafaeli* by creating a statutory process to claim sale proceeds. To state otherwise conflates the "right" articulated in *Rafaeli*: this Court did not guarantee a specific cause of action. Rather, the *Rafaeli* plaintiffs had a right to post tax-foreclosure sale proceeds. This Court recognized "a property owner's right to collect the surplus proceeds from the tax-foreclosure sale of his or her property," which is *the only* "vested right" addressed in that case. 505 Mich at 471.

The *Rafaeli* plaintiffs' takings claim was valid *because* the law this Court reviewed did not provide any claim mechanism. 505 Mich at 461. Their claim was subject to a final court order before PA 256 was law. Neither is true in this case.

This Court should reject the lower court's rationale and hold that Public Act 256 applies to these and all similar claims pending in courts across Michigan.

II. The property right identified in Rafaeli should be compensable only for sales that occurred after July 17, 2020, when the new rule was articulated, and for the Rafaeli plaintiffs under their final order.

Under Michigan jurisprudence, "the general rule is that judicial decisions are to be given complete retroactive effect" while "complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Lincoln*, 461 Mich at 490–491, quoting *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 189 (1999) (additional citations omitted).

This Court's holding in *Rafaeli* relied, in part, on a common law right dating back to the Magna Carta then connected via aperiodic case law to Michigan's 1963 Constitution. 505 Mich at 462–463. That reasoning would appear to favor retroactive compensation for the property right described in *Rafaeli*. But this Court's thorough historical analysis is the antithesis of obvious, and the statutory language and case law since Public Act 123 of 1999 became law gave the exact opposite guidance.

The plain language of Public Act 123 of 1999, subsequent administration of that tax collection law[6] and related provisions in the taxing statute, and every

[6] Also counting in favor of reasonable reliance on Public Act 123 for nearly two decades is the operation of the law that preceded Public Act 123, which process sold tax liens to private buyers which in turn could be privately foreclosed in actions that also vested for title to the property in the lien buyer for one year worth of unpaid taxes. In that regard, Public Act 123 merely changed the party foreclosing on the tax lien amount to ensure better and more uniform title work, notice, and hearing procedures, and to clear title to real property after tax foreclosure.

known case applying it since 1999 created reasonable reliance by all parties—with no expectation of any right to recovery by former owners—for nearly two decades.[7]

Respectfully, from the perspective of public officials and former property owners, *Rafaeli* represented a sea change in Michigan law. Since 1999, the legal landscape—as harsh as the result may have been in some circumstances—was clear and appeared to be well settled. Courts had consistently upheld the law and its procedures so long as sufficient notice was provided in advance of the foreclosure.

In *Rafaeli*, this Court held for the first time under this law that former owners of foreclosed property have a cognizable and vested property right in surplus proceeds[8] upon sale. *Rafaeli*, 505 Mich at 459. This Court also held that the retention and transfer of such proceeds into the county general fund amounts to a taking in violation of Article 10, § 2 of Michigan's Constitution. *Id*. at 437. But the constitutional provision, itself, did not speak to such rights and the Legislature passed a law it believed comported with the State and federal constitutions.

Arguing that *Rafaeli* should apply with very narrow retroactivity is not an attempt to rewrite history. The foreclosures, sales, and retention of proceeds

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[7] Even this Court, albeit in dicta, seemed to indicate that a law that operated much like a strict foreclosure was within the Legislature's authority to enact. "In cases where the [FGU] complies with the GPTA notice provisions, MCL 211.78k" and its provision depriving the circuit courts of jurisdiction after March 31, "is not problematic." In fact, "MCL 211.78*l provides in such cases a damages remedy that is not constitutionally required*." *In re Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 10 (2007) (emphasis added).

[8] "Surplus proceeds" are the amount of sales proceeds left after the delinquent taxes, penalties, and fees related to the sale and foreclosure of the property. *Rafaeli*, 505 Mich at 462.

occurred. Prospective application of a judicial decision considers whether *relief* for events that occurred before the new ruling should be equitably narrowed.

"In some instances, 'considerations of convenience, of utility, and of the deepest sentiments of justice' militate against the retroactive application of a new rule.' " *Placek v City of Sterling Heights*, 405 Mich 638, 686 (1979) (Coleman, J., Fitzgerald and Ryan, JJ, concurring in part; dissenting in part), quoting Cardozo, The Nature of the Judicial Process, 149 (1921). Thus, "the doctrine of prospective overruling has been forwarded as a judicial tool to promote both stability and development in the law." *Id.* And its application is more about facts and relative equities than pure legal analysis; "the choice between retroactive or prospective application of a new decision depends upon the 'juristic philosophy' of the particular court, regardless of whether 'the subject of the new decision is common law or statute.' " *Id.*, quoting *Great Northern*, 287 US at 365.

This court-applied limitation is "a procedural device which expressly recognizes the legislative nature of the act of overruling prior decisions, and recognizing it proceeds to establish a time from which the new law applies." *Placek*, 405 Mich at 686, Coleman, CJ, concurring in part (additional citations omitted). This Court's decision in *Rafaeli* did not just overrule a prior court decision. It declared a clearly worded statute and every known case applying that law for two decades unconstitutional with little to no foreshadowing.[9]

[9] The closest to "foreshadowing" was *First Nat Bank of Chicago v Dep't of Treasury*, 485 Mich 980 (2009), which affirmed due process was provided but remanded the case to the trial court for consideration of the bank's unaddressed takings claim.

That is not to say the Court's decision is any less correct. But none of the counties, their treasurers or circuit courts, or citizens had reason to believe the law was unconstitutional until 2020, nearly two decades into applying the 1999 law. During that time, the law applied as written statewide, impacting every state and local budget.

