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STATE OF MICHIGAN
IN THE SUPREME COURT

LYNETTE HATHON and AMY JO DENKINS, and all those similarly situated in the Counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch Counties
Plaintiffs/ Appellees

v.

STATE OF MICHIGAN
Defendant/ Appellant
/

Supreme Court Case No.: 165219
Court of Appeals Case No.: 356850
Court of Claims Case No.: 19-000023-MZ

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THE *HATHON* CERTIFIED CLASS'S
ANSWER TO THE STATE OF MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

*** ASSOCIATED WITH MSC CASE NO. 163003 ****

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STATEMENT IDENTIFYING THE ORDER APPEALED AND THE DATE OF ITS ENTRY

The Appellee Class does not dispute the Appellant State's statement identifying the order appealed from and the date of its entry.

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STATEMENT OF JURISDICTION

The Appellee Class does not dispute the Appellant State's statement of jurisdiction.

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COUNTER-STATEMENT OF QUESTION(S) PRESENTED

1. **Did the Court of Appeals correctly hold that PA 256 does not preclude class certification or otherwise interfere with the Class Members' claims?**

   Appellant's Answer: No.

   Appellees' Answer: Yes.

   Trial Court's Answer: Yes.

   Court of Appeals' Answer: Yes.

   This Court Should Answer: Yes.

2. **Should this Court's holding in *Rafaeli* have a retroactive effect when determining a takings claim?**

   Appellant's Answer: No.

   Appellees' Answer: Yes.

   Trial Court's Answer: Yes.

   Court of Appeals' Answer: Yes.

   This Court Should Answer: Yes.

3. **Did the Court of Claims properly certify this matter as a class action?**

   Appellant's Answer: No.

   Appellees' Answer: Yes.

   Trial Court's Answer: Yes.

   Court of Appeals' Answer: Yes.

   This Court Should Answer: Yes.

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INTRODUCTION

This Court unanimously found that Oakland County, like the State of Michigan here, illegally took the Class Members' property. *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020). Specifically, in *Rafaeli*, all nine justices agreed: when a tax foreclosed property is worth more than its tax debt, but a government such as Appellant take the entire value of the foreclosed property to satisfy the tax debt, that government commits an unconstitutional taking.

The State responds that, acting through its legislature, it has managed to retroactively immunize itself from its unconstitutional takings. Yet the government committed an unquestioned taking. Having done so, it cannot rewrite the law instead of paying the compensation due. The State's arguments on this issue do not merit revisiting the Court of Appeals' conclusions.

The State also claims that it should be excused for its unconstitutional takings because it did not expect this Court's *Rafaeli* decision. But the decision was well-founded, and it clearly applies retroactively. Again, this is no reason to revisit the Court of Appeals' decision.

Appellant also asks this Court to second-guess the Court of Claims' decision to certify this case as a class action. But this Court should not deprive the Class Members of their best – and, for many of them, their only – opportunity to vindicate their constitutional rights.

STATEMENT OF FACTS

Under Michigan's General Property Tax Act (the "GPTA"), unpaid property taxes are collected by a "foreclosing governmental unit" (the "FGU"). MCL 211.78 *et seq*. Usually, the local county serves as FGU. But eight counties – Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch – declined to do so and accepted the State's invitation to serve in that role. (App p 7). These are known as the "opt-out" counties. For them, the State continued to serve as the FGU due to these counties' decision not to opt-in. MCL 211.78(3)-(6). The State, as the FGU, proceeded to foreclose on properties with unpaid tax debts and sell the foreclosed

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properties at auction. (App p 8). When it did so, it kept the entire amount of the auction proceeds, even if they vastly exceeded the tax debt owed; it never returned any of the surplus to the foreclosed property owners or in any way accounted to them for the difference between the values of their properties and the taxes owed. (App p 8).

Plaintiffs Lynette Hathon and Amy Jo Denkins are the class representatives. They were the owners of residential property at 835 Michigan Avenue in Owosso, which is in Shiawassee County (an opt-out county). (App p 7). Their property tax debt was only $1,839.49. During the pre-foreclosure process, the total tax delinquency owed and due—which includes the past due tax owed plus additionally imposed compounding interest, fees, penalties, and costs—ballooned to roughly $5,200.00. (App p 7).

The State seized ownership of their property via a statutory *in-rem* civil forfeiture. However, that property had a fair market value of at least $66,600 as determined by the government's own selected assessors. (App p 7). Instead of selling the property for its fair market value or even a close approximation, the State sold the Michigan Avenue property at tax auction for only $28,250, which was about 40% of its fair market value. (App p 7). From the auction proceeds, the $5,200 in taxes-plus-penalties were paid in full, leaving a remaining proceeds surplus of $23,050. The State kept that too.

In short, to pay off an outstanding debt of about $5,000, the State seized Plaintiffs' $66,600 in equity, cashed out the property to only 40% of its value, and then kept the surplus auction proceeds of $23,147.46. All told, the State took $61,497.46 in equity. That has occurred, albeit with different damages amounts, thousands of times.

On January 9, 2019, Hathon and Denkins filed their notice of intent in the Court of Claims, and later filed their Class Action Complaint. (App pp 1-24). On June 7, 2019, the Court of Claims

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granted Appellees' Motion for Class Certification (App pp 54-68). This decision was followed by multiple other courts, all of which have either granted certification or denied it on plaintiff-specific grounds. See, e.g., *Fox v Saginaw Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 16, 2020 (Case No. 19-cv-11887), p 8 (certifying) (unpublished cases attached at App pp 111-207); *Arkona, LLC v Cheboygan Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued July 30, 2020 (Case No. 1:19-cv-12372), p 6 (same) (App pp 135-139); *Zettel v Charlevoix Co*, Case No. 18-0591-26-CZ, Tr at 9:21-23, 11:11-12 (Charlevoix Cir Ct August 31, 2020) (App pp 87-110) (same); *Grainger, Jr v Ottawa Co*, unpublished opinion of the United States District Court for the Western District of Michigan, issued March 2, 2021 (Case No. 1:19-cv-501), pp 15-16 (reasoning that class certification criteria supported certification but that named plaintiff had unique infirmity) (App pp 140-153).

In certifying the Class, the Court of Claims rejected Plaintiffs' argument that the six-year statute of limitations for takings claims should apply and should define the class period. (App pp 75-78). Instead, it found that the time limit under the Court of Claims Act governed. *Id.*

In August 2019, the Court of Claims held that the State violated the Michigan Constitution by effectuating a state-based taking. (App pp 29-45). It has yet to rule on the takings claim that Plaintiffs have brought under the Fifth Amendment to the United States Constitution. The Court of Appeals denied the State's prior interlocutory appellate challenge. *Hathon v State of Mich*, unpublished order of the Court of Appeals, entered January 14, 2020 (Docket No. 350460) (App p 86).

As to the Michigan constitutional takings theory, this Court affirmed the Court of Claims' correct foresight. *Rafaeli*, 505 Mich at 474-479. As this Court explained, "when property is taken

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to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less." *Id.* at 483-484.

The State then moved to revoke class certification, arguing that, even if *Rafaeli* found for the Class on the merits, it limited the scope of the potential class and, therefore, Appellees could no longer establish that the class was sufficiently numerous. (See App pp 393-411). On December 4, 2020, the Court of Claims rejected Appellant's argument that *Rafaeli* should only be applied prospectively, but granted Appellant's motion to decertify. (App pp 72-74). Appellees moved for reconsideration of the decertification decision and for renewed certification. (App pp 208-217).

Meanwhile, while Appellees' motion was pending, in response to *Rafaeli*, the Michigan Legislature amended the GPTA through Public Act 256 of 2020 ("PA 256") in December 2020, which purported to establish a new claims process for the recovery of surplus auction proceeds, excluding large portions of the Class and providing for lower recoveries than *Rafaeli* required. On February 22, 2021, the Court of Claims considered the impact of PA 256 on this case, and re-certified the Class. (See Application Ex E). The Class, as certified, has over 200 members. (See Application Ex E, opinion at 8).

After PA 256, multiple courts have found that plaintiffs situated similarly to Appellees here have still stated cognizable claims. See, e.g., *Fox v Saginaw Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 13, 2021 (Case No. 19-cv-11887), pp 10-12 (App pp 128-130); *Grainger v Ottawa Co* (WD Mich.).[1] Meanwhile, a federal

[1] The State says that the underlying case "is also the only known certified class action in Michigan's state courts on this topic." (Application p 1). In fact, the Charlevoix County Circuit

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court held that, under the Fifth Amendment to the United States Constitution, the *Rafaeli* damages were not enough, and the FGU minimally owed additional interest from the time of the taking. *Freed v Thomas*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 26, 2021 (Case No. 17-cv-13519), p 4 (App p 156); see also *Knick v Twp of Scott*, 139 S Ct 2162, 2170; 204 L Ed 558 (2019) ("the compensation must generally consist of the total value of the property when taken, plus interest from that time").[2] The Sixth Circuit later affirmed that federal law entitles the takings victims in such cases to the interest in their property that they lost, "which in common speech is called the 'equity' in real property." *Hall v Meisner*, 51 F4th 185, 187 (CA 6, 2022).

The State appealed the decision to recertify the class. App p 46. The Class cross-appealed, seeking a determination that PA 256 is partially or wholly unconstitutional, and that the six-year statute of limitations for takings claims applies and defines the class period, instead of the more limited period under the Court of Claims Act.

The Court of Appeals consolidated the appeal with *Breiner v State*. *See Breiner v State*, unpublished opinion of the Court of Appeals, entered December 1, 2022 (Case No. 356501), p 1 (citing *Breiner v Michigan*, unpublished order of the Court of Appeals, entered March 8, 2022 (Docket Nos. 356501, 356850)) (App p 383).[3] On December 1, 2022, the Court of Appeals issued

Court has certified a class action on this topic as well. Case No. 18-0591-26-CZ (Charlevoix Co Cir Ct) (App p 97). Several others have been certified in federal court.

[2] *Freed* is on appeal, arguing that the correct amount of Fifth Amendment damages is not merely surplus proceeds but the difference between the fair market value and the total tax delinquency. See *Hall*, 51 F4th 185.

[3] *Breiner* is pending on Application before this Court as well.

