STATE OF MICHIGAN
IN THE SUPREME COURT

LYNETTE HATHON AND AMY JO DENKINS, et al.,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN,

Defendant-Appellant.
_____/

Supreme Court No. 165219

Court of Appeals No. 356850

Michigan Court of Claims No. 19-000023-MZ

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

BRIEF ON APPEAL OF APPELLANT STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

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

On June 9, 2023, this Court issued an order directing the clerk to schedule argument on the application and outlining additional matters for briefing. Appellant sought to extend its filings deadline to coincide with the instant filing.

STATEMENT OF QUESTIONS PRESENTED

1. The Legislature passed Public Act 256 in December 2020 as a remedial and clarifying law following this Court's decision in *Rafaeli LLC*, and its provisions are consistent with this Court's analysis of property rights under state law. It applies only to property tax foreclosures. The law's plain language, mechanisms, and enacting language show the Legislature intended the statute to control all claims arising from disposition of tax foreclosed properties, including the instant claims. Does 2020 Public Act 256 control, thus depriving the Court of Claims of jurisdiction, precluding all original actions covering these claims?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

2. Class actions promote efficiency by deciding common questions of fact and law through lead, representative litigants, applying those determinations to the class and providing finality to all parties. Here, the subject matter, interested parties, and quantified (sum certain) damages make class litigation not only inefficient but unworkable. Did the Court of Claims abuse its direction in certifying a class in the first place, and again in its class definition?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

3A. If this Court holds that *Rafaeli* has some retroactive application covering sales before July 18, 2020, does the law provide that the notice of intent must be filed within 180 days of such ruling, starting the claim process?

Appellant's answer: Yes.

Appellees' answer: Did not answer.

Trial court's answer: Did not answer.

Court of Appeals' answer: Did not answer.

3B. Does the time limitation in MCL 211.78*l* apply to claims under MCL 211.78t?

Appellant's answer: Yes.

Appellees' answer: No. (by implication in arguing the entire statute is unconstitutional)

Trial court's answer: No. (by implication in holding the new statute does not apply here)

Court of Appeals' answer: No. (by implication in holding the new statute does not apply here)

3C. Under MLC 211.78t(6), claims based on pre-July 18, 2020 sales cannot be made unless this Court holds its decision in *Rafaeli, LLC v Oakland Co,* 505 Mich 429 (2020) applies retroactively. If that happens, qualifying claims may be made within 180 days of this Court's order. Should this Court apply equitable tolling for claims that turn on the application of *Rafaeli*, i.e., for claims based on sales held before July 18, 2020?

Appellant's answer: Yes, but consistent with Legislative intent.

Appellees' answer: Did not answer.

Trial court's answer: Did not answer.

Court of Appeals' answer: Did not answer.

STATUTES AND RULES INVOLVED

MCL 211.78*l*

(1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property shall not bring an action, including an action for possession or recovery of the property or any interests in the property or of any proceeds from the sale or transfer of the property under this act, or other violation of this act or other law of this state, the state constitution of 1963, or the Constitution of the United States more than 2 years after the judgment of foreclosure of the property is effective under section 78k. Nothing in this section authorizes an action not otherwise authorized under the laws of this state. An action to recover any proceeds from the sale or transfer of property foreclosed for nonpayment of real property taxes under this act must be brought as provided under section 78t.

(2) The right to sue recognized by this section is not transferable except by testate or intestate succession.

MCL 211.78t provides, in part:

(1) A claimant may submit a notice of intention to claim an interest in any applicable remaining proceeds from the transfer or sale of foreclosed property under section 78m, subject to the following:

(a) For foreclosed property transferred or sold under section 78m after July 17, 2020, the notice of intention must be submitted pursuant to subsection (2).

(b) For foreclosed property transferred or sold under section 78m before July 18, 2020, both of the following:

(i) A claim may be made only if the Michigan supreme court orders that its decision in *Rafaeli, LLC v Oakland County*, docket no. 156849, applies retroactively.

(ii) Subject to subparagraph (i), the notice of intention must be submitted pursuant to subsection (6).

(2) For foreclosed property transferred or sold . . . after July 17, 2020, . . . a claimant seeking remaining proceeds for the property must

notify the foreclosing governmental unit using a form prescribed by the department of treasury.

* * *

(4) For a claimant seeking remaining proceeds from the transfer or sale of a foreclosed property transferred or sold under section 78m after July 17, 2020, after receipt of a notice under subsection (3), the claimant may file a motion with the circuit court in the same proceeding in which the judgment of foreclosure of the property was effective under section 78k to claim any portion of the remaining proceeds that the claimant is entitled to under this section.

* * *

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

* * *

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

(12) As used in this section:

> (a) "Claimant" means a person with a legal interest in property immediately before the effectiveness of a judgment of foreclosure of the property under section 78k who seeks pursuant to this section recognition of its interest in any remaining proceeds associated with the property.
>
> (b) "Remaining proceeds" means the amount equal to the difference between the amount paid to the foreclosing governmental unit for a property due to the sale or transfer of the property under section 78m and the sum of all of the following:

(i) The minimum bid under section 78m.

(ii) All other fees and expenses incurred by the foreclosing governmental unit pursuant to section 78m in connection with the forfeiture, foreclosure, sale, maintenance, repair, and remediation of the property not included in the minimum bid.

(iii) A sale commission payable to the foreclosing governmental unit equal to 5% of the amount paid to the foreclosing governmental unit for the property.

MCR 3.501 provides, in part:

(1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:

(a) the class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

(2) In determining whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court shall consider among other matters the following factors:

(a) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or

(ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

INTRODUCTION

Public Act 256 of 2020 (PA 256) does not address litigation generally, like the Revised Judicature Act. Nor does PA 256 apply to mortgage foreclosures or other debtor-creditor collection disputes; it applies only to property tax foreclosure and is the exclusive statutory platform to claim and adjudicate surplus proceeds. It was enacted in the immediate aftermath of this Court's decision in *Rafaeli*, codified the common law property right in remaining proceeds, and provided a single statewide process to adjudicate that right. The new claim-making process is a seamless continuation of the existing tax law, curing the old law's failure to provide access to what is left *after* tax foreclosure and sale.