The Michigan Court of Appeals' decision in *Rafaeli* cited two separate reasons why there was no constitutional violation. The majority held that this Court's decision (later affirmed by the U.S. Supreme Court) in *Bennis v Michigan,* 516 US 442, 452 (1996) controlled, when it held that there was no right to compensation for "property . . . lawfully acquired under the exercise of governmental authority other than the power of eminent domain," here like in *Bennis* by "forfeiture." *Rafaeli LLC v Oakland Co*, unpublished opinion per curiam of the Court of Appeals, issued October 24, 2017 (Docket No. 330696), p *4 (attached as Ex J). The concurring Court of Appeals' Judge also held that there was no taking, but he relied on *Nelson* and stated that a "ruling of the United States Supreme Court rejecting a constitutional challenge to such statutes appears clear and unequivocal." *Rafaeli LLC v Oakland Co*, unpublished opinion per curiam of the Court of Appeals, issued October 24, 2017 (Docket No. 330696) (Shapiro, J., concurring), p *5. This Court distinguished the "forfeiture" in *Bennis* as a criminal matter, thus inapplicable. *Rafaeli*, 505 Mich at 446–447. This Court distinguished *Nelson* because it did not deal with a state common law right to surplus sales proceeds, which Michigan law does provide, even after Public Act 123 of 1999. *Id*. at 453.

The law questions are now settled. How a new judicial ruling should apply looks to equitable principles, and "there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances." *Placek*, 405 Mich at 665. The "circumstances" this Court must consider are "the involvement of vested property rights 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." *Id*. Here, the right at issue turns on state common law, threaded through disparate decisions thereby silently incorporating the right into the state's constitution, overturning a state statute.

In this scenario, " '[a] state supreme court has unfettered discretion to apply a particular ruling either purely prospectively, purely retroactively, or partially retroactively, limited only "by the juristic philosophy of the judges, their conceptions of law, its origin and nature." ' " *Id*., quoting *Warwick v State ex rel Chance*, 548 P2d 384 (Alaska 1976) in turn quoting *Great Northern*, 287 US at 365. A decision to apply a judicial decision prospectively "is not a matter of law but a determination based on weighing the merits and demerits of each case." *Placek*, 405 Mich at 664.

Generally, "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." *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620 (2006), citing *Wayne Co v Hathcock*, 471 Mich 445, 484 (2004). Yet, this Court has held that some decisions are of such magnitude and so drastically change legal expectations that narrow application is "appropriate" given "exigent circumstances."

Id., citing *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586 (2005). Courts thus consider: (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 v City of Allen Park*, 465 Mich 675, 696–97 (2002). Here, those three factors all weigh in favor of limited retroactive relief, only.

A. *Rafaeli* drastically changed the legal landscape, overturning 20 years of law extinguishing property rights post foreclosure.

The purpose of this Court's ruling in *Rafaeli* was to identify an infirmity in the law so that stakeholders (and ideally the Legislature) could bring practices (ideally the law itself) into constitutional compliance. How this tax collection law works in the greater system of taxation and balanced annual public budgeting matters, too.

In Michigan, property taxes are assessed and collected locally. MCL 211.10(1); MCL 211.45. If a property owner does not timely pay the local village, township, or city treasurer, the law has local governments turn over the delinquent tax roll to the county treasurer for collection so that local operations may continue. See MCL 211.87b. The county pays the local taxing units—not only villages, townships, and cities but every ambulance, library, school, road, veteran, or other taxing authority that levied mills on the property—for the taxes as if timely paid by the property, in rem. *Id.* All those with an interest in the property then have the chance to make payment to avoid foreclosure, and thus losing their interest in the property.

The property (and all its interest holders) is indebted to the county treasurer until those delinquent taxes and fees are paid in full. If the property is foreclosed and sold at auction and the sale amount is insufficient to cover the tax debt that the county already paid to the local taxing units two years prior, there is a "charge back" from the county to the local for any deficiency. MCL 211.87(4).

The "surplus" from prior years' sales was used to offset or eliminate a county's "charge back" to each entity that levied mills. This includes unpaid special assessments, public improvement projects financed via government bonds secured by future tax collections from benefitting properties. See, e.g., MCL 41.271 and MCL 41.288 (sidewalks); MCL 41.411 *et seq*. (storm sewers, street lighting, sewers, waterworks, etc.). Once those improvements are physically built, there is no unwinding the expense retroactively.

To improve stability for municipal finance, ensure due process for delinquent taxpayers, and clear title to tax-foreclosed properties for purchasers, the law was revised in 1999. Delinquent taxes are collected by the county treasurer, and forfeited properties are included in an action brought by the FGU; 77 counties serve as FGU through their own treasurer with the State of Michigan, through its Department of Treasury, acting as FGU in six counties. MCL 211.78(3). The FGU files the petition in circuit court each year and prosecutes the matter to a final judgment in pursuit of the county's tax debts. MCL 211.78h. The circuit court's judgment vests title to forfeited property in the FGU, which later sells the property, and the proceeds are (or were) required to be paid back to the county until its

aggregate tax debt was satisfied for that year's collection proceeding. MCL 211.78k; 211.78m(8).

Rafaeli represented a fundamental change from the plain language of the GPTA and its delinquent property tax collection provisions. Before that, courts consistently upheld the GPTA's tax collection mechanisms. There was nothing putting Treasury, or the other 77 FGUs, on notice that the sales distributions provision was unconstitutional.

There is no doubt *Rafaeli* announced a new principal and invalidated two decades of seemingly lawful practices. The purpose of the new rule is straightforward; "the purpose of taxation is to assess and collect taxes *owed*, not appropriate property *in excess of what is owed*." *Rafaeli*, 505 Mich at 464 (italics in original). Because the statute did not "recognize a former property owner's statutory right to collect these surplus proceeds," this Court sought to do what it had done in the past. *Id.* at 461–462. It acted "to correct a serious error in the interpretation of a statute." *Riley v Northland Geriatric Center,* 431 Mich 632, 646 (1988). The ruling made clear, for the first time since 1999 Public Act 123 became law, that there is a separate right in any remaining sale proceeds after foreclosure, even when due process has been satisfied.