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its opinion in the consolidated appeals, upholding the Court of Appeals' decision. *Id.* The State then filed its Application for Leave to Appeal.[4]

ARGUMENT

I. The Court of Appeals Was Correct that PA 256 Does Not Interfere with the Class's Claims

PA 256 is not a reason to revisit the Court of Appeals' decisions in the Class's favor. For most of the Class, whose foreclosures precede *Rafaeli*, the statute is not yet operative. But even when operative, it is constitutionally insufficient. At the least, it would be unconstitutional to require the Class Members to abandon takings claims for an inferior statutory mechanism.[5] Thus, as the Court of Appeals found,

> In this case, 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. [*Breiner*, unpub op at 8–9 (App p 389).]

A. Standard of Review

This Court "review[s] *de novo* . . . questions of statutory interpretation." *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009) (emphasis added), citing *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003) and *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

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[4] Although the Court of Appeals did not overturn the Circuit Court's analysis of the limitations period, the Class has foregone an application for leave to appeal this disposition.

[5] The State claims that "Public Act 256 applies to *all* potential claims, possible, pending, and future, by clarifying and setting the process to make such claims," and that "[t]he 'conditional' language in § 78t(2) addresses whether potential claims are compensable, not whether the new law applies at all." (Application p 15) (emphasis in original). But as discussed throughout, the statute cannot retroactively extinguish vested claims or otherwise render a takings claim "non-compensable." Indeed, the notion that the State can simply extinguish a vested takings claim would effectively nullify the takings clauses.

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B. The Court of Appeals Was Correct That PA 256 Does Not Apply to Class Members Whose Properties Were Sold Prior to *Rafaeli*

1. PA 256 Purports to Establish a Claims Process to Address the Takings at Issue

By the State's account, it was able to legislatively excuse its constitutional violations and immunize itself from vested takings claims.[6]

PA 256 purports to establish a specialized claims process for surplus auction proceeds, but it is in many cases illusory and in all cases constitutionally insufficient. Thus, the Court of Claims was correct to disregard it in certifying the Class, and the Court of Appeals was correct in concluding that it does not interfere with class certification of the Class's claims.

2. PA 256 does not provide a claims process for most Class Members.

a) The process depends on this Court's explicit pronouncement about *Rafaeli*'s application

The PA 256 process is illusory for equity takings victims whose foreclosures took place before the *Rafaeli* decision, and these persons comprise the majority of the Class.

The new claims process only becomes – in theory – activated upon this Court's explicit announcement: "For foreclosed property transferred or sold under section 78m before July 18, 2020… 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." MCL 211.78t(1)(a)-(b)(i).

The Court of Claims thus correctly found that PA 256 was inactive as to most of the Class:

> The "only if" language clearly signifies that the new statutory process for claims that predate *Rafaeli* is applicable if, and only if,

[6] Appellant quotes *Rafaeli*'s *dicta* that "[n]othing in our holding today prevents the Legislature from . . . requir[ing] former property owners to avail themselves of certain procedural avenues to recovery the surplus proceeds." (Application p 6) (citing *Rafaeli*, 505 Mich at 473 n 108). Even if, *arguendo*, this language is a binding component of this Court's holding, it is not a blank check: any such requirements would of course need to be constitutional.

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> this state's Supreme Court declares that *Rafaeli* is retroactive. To date, that condition precedent has not been satisfied. Thus, there is nothing within the plain language of MCL 211.78t(1)(b)(i) that would permit the Court to apply the new statutory claims process to plaintiffs' claims or to any claims that pre-date *Rafaeli*. [Court of Claims Certification Order at 4, Application Ex E (citing *People v Hayes*, 323 Mich App 470, 473; 917 NW2d 748 (2018) as "analyzing similar conditional language . . . as being 'triggered' if and only if the statutory condition were satisfied").]

The Court of Appeals upheld this determination. *Breiner*, unpub op at 8-9 (App p 389).

The State disagrees, arguing that "[t]he 'conditional' language in § 78t(2) addresses whether potential claims are compensable, not whether the new law applies at all," and that the "provision, in application, operates as a presumption that sales occurring before a certain date are not compensable [.]" (Application pp 15-16). This argument fails.

The statute's plain language renders the process inapplicable prior to a triggering decision from this Court. For example, the *Hayes* case that the Court of Claims cited considered MCL 769.25a. As the Court of Appeals explained there, "[i]n *Miller v Alabama* [], the United States Supreme Court held that mandatory punishment of life in prison absent the possibility of parole for a defendant who was under the age of 18 at the time of the sentencing offense violates the Eighth Amendment's prohibition against cruel and unusual punishments" but left open the issue of "whether its decision was to be retroactively applied to closed cases involving juvenile offenders." *Hayes*, 323 Mich App at 473, citing *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). "Anticipating the possibility of *Miller*'s retroactive application for closed cases, the Legislature . . . enacted MCL 769.25a, which would be triggered if our Supreme Court or the United States Supreme Court were to hold that *Miller* applied retroactively." *Id.* When the United States Supreme Court later did so, "MCL 769.25a took effect." *Id.* at 473-474. Thus, a

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statutory provision conditioned upon a potential judicial decision does not "[take] effect" until that decision.

b) The State claims that it is too late for this Court to make the requisite declaration

The State claims that PA 256's interlocking parts operate to ensure that pre-*Rafaeli* victims can never secure any redress. Claimants need to wait until this Court gives the go-ahead for such claimants to begin the process under MCL 211.78t(1)(a)-(b)(i). But the State also argues the two-year statute of limitations applies, no matter what. (Application p 13) (citing MCL 211.78l). Because it has been more than two years since the Court decided *Rafaeli*, the State's position is that these victims have no right to any recovery at all.[7] Under the State's theory, the Legislature could require takings victims to employ a certain procedure to recover their compensation; make the procedure unavailable until a condition precedent happens; impose a deadline that is sure to run before the condition precedent can take place; and thereby deprive victims of any recovery for their vested takings claims. To the extent PA 256 "applies" to the Class Members whose claims it bars, it is unconstitutional.

3. A statute cannot retroactively change the statute of limitations.

a) PA 256 purports to impose a new statute of limitations that would eliminate vested claims that were pending in this case when the law was enacted.

The State suggests that PA 256 changed the applicable statute of limitations in its favor to extinguish vested claims, including those being pursued by the Class Members here. But changing the rules mid-litigation is impermissible. At the time Plaintiffs filed their lawsuit, the statute of

[7] Thus, it is not accurate for the State to say that "for sales occurring before July 18, 2020… [t]he Legislature has expressly identified … in law" the question of whether "only the *Rafaeli* plaintiffs [should] have compensable claims … inviting this Court to rule on it." (Application p 1). Under the statute, whatever the Court says, it will be too late.

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limitations was six years. *Hart v Detroit*, 416 Mich 488, 503; 331 NW2d 438 (1982). PA 256 purports to amend the GPTA's statute of limitations to only two years to bar all claims, even constitutional-based claims. MCL 211.78l(1) (as amended eff 12/22/2020).[8] However, as discussed below, a statute of limitations cannot be amended to destroy a vested claim, and especially not by a State that is itself a litigant.[9]

b) PA 256 does not and cannot retroactively extinguish claims.

"[S]tatutes of limitations enacted by the Legislature are to be applied prospectively absent a clear and unequivocal manifestation of a legislative preference for retroactive application." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 161; 725 NW2d 56 (2006). Nothing in MCL 211.78l indicates a "clear and unequivocal manifestation" of retroactive application by the new amendment. Thus, the statutory change only applies prospectively.[10]

Moreover, as Appellant concedes, a legislative intent for retrospective application applies only if "no … right is impaired by retroactively applying the new law." (Application p 11). Here, retrospective application would impair the Class Members' vested rights to their claims.

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[8] The Court of Appeals noted in *dicta* that it had previously "held that the applicable statute of limitations for inverse condemnation claims against the state is three years, not six." *Breiner*, unpub op at 11 n 8 (citing *Gleason v. Mich. Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003) (App p 391). And at least one Court has found that the period for the federal claims under 42 USC 1983 is three years. *Grainger*, unpub op at 7 (App p 144). In any event, the State is flatly incorrect when it says that "the two-year provision is not new and did not cut short some longer period under this law." (Application p 13).

[9] The State argues that "[t]he *Rafaeli* plaintiffs' takings claim was valid *because* the law this Court reviewed did not provide any claim mechanism." (Application p 21) (citing *Rafaeli*, 505 Mich at 461) (emphasis in Application). But, again, the State's core argument is that PA 256 does not provide any "claim mechanism" for the Class Members whose claims accrued before *Rafaeli* and that it in fact extinguishes those Class Members' vested claims. And, as discussed *infra*, the PA 256 claims process is insufficient for the post-*Rafaeli* claimants as well.

[10] The State calls this argument a "bogeyman" because, it says, PA 256 "fills the void identified in *Rafaeli* by creating a statutory process to claim sale proceeds." (Application p 21). But the issue in *Rafaeli* was a taking claim, and, again, the entire focus of the State's argument is that this supposed "void fill[ing]" extinguished the vested claim that *Rafaeli* recognized.

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When all the facts in a case become operative and are known, a cause of action accrues and it becomes a "vested right." *Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Bd of Trustees v City of Pontiac*, 317 Mich App 570, 585; 895 NW2d 206 (2016). It cannot be subsequently impaired by amending the statute of limitations:

> If the Michigan Legislature had attempted, by shortening the . . . statute of limitations, to deprive the plaintiff, and others similarly situated, of the right, which he had immediately prior to the taking effect of the [the statute], to bring this action, as he did [timely] . . ., the effect thereof would have been to absolutely bar his right to bring the present action, and such attempt would have been unconstitutional. [*Fellows v Nat'l Can Co*, 276 F 309, 311-312 (ED Mich, 1921).]

Thus, Appellant's repeated assertions that no vested right is impaired by its proposed application of PA 256, see, e.g., Application p 13, are incorrect. Put simply, "the statute of limitations in effect at the time the cause of action arose govern[s]." *Weiss v Bigman*, 84 Mich App 487, 495; 270 NW2d 5 (1978), citing *Quinlan v Gudes*, 2 Mich App 506; 140 NW2d 782 (1966).