In short: the law exists to address exactly what this case is about. It applies here and requires proceed claims be made via motion filed by individual claimants in the existing circuit court tax foreclosure case. Once the law was enacted, with immediate effect, the Court of Claims no longer had jurisdiction, and it erred by not applying the law to these claims.

The Court of Claims also erred in certifying a class in this context, and further erred in its class definition. As it now stands, the class appears to include proceeds from sales held in 2021 and 2022 (and soon 2023), but there is no question that sales that occurred wholly after the new law was in effect must use *only* the new process. And the class definition currently excludes all lienholders, a group with equally vested and senior rights to those of "owners."

But correcting that error to include lienholders while maintaining the class action posture makes resolution less manageable and introduces adversity as

between class members. And the fact that litigants may "opt out" of class litigation makes this unworkable; the proceeds from Green Acre are finite and may only be decided by one court in one action. Class litigation, in this case, does not work.

Finally, the Legislature clearly intended that this Court would play a role in deciding which potential claimants should have an opportunity to use the new law, at least as it relates to sales held prior to *Rafaeli*. The Legislature provided a 180-day window for those older claims to use the new law, following any decision by this Court that those claims are payable based on *Rafaeli*. In some instances, like this case, statutory tolling and/or class action tolling may already apply for some claimants. Even so, some limited equitable tolling may be appropriate consistent with the Legislature's two-year statute of repose to protect lienholders' rights.

If this Court holds that *Rafaeli* applies retroactively, it should also hold that claimants from 2019 circuit court foreclosure orders (effective April 1, 2019) and subsequent sales may file claims under MCL 211.78t(6), so long as their claims have not already been adjudicated by another court or action. This should not toll any claims based on foreclosures that were effective after the new law was enacted and that required no ruling from this Court to proceed; those claimants' time to bring claims has expired. This limited application of equitable tolling puts all potential claimants, including those seeking the funds in this case, on equal footing by giving lienholders the same protections as "owners."

STATEMENT OF FACTS AND PROCEEDINGS

Public Act 123 of 1999 changed property tax collection.

In 1999, the Legislature rewrote Michigan's property tax collection law. That year, Public Act 123 repealed the State's tax lien sale process and created a new system to clear title and sell tax-foreclosed properties. See Smith, *Foreclosure of Real Property Tax Liens Under Michigan's New Foreclosure Process*, 29 Mich Real Prop Rev 51, 51 (2002).

From 1999 to 2020, the process and timeline were remarkably consistent; property taxes went from delinquent (one year late), to forfeited (two years late), to foreclosed (three years late). Annually, the Foreclosing Governmental Unit (FGU) filed a single in rem petition in the county circuit court. MCL 211.78h(1). There is title work (MCL 211.78i(1)) to provide notice to interested parties (MCL 211.78i(2)), administrative review (MCL 211.78j(1)), and then a circuit court hearing. MCL 211.78k. Even after 2020, tax foreclosure remains a valid collection tool; tax delinquent owners "may not contest the legitimacy of defendants' authority to foreclose on their properties for unpaid tax debts, nor may plaintiffs contest the sale of their properties to third-party purchasers." 505 Mich at 451. " 'People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property.' " 505 Mich at 451, n 47, quoting *Jones v Flowers*, 547 US 220, 234 (2006).

The subject property was foreclosed under Public Act 123 in 2018.

Named Plaintiffs Lynette Hathon and Amy Jo Denkins owned real property at 835 Michigan Ave, Owosso, MI (Property). (Appellant's Appx, p 2 ¶ 5.) The Department of Treasury was the FGU for Shiawassee County. (Appellant's Appx, p 2 ¶ 6.) The 2015 taxes were not paid, and on February 9, 2018, the Shiawassee County Circuit Court entered a Judgment of Foreclosure in case number 17-9804-CZ. (Appellant's Appx, pp 1–17, 18–38.) The judgment required redemption by April 2, 2018.

Plaintiffs did not redeem, and title vested in the State of Michigan, which sold the Property at public auction for $28,250.00 in 2018. (Appellant's Appx, pp 1–17.) None of the class litigants in this case, as plead, dispute notice of the underlying foreclosure proceeding. The 2018 tax sale proceeds were distributed under MCL 211.78m(8).

The $28,250 was deposited in that year's sale account and the account first reimbursed the county treasurer for the county's taxes and associated collection costs. See former version of MCL 211.78m(8)(a). Remaining funds covered collection shortfalls in other counties where Treasury was FGU. If every county in which the State Treasurer was FGU was made whole, any balance was deposited in the land reutilization fund. Id. at (8)(g).

Plaintiffs file a putative class action.

On January 9, 2019, Plaintiffs filed a notice of intent in the Michigan Court of Claims, asserting an unconstitutional taking, excessive fines, and other claims. (Appellant's Appx, pp 39–43.) Only Hathon and Denkins filed a notice of intention, although it included class action language.

On January 26, 2019, Hathon and Denkins filed a putative class action against the State of Michigan listing counties where the state was once FGU.[1]

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

> All property owners formerly owning property from within the counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch who, since June 30, 2013, had said property seized by Defendants State of Michigan and Patricia A. Simon via the General Property Tax Act, which was worth more and was sold at tax auction for more than the total tax delinquency and was not refunded the excess/surplus equity. [Appellant's Appx, pp 44–58.]

The parties briefed threshold legal questions, and the Court of Claims held Plaintiffs' taking theory was viable. (Appellant's Appx, pp 59–79.) The case was held in abeyance pending resolution of *Rafaeli LLC v Oakland County,* 505 Mich 429 (2020).

[1] MCL 211.78 allowed each county to choose to serve as the FGU. As of this filing only six counties utilize the Michigan Department of Treasury.

Surplus proceeds are a separate property right.

On July 17, 2020, nearly twenty years after Public Act 123 of 1999 was enacted, this Court held that if "properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties" there was a separate property right in what was left. *Rafaeli*, 505 Mich at 474–475.