But the *Rafaeli* decision was not the result of the FGUs' misinterpretation of the plain language of the 1999 tax collection law. Rather, it was the result of that law's interplay with Michigan's common law. Until *Rafaeli*, no court had held the two were in conflict. Now, everyone knows and can operate in a manner that

satisfies the statutory purposes of collecting delinquent property taxes, providing for government operations and balanced budgets, and safeguarding the common law and constitutional right that former interest holders retain in anything remaining after the delinquent tax debts are paid. While the purpose of this Court's ruling is clear, it represented a seismic shift by overturning the plain language of the law and all known case law applying it.

Prior to *Rafaeli*, courts consistently upheld the GPTA's foreclosure process so long as the FGU provided sufficient notice, i.e., due process. The result was sometimes harsh, but the process passed muster because due process ensured property owners could pay or appear in court to seek relief. And unlike the New York law in *Nelson,* Michigan's law gave presiding circuit courts equitable authority to safeguard those unable to pay by the statutory deadline. MCL 211.78k(4).

All involved understood that "a statute is presumed to be constitutional unless its unconstitutionality is clearly apparent." *McDougall v Schanz*, 461 Mich 15, 24 (1999), citing *Johnson v Harnischfeger Corp,* 414 Mich 102, 112 (1982). Likewise, "the burden of proving that a statute is unconstitutional is on the party challenging it." *In re Trejo*, 462 Mich 341, 355 (2000). Since 1999, no one had—*other than under a due process challenge*.

Despite its sometimes-harsh results, still no takings challenge like this had been successful since 1999. "A statute is not unconstitutional . . . merely because it is allegedly undesirable, unfair, or unjust." *In re Juvenile Commitment Costs*, 240 Mich App 420, 440 (2000), citing *Doe v Dep't of Social Servs*, 439 Mich 650, 681

(1992). The U.S. Supreme Court recognized the same, holding that "[i]t is contended that this is a harsh statute," describing a New York property tax foreclosure law strikingly similar to Michigan's under Public Act 123, but "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." *Nelson*, 352 US at 110–111.

This Court found such an infirmity by way of common law that was incorporated in the State's 1963 Constitution, although indirectly through historical case law not explicitly in the Constitution's plain language. Having been so incorporated, the right was not subject to legislative abrogation via Public Act 123 of 1999. 505 Mich at 473. Before that, courts consistently upheld this regime focusing on adequacy of notice prior to foreclosure. See, e.g., *Sidun v Wayne*, 481 Mich 503 (2008).

Another example, *Wayne Co Treasurer v Westhaven Manor Ltd Dividend Hous Dev Ass'n,* 265 Mich App 285, 300 (2005) involved foreclosure of a multimillion-dollar property, sold at public auction for $19,000 to collect approximately $404.73 in delinquent special assessments. The circuit court granted post-judgment relief, but the Court of Appeals reversed because the lower court did not first determine whether the interested parties were provided adequate notice, i.e., due process. *Id*. at 289. The Court of Appeals recognized that the GPTA's notice provisions, specifically MCL 211.78i, 211.78j, and 211.78k "are designed to ensure that those with an interest in the property are aware of the foreclosure

proceedings and may take advantage of their redemption rights." *Id*. at 293. The Court declined to address the party's unjust enrichment claim. *Id*. at 299.

In *Wayne Co Treasurer v Perfecting Church*, 478 Mich 1, 8 (2007), this Court held the GPTA unconstitutional if the FGU does not provide adequate notice, but otherwise upheld the law. This Court held that § 78k(6) "provides an appropriate procedure" in a "majority of cases" as:

> This language reflects a clear effort to limit the jurisdiction of [circuit] courts so that judgments of foreclosure may not be modified other than through the limited procedures provided in the GPTA. [*Id*.]
>
> In the majority of cases, this regime provides an appropriate procedure for foreclosing property because the statute requires notices that are consistent with minimum due process standards. [*Id*.]

In short: if adequate notice was provided the sole post-judgment remedy, one for damages under the prior version of § 78*l*, was constitutionally sound and in fact "provides . . . a damages remedy that is not constitutionally required." *Id*. at 10. In *Perfecting Church*, the former owner sought return of the property, not monetary damages, because it *did not* get adequate notice prior to foreclosure. *Id*. But FGUs and property owners were left to believe that if notice satisfied due process, the law was constitutional.

In *Tuscola Co Treasurer v Dupuis*, 317 Mich App 688, 699–700 (2016), the Court of Appeals reversed the circuit court's order granting a former property owner relief from judgment, affirming that absent a notice violation, the circuit court lacked jurisdiction to grant post-judgment relief. The plaintiff had argued the jurisdictional limitation in MCL 211.78k(5)(g) violated the separation of powers doctrine. *Id*. at 701. The Court of Appeals rejected this claim:

> MCL 211.78k(6) reflects a legislative effort to provide finality to foreclosure judgments and to return property to the tax rolls in a swift manner. *Wayne Co Treasurer*, 478 Mich at 4. The [*Wayne*] Court further explained that MCL 211.78k(6) reflects "a clear effort to limit the jurisdiction of courts so that judgments of foreclosure may not be modified other than through the limited procedures provided in the GPTA." *Id*. at 8. The same reasoning applies to MCL 211.78k(5)(g), which requires that the circuit court state in the judgment of foreclosure that the judgment cannot be modified, stayed, or held invalid following expiration of the redemption period. Thus, MCL 211.78k(5)(g) and (6) demonstrate a clear legislative policy reflecting considerations other than judicial dispatch of litigation. *See Estate of Gordon*, 222 Mich App at 153. Accordingly, we conclude that MCL 211.78k(5)(g) and (6) do not violate the separation-of-powers doctrine. [*Id*. at 704.]