As the United States Supreme Court has explained, "[t]he Constitution . . . requires that statutes of limitations must 'allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.'" *Block v N Dakota ex rel Bd of Univ and Sch Lands*, 461 US 273, 286 n 23; 103 S Ct 1811; 75 L Ed 2d 840 (1983), citing *Texaco, Inc v Short*, 454 US 516, 527 n 21; 201 S Ct 781; 70 L Ed 2d 738 (1982) and *Wilson v Iseminger*, 185 US 55, 62-63; 22 S Ct 573; 46 L Ed 804 (1902). Simply, a "general rule against retrospective application has been applied in cases where a new statute abolishes an existing cause of action." *In re Certified Questions (Karl)*, 416 Mich 558, 573; 331 NW2d 456 (1982). When all the facts become operative and known, a cause of action accrues and becomes a "vested right." *Id*. See also 76 ALR6th 31 (originally published in 2012) ("all . . . courts recognize that a shortened limitation period cannot be applied to extinguish a previously accrued action unless prospective plaintiffs have been given

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a reasonable opportunity to commence existing actions after a shortened period has taken effect").[11] And these considerations are all the more critical where, as here, the State is purporting to amend the statute of limitations for pending, vested claims against the State itself for a constitutional violation.[12]

c) Appellant's additional arguments that it could "amend away" vested claims against it fails.

(1) The ordinary principles of statutory construction do not override the Constitution.

The State responds, in part, by availing to ordinary statutory interpretation guidelines that are inapplicable to this constitutional dispute. (See, e.g., Application p 13 (discussing effect of statutory amendment)). It quotes *Frank W. Lunch & Co v Flex Tech Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (quoting *Franks v White Pine Copper Div*, 422 Mich 636, 670; 375 NW2d 715 (1985)) (superseded by statute) for its "holding that ''[t]he primary and overriding rule is that legislative intent governs,'" and that "'''[a]ll other rules of construction and operation are subservient to this principle.'" (Application p 18). But the issue here is not the resolution of a

[11] The State cites *Great Northern Ry Co v Sunburst Oil & Refining Co*, 287 US 358; 53 S Ct 145; 77 L Ed 360 (1932) as finding the United States Constitution irrelevant to a state court's decision on the retroactivity of its own decision. (Application p 17). But the issue in *Great Northern Ry* was "whether the annulment by retroaction of rates valid when exacted is an unlawful taking of property within the Fourteenth Amendment." *Id.* at 359. This is the inverse: the Class Members are not claiming that they suffered takings when this Court retroactively regulated the rates they charged; but they indisputably *did* suffer takings, which this Court recognized, and for which the State claims retroactive immunity through a legislative enactment.

[12] Appellant cites *Bank Markazi v Peterson*, 578 US 212; 136 S Ct 1310; 194 L Ed 2d 463 (2016) that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." But *Bank Markazi* explicitly recognized Constitutional restrictions to retroactive legislation, including that the "'[t]he Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'" *Id.* at 228-229, quoting *Landgraf v USI Film Prod*, 511 US 244, 267–268; 114 S Ct 1483; 128 L Ed 2d 229 (1994).

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statutory ambiguity; it is that the statutory terms at issue are unconstitutional. Whether the "[t]he Legislature could … have been clearer in stating its purpose" that "this law is *the* method that must be used to make these claims" (Application p 19) (emphasis in original) is irrelevant.

(2) PA 256 changed the applicable statute of limitations

The State claims that PA 256's two-year statute of limitations is not new, but rather a refinement of MCL 211.78l's prior language imposing a two-year statute of limitations for non-takings foreclosure-related claims. (Application p 10) (citing *2 Crooked Creek, LLC v Cass Co Treasurer*, 507 Mich 1; 967 NW2d 577 (2020)). But *Rafaeli* and *Hall* both explicitly found that the claim at issue was a "taking." *Rafaeli*, 505 Mich at 474-479; *Hall*, 51 F4th at 194-196. Thus, the limitations period for takings applies. Moreover, again, PA 256's two-year statute of limitation interlocks with the bar on petitions from pre-*Rafaeli* claimants to bar claims. At its core, the State's contention is astonishing: having committed a widespread taking, it can immunize itself by imposing a truncated statute of limitations and barring its victims from bringing a claim until the limitations period has run.

Indeed, the State concedes that "courts have recognized statutes of limitation as procedural mechanisms that nevertheless may impact substantive rights." (Application p 13) (citing *Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999)). Yet it claims that, "as it applies here, the period is unchanged (two years) and the context (tax foreclosure) and triggering event (alleged constitutional violation) are also unchanged." *Id.* Again, though: the claim at issue is a "taking," the statute of limitations for which exceeded two years; and the State designed PA 256 so that most Class Members – those whose foreclosures predated *Rafaeli* – could not bring a statutory proceeding until after the two years had run. Even if the "context" or "triggering event"

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of the Class Members' claims is in some abstract sense similar to, say, a due process claim related to an underlying foreclosure, that does not permit the State to extinguish vested takings claims.

(3) PA 256 does not fall into a remedial exception to the rule against eliminating vested claims.

The State argues that an exception to the general rule presuming prospective application of statute applies, claiming that the statutory amendment is remedial or procedural in nature. *Davis*, 272 Mich App at 158. Again, though, that exception cannot be used to "deny vested rights." *Id.*[13]

"'An amendment may apply retroactively where the Legislature enacts an amendment to *clarify* an existing statute and to resolve a controversy regarding its meaning.'" *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 371-372; 803 NW2d 698 (2010), citing *Mtg Electronic Registration Sys, Inc v Pickrell*, 271 Mich App 119, 126; 721 NW2d 276 (2006) (emphasis added). The State concedes that, for the statute to apply retroactively, it must be "'"related to remedies or modes of procedure,'"" and avoid "'"creat[ing] new or tak[ing] away vested rights, but only operat[ing] in furtherance of a remedy or confirmation of rights already existing.'"" (Application p 12) (quoting *In re Certified Questions from U.S. Court of Appeals for the Sixth Circuit*, 416 Mich at 572, which quoted *Hansen-Snyder Co v General Motors Corp*, 371 Mich 480; 124 NW2d 286 (1963) (internal citations omitted)). (See also Application p 18) ("this Court has … held that remedial laws 'neither create new rights nor destroy existing rights' and thus 'are held to operate

[13] Appellant claims that "[n]o vested right can exist to keep statutory procedural law unchanged [and] free from amendment." (Application p 14, citing *Cichecki v City of Hamtramck, Police Dep't*, 382 Mich 428, 436; 170 NW2d 58 (1969)). But the Class Members assert a vested right to their accrued constitutional claims, "hich the State is trying to extinguish.

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retrospectively, unless a contrary legislative intention is manifested,'" quoting *Selk v Detroit Plastic Prod*, 419 Mich 1, 10; 345 NW2d 184 (1984)).[14,15]

The State nonetheless claims that PA 256 somehow meets this test, even though it blatantly "take[s] away vested rights." It argues, in substance, that because PA 256 has some procedural provisions, it is "procedural."[16] But this Court has "rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as 'remedial.'" *Frank W Lynch*, 463 Mich at 585 (citation omitted). Here, as discussed throughout, PA 256 decidedly does "take away vested rights"; rather than "operat[ing] in furtherance of a remedy or confirmation of rights already existing," it purports to deprive Class Members of such rights. *In re Certified Questions (Karl)*, 416 Mich at 572. And "[a] statute may not be applied retroactively if it abrogates or impairs vested rights, creates new obligations, or attaches new disabilities concerning transactions or considerations occurring in the past." *Davis*, 272 Mich App at 158. See also *Doe v Dep't of Corrections (On Remand)*, 249 Mich App 49, 61; 641 NW2d 269 (2001); *Gen Motors*, 290 Mich App at 371-372 (when an "amendment affect[s]

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[14] This Court's general conclusion 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 453, quoting *In re School Dist No 6, Paris and Wyoming Twps, Kent Co*, 284 Mich 132, 144 (1938), quoted at Application pp 17-18, does not prevail over this jurisprudence, and in any event does not permit the State to immunize itself from vested takings claims through a legislative enactment.

[15] Despite this concession, the State claims that "[a]pplying PA 256 retroactively does not impair substantive rights because it addresses only procedure." (Application p 11). But even if its provisions are in some sense "procedural," they clearly affect the Class Members' substantive rights by extinguishing most of the Class's claims. Indeed, the focus of the State's petition is that the Court should apply the statute to extinguish the Class Members' substantive rights. Worse yet, the substantive rights at issue the Class Members' rights to secure the takings redress guaranteed to them by the Michigan and United States Constitutions.

[16] The State claims that "[t]his Court has also held that '[s]tatutes which operate in furtherance of a remedy already existing' are considered remedial." (Application p 18) (quoting *Selk*, 419 Mich at 10). But the statute here purports to *undermine* the takings "remedy already existing," not "operate in [its] furtherance."

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substantive rights or obligations" like a vested claim in court, "it cannot come within the rule permitting retroactive 'remedial' amendments").[17]

Indeed, the rights that the State seeks to extinguish are particularly important constitutional property rights. The State concedes that "the right" recognized in *Rafaeli* "was not subject to legislative abrogation[.]" (Application p 31) (citing *Rafaeli*, 505 Mich at 473). *See also Hall*, 51 F.4th 188 ("The government may not decline to recognize long-established interests in property as a device to take them."). Nor can the legislature effectively abrogate it by rendering it impossible to enforce or otherwise failing to recognize it in effect.

The State then backtracks, claiming that PA 256 "operates as a presumption that sales occurring before a certain date are not compensable" but that "the statutory presumption does not conclusively preclude compensating older sales," because, depending on this Court's conclusion, "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.'" (Application pp 15-16) (citing MCL 211.78t(6)). But the State never squares this analysis with its insistence that PA 256's two-year statute of limitations is binding and enforceable, given that this limitations period has already run for the subject Class Members. Moreover, for all of the reasons discussed *infra*, even if the PA 256 process is somehow available to the pre-*Rafaeli* Class Members, it is unconstitutionally inadequate, and any requirement that they use the statutory process in lieu of the takings claim to which they are entitled is invalid. In the end, the State's characterization of the statutory limitation as an "interim limitation… tied to this Court's inherent authority to announce that a new rule of law is for

[17] *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394; 878 NW2d 891 (2015) concerned the State's departure from a Multistate Tax Compact. Unlike here, the taxpayer lacked a vested right to the State's membership. *Id.* at 902 ("taxpayers do not generally have a vested interest in tax laws that exist at any particular moment," citing *United States v Carlton*, 512 US 26, 30; 114 S Ct 2018; 129 L Ed 2d 22 (1994)).

