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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. 165219

Court of Appeals No. 356850

Michigan Court of Claims No. 19-000023-MZ

REPLY BRIEF OF APPELLANT STATE OF MICHIGAN

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INTRODUCTION

Plaintiffs urge this Court not to "second guess" the trial court's decision or to "revisit[]" the Court of Appeals' published decision. This interlocutory application addresses legal, not factual, determinations. The question, then, is if the legal questions are novel and have statewide implications, meriting further review. Whether a law enacted as the exclusive avenue to resolve these exact situations, statewide, applies at all qualifies for such review.

Plaintiffs do little to push back on the importance of this case or its statewide impact. Their arguments are at times inconsistent; Plaintiffs dispute the State's statute of limitations argument but also dispute the trial court's decision, all but admitting the answer is not well-established.

The reality is, this case is significant for the entire state and will shape how property tax collection laws work, or do not work, for years to come. This is *the* Court best situated under our system of federalism to interpret Michigan property and tax laws. It is also *the* Court best equipped to decide proper application of its own prior decisions, like *Rafaeli*. And the Legislature expressly identified this Court as the one to answer the question of retroactivity. The Court should grant this application.

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ARGUMENT

I. Public Act 256 of 2020 applies to all claims arising from tax foreclosure and sale; it cannot apply to some and not others.

The Court of Appeals has held both an original action asserting a taking, here as a class action (seeking sale proceeds) and claims under Public Act 256 brought in circuit court (for sale proceeds) can exist simultaneously. "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." *Hathon*, Slip at 11, citing *Proctor v Saginaw*, 340 Mich App 1 (2020). But *Proctor* held that unnamed putative class members and "their still-to-be-made claims" were not in a class, but "should be subject, instead, to the requirements of 2020 PA 256." *Proctor*, 340 Mich App at 39.

The latter makes sense; "the Michigan Legislature has now adopted a specific procedure for a person to claim surplus proceeds under the GPTA. The Legislature has expressed its clear intent as to how claims for surplus proceeds must be made." *Id.* And generally, class members have the right to opt out, here to use Public Act 256. But if that law is available to some claimants, including class opt outs, it must be required for all. Two trial courts cannot decide competing claims for one sum of money.

Yet, as it stands, each potential claimant may choose the method and court to proceed in. *Id.* Plaintiffs merely cite this as being correct or even necessary, asserting that to hold otherwise deprives some vested right. Pl's Br. at 1 *Id.* But case law makes these conclusory statements look doubtful. See, e.g., *Dix v Am Bankers Life Assur Co of Fla*, 429 Mich 410, 420, (1987). Holding that "class actions

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may be maintained in the circuit court, and only in the circuit court, without regard to the amount in controversy, provided the other requirements for maintenance of a class action are satisfied." And the Legislature has provided otherwise, affirming the right, and requiring claims be resolved under MCL 211.78t; a law that by its very existence negates Plaintiffs' argument that this class action, is born of necessity, i.e., the only option.

The opposite is true; under § 78*l* "an action to recover any proceeds from the sale . . . of property foreclosed for nonpayment of . . . taxes . . . must be brought as provided under [MCL 211.78t]." The Legislature further provided § 78t is the "exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state." MCL 211.78t(11).

The statute is not *an option* among several, it is *the* exclusive method to make the claims raised here. The Court of Appeals did not strike down the statute, it merely sidestepped the exclusivity language. Plaintiffs' assertion that the State has argued sales held more than two years ago are already untimely under the two-year statute of limitations, Pl's Br. at 13, misses MCL 211.78t(6), providing for claims within 180 days of a decision by this Court holding that such sales are compensable. Plaintiffs' counsel has also argued for tolling in myriad other cases filed in state and federal courts, but here seeks to strike down the law entirely based on one provision. How the two-year statute of limitations applies during an interim period is no grounds to ignore the statute entirely. Here, the lower courts already applied a shorter one-year limit, with no cross appeal.