The circuit courts' inability to modify, stay, or invalidate its own judgment of foreclosure after March 31 was based on MCL 211.78k, which language was also incorporated in the judgment itself. Both cut off all rights in the property, and thus any proceeds or other derivative claims, if due process was satisfied.

Dupuis, a published decision, echoed myriad unpublished decisions hold that once due process was satisfied and foreclosure was final, no claim existed:

- *Jackson Co Treasurer v Christie*, unpublished per curiam opinion of the Court of Appeals, issued May 11, 2004) (Docket No. 246672) (copy attached as Ex K) ("any failure to comply with the statute would not have authorized the invalidation of the tax foreclosure proceeding").

- *In re Sanilac Co Treasurer*, unpublished per curiam opinion of the Court of Appeals, issued February 11, 2014 (Docket No. 316814) (attached as Ex L) (holding that there was no due process violation for a foreclosed property that sold for approximately $300,000 at auction, in satisfaction of approximately $6,000 in unpaid taxes). This Court denied the property owner's application for leave to appeal. 496 Mich 866 (2014).

- *Breiner v State of Michigan* (Docket No. 322406) (Ex M) (Order denying application for leave to appeal for lack of merit where the former property owners raised takings claims based on the sale price of the property at auction and the amount of tax owed in Branch County).

- *Gardner v Dep't of Treasury, et al* (Docket No. 338548) (Ex N), (former property owners in Clinton County sought post-foreclosure relief from the circuit court in case in which a tax-foreclosed property sold for $91,000 at auction when the redemption amount was approximately $5,400 and the Court of Appeals denied leave).

- *Ingham Co Treasurer v Small*, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2017 (Docket No. 329804) (attached as Ex O), (while the "trial court found that the market value of the property in 2009 was approximately $384,000 and the amount of back taxes owed were $34,000,"the Court of Appeals reversed the grant of relief, holding that " '[w]hen a statute governs resolution of a particular issue, a court lacks the authority to invoke equity in contravention of the statute,' " quoting *Thomas v Dutkavich*, 290 Mich App 393, 413, n 9 (2010).)

Other appellate court decisions, most unpublished, all held that same. If due process was satisfied, the law barred any further attack of a final judgment of foreclosure, regardless of the value of the property or amount it sold for. For the first time, *Rafaeli* opened the courts' doors after foreclosure, regardless of notice, and found a taking despite the language of MCL 211.78k. This seismic change in precedent warrants limited application of *Rafaeli*, providing compensation for sales occurring after the decision and for the *Rafaeli* plaintiffs, only.

B. Each FGU reasonably and extensively relied upon the plain language of MCL 211.78k and the GPTA's other provisions.

Treasury, currently FGU in six counties, and the remaining 77 county treasurers in this State, have all reasonably relied upon the long-standing law that tax foreclosures are in rem proceedings where the land itself, upon being transferred to the FGU, satisfies the delinquent tax debt. This was consistent with the understanding that the tax collection process "is a proceeding *in rem,* against

the land itself" and not against an owner, interest holder, or any other person. See *Smith v Cliffs on the Bay Condominium Ass'n*, 245 Mich App 73, 75 (2011), quoting *Thompson v Auditor General,* 261 Mich 624, 652 (1933).

Although *Rafaeli* held that this has no bearing on the right to surplus, before *Rafaeli* stakeholders understood this to mean that the property satisfied the debt, period. That was true whether the subsequent sale proceeds were sufficient to pay the total liability or if the proceeds were more than enough; turning over the property was payment in full regardless of what happened later. If the GPTA and interpreting case law hinted at any infirmity or confusion as to what was required after a tax foreclosure, then every FGU would have proceeded differently for the last 20 years. This reliance, statewide and for decades, also favors prospective application.

Every known appellate decision and the plain language of the statute supported those actions under Public Act 123. This Court must then consider whether that law and interpreting case law "foster[ed] a reliance interest [and] shaped future . . . conduct." *Grimes v Dep't of Transp*, 475 Mich 72, 88 n 49 (2006) (citations omitted). If "reliance on [overruled case law] during an interim of more than eight years" justifies limited application of a new rule, then twenty years applying the plain language of a statute and case law favors limited application of *Rafaeli*. *Riley v Northland Geriatric Center,* 431 Mich 632, 636 (1988).

And "[t]here is perhaps no area of law in which certainty, clarity, and predictability are more essential than in the realm of property law." *In re Certified*

Question from U.S. Bankruptcy Court of Eastern Dist of Michigan, 477 Mich 1210, 1214 (2006) (Markman, J. dissenting). In terms of important public questions, municipal budgeting and finance cannot be far behind. Tax revenues are "the lifeblood of government," and "their prompt and certain availability [are] an imperious need" in real-time collection, budgeting, and municipal spending. *GM Leasing Corp v US*, 429 US 338, 250 (1977), quoting *Bull v US*, 295 US 247, 259 (1935). Government must know what funds are available before it can responsibly implement a balanced budget each year. Here, even after responsible planning and reliance on the law as written, retroactive damages for fiscal years that are already closed threaten the public fisc statewide. That is especially true for funds used to make bond payments, either for special assessment projects, money to operate the county's delinquent tax revolving fund, or both. See MCL 211.87b; see also *Rafaeli*, 505 Mich at 442 n 14.

A comparison to a U.S. Supreme Court in a case involving the rights of property taxpayers is helpful. In *Cipriano v City of Houma*, 395 US 701, 702, 706 (1969), the U.S. Supreme Court gave only prospective effect to its decision declaring as unconstitutional a Louisiana law that only permitted "property taxpayers" the right to vote on issuance of certain bonds where retroactive application of the opinion would require unwinding municipal bonds that hinged on those elections. *Id*. at 702 and 706. The Court recognized the "[s]ignificant hardships" that would occur for "cities, bondholders, and other connected with municipal utilities" if the decision were given retroactive effect. *Id*. at 706. By making the decision only

prospectively effective, the Court "avoid[ed] the injustice or hardship" that would otherwise result. *Id.* (internal quotation marks omitted).