This Court also provided: "[n]othing in our holding today prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id.* at 473 n 108. The prior law did not recognize the separate property right in proceeds and gave no mechanism to claim those proceeds. *Id.* at 447.

The *Rafaeli* decision upended two decades of Michigan case law and property tax collection practices under the 1999 law. The decision identified a common-law right in excess proceeds, which was silently incorporated in Michigan's 1963 Constitution, Article 10, § 2. But before that, taxpayers, treasurers, and courts relied on the statute's plain language and cases like *Nelson v City of New York*, 352 US 103 (1956) and *Bennis v Michigan*, 516 US 442 (1996), as well as a body of state court decisions that appeared to hold that Public Act 123 was constitutional so long as due process was satisfied in the lead up to foreclosure.

Before *Rafaeli*, even property owners appeared to understand how Michigan's taxing law applied; very few claims of this type were filed under the 1999 law. Even when claims were filed, trial courts rarely granted relief and the handful of claims that succeeded were reversed on appeal. See, e.g., Appellant's Appx, pp 80–100.

On December 22, 2020, Public Act 256 was enacted with immediate effect.

Less than six months after *Rafaeli* issued, the Legislature unanimously passed Public Acts 255 and 256 of 2020 with immediate effect, the most comprehensive statutory modifications since 1999. Public Act 256 clarified the statute of limitations (MCL 211.78*l*), defined "claimants" able to make claims for remaining sale proceeds (MCL 211.78t(12)) and how claims must be made (§ 78*l*(1);§ 78t(2), (4), (6)). The law covers periods before and after the *Rafaeli* decision. MCL 211.78t(1)–(2). It claims to be the exclusive mechanism to seek sale proceeds (§§ 78*l,* 78t(11)) and vests jurisdiction in the state's circuit courts (§§ 78t(4), (6)).

The Court of Claims holds Public Act 256 does not apply, recertifying a class.

On February 22, 2021, the Court of Claims held that Public Act 256 does not apply to this case. (Appellant's Appx, pp 101–110.) The Court of Claims asserted jurisdiction and re-certified a new, narrower class which presently excludes lienholders but includes sales held after PA 256 became law. The narrowed definition applied the Court of Claims Act's notice of intention one year limitation, including:

> All persons and entities who, from January 15, 2018, through the final order in this matter, had real property in the counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch that was foreclosed upon by the State of Michigan under the General Property Tax Act, MCL 211.78, which was then subsequently sold at tax auction for an amount exceeding the minimum bid and who were not refunded the excess/surplus equity as described by the Michigan Supreme Court in *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020). [Appellant's Appx, pp 101–110.]

The State sought reconsideration, which was denied. (Appellant's Appx, p 111.)

On April 9, 2021, the State sought leave to appeal in the Michigan Court of Appeals. The State then filed a bypass application, which was denied because this Court was "not persuaded that the question presented should be reviewed by this Court before consideration by the Court of Appeals." (Appellant's Appx, p 112.)

The Court of Appeals granted the State's application on August 31, 2021, and Plaintiffs-Appellees filed a cross application as to the constitutionality of PA 256. The parties fully briefed the issues, provided oral argument, and the lower court issued its published decision on December 1, 2022, affirming the trial court decision. The State's timely application for leave to appeal followed, and on June 9, 2023, this Court ordered argument on the application and additional briefing.

STANDARD OF REVIEW

"Matters of constitutional and statutory interpretation are reviewed de novo." *People v Skinner*, 502 Mich 89, 99 (2018). In determining the validity of a statute, "[e]very reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution, that a court will refuse to sustain its validity." *Cady v Detroit,* 289 Mich 499, 505 (1939). This Court also considers retroactive application of a statute de novo. *Buhl v City of Oak Park*, 507 Mich 236, 242 (2021).

"[T]he 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" and as a result, this Court reviews "the trial court's factual

findings for clear error and the decisions within the trial court's discretion for abuse of discretion." *Henry v Dow Chemical Co*, 484 Mich 483, 496 (2009). The abuse of discretion standard recognizes that there may be more than one principled outcome; so long as " 'the trial court selects one of these principled outcomes,' " the reviewing court will not disturb that determination. *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006), quoting *People v Babcock,* 469 Mich 247, 269 (2003). However, this Court reviews "the interpretation and application of . . . court rules de novo." *In re Rerranti*, 504 Mich 1, 14 (2019).

SUMMARY OF ARGUMENT

In this area of the law, this statute is it. Public Act 256 was written and enacted for claims just like these, and it controls here. The law is comprehensive in scope, covering sales before and after the *Rafaeli* decision. The law is remedial and curative and works harmoniously within the existing tax foreclosure provisions—when it is allowed to work. Yet, some questions remain.

In application and voice, PA 256 is not an outlier or afterthought. It is not a set of orphaned provisions awkwardly appended to an existing statute. It is an integrated part of the existing timeline and process. But because it includes new duties, work, and expenses after sale, the law extends its prior mantra: *pay your own way* to the new provision. Thus, while it provides the new claim-making process, the law also recognizes that the expense of that process should be borne by the sold properties, through reasonable fees. This is, after all, the final stage of the tax collection action so the (potential) retroactive expenses of administering the

sales, newly required notices, and claim-making process should be paid by the claimants not the public generally.

The idea that there would be a specific legislatively designed process to handle these claims is unsurprising. This area of law has long operated under a Legislatively created process that is nearly self-contained, procedurally unique from other areas of law. Had the Legislature understood there was a property right to remaining proceeds in 1999, it is likely something quite like PA 256 would have been included in this law from the start—including provisions to account for the expense of the post-sale process.

Even if that were not the reality, it is worth considering the big picture; this dispute arose from extended delinquency ending in tax foreclosure. The funds sought in these situations are comprised entirely of proceeds from tax foreclosed property sales. That any returned funds should come from the same underlying case and be decided by the same circuit court judge who handled the tax foreclosure action, only makes sense.