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prospective application only," Application p 16, suggests an occasion for inter-branch bargaining and discretionary judgment calls, when in fact the rule against the extinguishment of vested rights is a clear constitutional mandate.[18]

C. The Court of Claims Was Correct to Include Post-*Rafaeli* Class Members in the Class Because It Would be Unconstitutional to Require Them to Use the PA 256 Claims Process in Lieu of a Takings Claim

As discussed above, PA 256 is irrelevant to the Class Members with pre-*Rafaeli* foreclosures and, to the extent it is relevant, it is unconstitutional. As to the minority of Class Members with post-*Rafaeli* foreclosures, it would likewise be unconstitutional to require the Class Members to use the PA 256 process. Thus, this Court should uphold the Court of Claims' decision to include these Class Members in the Class, as opposed to requiring them to pursue PA 256 procedures, and the Court of Appeals' affirmance of this decision. Put simply, PA 256's "exclusive remedy" provision, MCL 211.78l, is unconstitutional. *See Knick*, 139 S Ct at 2171 ("The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right.").[19]

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[18] The State claims that "[o]nly 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." (Application p 14). But it bases this assertion on the curious *ipse dixit* that "[t]he law itself does not eliminate any vested property right," *id.*, even though the focus of the State's brief is the argument that PA 256 does eliminate the pre-*Rafaeli* Class Members' "vested property right" and associate vested takings claims.

[19] The State claims that "the orderly, fair administration of" the post-*Rafaeli* "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." (Application p 41). But as discussed *infra*, the magnitude of the various governments' takings does not excuse it. *Hall*, *infra.* And the best way to avoid "clogging up courts" is by permitting the straightforward, comprehensive class actions that the State argues assiduously against here.

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1. PA 256 purports to impair equity victims' rights to interest and full surplus proceeds.

Again, new statutes cannot impair litigants' substantive vested rights. Under *Rafaeli*, "just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, *no less*." *Rafaeli*, 505 Mich at 483-484 (emphasis added).

Similarly, the State cannot extinguish a vested takings claim by providing a process for partial just compensation. Imagine if the State took houses to build a road. It would be absurd for the State to offer the homeowners anything less than the value of their property on a take-it-or-leave-it basis—and then to argue that the fact of its offer extinguishes the takings claims altogether. Yet despite "labelling" PA 256 as "curative," the State, as FGU, awards itself five percent of the surplus proceeds. MCL 211.78t(9) ("the court shall require payment to the foreclosing governmental unit of a sale commission equal to 5% of the amount for which the property was sold by the foreclosing governmental unit"). That is less than "no more, no less" required by *Rafaeli*. Moreover, the State has *already* recouped the cost of the sale by establishing the "minimum bid" at the auction. MCL 211.78m(16) (in effect prior to PA 256). Even more, expenses were already paid by the auction buyers through imposition of a "buyer's premium" collected by the State's auctioneer company, Title Check, LLC.[20] Neither *Rafaeli* nor federal takings jurisprudence permit such deductions. *Knick*, 139 S Ct at 2170 (full value of taken property plus interest must be paid).

[20] https://tax-sale.info/forms/Standard-Rules.pdf. App pp 364-369.

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In addition, the Fifth Amendment, separate from the Michigan Constitution, expressly requires the payment of constitutional "interest" from the time of the taking to the time of payment. *Knick*, 139 S Ct at 2170; *DLX, Inc v Kentucky*, 381 F3d 511, 528 (CA 6, 2004) ("where the Constitution requires a particular remedy, such as . . . through the Takings Clause as indicated in *First English* [*Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 US 304, 315; 107 S Ct 2378; 96 L Ed 2d 250 (1987)], the state is required to provide that remedy in its own courts"). This interest is due here. See *Freed*, unpub op at 4 (App p 156). PA 256 does not contain this constitutional requirement and purports to impair Plaintiffs' federal rights.

2. State law may not extinguish federal rights.

The Supremacy Clause of the US Constitution bars a state legislature from abolishing federal constitutional rights by state statute or through alternate, "preclusive" causes of actions. "[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v Campbell*, 402 US 637, 652; 91 S Ct 1704; 29 L Ed 2d 233 (1971). The Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected." *Felder v Casey*, 487 US 131, 151; 108 S Ct 2302; 101 L Ed 2d 123 (1988). "A state court" when reviewing state laws "may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'" *Howlett By & Through Howlett v Rose*, 496 US 356, 369; 110 S Ct 2430, 110 L Ed 2d 332 (1990) (citation omitted). "The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content . . ." *Id.* at 371. And where compliance with state law and compliance with federal law are impossible, the state law is preempted. US Const, art VI, § 2 ("This Constitution . . . shall be the supreme Law of the

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Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). See also *DLX*, 381 F3d at 528.[21]

The Class Members here have a claim under federal law for the even larger measure of damages, based not on the auction proceeds secured by the State, but the properties' fair market value. *Hall*, 51 F4th at 188. Indeed, *Hall* concludes that the seizure of outright title, independent of the failure to return excess proceeds, constitutes a taking, suggesting that it recognizes a federal taking distinct from the state-law taking found in *Rafaeli*. *Id*. And it affirms that the State cannot legislatively extinguish the Class Members' right to their equity. *Id*. The State certainly cannot require takings victims to pursue a state-court process to secure inadequate compensation. See *Knick*, 139 S Ct at 2170. The Fifth Amendment creates a "self-executing" cause of action for the value of property taken by governments, *First English*, 482 US at 315, meaning "the State already indicated its consent to be sued when adequate payment to an owner did not follow a taking." *In re Venoco LLC*, 998 F3d 94, 110 (CA 3, 2021). Again, it also requires the payment of interest along with the total value of the property taken. *Knick*, 139 S Ct at 2170.

D. Appellant's Jurisdictional Argument Fails

The State claims that "the trial court," that is, the Court of Claims, "lacks jurisdiction." (Application p 42). But it does not show where it challenged the Court of Claims' jurisdiction below. The State's argument in this Court appears premised on the enactment of PA 256. But Appellant never explains how PA 256 could have amended the Court of Claims Act to divest the

[21] The State concedes that "'[w]hatever 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)." (Application p 16).

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Court of Claims of jurisdiction. Indeed, the statute never mentions the Court of Claims Act or any litigation against the State as FGU.[22]

II. *Rafaeli* Applies Retroactively

Appellant asks this Court to overturn the Court of Claims and the Court of Appeals because, in effect, prior to *Rafaeli*, it did not realize it was committing a taking. Therefore, it reasons, it should be able to keep the money it illegally took. In other words, *Rafaeli*'s application should only be prospective, and it should not have any retrospective effect. The argument fails for several reasons.

A. Standard of Review

Issues of law are reviewed *de novo* on appeal. See *In re Jude*, 228 Mich App 667, 670; 578 NW2d 704 (1998).

B. The Court of Appeals Has Consistently Found that *Rafaeli* Applies Retroactively

The Court of Appeals here was not the only panel to find that *Rafaeli* applies retroactively. Two other panels have reached the same conclusion. *Proctor v Saginaw Co Bd of Comm'rs*, 340 Mich. App. 1, 23; __ NW2d __ (2022) ("We hold that *Rafaeli*, . . . should be applied to pending cases, such as those of the named plaintiffs, in which a challenge has been raised and preserved."); *Schafer v Kent Co*, unpublished opinion of the Court of Appeals, issued September 22, 2022 (Case No. 356908), p 4 ("*Rafaeli* should be given full retroactive effect.") (Application Ex I, opinion at 5).[23]

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[22] For all of these reasons, the State's conclusory assertion that "[r]egardless 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*," (Application p 20) (emphasis in original), is not only presumptuous, but incorrect.

[23] The State claims that these two cases "seem to conflict." (Application p 20). But *Schafer* rejected this idea, noting that "*Proctor* did not presume to address every possible case and

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C. *Rafaeli* Is Explicitly Retroactive

Rafaeli itself is, on its own terms, retroactive. Its inquiry was retrospective; the conduct in question had already happened, and thus this Court of course discussed it in the past tense. See, e.g., *Rafaeli*, 505 Mich at 474 ("Defendant's retention of the surplus proceeds *was* an unconstitutional taking"); *id.* at 479 ("we hold that defendants *were* required to return the surplus proceeds"); *id.* at 484-485 ("defendants' retention and subsequent transfer of those proceeds into the county general fund *amounted* to a taking of plaintiffs' properties under Article 10, § 2 of our 1963 Constitution") (emphasis in all quotes added). See also *Breiner*, unpub op at 9 ("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," quoting *Proctor*, __ Mich App at __; slip op. at 15).

Moreover, this Court proceeded to consider and decide the appropriate "just compensation" for the specific plaintiffs before it – who, again, had suffered the taking in the past. *Rafaeli*, 505 Mich at 485 ("plaintiffs are entitled to just compensation . . ."). A decision that only applied prospectively could not have resulted in a damage award for the litigant.[24]

Indeed, the State seems to recognize this, arguing that "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

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circumstance nor did it limit its retroactivity to only the matters before the Court in that case." *Schafer*, unpub op at 4 (Application Ex I, opinion at 5).

[24] The State concedes that this Court's "reasoning [in *Rafaeli*] would appear to favor retroactive compensation for the property right described in *Rafaeli*," but then argues that "this Court's thorough historical analysis [in *Rafaeli* wa]s the antithesis of obvious[.]" Yet prior to *Rafaeli* at least one Sixth Circuit judge agreed that the State's conduct was akin to "theft." *Wayside Church v Van Buren Co.*, 847 F3d 812, 823-824 (CA 6, 2017) (KETHLEDGE, J., dissenting) (noting "the gross injustice…caused by the kind of governmental action on display here" and , "[i]n some legal precincts [Defendants'] sort of behavior is called theft.").