The State, as FGU, also relied on cases holding that persons can be deprived of property if they are provided due process, as did every other county FGU. In *Nelson v New York*, 351 US 103 (1956), the U.S. Supreme Court held that a city's retention of all the surplus proceeds after tax foreclosure was not a taking:

> What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. *We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.* [*Id.* at 110–111 (emphasis added).]

And *Bennis v Michigan*, 516 US 442 (1996) directly addressed a "takings" claim:

> Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But 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. *The government may not be 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.* [*Id.* at 452 (emphasis added).]

While *Rafaeli* distinguished *Nelson* and *Bennis*, before that, both U.S. Supreme Court decisions supported Treasury's (and other FGU's) understandings and thus actions under Public Act 123. The same is true as to the Court of Appeals' holding in *Rafaeli* and dozens of other cases like it. Again, the *Rafaeli* ruling is not questioned, but it did represent a fundamental change of what appeared to be well-established law.

None of the unpublished decisions above are cited as if they control. The point worth considering, however, is that every county FGU has likely relied on similar results in their own litigation, arising from their own trial courts that never got appealed. If asked, every county FGU would also have a long list of decisions it relied on and would not be able to cite a single decision, prior to *Rafaeli*, that called the sale process in the 1999 into question. Reliance on the law as written was thus thorough, longstanding, reasonable, and statewide.

C. The administration of justice favors prospective application.

The third consideration here is "the effect on the administration of justice." *People v Auer*, 393 Mich 667, 676–677 (1975), quoting *People v Hampton*, 384 Mich 669, 674 (1971). This Court has declined retrospective application when it "would require in many cases new trials with the tremendous obstacle of reassembling now stale evidence." *Auer*, 393 Mich at 677. Here, claims for prior years will the state's circuit courts to decide the relative rights of *each* claimant (as defined in MCL 211.78t(12)), with significant time and expense providing new notices to claimants, substantial court time, and highly individualized proofs for each parcel of property: in short, hundreds of lien priority claims based on aging liens and claims. This would all be in service of unwinding—applying a new rule—litigation results the old law required and that are now well-settled.

Often "the second and third factors can be dealt with together, because the amount of past reliance will often have a profound effect upon the administration of justice." *People v Hampton*, 384 Mich 669, 677 (1971). Thus, a present court's

"correct interpretation of a statute is better given prospective application when retroactive application seriously undermines parties' reliance on the rule of law and disrupts the administration of justice." *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 465 n 6 (2010).

Here, the new pronouncement was less interpretation of the tax law and more recognition that its plain language did not comport with or abrogate common law that had become enmeshed in the constitution, silently.

"Courts have acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley et al v Detroit Bd of Ed*, 431 Mich 632, 643 (1988). And "where there was profound reliance on the old rule, the effect of retroactive application of the new rule on the administration of justice could be marked." *People v Rich*, 397 Mich 399, 403 (1976).

Here, public policy considerations strongly weigh against retroactivity, as each FGU acted in accordance with the plain language of the law and case law applying it. They also budgeted and provided public services in line with those expectations and actions. Respectfully, for nearly two decades, former property owners also believed they knew what the law meant. No one, not even the courts, had reason to doubt the force and effect of Public Act 123 of 1999 based on common law predating its enactment.

As this Court recently affirmed, the reliance on the law as written (both for municipalities and property owners) is significant as "[t]he people of this

state, as well as their public officials, deserve to be able to read and to comprehend their own laws." *In re Certified Questions From U.S. Dist Court, W Dist of Michigan, S Div*, 506 Mich 332, 354 (2020), citing *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284 n 10 (2005). Where "the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts." *Robinson v Detroit*, 462 Mich 439, 467 (2000). And rely the FGU's did, for nearly 20 years.

In *Bolt v City of Lansing*, 459 Mich 152, 154 (1998), this Court held that a city "storm water service charge" was not a fee but a tax that violated the Headlee Amendment. On remand, the Court of Appeals applied this Court's ruling prospectively because prior case law provided a reasonable basis that the ordinance in question was a permissible fee and this Court's decision created a "different analytical framework for distinguishing user fees from a tax, one that perhaps could not have been reasonably anticipated by taxpayers or municipalities." *Bolt v City of Lansing* (on remand), 238 Mich App 37, 48 (1999).

The Court of Appeals further held the decision was a shift in the law:

> Here, the Supreme Court's decision announced a new and unanticipated rule of law concerning a significant public issue of first impression, i.e., whether a charge assessed to property owners to fund a federally mandated project is a user fee, or a tax subject to the Headlee Amendment requirements. The Supreme Court's resolution of this issue differs from case law addressing the user fee/tax inquiry in other contexts. [*Id*. at 45.]

In other words, prospective application was appropriate because a court decision resulted in a new and unanticipated rule of law concerning a significant public issue (impacting both "taxpayers and municipalities") and retroactive

application would have required courts to review prior actions under a new "analytical framework." *Id.* at 47. This Court initially granted leave to appeal from that decision, and the parties briefed and argued the matter. But this Court later vacated the grant, leaving the Court of Appeals' published decision in place. *Bolt v City of Lansing*, 464 Mich 854 (2001).

Here, identifying a post-foreclosure property interest in surplus proceeds, where long standing case law and the GPTA cut off all rights in the property and arising from the property, is a new and unanticipated rule concerning a significant public issue. Few Michigan cases come to mind that reversed nearly 20 years of practice under an unambiguous law. But almost none could have had the reach and repetition of this law, which is applied statewide, every year, and impacts the finances of every municipality. In that regard, this case likely has a greater reach than *Bolt*.