And when the new process has been given a chance to work, the law is already doing exactly that. This Court should hold that the new law applies to all such claims, pending and potential, arising in this context. This Court should thus hold that the Court of Claims lacks jurisdiction. And it should rule that even if the Court of Claims retains some authority, that it erred in certifying a class in this context. Class litigation is simply not workable, here.

First, these parties and facts do not meet the criteria or support the purpose of class litigation. It will not achieve greater efficiency than separately resolving claims. And there are inherent and irreconcilable conflicts. The class omits all lienholders, allowing former owners to benefit from their foreclosure at the direct expense of lienholders, and also fails to provide finality. If there is more than one claimant for a property and one opt outs, it also allows for the possibility of multiple courts deciding the same underlying claims and funds. Yet, adding lienholders to the class definition introduces competing interests under one legal counsel, multiplying inefficiencies. It simply does not work here. This Court should reverse the class certification decision.

The most interesting question, then, is how must sales held before the *Rafaeli* decision be handled? The Legislature accounted for that contingency, too: the new law includes a six-month window to file a notice of intention and subsequent circuit court motion seeking proceeds, if this Court holds those sales are eligible. That is a matter for another appeal, but even so, which year(s)' sales, from how far back in time, can invoke the statute during the 180-day window?

To begin, the Legislature always had a clear intention that claims arising in this context be limited to two years. Since 1999, the law always had a statute of repose for post-tax foreclosure claims. Originally, the Legislature only envisaged a due process claim for lack of notice, which it identified in MCL 211.78*l*. That claim is based on a constitutional violation, just like the claim asserted here. And in PA 256 the two-year limitation remains.

If this Court holds for some retroactive application of *Rafaeli*, the two-year statute of repose should apply from this Court's *Rafaeli* decision backward two years, thus providing a 180-day window for claimants that were foreclosed under MCL 211.78k within two years prior to July 18, 2020, to proceed under the new law. Clearly, the Legislature intended this Court to decide how its prior decision applied, which implies some *interim* flexibility in the limitation period as equity requires.

As to equitable tolling, should this Court hold *Rafaeli* is subject to retroactive application this Court should allow lienholders to file within 180 days alongside owners. For "owners," such equitable tolling is unnecessary because once the class is decertified, they can rely on principles of statutory and class-certification tolling. No one's interest is prejudiced by such a ruling, consistent with the framework laid out by the Legislature.

ARGUMENT

I. Public Act 256 was intended to apply retroactively, as the exclusive method of adjudicating these claims. The law prohibits original actions, class actions, and vests exclusive jurisdiction in the State's circuit courts.

This Court has asked whether Public Act 256 controls these Plaintiffs' claims, thus depriving the Court of Claims of jurisdiction. If the law is applied on its own terms, then it applies to all such claims, including any pending cases filed in other courts, under other theories but seeking the same thing: proceeds from the sale of tax-foreclosed real properties. The law provides no exceptions. If a law shows retroactive legislative intent, and it does not divest a vested right in application (and is not otherwise unconstitutional) then it must be so applied.

Once the new law is applied there is a statutory mechanism to claim remaining proceeds, leaving no "taking" to adjudicate. The law remedies the foundational defect this Court identified in *Rafaeli*—the statute's lack of a claim-making mechanism. The State's circuit courts must now adjudicate these claims as a continuation of the existing action in which the property was initially foreclosed.

The new law comports with *Rafaeli*, which recognized three important things:

First, property tax foreclosure remains a valid way to collect delinquent property taxes; tax foreclosure is not a taking.[2]

Second, after tax foreclosure "the vesting of fee simple title to the real property does not extinguish the property owner's right to collect the surplus proceeds," which is "a separate property right that survives the foreclosure process." 505 Mich at 476. Thus, when a foreclosure is otherwise valid only one property right remains: a right to claim surplus.[3] That is exactly what is at issue here.

Third, Public Act 123 of 1999 was constitutionally deficient because the "scheme under the GPTA [did] not recognize a former property owner's statutory right to collect these surplus proceeds." *Id*. at 462–462. That vacuum was the prior

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[2] "As long as defendants comply with these due-process considerations, plaintiffs may not contest the legitimacy of defendants' authority to foreclose on their properties for unpaid tax debts, nor may plaintiffs contest the sale of their properties to third-party purchasers," 505 Mich at 451, and "defendants were entitled to seize plaintiffs' properties to satisfy the unpaid delinquent real-property taxes as well as any interest, penalties, and fees associated with the foreclosure and sale of plaintiffs' properties," *Id*. at 474.

[3] A separate designation–"the equity"– is not at issue here because the claims and class consist of parcels *foreclosed and sold*, not parcels foreclosed but never sold. Nevertheless, "the equity" here has been liquidated because there were post-foreclosure public sales.

statute's downfall; "*Nelson [v New York]* . . . on the other hand, informs us that no [taking] will exist when there is a statutory path to recover the surplus proceeds but the property owners fail to avail themselves of that procedure." *Id.* at 461. Consistent with *Nelson*, nothing prevents "the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id.* at 473, n 108.

The Legislature passed just such a law, unanimously, within months of this Court's *Rafaeli* decision, cited *Rafaeli*, and cured the statutory defects with retroactive procedures. Without it, 83 State circuit courts and the Court of Claims would be left to craft their own processes, timelines, and requirements for these claims. But with unanimous bipartisan support Michigan has "legislation that . . . require[s] former property owners to avail themselves of certain procedural avenues to recover . . . surplus proceeds." *Id.* at 473 n 108.

It stakes out one, exclusive method to make claims. MCL 211.78*l*; § 78t(11). It defines "claimants" as "any person with a legal interest in property immediately before the effectiveness of a judgment of foreclosure." MCL 211.78t(11). It all happens in one court; "[§ 78t] is the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state." MCL 211.78t(11). The forum is the same county circuit court and same case that addressed the foreclosure.

The law has two basic requirements: (1) providing the FGU a notice of intention to make a claim, and (2) later filing a verified motion in the same circuit

court "proceeding" in which the property was foreclosed. MCL 211.78t(2); 211.78t(4); 78t(6). The new law covers all possible time periods; it applies to claims arising "before July 18, 2020" and those from "after July 17, 2020." MCL 211.78t(1)(a)–(b). It purports to be the exclusive method, then follows through with processes covering all time periods. It applies here.