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compensation only for sales that happened after July 17, 2020" (Application p 2). But the rule of law depends on the neutral application of general principles, not bespoke rulings. See, e.g., *Comerica Bank-Detroit v Dep't of Treasury*, 194 Mich App 77, 86; 486 NW2d 338 (1992) ("principles of equality and stare decisis" compel retroactive application of decision, citing *Beam*, 501 US 529, 538-541; 111 S Ct 2439; 115 L Ed 2d 481). The State never explains how something could be a taking in one situation – *Rafaeli* – but not in an identical situation. *See Proctor*, __ Mich App at __; slip op. at 14-15 ("It would neither be logical nor just for the plaintiffs in *Rafaeli* to be entitled to relief… but the present plaintiffs denied relief, even though both sets of plaintiffs raised and preserved the pertinent issue," cited in *Breiner*, unpub op at 8).

D. A Takings Determination Is Inherently Retroactive

Takings claims are fundamentally damage claims, deciding on whether past conduct should be compensated. Thus, a finding that the government has illegally taken property without paying compensation (or enough compensation) is inherently retroactive. See, e.g., *O'Neil v California Coastal Comm'n*, unpublished opinion of the United States District Court for the Central District of California, issued May 18, 2020 (Case No. 2:19-CV-07749-ODW (AFMx)), p 8 (discussing *Ex parte Young*, 209 US 123, 156–157; 28 S Ct 441; 52 L Ed 714 (1908) and citing *City of Monterey v Del Monte Dunes at Monterey, Ltd*, 526 US 687, 710–711; 119 S Ct 1624; 143 L Ed 2d 882 (1999)). Put simply, "'just compensation,'" the takings remedy that this Court determined in *Rafaeli*, "is on all fours with traditional monetary damages, which are the *quintessential form of retrospective relief*." *Seven Up Pete Venture v Schweitzer*, 523 F3d 948, 956 (CA 9, 2008) (emphasis added).

E. Even Absent the Principle That Takings Determinations Are Inherently Retroactive, *Rafaeli* Would Apply Retroactively

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1. Judicial decisions presumptively apply retroactively.

As the States concedes, "[g]enerally, 'judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved.'" (Application p 26) (quoting *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006) (additional citation omitted).

2. The State's argument that *Rafaeli* is the rare case that should only apply prospectively fails.

a) *Rafaeli* was not a "new rule" that overturned prior precedent.

As the State concedes, "complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law.'" (Application p 22, citing *Lincoln v General Motors Corp*, 461 Mich 483, 491; 607 NW2d 73 (2000)). Yet, it fails cite to any decision that *Rafaeli* "overrule[d]" except for the lower Court of Appeals' panel decision . Indeed, prior to *Rafaeli*, this Court had never considered the issue.

The State cites numerous cases that, it says, rejected challenges to the General Property Tax Act or its application prior to *Rafaeli*. But none of them were on point. Instead, they dealt with the finality of foreclosure judgments. See *Wayne Co Treasurer v Westhaven Manor Ltd Dividend Hous Dev Ass'n*, 265 Mich App 285, 300; 698 NW2d 879 (2005) (judgment would not be disturbed unless notice was inadequate); *In re Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 8; 732 NW2d 458 (2007) (judgment's finality turns on notice); *In re Petition of Tuscola Co Treasurer for Foreclosure*, 317 Mich App 688, 699-700; 895 NW2d 569 (2016) (same). So did the unpublished cases cited at pages 33 and 34 of Appellant's Application.

Here, the Class argues that, regardless of the foreclosures' validity, the State could not take the excess equity. As the U.S. District Court for the Eastern District of Michigan found, "the property at issue [here]—the right to collect surplus proceeds—is distinct from title to the

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foreclosed property and is not extinguished in the foreclosure process." *Fox*, unpub op at 15 (October 16, 2020). But see *Hall*, 51 F4th at 196 ("Here, [the] event [of taking] was the County's taking of 'absolute title' to the plaintiffs' homes. Before that event, the plaintiffs held equitable title; after it, they held no title at all.").

Indeed, the State never even claims that any of the cases it cites are now bad law after *Rafaeli*. For example, does it now contend that circuit courts can modify entered foreclosure judgments because *Rafaeli* has overturned *Perfecting Church*? Does Appellant concede that a taxpayer can have a foreclosure set aside in its entirety because, it says, *Rafaeli* has overruled *Dupuis*? Can a foreclosed taxpayer now challenge the State's foreclosure after the fact because *Rafaeli* has overturned *Westhaven*? Even if the State is now making these concessions, it is difficult to see how they are compelled by *Rafaeli*.

Thus, as the Court of Claims correctly found, "*Rafaeli* . . . did not, contrary to [Appellant]'s assertions, create a 'new' rule of law." Court of Claims December 4, 2020 Opinion at 5 (App p 73). See also *Schafer v Kent Co*, unpublished opinion of the Court of Appeals, issued September 22, 2022 (Case No. 356908), p 4 ("we hold *Rafaeli* did not announce a new rule of law but returned the law to that which was recognized at common law and by the ratifiers of the Michigan Constitution of 1963, … and should be given full retroactive effect."). "Instead, there was no published authority on point, and the Supreme Court traced its rationale for finding a protected property right in surplus proceeds all the way back to the Magna Carta, continuing through this state's Common Law, and recognizing the same right under this state's Constitution." *Id.* at 5-6, citing *Rafaeli*. "Indeed," the Court of Claims noted, it "was able to issue the decision it did prior to *Rafaeli*" because the Michigan Constitution barred Appellant's conduct. *Id.* at 6. Thus, Appellant's "arguments about prospective-only application of *Rafaeli* fall flat . . ." *Id.*, citing

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Pohutski v City of Allen Park, 465 Mich 675, 696; 641 NW2d 219 (2002) as explaining that whether the decision "clearly established a new principle of law" was a "threshold question" to any retroactivity issue.

Thus, "[t]his Court's decision in *Rafaeli* did not … overrule a prior court decision" at all, let alone "declare[] a clearly worded statute and every known case applying that law for two decades unconstitutional with little to no foreshadowing." (Application p 24). The previous cases address different issues, and none of them argued that the retention of excess value or proceeds after foreclosure constituted a taking. Indeed, the State concedes that in *First Nat Bank of Chicago v Dep't of Treasury*, 485 Mich 980; 774 NW2d 912 (2009), which it describes as "the closest thing to 'foreshadowing'" the Court "remanded the case to the trial court for consideration of the bank's *unaddressed* takings claim." (Application p 24 n 9) (emphasis added).

b) Even if, *arguendo*, *Rafaeli* announced a "new rule," it would still apply retroactively.

If, *arguendo*, there is a new rule, then the Court should 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*, 465 Mich at 696-697 (cited in Application p 27).

(1) *Rafaeli*'s purpose compels retroactive application.

Even if, *arguendo*, *Rafaeli* did announce a "new rule," the "purpose to be served by the new rule," *id.*, is the paramount concern of fidelity to the constitution. Specifically, as discussed above, *Rafaeli* discerned a well-established property right to surplus equity, and determined that the FGUs – such as Appellant – had illegally taken it. Again, a rule recognizing a property right

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inherently "serves the purpose" of protecting the property right. *Id.* Conversely, a "rule" that recognizes a property right, but permits its trampling, would be illusory.[25]

(2) Appellant's claimed reliance on pre-*Rafaeli* jurisprudence was unjustified.

(a) Appellant was not justified in believing that pre-foreclosure due process permitted it to take the Class Members' equity.

Appellant claims that "FGU's also relied on cases holding that persons can be deprived of property if they are provided due process." (Application p 37). This argument fails for two reasons. *First*, it ignores the fact that there was insufficient due process here. The FGUs in *Fox* argued that the Court should dismiss the procedural due process claims of the certified class in that case because the pre-foreclosure notice was sufficient. *Fox*, unpub op at 14 (October 16, 2020). The court rejected this argument, noting that "[p]laintiff challenges the post-foreclosure process; specifically, [the] failure to furnish adequate procedures before retaining the surplus proceeds." *Id.* at 15. As in *Fox*, "[i]nsofar as [Appellant] argue[s] that an adequate process for certain property before foreclosure should enable [it] to seize different property after foreclosure, [it] offer[s] no authority in support." *Id.*

[25] The State alternately speculates that "[t]he 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," (Application p 27), and that "[t]here is no doubt [it] announced a new principal…. [t]he purpose of [which] 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)." (Application p 29). But it is hardly "a new principal" that the government can only collect taxes actually owed.

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Second, did Appellant really believe that, even if it provided procedural due process, it could take property without due compensation? Again, any such "reliance" on due process jurisprudence would be entirely unjustified.[26]

(b) Appellant was not justified in believing it could take Class Members' property based on pre-*Rafaeli* jurisprudence.

Rafaeli was unanimous, and based on well-settled jurisprudence. Yet, Appellant cherry-picks pre-*Rafaeli* precedent, arguing that while "*Rafaeli* distinguished *Nelson* [*v New York*] and *Bennis* [*v Michigan*] . . . before that, both U.S. Supreme Court decisions supported FGUs' actions under Public Act 123." Application at 37.[27] If this was truly Appellant's mindset, it was mistaken.[28] For example, in *United States v Lawton*, 110 US 146; 3 S Ct 545; 28 L Ed 100 (1884), the federal government defended a tax auction process similar to the Defendants' here. The Court found that "[t]o withhold the surplus from the owner would be to violate the fifth amendment to the constitution and deprive him of his property without due process of law or take his property

[26] Appellant cites *Grimes v Dep't of Transp*, as finding that "[t]his Court must . . . consider whether that law and interpreting case law 'foster[ed] a reliance interest [and] shaped future . . . conduct.'" (Application p 35, citing *Grimes v Dep't of Transp*, 475 Mich 72, 88 n 49; 715 NW2d 275 (2006)). But *Grimes* was discussing whether to overturn a case despite the principle of *stare decisis*, and even then concluded, as here, there were "no reliance interests at work." *Id.*

[27] Appellant claims that it relied on the United States Supreme Court's reasoning that "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed." (Application p 31, quoting *Nelson v City of New York*, 352 US 103, 110–111; 77 S Ct 195; 1 L Ed 2d 171 (1956). But this ignores the fact that this Court found that the statute here did indeed infringe on a constitutional guarantee.