The administration of justice is served where there is an orderly process and procedure for remaining sale proceeds. But the orderly, fair administration of that process should take place going forward in a way that does not impact local taxpayers, municipal budgets for years in the past, or by clogging up courts with new rulings revisiting old rulings under a different analytical framework.

The Legislature is the body best equipped to set a uniform claims process. And it did just that through Public Act 256. This Court should hold that it applies to claims arising (i.e., sales held after) *Rafaeli* was issued.

The Legislature preserved that question for this Court. *Rafaeli* is best applied prospectively to safeguard "fairness" and as a matter of sound "public policy." *Riley*, 431 Mich at 644–645. This Court should hold that *Rafaeli*-based relief is only available for claims that arise after July 17, 2020, and for the lead plaintiffs, being the *Rafaeli* litigants with a final court order.

III. The lower court erred when it affirmed class certification, which is not appropriate given the nature of Public Act 256 and considering the nature of the claims.

This is not a claim for which class certification is appropriate. Public Act 256 provides the mechanism by which these claims are to be adjudicated. The Court of Claims erred in certifying a class here.

A. The claims here are not properly reviewed as a certified class, but rather should be examined as provided by the Legislature in Public Act 256.

The lower court erred when it affirmed class certification for two reasons.

First, it is contrary to the process set by Public Act 256. Thus, the new law controls, and the trial court lacks jurisdiction. But the error runs deeper than that.

Even if the new law does not apply, this matter does not satisfy the class action court rules or caselaw. And it is not a matter of degree or proofs; the case is simply incompatible with class resolution. There are concerns with nearly every requirement of MCR 3.501—each of which must be met. At a fundamental level, this action is simply incongruous with the entire purpose of the class action court rule, its goals, and its procedures.

And even if a class action were appropriate here, the current class definition is both underinclusive and overinclusive. The class purposefully excludes lawful "claimants" under Public Act 256, MCL 211.78t(12) in the form of recorded lienholders, which regardless of that law had property rights prior to foreclosure *senior* to the property "owners" that make up the class (liens, lienors, lienholders as referenced by this Court in *Rafaeli*). To exclude them threatens to decide the distribution of discrete funds in one action, entirely to owners, leaving the FGU to defend against takings claims by senior creditors for the same funds. That may include claims brought under the new statute in a different court. Class actions contemplate, and in fact require, inclusion of all parties to "permit the court to render complete relief." MCR 3.501(A).

Both the trial court and lower court avoided this issue by reasoning that the court need not "consider whether the properties at issue were encumbered by liens," further reasoning that "MCL 211.78k(5)(c) extinguishes all liens upon the issuance of a judgment of foreclosure." *Hathon,* slip op, p 13. This misses the forest for the trees; so, too, were the former "owners" *real* property rights extinguished in foreclosure.

This Court already rejected that reasoning in two ways, holding first that "the vesting of fee simple title to the real property does not extinguish the property owner's right to collect the surplus proceeds of the sale. This is a separate property right that survives the foreclosure process." 505 Mich at 476. The lower court erred when it conflated the stripping of a lien on the real property going forward, as it

relates to the FGU's taking of clear title upon foreclosure (and the subsequent auction buyer's title free and clear of prior owners and liens), with the *separate* right to proceeds that arises by virtue of having had a property right in the moment *prior* to foreclosure.

What is good for the goose is good for the gander. If a former owner's separate property right to claim remaining proceeds survives, based on their rights that existed just before foreclosure, so too must the *senior* rights of recorded lienholders survive. To hold otherwise allows a former owner to use the foreclosure to step to the front of the line in terms of priority, thereby "benefit[ting] from their [own] tax delinquency." *Id* at 483.

Second, albeit more implicitly, this Court rejected the lower court's rationale throughout *Rafaeli*, citing case law that dealt with *all* creditors with perfected interests. See, e.g., 505 Mich at 476, n 111–112, quoting *Armstrong v United States*, 364 US 40, 48 (1960) that "the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done" and thus "the government's "total destruction" of the value of a lienholder's lien against government-held property was an unconstitutional taking." This Court then quoted *Bank of America, NA v First American Title Ins Co*, 499 Mich 74 (2016), in which this Court previously held "[n]o one disputes that the mortgagee is entitled to recover only his debt. Any surplus value belongs to others, namely, the mortgagor *or subsequent lienors*." 505 Mich at 476, n 111. (Italics added.) Lienholders have a

right to claim the proceeds, too, independent of their liens on the underlying real property being extinguished at the same time as the former owner's interest.

But correcting that error by bringing those lienholder claimants into the class makes resolution impractical at best, and likely impossible. The parties become competing adversarial claimants. This is not a generalized pot of damages to be split up among members of a class of generally injured plaintiffs, like asbestos or tobacco litigation; here each "claim" is related to the sale of a specific property and the resulting discrete proceeds. There are often multiple potential claimants (joint owners, lien holders, etc.) entitled to vie for those funds.

Because they are competing, they cannot be represented by the same counsel. Because each parcel, its resulting proceeds, and its interest holders prior to tax foreclosure are factually unique, resolving one property's proceeds does nothing to advance a "class" of likewise unique properties, proceeds, and claimants. There is no advantage to pulling six or more counties worth of properties, covering multiple tax years and sales, into one action when each parcel sale and resulting claimants will have to be individually litigated with separate representation for each competing claimant.

At the same time, the current class includes sales occurring in late 2020, 2021, and at this point 2022, all of which post-date the "conditional" language in PA 256. In short: there is no doubt that the new law *must* control claims arising after the law was enacted which claims may only be brought in the circuit court that adjudicated the underlying foreclosure, via motions filed by individual

claimants in the existing case, as provided in MCL 211.78t(4). To include those foreclosed properties in this case is overinclusive and contrary to law.