A. MCL 211.78*l* and § 78t declare the new law is the exclusive way to claim remaining proceeds. And § 78t is comprehensive in scope, covering all potential claims and time periods.

Public Act 256 modified MCL 211.78*l,* which now mandates that claims for tax-foreclosure sale proceeds must be brought exclusively under § 78t. And §78t restates the Legislature's intent: "this section is the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state." MCL 211.78t(11). The Legislature backed up that declaration with processes that cover the entire universe of potential claims.

MCL 211.78t(1) has two parts. Subpart (a) addresses sales held after July 17, 2020, while (b) covers any "foreclosed property transferred or sold . . . before July 18, 2020." MCL 211.78t(1)(b). The statute lays claim to this entire area of the law, giving explicit instructions and provisions covering past and future claims.

B. The Legislature showed retroactive intent, the law's provisions are primarily procedural and remedial, and it embraces and bolsters this Court's holding in *Rafaeli* rather than divesting any substantive right.

Michigan law presumes that statutes apply prospectively, absent evidence to the contrary. *Hansen-Snyder Co v General Motors Corp*, 371 Mich 480, 484 (1963). Evidence of contrary intent includes (1) when the Legislature makes it clear that it intends a new law be applied retroactively, or (2) when the law is remedial, i.e., procedural. *Id*. at 571–572. If either is true and no other right is violated by such application, then the new law applies retroactively, including to pending claims. Here, both are present, and no right is divested.

1. The Legislature's intent is clear: this law controls all claims for proceeds from tax foreclosure, including these claims.

The Legislature intended this law: to "codify" and give "full effect" to potential claimants with the exact type of claim identified in *Rafaeli*. 2020 PA 256 Enacting Section 3. It is the exclusive remedy (§§ 78*l,* 78t(11)), is comprehensive in scope (§ 78t(1)(a)–(b)), and carves out no exceptions. It clarifies existing statutory requirements and is remedial and curative, implementing the *Rafaeli* decision.

It promotes uniformity through one statewide procedure, defines "remaining proceeds" (MCL 211.78t(12)(b), defines "claimants" as persons with an interest in foreclosed property immediately prior to foreclosure (MCL 211.78t(12)(a)), and applies those definitions to all eligible claim periods. MCL 211.78t(1). Under § 78t(2) a claimant must give notice of intention to make a claim and § 78t(4) sets a deadline to file a circuit court motion, after which § 78t(9) sets when and how courts

must adjudicate claim(s). For claims that turn on a decision by this Court, the Legislature covered that contingency, too. Under MCL § 78t(1)(b) and § 78t(6), claimants from older sales have 180 days to start that same process, if this Court holds those claims are compensable under *Rafaeli's* reasoning.

Public Act 256 also provides new notice and filing requirements for the FGU.[4] It confers exclusive jurisdiction on the appropriate county circuit court and outlines a priority-based adjudication processes to resolve competing claims under § 78t(9). Each of these provisions is remedial, filling the statutory void identified in *Rafaeli*, and each provision is clearly procedural as it directs the claims process. The law may be imperfect, but it is clear, comprehensive, and works within the existing law and timeline. And it keeps the matter local, in the same court and action as the underlying foreclosure. See, e.g., MCL 211.78t(4); 78t(9). It supports the property right to proceeds and creates a single orderly process to adjudicate such claims.

As this Court has held, "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). Here, the Legislature addressed just such a grievance, describing

[4] See, e.g., MCL 211.78t(3) requiring the FGU send claimants post-sale information; §78t(5) requiring the FGU provide the circuit court a proof of service of the notices sent to claimant(s), above, and information associated with claims; § 78t(7) requiring the FGU respond to motions for proceeds; § 78t(9) allowing FGU participation at hearing(s); MCL 211.78t(10) requiring the FGU to pay if so ordered.

its actions as "curative" and giving statutory force and effect to this Court's decision in *Rafaeli*. 2020 PA 256 Enacting Section 3.

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

The Legislature stated its intent bluntly: "to codify and give full effect to the right . . . to any remaining proceeds . . . as recognized . . . in *Rafaeli*":

> This amendatory act is curative and is intended to codify and give full effect to the right of a former holder of a legal interest in property to any remaining proceeds resulting from the foreclosure and sale of the property to satisfy delinquent real property taxes . . . as recognized by the Michigan supreme court in *Rafaeli, LLC v Oakland County*, docket no. 156849, consistent with the legislative findings and intent under

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

> section 78 of the general property tax act. [Enacting section 3 of Act 256 of 2020.]

There is a third reason this law applies retroactively; common sense. That the Legislature would create a single process specific to this unique area of law, regardless of which county a property is located in, makes sense. Now, there is one process whether a tax foreclosure occurred in Gogebic County or in Lapeer County; the same requirements apply whether the Saginaw County Treasurer or the State Treasurer was the FGU. And the process does not borrow from other areas of law that are not exactly like in rem tax debt collection. This law addresses the needs and requirements of this process, adjudicating claims in the same circuit court already familiar with the property, parties, and processes. MCL 211.78t(4), 78t(9).

2. Public Act 256 applies to pending claims under other theories, in other courts, so long as those claims are not subject to final court orders.

Courts have long held that new laws may apply to pending disputes, so long as there is no final court order, if the new law is intended for retroactive application. See, e.g., *Bank Markazi v Peterson*, 136 S Ct 1310, 1325 (2016), reaffirming that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." *Id.*, citing *Landgraf v USI Film Products,* 511 US 244, 267–268 (1994); and *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226 (1995). This Court applies the same standard:

> [S]tatutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then pending . . . . No

> vested right can exist to keep statutory procedural law unchanged [or] free from amendment. [*Cichecki v City of Hamtramck Police Dept,* 382 Mich 428, 436 (1969), quoting *Hansen-Snyder Co v General Motors Corporation*, 371 Mich 480, 485 (1963).]