[28] The State claims that "a statute is presumed to be constitutional unless its unconstitutionality is clearly apparent" and that "the burden of proving that a statute is unconstitutional is on the party challenging it." (Application p 30) (quoting *McDougall v Schanz*, 461 Mich 15, 24 (1999) and *In re Trejo*, 462 Mich 341, 355 (2000)), and that "[a] statute is not unconstitutional . . . merely because it is allegedly undesirable, unfair, or unjust." (Application, pp 30-31) (quoting *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000)). These arguments miss the point: this Court has already found that the prior statute, in operation, was unconstitutional.

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for public use without just compensation." *Id*. at 150. Other courts have agreed. See *Thomas Tool Servs v Town of Croydon*, 761 A2d 439, 441 (NH, 2000); *Bogie v Town of Barnet*, 270 A2d 898, 900-901 (Vt, 1970) (following *Lawton*); *Lake Co Auditor v Burks*, 802 NE2d 896, 899–900 (Ind, 2004). It was Appellant – not this Court – that acted outside the established jurisprudence.[29]

Moreover, as discussed throughout, none of the pre-*Rafaeli* Michigan cases are inconsistent with *Rafaeli.*[30] As the Court of Claims found, "defendant's arguments about reliance on a purported 'old rule' are unconvincing, as there were no prior judicial decisions on which to rely." Court of Claims December 4, 2020 Opinion (App p 74) at 6 n 3.

Meanwhile, *Bennis v Michigan*, 516 US 442; 116 S Ct 994; 134 L Ed 2d 68 (1996) permitted the forfeiture of a vehicle involved in criminal activity, but never permitted Appellant to take the Class Members' equity. See *Rafaeli, LLC v Oakland Co*, unpublished per curiam opinion of the Court of Appeals, issued October 24, 2017 (Docket No. 330696), pp 5-6 (SHAPIRO, J., concurring) ("this case bears little, if any, relation to *Bennis*, and that it is a mistake to conclude that *Bennis* addresses, let alone controls, the issues in this case"); *Rafaeli*, 505 Mich at 448-450 (rejecting "forfeiture" analysis of tax foreclosure process and finding that "*Bennis* is distinguishable because the purpose of civil-asset forfeiture is different than the purpose of the GPTA provisions at issue here," because "the GPTA is not punitive in nature.").

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[29] The State claims that "sales that happened before *Rafaeli* did not have any way to know its eventual outcome or avoid a taking." (Application p 2). But the State itself enacted the statute; it could have avoided enacting a law that violated well-established property rights.

[30] The State claims that "[f]ormer property owners also treated the law as valid" because, it says, "until *Rafaeli*, very few claims of this type were filed under the 1999 law, and trial courts rarely showed sympathy." (Application, pp 6-7). But this is belied by the very fact of this litigation, as well as the multiple other cases filed before *Rafaeli* and discussed throughout. And the State claims that "[d]espite its sometimes-harsh results, still no takings challenge like this had been successful since 1999." (Application p 30). But neither had this Court rejected such a challenge.

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Ultimately, *Rafaeli* was consistent with previous Michigan caselaw. For example, in *Dean v Michigan Dep't of Natural Resources*, 399 Mich 84; 247 NW2d 876 (1976), a state agency executed a tax foreclosure and sold the property for more than the tax delinquency. The taxpayer sued for unjust enrichment. *Id.* at 93. The trial court summarily dismissed the claim as an impermissible attack on the foreclosure judgment. *Id.* This Court reversed, finding that "the subject matter of that judgment, i.e. the validity of the taxes of the state and the delinquency of plaintiff in the payment of those taxes, is completely independent of the subject matter of plaintiff's instant suit for restitution due to the unjust enrichment of the state." *Id.* at 94.

(c) A state cannot justifiably rely on its own unconstitutional statute.

Appellant claims that "[a]ll involved understood that 'a statute is presumed to be constitutional unless its unconstitutionality is clearly apparent.'" (Application p 30, quoting *McDougall*, 461 Mich at 24).[31] But the supposedly "relying" party here is the same state that enacted the unconstitutional statute in the first place. A state's reliance upon an unconstitutional statute is never "justified" – if so, then states could eviscerate their constitutional obligations by enacting unconstitutional statutes, "relying" upon them, and then claiming "justified reliance."

(3) Fairness and public policy considerations compel *Rafaeli*'s retroactive application.

(a) Adherence to the Constitution is a paramount consideration.

[31] Appellant's unsupported *ipse dixit* that "stakeholders" generally "understood [the pre-amendment General Property Tax Act] to mean that the property satisfied the debt, period," Application p 35, is also unpersuasive. Nothing in this pronouncement suggests that such reliance was justified. Indeed, it was not. How could these stakeholders reasonably – let alone justifiably – believe that tax debts would require properties for satisfaction even if the properties' values were many multiples of the underlying debt? And the idea that the equity takings victims shared this "understanding" is belied by the very fact of this litigation.

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Appellant suggests that *Rafaeli* should be limited to prospective application because "[i]n some instances 'considerations of convenience, of utility, and of the deepest sentiments of justice' militate against the retroactive application of a new rule." (Application p 24, quoting *Placek v City of Sterling Heights*, 405 Mich 638, 686; 275 NW2d 511 (1979) (COLEMAN, J., FITZGERALD, J., AND RYAN, J., concurring in part; dissenting in part)). But this turns the *Placek* concurrence's reasoning on its head. "[T]he deepest sentiments of justice" cannot "militate" in favor of an outcome in which the government gets away with having systematically violated constitutional rights and gets to keep illegally taken property. The State's "convenience" and "utility," *id.*, must yield to the "fundamental and paramount law of the nation." *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803). Even Appellant concedes that its proposed inquiry would consider "'the involvement of vested property rights.'" (Application p 26, citing *Placek*, 405 Mich at 665). Here, the "involvement of vested property rights" is determinative – Appellant committed a taking.

Ultimately, as Appellant concedes, "'[c]ourts have acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy.'" (Application p 39, quoting *Riley v Northland Geriatric Ctr.*, 431 Mich 632, 644; 433 NW2d 787 (1988), amended sub nom *Juncaj v C & H Indus*, 432 Mich 1219 (1989)). "Fairness and public policy" dictate that the government follow the constitutions that govern it; that takings be compensated; and that the government not retain money it illegally took.

(b) Appellant's fiscals interests do not excuse its takings.

Appellant argues at length for retroactive application based on its fiscal interests. These arguments fail.

Appellant claims that its taking should be excused because, it says, "[g]overnment must know what funds are available before it can responsibly implement a balanced budget each year."

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(Application p 36). But this unsupported claim is belied by the common knowledge that both tax receipts and expenditures vary throughout the year. The idea that the takings here were necessary for budgetary planning is unconvincing.

Appellants' cases on this issue are easily distinguishable. It cites *Bolt v City Lansing* (*On Remand*), 238 Mich App 37; 604 NW2d 745 (1999), in which this Court applied a tax decision prospectively. But *Bolt* was not a takings case. Appellant also notes that, "[i]n *Cipriano v City of Houma* . . . , the 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." (Application p 36, citing *Cipriano v City of Houma*, 395 US 701, 702, 706; 89 S Ct 1897; 23 L Ed 2d 647 (1969)). But this was a voting rights case, not a takings case. The Court's declination to undo the products of a too-restricted vote hardly means that the State here should get away with an illegal taking.[32]

Appellant similarly claims that "[r]eliance on the law as written 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.'" (Application pp 39-40, quoting *In re Certified Questions From US Dist Court, W Dist of Mich, S Div*, 506 Mich 332, 354; 958 NW2d 1 (2020), which cited *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284 n 10; 696 NW2d 646 (2005)). But reliance

[32] *Riley v Northland* discussed how a decision setting workers' compensation benefit limits was overturned by a subsequent decision lowering the limits, and how the later decision did not seek to claw back the benefits paid under the old decision. *Riley*, 431 Mich at 636 (discussing *Gusler v Fairview Tubular Products*, 412 Mich 270, 298; 315 NW2d 388 (1981), reh gtd 414 Mich 1102 (1982), app dis 414 Mich 1102 (1983)). That is the inverse of Appellant's position here, where the government seeks to retain property it illegally took.

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on the Constitution matters more. See *Marbury*, 5 US at 177.[33] In this case, Appellant's argument that "[w]here '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,'" Application p 40, quoting *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000), amounts to an argument against judicial review. In particular, it suggests that, as long as a taking was committed pursuant to a clearly worded statute, it is not compensable. The State provides no authority that either applicable Takings Clause entails such a loophole.

Fundamentally, the State asks the Court's indulgence based on the "magnitude of the [takings'] impact." (Application p 26). But the "magnitude" of the taking is all the more reason to remedy it, not a reason to excuse it. The idea that of a taking "too big to fail" is noxious to the constitutional order. Indeed, the Sixth Circuit considered and rejected just this argument:

> the Michigan Attorney General, as an intervenor, warns about the "serious fiscal consequences" of a decision in the plaintiffs' favor here. But in this case we sit as a court of law, not equity; and meanwhile the equities run very much the other way. The County forcibly took property worth vastly more than the debts these plaintiffs owed, and failed to refund any of the difference. … And meanwhile the Takings Clause bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The plaintiffs have patently been forced to bear such burdens here. [*Hall*, 51 F.4th at 196 (quoting *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 163, 101 S.Ct. 446.).[34]]

[33] The State claims "[w]here '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,'" (Application p 40, quoting *Robinson*, 462 Mich at 467). But, again, these general principles of statutory interpretation do not excuse an unconstitutional enactment or otherwise preclude judicial review.

[34] Moreover, the State has not made a record with respect to the fiscal impact. Given that the offending parties are sitting on substantial illegally taken sums, it seems just as plausible that they could easily afford to fulfilly their obligations.

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If the importance of "municipal budgeting and finance" could excuse unconstitutional conduct, governments could take property freely in order to satisfy "the lifeblood of government." (Application p 36, quoting *GM Leasing Corp v US*, 429 US 338, 350; 97 S Ct 619; 50 L Ed 2d 530 (1977)).

Paradoxically, the State also argues that "'[t]here is perhaps no area of law in which certainty, clarity, and predictability are more essential than in the realm of property law.'" (Application pp 35-36, quoting *In re Certified Question from US Bankruptcy Court of Eastern Dist of Mich*, 477 Mich 1210, 1214; 722 NW2d 423 (2006) (MARKMAN, J., dissenting)). But this is a reason why the government cannot illegally seize property and retain the ill-gotten gains. The importance of property rights hardly justifies immunity for takings.