B. The lower court's reasoning in certifying a class is not supported in law.

Under Michigan's class action rule and case law, Plaintiffs have the burden to show that a class action is not only appropriate, but superior to all other methods of resolution. *Tinman v Blue Cross & BlueShield of Michigan*, 264 Mich App 546, 562 (2004). That burden includes meeting "*all* the requirements in MCR 3.501(A)(1); a case cannot proceed as a class action when it satisfies only some, or even most, of these factors." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597 (2002) (italics in original). Those requirements are:

> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> > (a) the class is so numerous that joinder of all members is impracticable;
> >
> > (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> >
> > (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> >
> > (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
> >
> > (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

Here, the lower court erred in certifying a class action, and further erred in defining a class that is underinclusive (omitting lienholders) and overinclusive (including 2020 and later years' sales).

1. The class excludes lawful claimants while including tax years that unquestionably fall under Public Act 256.

The lower court erred when it held that the Court of Claims properly certified a class because Plaintiffs fail to satisfy the requirements of MCR 3.501.

Numerosity and Commonality

First, there are no common issues of fact or law left to adjudicate; *Rafaeli* decided the only common legal question, and what remains are individualized inquiries specific to each foreclosed property, the proceeds from that property's sale, and priority as amongst any claimants to those specific proceeds.

Second, the class currently omits an entire group of claimants: lienholders whose interests were senior to the "owners" at the time of the foreclosure. In arriving at its holding regarding vested property rights that survive tax foreclosure, *Rafaeli* cited and relied on caselaw recognizing liens, lienors, and lienholder rights. See 505 Mich at 476 n 112 discussing rights of lienors as discussed in *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 91 (2016); see also 505 Mich at 476 n 111 citing *Armstrong v United States*, 364 US 40, 48 (1960), holding "that the government's 'total destruction' of the value of a lienholder's lien against government-held property was an unconstitutional taking."

The Legislature also recognized lienholders' rights when it drafted PA 256. In MCL 211.78t(12), the Legislature defined a "claimant" as "a person with a legal interest in property immediately before the effectiveness of a judgment of foreclosure of the property under section 78k who seeks pursuant to this section recognition of its interest in any remaining proceeds associated with the property."

By excluding lienholders, the lower courts applied a standard other than that required by law, inconsistent with the principles set forth in *Rafaeli*, and exposed Appellant to potential future litigation for disbursing funds to a junior lienholder. But at a more fundamental level, leaving lienholders out is not equitable and does not provide complete relief through this litigation as contemplated by MCR 3.501.

Yet, to include those lienholders in this class action would show the fundamental problem with trying to force this matter into a class-action mold. If the claimant class (see MCL 211.78t(12) defining claimants) were corrected to include lienholders, the class members would be internally adverse to each other on a parcel-by-parcel basis. See, e.g., MCR 3.501(A)(2)(a).

By way of example, each parcel subject to tax foreclosure may have three, four, or more interest holders entitled to notice because they have a record interest in the property. See MCL 211.78i(1). When a tax-foreclosed property later sells for more than the aggregate debt, each of those noticed parties is a likely claimant for the finite funds arising from that sold parcel. MCL 211.78t(12). Those claimants are all vying for the same finite funds, based on priority or other legal claims. Those adverse, competing claimants cannot be represented by the same legal

counsel. And once a court adjudicates how the funds from one sold parcel should be distributed as amongst all claimants to those funds, that decision will have no bearing on the remaining parcels' claims. MCR 3.501(A)(1)(b) "prescribes that, to certify a class action, there must be common questions of law or fact that predominate over individual questions." *A&M*, 252 Mich App at 582. In short: the rule and resulting process are intended to promote efficiency and economic use of judicial resources. See *American Pipe & Const Co v Utah*, 414 US 538, 553 (1974) ("[T]he efficiency and economy of litigation is a principal purpose of the [class action litigation] procedure.")

For a class action to be of benefit, there must be predominate common questions and proofs that allow for improved efficiency such that "'resolution'" of those common questions via common proofs "'will advance the litigation.'" *Tinman*, 264 Mich App at 565, quoting *Sprague v General Motors Corp*, 133 F3d 388, 397 (6th Cir 1998). Because the burden of establishing commonality is "allocated to the party moving for class certification," that party also has the burden "to find a method of common proof." *A&M*, 252 Mich App at 631–32.

Here, there is no common question of law after *Rafaeli*, and there can be no common proof because each sum of money from each sold parcel will turn on each claimant's competing property interest in the sold parcel; deeds, liens, contracts, and other claims of an interest in the property will have to be considered property by property, claim by claim. See, e.g., the process outlined in MCL 211.78t(9).

Moreover, there is no economic advantage to litigating via class action. "The superiority and commonality requirements are related because 'if individual questions of fact predominate over common questions, the case will be unmanageable as a class action.' " *Duskin v Dep't of Human Services*, 304 Mich App 645, 658 (2014), quoting *Zine v Chrysler Corp*, 236 Mich App 261, 289 n 14 (1999). In this instance a class action is disadvantageous and far inferior to PA 256.

Typicality, Representation, and Maintenance

Nor have the named Plaintiffs shown typicality. "Typicality is concerned with whether the claims of the named representatives 'have the same essential characteristics of the claims of the class at large.' " *Duskin*, 304 Mich App 645 (2014), quoting *Neal v James,* 252 Mich App 12, 21 (2002) overruled in part on other grounds by *Henry v Dow Chemical Co,* 484 Mich 483, 505 n 39 (2009). Using the same type of example as above, if a foreclosed and sold parcel had only one owner and no liens, the resolution of where surplus funds should go is straightforward.