Plaintiffs have no such final order, so the new law applies.

At the same time, the new statute preserved for this Court a right it already had—to decide how *Rafaeli* applies to older sales. The statute provides a remedy if this Court holds that retroactive relief is appropriate. MCL 211.78t(1)(b). This does not deprive a right; it creates a process to adjudicate a right *if it is appropriate for adjudication in the first place.* And this is not the first time a new law applied to pending litigation addressing prior events.

In *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394 (2015), the Michigan Court of Appeals considered relief granted to a different plaintiff, IBM, through a final order issued by this Court. The Court of Appeals held that other litigants' claims, including *Gillette's*, were subject to a new law the Legislature passed after IBM had prevailed, explaining:

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

This Court denied *Gillette's* application for leave to appeal. *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 499 Mich

960 (2016). *Gillette* was not alone; there were dozens of similar claims pending that sought relief like IBM (and *Gillette*) but were instead subject to the new law.

While *Gillette* addressed a statutory right, not a common law or constitutional right, the outcome is still instructive since the instant law is remedial and supports rather than divests the property right Plaintiffs seek to recover; it is worth noting that the "right" here is the property right in proceeds not a particular cause of action. This Court identified a property right and a statutory void in *Rafaeli*, Public Act 256 codifies that common law right and provides a path to recovery, thus avoiding the very taking Plaintiffs allege.

The Court of Claims held MCL 211.78t(1)(b) was an unmet condition precedent, holding the law did not apply to these claims. The Court of Appeals affirmed the result because the litigants were entitled to proceed in their existing actions, under theories as plead, in their current venue under *Proctor v Saginaw County Board of Commissioners*, 340 Mich App 1 (2022).

The Court of Appeals reasoned "that '[a]pplying MCL 211.78t(1)(b)(i) to deny plaintiffs an avenue for relief under *Rafaeli* would be denying them existing rights.' " *Hathon*, slip at 11, quoting *Proctor,* 340 Mich App at 25, n 13. Again, citing *Proctor*, the lower court noted that its sister panel "further concluded that 'our Supreme Court has indicated its intent that *Rafaeli* be applied to cases in which the parties are similarly situated to the named plaintiffs' claims in these cases.' " *Hathon,* slip at 11, citing *Proctor*, 340 Mich App at 27.

Under the Court of Appeals' reasoning:

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

Yet, this Court has not yet directly addressed *Rafaeli*'s application. And the idea that Public Act 256 divests a right misconstrues the "right" at issue.

a. A cause of action is distinct from the underlying right it seeks to vindicate. The former is not a vested right free from retroactive legislation, so long as the latter is not destroyed in the process.

Like the Court of Appeals' holding, Plaintiffs have similarly argued they have a right to a specific cause of action. That argument conflates the subject of the "vested right" analysis. The only vested right at issue here is that identified in *Rafaeli*: the right to make a claim for remaining proceeds, after netting out the taxes, interest, costs, and fees. 505 Mich 429 at 484. Public Act 256 does not destroy any such vested right; rather, it codifies that right and creates a unified claim-making process that respects the competing interests of all potential claims.

Plaintiffs' argument elevates a cause of action over the property right it seeks to vindicate. Plaintiffs' theory appears to find some support in case law, but after a closer look, it seems Plaintiffs misidentify the focus of a divestment analysis.

The reality is this: a new and retroactive law that abrogates a prior cause of action and in the process eliminates every manner of claiming a vested right (i.e., leaves no other method of recovery) is impermissible retroactive legislation. A new law cannot eliminate all access to a remedy the prior law would have afforded. If a

new law replaces or modifies a cause of action but substantially protects the underlying "vested right," there is no constitutional infirmity. That is consistent with this Court's guidance that "when determining whether a right is vested, policy considerations, rather than inflexible definitions must control, and we must consider whether the holder possesses what amounts to be a title interest in the right asserted." 445 Mich 682 at 699. This Court has previously refused to "include within the realm of vested rights immunity from the retroactive operation of a tax collection procedure implemented to secure delinquent taxes owed to a municipality." *Id.* at 700. In *Walker*, defendants challenged a new tax collection remedy which allowed municipalities an additional method to collect unpaid property *in personam* in addition to *in rem*. *445 Mich* at 700. But the law did not divest any vested rights; "allowing in personam actions may affect the character of the *remedy,*" but it did not "change the character of the tax because the amount of the tax itself has not been altered." *Id.*

And while that refusal involved a new tax collection law that did not "expand[] the defendant's preexisting indebtedness," which this Court defined as the underlying taxes, this Court "refuse[d] to make delinquent taxpayers immune from the imposition of statutory obligations." *Id.* at 701. Rather, "as a matter of policy, it is imperative that taxpayers do not hide behind the facade of vested rights in an attempt to evade their financial responsibilities." *Id.* at 702. Here, delinquent taxpayers remain responsible for the public's efforts and expenses incurred as a result of having to chase down tax payments. That is: Plaintiffs were never entitled

to the entire proceeds from the sale; it was always net of the taxes, interest, fees, and costs where there is a surplus.

Here, the remedy remains the same: the ability to bring and prove a claim for remaining proceeds net of the costs associated with collection, as determined by the Legislature. The 5% fee divests nothing because Plaintiffs were never entitled to such services without paying for them.

b. When deciding if a new law divests a right, courts look to the vested interest in dispute, not the path taken to get there.

This Court has previously reviewed retroactive laws to determine if a vested right has been harmed by focusing on the relief sought, not the method or cause of action. One example is *Minty v State*, in which this Court held a retroactive repeal of the State's waiver of sovereign immunity did not defeat a claim against the state that accrued while the law waiving immunity was in effect. *Minty v State*, 336 Mich 370 (1953). In *Minty*, the Legislature enacted a new law after a litigant was injured in a state building, and that new law retroactively repealed the State's prior waiver of immunity from liability. *Id.* at 382. The new law did not repeal the underlying tort cause of action but purported to claw back the state's waiver of liability for the tort. *Id.* at 389. The *Minty* Court thus focused on whether the right to a recovery (damages) vested prior to the retroactive change in the immunity law, holding that the plaintiff did have a vested right to sue the state for her injury. *Id.* at 394–395. While the effects of the two laws are somewhat different (*Minty* addressed the state's immunity, not a change in tort laws), the analysis is still helpful here.