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Equally troubling, only former "owners" are class members in this case, while lienholders and co-owners may proceed in circuit court for the same funds. A "claimant" is a person that had an interest in real property immediately before tax foreclosure. MCL 211.78t(12)(a). That includes lienholders, and other joint owners. Once the claim period ends, circuit courts decide the priority of each claimant's interest, ordering disbursement. MCL 211.78t(9).

Allowing venue and cause of action options claimant by claimant is untenable, and contrary to law. Plaintiffs cite case law in traditional tort-like cases that work under class action procedures: " '[P]ersons left out of the class definition remain[] free to assert their rights as they s[ee] fit.' " Br. at 45 quoting *In re Syngenta AG MIR 162 Corn Litig*, unpublished opinion of the United States District Court for Kansas, issued April 3, 2020 (Case No. 14-MD-2591-JWL). The cited case is not binding here, nor even on point factually or under this state law.

But at a more basic level, this is not some boundless, untethered personal injury case. There is a sum certain for each sold parcel, and adjudication is zero sum; once distributed, there is no subsequent *asserting of rights*.

Plaintiffs brush this off, along with this Court's admonition that tax foreclosure cannot be used by a delinquent taxpayer to their own benefit[1] in pursuit of a particular cause of action (a taking) and procedural mechanism (a class action). The "owners" thus attempt to wash liens from a property through tax foreclosure,

[1]Plaintiffs cannot so misuse the tax law to "benefit from their [own] tax delinquency." *Rafaeli*, 505 Mich at 483.

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then step to the front of the line for any sale proceeds. The trial court agreed with Plaintiffs, holding "owners" interests survived foreclosure for purposes of proceeds but lienholders were eliminated. (Ex A, COC 6/7/19 Op and Order p 8.) That does not square with *Rafaeli's* reasoning. True, all *real* property rights are extinguished by foreclosure. But the right to seek proceeds arises from having had an interest in the real property before foreclosure; like "owners," lienholders had a property right before tax foreclosure that must allow them to seek proceeds after a sale.

The current state of the law is uncertain, offering litigation options in conflict with the statute, and which practicality does not afford; some claimants may currently proceed in one court and others in a different court, all competing for finite funds arising from a specific sold property. That might work in a typical tort case with unknown or boundless damages. But that is not the stance, here. Two courts cannot decide the same claims arising out of the same transaction or occurrence, between the same parties, each court purporting to fully adjudicate rights to discrete proceeds.

Undercutting the Legislature's curative efforts, Plaintiffs argue the Legislature cannot pass laws to avoid a taking. See, e.g., Pl's Br. at 19–20. That presumes the predicate—that is, Plaintiffs assume tax foreclosure itself is a taking. That is wrong; "the [statute's] failure to provide the divested property owner an avenue for recovering the surplus proceeds" resulted in a taking of the *Rafaeli* plaintiffs' proceeds, but the real property foreclosure was not a taking. (*Rafaeli*, 505 Mich at 461.)

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The curative law creates such an "avenue," avoiding a taking in the first instance. That is especially true for sales held after the new law was enacted, which proceeds (and potential claimants) Plaintiffs vigorously argue should be part of this class action. Plaintiffs' references to *Knick v Twp of Scott,* 139 S Ct 2162 (2019), and similar cases addressing remedies after a taking, do nothing to advance that argument when no taking occurs under the present statute.

II. Class litigation does not work here.

Plaintiffs barely address how class action litigation is more efficient here, instead repeating that to resolve any other way would divest a right to litigate in a specific manner, and by repeating that lienholders are irrelevant. Both arguments lack merit, and proceeding in a class action is problematic, if not impermissible.

In fact, the same dissenting jurist in *Wayside*, Hon. Judge Kethledge, whom Plaintiffs cite for the foreseeability of the *Rafaeli* decision, recently heard oral argument in a Michigan tax case, observing:

> I guess the concern I have with [class] certification, you know? Having worked on the *Hall* case is twofold. The first concern … defenses that might be particularly for individuals where you look at *Hall* [*v. Meisner*, 51 F.4th 185 (6th Cir. 2022)]. That case, actually came to us with I think eight plaintiff-appellants and if you look at the published opinion, only four are a part of the published opinion. And there's an unpublished opinion where there's another four or five who had the same thing happen to them, but they all lost their cases because either there was a *res judicata* bar or there is a time bar. It is all very particularized. Very fact bound, which is kind of why it was an unpublished opinion. So just looking at the question first of affirmative, you know defenses is why … why … let me just step back a little further. I mean, why shouldn't the District Court have to address some of those [individualized fact and defense] questions specifically? You know, like why is it that the Court's liability issue