But resolving *that* parcel's fund distribution (based on the number and priority of the claimants relative to that parcel) does nothing to resolve some other parcel's proceeds and claims that may have multiple owners and lienholders, and a different priority analysis, all vying for the same finite sale proceeds. That, under the law, is a matter of priority for the circuit court to decide parcel by parcel, claim by claim. MCL 211.78t(8)–(9). For the same reason, there is no way that a claim to a specific parcel's proceeds can show typicality under MCR 3.501; there can be no "typical" claim because each claim is factually unique based on the liens, owners,

and their relative priority. The lower court erred when it summarily considered lienholders' interests as eliminated by focusing on the *real* property *after* foreclosure and not the property right in proceeds which turns on interests in the real property *before* foreclosure. The lower court wrongly reasoned that "MCL 211.78k(5)(c) extinguishes all liens upon the issuance of a judgment of foreclosure," thus the court need not "consider whether the properties at issue were encumbered by liens" at the instant preceding tax foreclosure. *Hathon*, slip op p 13.

Plaintiffs have not shown that their specific ownership interests vis-à-vis competing lienholders' claims are typical of the class, or that any set of claims for any specific parcel could be "typical" of any other set of facts and claims for a different parcel such that class resolution improves judicial economy.

Because of these individualized issues relative to ownership and priority, this case cannot be resolved through simple math, use of a spreadsheet, or by deciding one test case and applying some derived rule from that parcel to all other claims. This involves questions of priority between competing claimants *parcel-by-parcel*. For that reason, class resolution is not viable, much less superior to other options. See *Duskin*, 304 Mich App 645 (2014) (individualized inquiries among class members meant that the superiority element was also not satisfied); see also *Tinman*, 264 Mich App at 565 discussing medical claims turning on "services provided . . . signs and symptoms . . . and whether payment was denied for services . . . will vary from patient to patient."

Relatedly, there are no remaining common questions of law or fact. While "almost any set of claims can be said to display commonality" it is likewise true that "'not every common question that will suffice.'" *Tinman*, 264 Mich App at 563, quoting *Sprague*, 133 F3d at 397. *Rafaeli* resolved the common legal questions, leaving only individualized claims to finite proceeds property by property.

Finally, the lower court affirmed the trial court's certification and class definition which included 2020 and subsequent years' sales in the class. (*Hathon* slip at 12; Ex B, p 9.) Those sales and any related claims for proceeds, without question, must be brought in the State's circuit courts under the requirements of MCL 211.78t(2) and § 78t(4). Roping those claims into this action has only caused confusion and delay; dozens of claims are sitting in the state's circuit courts in counties where the State is FGU, because the lower court has asserted jurisdiction over the claims and held that PA 256 does not apply.

Even if the lower court is correct that PA 256 does not apply to sales from before the law was enacted, that has no relevance to sales occurring after July 17, 2020. The lower court's reference to "a decertification of the class on the basis of *Rafaeli* . . . penalize[ing] class members who would then have to file individual actions that would be newly subject to the notice requirements of MCL 600.6431," is likewise irrelevant here.

To begin, that analysis relies on equity to overcome clear statutory requirements under PA 256, contrary to Michigan law. See, e.g., *Stokes v Millen Roofing Co*, 466 Mich 660 (2002); see also *Martin v Secretary of State*, 482 Mich 956

(2008), wherein this Court "in lieu of granting leave to appeal" reversed "the judgments of the Court of Appeals and the Ingham Circuit Court for the reasons stated in the Court of Appeals dissenting opinion" regarding the "trial court's application of equity." The adopted Court of Appeals' dissent reasoned that "equity only applies in the absence of a specific statutory mandate." See *Stokes v Millen Roofing Co,* 466 Mich 660, 672 (2002). *Martin v Secretary of State,* 280 Mich App 417, 438 (2008). " 'It is not [a court's] place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.' " *Id.,* quoting *Stokes*, 466 Mich at 672. The lower court implies that the ends justify the means, shoehorning litigants into a class litigation that simply does not fit to avoid application of a controlling statute.

Finally, the lower court cited the Court of Claims notice of intent requirement in MCL 600.6431 as a further burden litigants would not be able to meet if the class was decertified. That provision would not apply; under Public Act 256 claims must be filed in the underlying circuit court action. And these hypothetical concerns "have not . . . been briefed on appeal." *Hathon,* slip op, p 13, n 7.

2. Public Act 256 controls and provides for individualized claims filed as motions in existing circuit court actions.

Under Public Act 256 of 2020, claims for excess proceeds must be brought in the State's circuit courts, not in the Court of Claims. MCL 211.78t(4), (6). And, because they must be filed within the existing circuit court case in which the property was foreclosed, these claims do not run afoul of the Court of Claims Act. As the "petitioner" in the underlying foreclosure action, the State Treasurer acting

as FGU is the moving party on behalf of the county's funds under MCL 211.78h. The Legislature has granted exclusive jurisdiction to hear the claims arising out of that foreclosure action to that same circuit court, within the same case. *Id.*

This case was filed as an original action, as a putative class action, and in the Michigan Court of Claims. None of that is allowed under 2020 PA 256. The lower court erred in affirming the trial court's decision that PA 256 simply does not apply; it was wrong when it held the law does not apply to older sales (those before July 18, 2020) or to claims that arose fully after the new law was enacted. But for this litigation, the later claims would be immediately justiciable in the state's circuit courts.

CONCLUSION AND RELIEF REQUESTED

The State of Michigan asks that this Court grant its application for leave to appeal and hold that Public Act 256 of 2020 applies to these and all similar claims; that as a result the court of claims lacks jurisdiction; that this Court's holding in *Rafaeli* is appropriate for narrow retroactive application such that only the *Rafaeli* litigants and their final order from this Court may be compensated for sales held prior to July 18, 2020; that even if Public Act 256 does not control, resolution via class action is not appropriate here, decertifying the class; and that even if it were appropriate, the class is currently underinclusive by omitting lienholder claimants and overinclusive by including claimants for sales held in 2020 and later years.

Respectfully submitted,

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WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.305(A)(1) and 7.212(B) because, excluding the part of the document exempted, this **application for leave to appeal** contains no more than 16,000 words. This document contains 15,470 words.

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