(4) *Rafaeli*'s retroactive application is consistent with the administration of justice.

Appellant cites *Bezeau v Palace Sports & Entertainment, Inc* for its language that "the correct interpretation of a statute is better given prospective application when retroactive application . . . disrupts the administration of justice." (Application pp 38-39, quoting *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 465 n 6; 795 NW2d 797 (2010)). (See also Application p 38) ("The third consideration [when weighing prospective versus retroactive application of a judicial decision] is 'the effect on the administration of justice,'" quoting *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971)). Here, though, the process for takings claims is well-suited to adjudicate claims. As the Court of Claims found, "given that the subject of this case is an uncompensated taking of surplus proceeds, [Appellant]'s appeals to the administration of justice are unconvincing." Court of Claims December 4, 2020 Opinion (App p 74), p 6 n 3. Indeed, it is curious that Appellant complains about the inefficiency of litigating the

takings claims against it at the same time as it does all it can to avoid a class action that would make such litigation efficient.

III. The Court of Claims Properly Certified a Class

The Court of Claims had broad discretion to certify the Class, the State has not provided a reason to disturb its conclusion.

A. Standard of Review

"Given that the analysis a trial court must undertake in order to determine whether to certify a proposed class may involve making both findings of fact and discretionary determinations," in considering class certification, appellate courts "review the trial court's factual findings for clear error and the decisions within the trial court's discretion for abuse of discretion." *Henry*, 484 Mich at 495-496 Trial courts have broad discretion to define the scope of a class and enter orders for the case's management. See *Hevesi v Citigroup Inc*, 366 F3d 70, 83 (CA 2, 2004). Moreover, while Michigan courts "are not bound by federal decisions regarding requirements for class actions," Michigan courts often look to federal case law regarding Rule 23 of the Federal Rules of Civil Procedure when interpreting MCR 3.501 given the similar "'purposes, goals, and cautions . . . applicable to both.'" *Hanton v Hantz Fin Servs, Inc*, 306 Mich App 654, 665; 858 NW2d 481 (2014) (citation omitted). One difference is that Michigan does not follow a "rigorous analysis" approach in determining whether class prerequisites are met. *Michigan Ass'n of Chiropractors v Blue Cross and Blue Shield of Mich*, 300 Mich App 551, 560; 834 NW2d 148 (2013).[35]

[35] If this case, where all of the Class Members suffered identical injuries stemming from the Defendants' uniform conduct "is simply incompatible with class resolution," Application p 42, then it is difficult to see what kind of case could conceivably be litigated as a class action. And if it "is simply incongruous with the entire purpose of the class action court rule, its goals, and its procedures," Application p 42, then there is no such action that would be congruous, and the Rule is dead letter.

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B. The Court of Claims correctly applied MCR 3.501

1. The Class meets the MCR 3.501 requirements.

a) Numerosity.

The proposed class has over 200 members (see Application Ex E, opinion at 8), which easily meets the numerosity factor. MCR 3.501(A)(1)(a) requires only that the class be "so numerous that joinder of all members is impracticable." "There is no particular number of [class] members necessary, nor need the number be known with precision 'as long as general knowledge and common sense indicate that the class is large.'" *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007) (finding that the numerosity standard had been satisfied because '"general knowledge and common sense'" suggested that thousands of class members existed, even though the precise number was unknown, citation omitted). Indeed, there is no "magic number" necessary to satisfy the requirement, and a plaintiff "need only demonstrate that it is extremely inconvenient or difficult to join the members of the class." *Rodriguez v Berrybrook Farms, Inc*, 672 F Supp 1009, 1013 (WD Mich, 1987).[36]

The Class here easily meets this requirement. The Court of Claims considered the auction data from January 15, 2018 onwards. (See Application Ex E, opinion at 9). It showed that at least 200 parcels in the counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch were foreclosed by the State of Michigan under the Michigan GPTA; and were

[36] Generally, classes of around 35 to 40 are sufficiently numerous. *Smith v General Motors Corp*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 3, 1977 (Case No. 5-71348), p 5 (certifying class) (App p 165). See also *Crawford v TRW Auto US, LLC*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 21, 2007 (Case No. 06-14276), p 3 ("[I]t generally is accepted that a class of 40 or more members is sufficient to satisfy the numerosity requirement") (App p 168); *In re Cardizem CD Antitrust Litig*, 200 FRD 297, 303 (ED Mich, 2001) (finding that a class with approximately 80 members was sufficiently numerous).

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subsequently sold at tax auction for an amount exceeding the minimum bid; and whose prior owners were not refunded these surplus proceeds as described in *Rafaeli*.

b) Commonality.

The second requirement is that "there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). The common question factor is concerned with whether there is a common issue the resolution of which will advance the litigation. It requires that the issues in the class action be subject to generalized proof, and thus applicable to the class as a whole, and that the common issue predominate over those issues that are subject only to individualized proof. *Zine v Chrysler Corp*, 236 Mich App 261, 289-290; 600 NW2d 384 (1999). This "standard is not that demanding," requiring only a single common question of law or fact. *Beattie v CenturyTel, Inc*, 234 FRD 160, 168 (ED Mich, 2006), aff'd in part, remanded in part, 511 F3d 554 (CA 6, 2007). In fact, the Court Rule explicitly provides that "[w]hen appropriate the court may order that . . . the action be maintained as a class action limited to particular issues or forms of relief." MCR 3.501(B)(3)(d)(ii).

Moreover, "there is no requirement . . . that all questions necessary for ultimate resolution be common to the members of the class." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599; 654 NW2d 572 (2002). See also *Grigg v Michigan Nat'l Bank*, 405 Mich 148, 184; 274 NW2d 752 (1979); *Hill*, 276 Mich App at 311; *Dix v Am Bankers Life Assurance Co*, 429 Mich 410, 416; 415 NW2d 206 (1987). Where, as here, defendant's conduct affected a group, one or more of the claim's elements will generally be common to every member. *Rodriguez*, 672 F Supp at 1015.[37]

[37] As the *Sprague* case that Appellant cites makes clear, "there need only be one question common to the class." *Sprague v Gen Motors Corp*, 133 F3d 388, 397 (CA 6, 1998) (citation omitted).

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Individual determinations of appropriate final damages will not defeat commonality predominance. *Hill*, 276 Mich App at 311-312. Thus, uniformity of the amount of damages is not required. *Id.* at 312. In this case, the damages calculations can be performed with a simple spreadsheet calculation. "[A]lmost all claims will involve disparate issues of law and fact to some degree"; however, "[t]he relevant concern here is whether the issues are so disparate as to make a class action unmanageable." *Dix*, 429 Mich at 415-416, 419.

Here, the core common question is the legality of Appellant retaining surplus proceeds following the sale of tax-foreclosed property. The only "individualized" issue would be the amount of damages and, again, any differences in the amount of damages do not disturb a commonality finding. (See Application p 60) (original class certification opinion at 7) (finding commonality); *Fox*, unpub op at 8 (October 16, 2020) (commonality in analogous case). See also *Breiner*, unpub op at 11 ("as the Court of Claims noted, the need to make individualized findings only relates to determining the amount of damages," and "'the individualized determinations of the extent of damage will not predominate over the common questions of whether defendant is liable at all for damages,'" quoting *Hill*, 276 Mich. App. at 312).

The State claims that commonality is absent here, because, it says, *Rafaeli* has resolved the common issue. This is backwards: the fact that this Court has resolved this core liability issue in favor of the Class *supports* a commonality finding. "[R]esolved questions" should factor into a predominance analysis, and "eliminating conceded issues . . . would undermine the goal of efficiency by requiring plaintiffs who share a 'commonality of the violation and the harm,' nonetheless to pursue separate and potentially numerous actions because, ironically, liability is so clear." *In re Nassau Co Strip Search Cases*, 461 F3d 219, 227-228 (CA 2, 2006) (holding that "a concession does not eliminate a common issue from the predominance calculus"). Thus, for

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example, in *Gulino v Bd of Ed of City Sch Dist of City of New York*, unpublished opinion of the United States District Court for the Southern District of New York, issued August 29, 2013 (Case No. 96 CV 8414 KMW), the court held that resolved issues can satisfy the commonality requirement. *Gulino*, unpub op at 6, citing *In re Nassau Co*, 461 F3d at 227-228. See also *In re MF Glob Inc*, 512 BR 757, 766 (Bankr SDNY, 2014), citing *Gulino*, unpub op at 6; *Kalish v Karp & Kalamotousakis, LLP*, 246 FRD 461, 462 (SDNY, 2007) (class certified where "Defendant concede[d] liability on the underlying [] claim"); *DeMons v United States*, 119 Fed Cl 345, 353 (2014) (class certified against federal government despite "the Government's argument that because it concedes liability, there are no common questions for the court to decide"). *See also Breiner*, unpub op at 10 ("We reject the state's argument that the fact that the class can now cite *Rafaeli* in support of some of its claims somehow requires decertification of that class. In essence, the state would punish class members for being the beneficiaries of a favorable decision that may assist them in litigating their claims").

c) Typicality.

"The typicality directs the court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *Nowacki v Dep't of Corrections*, unpublished per curiam opinion of the Court of Appeals, issued August 19, 2014 (Docket No. 315969), p 4. Thus, "the representative's claim must arise from the same event or practice or course of conduct that gives rise to the claims of the other class members and be based on the same legal theory." *Id.* "'So long as there is a nexus between the class representatives' claims [and] defenses and the common questions of fact or law which unite the class, the typicality requirement is satisfied.'" *Henry*, 484 Mich at 516 (citation omitted). Factual differences between

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the class members' claims are okay as long as their "claims . . . share a legal theory" and "core of allegation." *Hill*, 276 Mich App at 313.

Here, the class members' legal theories are the same. The class members' "core of allegation" is also the exact same: after Appellant foreclosed upon each member of the class, it failed to return the surplus equity. For this reason and for the same reasons outlined as to commonality, the claims between all class members are identical – that is, they have the same essential characteristics – and thus are typical to the named representatives' claims.

d) Adequacy.