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> predominates? Notwithstanding, at least you know if you look at *Hall*'s small sample size, but half of the plaintiffs fall out. I'm really, trust me, really individualized grounds it took a while to deal with, so why … why is it so obvious that we don't have to do more of a rigorous analysis here [regarding certification criteria], why so obvious that the core issue predominates over those kinds of issues?
>
> [*Fox v Saginaw Cnty*, 6th Cir Oral Arg Tr at 11–12, Ex B.]

The observations are true here as well. Aside from the common legal question *Rafaeli* already answered (and the Legislature buttressed), as Judge Kethledge notes, these disputes turn on individualized claims, defenses, and facts with little commonality to extrapolate or promote efficiency.

Finally, the class is open-ended; February, 2023, hearings that will result in foreclosure and sales weeks and months from now, are arguably on the cusp of class membership. Those sales' claims must proceed under Public Act 256. The exclusivity language either applies, or it does not; it is not optional.

III. Plaintiffs misapprehend certain facts and the relevance of certain legal and equitable considerations to the issues raised here.

Plaintiffs' response misapprehends certain facts and legal concepts. Few of the assertions are dispositive or even relevant to this application. But in aggregate they paint an incomplete or inaccurate narrative, requiring clarification.

A. The properties in this case all sold. Plaintiffs' references to "equity" conflate the issues before this Court.

Plaintiffs repeatedly reference "equity," a "fair market value" damages argument. But the complaint and class definition include only sold properties. What might be called "equity" before sale is no longer hypothetical; once sold it is

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fully realized as a sum certain. There is no cross appeal on an "equity" damages theory, and mere repetition cannot flog the argument back to life.

The lack of a cross appeal is not surprising, as this Court already rejected the "equity" damages theory. "We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties…." *Rafaeli LLC v Oakland County*, 505 Mich 429, 483. It is also inconsistent with U.S. Supreme Court precedent on the validity of distressed sales for collection purposes. (See *BFP v Resolution Trust Corp*, 511 US 531, 538–539 (1994), holding that "Market value cannot be the criterion of equivalence in the foreclosure-sale context," since " 'the market value of ... a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner.' ") This makes sense; an owner cannot refuse to pay taxes, force foreclosure for collection, then dispute the result of a statutory public sale.

If Plaintiffs wanted to control the terms of a sale, they could have appeared at the circuit court hearing *before* foreclosure and sought time to complete a sale on their own terms. MCL 211.78k. Ms. Hathon did not do that. In this circumstance, "it is no more realistic to ignore . . . (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station)." *Id.* at 549. "Absent a clear statutory requirement to the contrary," the US Supreme Court has held that courts "must

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assume the validity of this state-law regulatory background and take due account of its effect;" i.e., if the state law provides for public sale and that process is followed, the result is presumed good value for purposes of debt collection. *Id.* at 539.

Undeterred, Plaintiffs argue the FGU, "instead of selling the property for its fair market value or even a close approximation," sold it for "about 40% of its fair market value." Pl's Br. at 2. The implication: the State sold the property for less than it could have. Yet, Plaintiffs simultaneously allege "the state kept [all the proceeds from the sale] too." *Id.* That is inconsistent with the record and simply not accurate. It also argues conflicting narratives; did the state greedily keep as much money as possible, or did it sell the property for less than it could have?

In attempted support of the "equity" argument, Plaintiffs cite language from a 6th Circuit Court of Appeals case in which *there was no public sale.* Pl's Br. at 5, quoting *Hall v Meisner,* 51 F4th 185 (6th Cir 2022). In *Hall* the County transferred tax foreclosed properties under the statutory right of first refusal, without public auction. See MCL 211.78m. Here, *only* sold properties are at issue. Still, the *Hall* Court cited decades of case law establishing if there is a sale *the sale price* is the best measure of the property's value. See *Hall,* 51 F4th at 194.