Minty held that "a law can be repealed by the law-giver; but the rights which have been acquired under it while it was in force do not thereby cease." *Id.* at 390, quoting Lewis' Sutherland State Const (2d Ed.) § 284. The right to recover for her injury could not be retroactively revoked, for "[i]t would be an act of absolute injustice to abolish with a law all the effects which it had produced." *Id.*

The same held true in *In re Certified Question from US Court of Appeals for the Sixth Circuit*, 416 Mich 558 (1982), which discussed historical Michigan case law addressing "abolition of a cause of action," holding that a "new law [that] abolished the plaintiff's accrued cause of action" entirely because of a change in the applicable duty of care did not apply to injuries that occurred under the old law. *Id.* at 574. Such laws do not involve a " 'mere change in remedy or procedure' but affected a rule of substantive law." *Id.* The Court went on to cite *Minty*, in which "this Court refused to apply a statute retrospectively because it totally barred the plaintiff from recovery for his damages." *Id.*

While a vested right to recover something under a law must remain intact, the exact method by which it must be recovered is not set in stone. The continued recognition of a vested property right "is a principal of general jurisprudence," *Minty*, 336 Mich at 390–391, but the right to a specific law's procedures is something different. Vested rights "must be something more than a mere expectation based upon an anticipated continuance of existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or

to the present or future enforcement of a demand." *Id.* at 391. A mechanism to claim the proceeds, not a specific mechanism, is what matters.

This Court's prior reasoning is consistent with U.S. Supreme Court precedent, which held 140 years ago that "it is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired." *Antoni v Greenshow*, 107 US 769, 775 (1883).

The *Antoni* Court addressed retroactive laws covering contracts, laying out the "general rule," that "laws applicable to the case which are in force at the time and place of making a contract, enter into and form part of the contract itself, and 'that this embraces alike those laws which affect its validity, construction, discharge, and enforcement.' " *Id.* at 774, quoting *Walker v Whitehead*, 83 US 314, 315 (1872). However, "it is equally well settled that changes in the forms of action and modes of proceeding" i.e., causes of action and processes, "do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left." *Antoni*, 107 US at 774. When reviewing such a "change of remedies," *Antoni* held " 'the rule seems to be that in modes of proceeding and of forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with restrictions and conditions, as seriously to impair the value of the right.' " *Id.* at 800, quoting *Walker*, 83 US at 318.

The real dividing line, then, is between claims subject to a final court order and pending proceedings without such an order, for "Legislation . . . may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." *McCullough v Com of Virginia*, 172 US 102, 123–124 (1898). But when a new law's "remedy [is] adequate and efficacious, the taking away of the old right" while replacing it with a new method of recovery, does not violate any vested right. *Id.* at 124.

The *Antoni* Court's reasoning is consistent with other U.S. Supreme Court precedent. See, e.g.,*Von Hoffman v City of Quincy*, 71 US 535 (1866) (reviewing courts have made "no attempt . . . to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances."). See also *Poindexter v Greenshow*, 114 US 270, 299 (1885) (discussing the *Antoni* Court's reasoning that a litigant under a new law "might have been put to the same proof in the former mode of proceeding, and that the amendment did not destroy the efficiency of the remedy.").

In *Rafaeli*, this Court noted that historically "whenever the government seized property for delinquent taxes, it did so subject to 'an implied contract in law' to either return the property if the tax debt was paid or 'to render back the overplus' if the property was sold to satisfy the delinquent taxes." *Rafaeli*, 505 Mich at 464, quoting 2 Blackstone, Commentaries on the Laws of England, p. 452. Looking to contract principles and case law is not new in this context, either.

Minty held that if " 'there is no separate provision of the repealing statute dealing with the remedy, the entire statute would necessarily be held invalid in so far as it applied to transactions occurring prior to its passage.' " *Minty*, 336 Mich at 396, quoting *Duke Power v South Carolina Tax Commission*, 81 F 2d 513, 517 (CA 4, 1936). A new law that purports to repeal a cause of action but fails to provide an alternate route to any vested remedy under that old law is unconstitutional. As this Court described it: " 'A statute which attempts by the same provision to destroy both a right and a remedy succeeds in destroying neither.' " *Minty*, 336 Mich at 396, citing *Duke*, 81 F 2d at 586, citing *Lynch v U.S.,* 292 US 571, 586 (1934).

Here, the vested right remains intact, and the new law sets the method by which it must be adjudicated. Public Act 256 defines the process to vindicate the sole right this Court found in *Rafaeli* in proceeds, which this Court held was the result of the statute's omission of such a mechanism: "ample precedent exists for retroactive application of remedial statutes designed to correct defects in existing law or to provide procedures for enforcing existing liabilities, as distinguished from those creating new substantive rights or destroying vested rights." *Leonard v Lans Corp*, 379 Mich 147, 155 (1967).

Plaintiffs have also previously argued that proceeding as a class action is a vested right. The new law does not provide for original actions or class actions; thus, the argument goes, the new law impermissibly divests a right. But, again, to be vested it "must be something more than a mere expectation based upon an anticipated continuance of the existing law." *Minty*, 336 Mich at 390. The class

action court rule is a discretionary court tool not a vested individual property right. In fact, "the class action device for litigation is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " *Henry v Dow*, 484 Mich 483, 498 (2009), quoting *General Telephone Co of Southwest v Falcon*, 457 US 147, 155 (1982). The device is applied if it will conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion" in a single action. *Falcon*, 457 US at 155. The rule's application cannot be considered any vested right here when such application will allow some litigants to prejudice (or even eradicate) the rights of other claimants. If a cause of action is not vested, which case law appears to show it is not here, then a particular way of proceeding in an original action under a discretionary court rule cannot be vested either.

c. The law is otherwise constitutional, including its 5% commission fee, and must be applied here.