The adequacy of class representation is measured by the extent to which the named plaintiffs' interests may be antagonistic to those of the class and the qualifications of the plaintiffs' attorneys. *Hill*, 276 Mich App at 313; *Nowacki*, unpub op at 4. Plaintiffs satisfy both prongs. For the first, the only "antagonistic" or "conflicting" interests are Appellants' contrived differences based on their idea that lienholders should be in the class. As discussed below, this is a red herring. For the second component, Plaintiffs have retained counsel who far exceed this standard, especially for cases like the present action. Appellant does not appear to dispute this conclusion.

e) Superiority.

MCR 3.501(A)(2) provides that in determining whether the manageability requirements of MCR 3.501(A)(1)(e) are met, courts shall consider multiple factors. So long as a case does not contain "issues . . . so disparate as to make a class action suit unmanageable," the class fulfills MCR 3.501(A)(1)(e). *Dix*, 429 Mich at 419; *Lee v Grand Rapids Bd of Educ*, 184 Mich App 502, 504-505; 459 NW2d 1 (1989); *Edgcumbe v Cessna Aircraft Co*, 171 Mich App 573, 575; 430

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NW2d 788 (1988).[38] As "[n]o two claims are likely to be exactly similar" and "[a]lmost all claims will involve disparate issues of law and fact to some degree," the "criterion does not preclude the maintenance of a class action where the individual claims differ slightly with regard to such specifics as the time, place, and exact nature of the injury." *Dix*, 429 Mich at 418-419. Instead, it "is essentially a practicality test" that looks at "'whether the issues are so disparate as to make a class action unmanageable.'" *Hill*, 276 Mich App at 314.

Class certification here is superior to other available methods for the fair and efficient adjudication of this matter. The victims of the State's conduct should not be forced to bring their own actions and, of course, many will not even know of their rights in the absence of a class action, or may not have the resources to bring their own claim. And broad adjudication is worthwhile to ensure the comprehensive resolution of this significant public matter. Class certification is both useful and necessary and it offers judicial efficiencies because it permits common claims and issues to be decided only once, with binding effect to all parties and with the effect of ensuring that there will be no inconsistent or varying adjudications. See MCR 3.501(A)(2). No management difficulties are likely to arise that could preclude this action from being maintained as a class action. See *Henry*, 484 Mich at 499 n 22 (explaining that class actions provide "a procedural device used 'to achieve the economies of time, effort, and expense'").[39] In fact, as discussed below,

[38] While this Court in *Dix* considered the predecessor to MCR 3.501, "this fifth factor is 'essentially the same' as the 'convenient administration of justice' consideration required under former GCR 1963, 208." *Hill*, 276 Mich App at 314 (citing *Dix*, 429 Mich at 414 n 6).

[39] The State argues that the Court of Appeals' reasoning that "a decertification of the class on the basis of *Rafaeli* would penalize class members who would then have to file individual actions that would be newly subject to the notice requirements of MCL 600.6431" impermissibly "relies on equity to overcome clear statutory requirements under PA 256." (Application pp 52-53) (citing *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002) and *Martin v Sec'y of State*, 482 Mich 956; 755 NW2d 153 (2008)). But, if anything, the Court of Appeals was too accommodating towards the State, given that, as discussed above, PA 256's exclusive remedy provision is unconstitutional and the victims could bring non-PA 256 takings claims in this case's

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Appellant's purported concern – that the Class Members' creditors will somehow disrupt the class action process – is an unfounded red herring.[40]

C. Appellant's Criticisms of the Court of Claims' Certification Decision Do Not Warrant Overturning the Decision

1. PA 256 cannot abrogate MCR 3.501.

PA 256 also cannot deprive the Class of its right to class-wide adjudication by requiring a different procedure for the Class Members to seek recovery, because the Legislature cannot simply overwrite a court rule such as MCR 3.501.[41] "It is beyond question that the authority to determine rules of practice and procedure rests exclusively with [the Michigan Supreme] Court," and its "primacy in such matters is established in our 1963 Constitution." *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999), citing Const 1963, art 6, § 5. "This exclusive rule-making authority in matters of practice and procedure is further reinforced by separation of powers principles." *Id*., citing Const 1963, art 3, § 2; *In re 1976 PA 267*, 400 Mich 660; 255 NW2d 635 (1977). Thus, "'the function of enacting and amending judicial rules or practice and procedure has been committed exclusively to this Court . . . ; a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will.'" *Id*. at 26-27, quoting *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964). Yet PA 256

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absence. In any event, the Court of Appeals was hardly substituting its judgment as to the equities for a statute; it was explaining that a class action that predated the statute was a superior mechanism for resolving the claims. The State in effect asks this Court to penalize the Court of Appeals for making the requisite analysis under MCR 3.501.

[40] The State concedes that, under PA 256, "claims for prior years will [burden] 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." (Application p 38) (emphasis in original). This is another reason that the Court of Claims was correct to certify the Class.

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directly contradicts the Court Rules, laying out a detailed set of procedures at odds with them. The Legislature cannot abrogate class action procedures generally—let alone a pending class action—and impose a specialized process on pending claims.

2. The Court of Claims did not err in rejecting the argument that potential lienholders made class certification improper.

Appellant's primary class certification argument is that the Court of Claims improperly failed to address the prior holders of liens on the Class Members' properties. Under the pre-PA 256 GPTA's MCL 211.78k(5)(c), the underlying foreclosure judgment extinguished a parcel's liens. See *Barry Co Treasurer v Klinge*, unpublished per curiam opinion of the Court of Appeals, issued January 8, 2013 (Docket No. 308783), p 3 ("trial court's judgment of foreclosure extinguishes all liens against and interests in the subject property, except for those specifically enumerated in the statute") (App p 378).[42] Thus, as the Court of Claims correctly explained, "the GPTA accounts for, and extinguishes, all liens–with limited exceptions–upon foreclosure." See also *Rafaeli*, 505 Mich at 445 (after foreclosure, "the foreclosing governmental unit's title to the property is not subject to any recorded or unrecorded lien," citing MCL 211.78k(6)). These liens cannot be "resurrected" against the Class Members' equity without subjecting them to yet another taking. Indeed, the taking of the Class Members' equity to provide it to private sector lienholders is also barred by Art. X § 2 of the Michigan Constitution, which expressly prohibits any such takings for private use. Const 1963, art X, § 2.[43] Accordingly, as observed by the trial court, "the interests of the former lienholders are just that: former or expired."

[42] Appellees cite this unpublished case because there seems to be limited caselaw on this issue.

[43] The State claims that the Court of Appeals "misse[d] for the forest for the trees" when it noted that "MCL 211.78k(5)(c) extinguishe[d] all liens upon the issuance of a judgment of foreclosure," because the statute had also purported to extinguish the Class Members' property rights. (Application p 43) (citing *Hathon*, slip op, p 13). While the issue is not before the Court, it

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Ultimately, former lienholders are little different from other creditors. As the Court of Claims found, "[i]n essence, defendants are arguing that if there are any creditors of the plaintiffs, the very existence of those creditors will defeat the class action." (App p 63) (original class certification decision at 10). But, properly, "the Court decline[d] to give credence to hypothetical actions of potential creditors that might be taken post-judgment." *Id.* at 10-11. And even if, *arguendo*, there are former lienholders who seek to intervene, the case would remain manageable. Again, these are issues for the trial court's management.

3. Appellant's "inclusiveness" arguments fail.

Appellant argues that "the current class is both underinclusive and overinclusive," Application p 43, because it omits lienholders while including post-*Rafaeli* claimants. This argument is wrong on both counts.

As to the "overinclusivity" argument, as explained above, the post-2020 victims are properly part of the Class because Appellant cannot, acting through its Legislature, compel them to use the inferior PA 256 process to seek less money than the State owes them. [44]

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is possible that the lienholders also suffered a taking, a possibility about which the State seems oddly enthusiastic. (See Application p 44) ("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.") (emphasis in original). But even if the State is correct that it took the lienholders' property, this does not impair the Class Members' takings claims or compel the hassle of their individual litigation. (See also App p 62) (original class certification decision at 9) ("to the extent those lienholders would even have a claim, it would be against the statutory framework that extinguished their liens," which would be a different case than this."). At most, the issue of liens is an issue of damages, which, as discussed above, does not defeat commonality.

[44] Given the statute's constitutional infirmities, the State is incorrect that "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," and that thus "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)." (Application pp 45-46). At the very least, it is

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The "underinclusivity" argument also fails. There is no obligation that a Class contain every possible person wronged by a defendants' conduct. "[T]he [trial] court may choose one possible class definition over another in order to ensure that the requirements of [the court rule] are best satisfied." *Bertulli v Indep Ass'n of Cont'l Pilots*, 242 F3d 290, 296 (CA 5, 2001) (rejecting underinclusiveness argument) (citations omitted).[45] "[P]ersons left out of the class definition remain[] free to assert their rights as they s[ee] fit." *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), p 4, citing *Bertulli*, 242 F3d at 296 n 25 (App p 189). And the other "interest holders" are presumably the hypothetical lienholders. As explained throughout, they are irrelevant to class certification.

4. The State's impracticability arguments fail.

The State claims that "Public Act 256 controls and provides for individualized claims filed as motions in existing circuit court actions," and that the Court of Claims' decision to certify the class was therefore erroneous. (Application pp 53-54). But for all of the reasons explained throughout, PA 256 – or at least its exclusive remedy provision – does not apply to this case.

CONCLUSION AND REQUESTED RELIEF

The Class respectfully requests that this Court deny the State's Application.

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unconstitutional to require claimants to use the PA 256 process as opposed to alternatives such as this class action.

[45] Nor are former lienholders indispensable or otherwise required for complete relief. "'[C]omplete relief' is determined as between persons already parties, and not as between 'a party and the absent person whose joinder is sought.'" *May v CitiMortgage, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued December 13, 2013 (Case No. 12-CV-14603), p 2 (citations omitted) (App p 206). And "factors such as judicial economy or avoidance of multiple litigation are not enough to compel joinder." *Mather Inv'rs, LLC v Larson*, 271 Mich App 254, 257-258; 720 NW2d 575 (2006) (quotations omitted). Again, this is an action for money damages – not an *in rem* proceeding to establish the rights of potential property claimants.

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WORD COUNT STATEMENT

This document complies with the type-volume limitation of the Michigan Court Rules because, excluding the part of the document exempted, this **response to Appellants' application for leave to appeal** contains no more than 16,000 words. This applicable portion of this document contains 15,923 words.