Plaintiffs export meaning from *Hall* that is simply not there. Rather, *Hall* cited "long-settled principles," under which "the debtor would then be entitled to any surplus proceeds from the sale, which [sale] represented the value of the equitable title thus extinguished." *Id.* To argue the term "equity" has any other

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meaning under these facts, in a case involving only properties that were sold and resulted in proceeds above the debt, is inconsistent with factual and legal realities.

B. Foreseeability matters when considering reliance on the law as written, for years, by every FGU in this State.

Plaintiffs assert that it does not matter whether the *Rafaeli* decision was expected. E.g., Pl's Br. at 1. Yet it does matter; degree of reliance on an old rule is part of the *Pohutski* test. Hedging, Plaintiffs assert the *Rafaeli* ruling was foreseeable, citing a dissenting opinion in a federal case. Pl's Br. at 22, n 24.

That dissent came in a published dismissal of a takings claim, like *Rafaeli*, for lack of federal jurisdiction. *Wayside Church v Van Buren Co*, 847 F3d 812 (2017). It was nearly three years later, in *Freed v Thomas*, 976 F3d 729 (2020), that the 6th Circuit first held Michigan's statute was infirm. The *Freed* ruling came *after* (and cited) *Rafaeli*. *Id.* at 736.

C. The State did not retain all the sales proceeds, nor did the amount Hathon owed deviate from what the statute required.

Plaintiffs allege Treasury kept all of the sale proceeds when it acted as FGU. Pl's Br. at 2. It is irrelevant to this application, and only supports a non-legal narrative intended to ascribe bad or greedy intent. It is not only wasted effort, but also wrong. When the State Treasurer acted as FGU for a county, the collected funds remained debts owed to the county. See MCL 211.44(1); MCL 211.78g(1); MCL 211.87(4)–(5); MCL 211.87f(3). If the full debt was not collected after foreclosure and sale, each local taxing authority remained responsible *to the county*

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for the shortfall, via charge back. MCL 211.87(4). The State Treasurer distributed proceeds first, and almost entirely, back to the counties. (Ex C, 4/17/19 Affidavit.)

Plaintiffs also assert the Hathon parcel's debt was only $1,839.49, which "ballooned to roughly $5,200" by the time of sale. Pl's Br. at 2. Again, that is irrelevant to this application and presents as an airing of grievances with the statute. But it also misapprehends the facts and law. The Hathon parcel had unpaid 2015 local property taxes of roughly $1,840, listed in the 2017 circuit court petition. See MCL 211.78h. The February 9, 2018, judgment addressed unpaid 2015 taxes and set a redemption deadline of April 2, 2018. (Ex D, 2/9/18 Judgment.)

In the meantime, the 2016–17 property taxes were unpaid, and after foreclosure the total debt sets the starting auction bid. MCL 211.78m. Plaintiffs' reference to $5,200 is that minimum bid. *Id.* These briefing missteps all center on framing; painting a picture of property tax foreclosure and sale that is irrelevant to the questions on application. Yet, if raised, they should accurately reflect what the law requires, what the record shows, and what actually happened.

What is at issue here comes after the notices, extended time to pay or object, and even after sale. The question is, what now? Does the law enacted to address these exact scenarios control? Is its exclusivity language effective, or optional? Regardless, is this appropriate for class action resolution? Are certain older sales compensable under this Court's *Rafaeli* decision? This Court is best situated to provide guidance, which is sorely needed not only in this case, but statewide.

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CONCLUSION AND RELIEF REQUESTED

This application raises important questions that need to be resolved. There are other similar cases pending on application, but no other case can answer the class action questions posed here, and none involves jurisdictional disputes between the Court of Claims and the State's circuit courts. This Court should grant the application for leave to appeal and provide statewide guidance.

Respectfully submitted,

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WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rule 7.305(E) because, excluding the part of the document exempted, this **reply brief at the application stage** contains no more than 3,200 words. This document contains 3,165 words.

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