As outlined above, the new law bolsters, rather than harms, this Court's holding in *Rafaeli* and the vested rights in potential proceeds it identified, by rectifying the old law's shortcomings. Plaintiffs, and others in separate litigation, allege that Public Act 256 is unconstitutional because it applies a 5% commission before determining remaining proceeds (§§ 211.78t(3)(g), (5)(g), (7)(g), (9), (12)); and because it includes a two year statute of repose (§ 78*l*); and because it negates a taking by giving a remedy in circuit court via motion in the existing foreclosure case (thus, divesting a cause of action and/or the right to proceed via class action).

It is unclear how any one of these alleged infirmities would render the entire law unconstitutional for every application given the requirement that unconstitutional statutory provisions be severed, and the remainder of the law otherwise left in place, if possible. See MCL 8.5. Regardless, none of these individual arguments is legally sound.

i. This remains a tax collection action and the law's new rights create new expenses that must be borne by the property, not the public. The law's 5% fee serves a legitimate purpose.

Under MCL 211.78t, the Legislature added a 5% sale fee to be deducted from the sales proceeds when calculating what amount is left subject to circuit court claims. See, e.g., § 78t(5)(g); § 78t(9). This modest fee serves at least two functions: (1) it is a fee for the additional FGU duties, services, and costs incurred in the newly lengthened tax collection process, which no longer ends at public sale. And (2) it serves as a modest deterrent consistent with the law's *pay your own way* requirements. It is worth remembering that this is a tax collection law. This is not an eminent domain or a condemnation or even a regulatory taking; rather, this is a collection action that, but for the failure to provide access to remaining proceeds, would have nothing to do with takings law.

Like any debt collection action, debtors are responsible for the added expenses they create under this collection law, through its conclusion, which now includes post-foreclosure processes. Otherwise, the costs of collecting the same amount of taxes everyone else already paid would impermissibly come at the

expense of the public fisc. 505 Mich 429 at 484. Recalling that this is a collection action, not eminent domain, also squares with this Court's rationale that the measures of damages is a public sale *after* foreclosure not the hypothetical value of the real property *as if not foreclosure had occurred,* i.e., the "equity" as if not foreclosure or sale occurred. 505 Mich 429 at 482–483. In the debt collection context, it is accepted that a legally valid public sale under state laws represents the market value of the liquidated property, despite the fact that the "value" may be significantly less than what would be expected in a non-duress market transaction. In a similar context—mortgage foreclosure under state laws—the U.S. Supreme Court recognized the same distinction.

"[M]arket value, as it is commonly understood," free of duress and between a willing buyer and seller, each typically motivated, "has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value." *BFP v Resolution Trust Corp*, 511 US 531, 537 (1994). Instead, " 'fair market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale." *Id.* at 538. And so "it is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station)." *Id*. at 539.

Summed up: when a debtor forces a creditor to use foreclosure to collect, the debtor bears the risk and the costs of that decision. This is consistent with

Michigan's tax law that makes the property, and thus its interest holders, responsible for the extra time and expense required for collection. Pay your own way; and, as this Court held, "no more, no less." 505 Mich 429 at 484.

ii. The fees are clearly constitutional going forward. And as applied to sales held before the new law was enacted, they remain constitutional.

As an initial point, although the class definition presently includes sales occurring after the new law was enacted, that definition is legally erroneous as the new statute is the only way to make these claims. MCL 211.78*l*; MCL 211.78t(11). Properly removing such "future" class members, the remaining pre-PA 256 litigants lack standing to challenge post-PA 256 fees. See, e.g., *Andary v USAA Casualty Ins Co*, ___ Mich ___; 978 NW2d 875, (July 31, 2023).

Regardless, there is no violation in applying the fee to properties foreclosed and sold after the law was enacted; "legislative act[s] adjusting the burdens and benefits of economic life . . . come to the Court with a presumption of constitutionality". *Usery v Turner Elkhorn Mining Co*, 428 US 1, 15 (1976). A fee for the new statutory services and FGU burdens (when *all* such funds were previously available to cover costs) applied prospectively need only be rationally related to a legitimate Legislative purpose to be constitutional under a due process or equal protection analysis. *Id.*

The 5% fee is not simply an adjustment to generate new general revenue, untethered to any new public service or expense. There is new work to be done—new notices, new court filings, and new court appearances. See, e.g.,

MCL 211.78t(5); § 78t(9). Delinquent properties were always responsible for the time and expense they caused to be expended in collection efforts. The FGU was entitled to the "amount owed in unpaid taxes, interest, penalties, *and fees related to the forfeiture, foreclosure, and sale of their properties*," which tax collection process now continues after public sale. 505 Mich 429 at 475. The US Supreme Court has held the same; the United States could keep enough "to pay the tax and penalty and interest *and costs*," but not more. *Id.* at 459, quoting *United States v Lawton*, 110 US 146, 149150 (1884) (emphasis added.).

Nor is the 5% fee an excessive fine even if it serves the additional purpose of a mild deterrent. Given the new processes and expenses, it is clearly not a pure fine for behavior. Yet, it provides advance notice of the fee added for the additional expense if a property owner chooses to let the FGU foreclose and sell, allowing for informed choices and ensuring the delinquent owner does not benefit from additional services at the expense of the public. MCL 211.78t(9).

Finally, as outlined above the fee provision would be unconstitutional if it retroactively, and wrongfully, divested a vested right. *Walker*, 445 Mich at 698. Such a law would violate principles of due process. *Id.* One could label the new 5% fee as a "new" burden for sales held before the law was enacted, thus divesting them of their due proceeds. But Plaintiffs were never vested in anything more than that which they are entitled. Just like the *Rafaeli* plaintiffs, the instant Plaintiffs only potential vested right is to the "return [of] 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." 505 Mich at 429 (emphasis added). They were never entitled to the entirety of the sale proceeds, only what was left after deducting for the process that their delinquency brought about.

Now the process includes additional time, work, and expense all brought about because of failure to pay taxes. To complete those new requirements and provide those new avenues, without depleting general tax funds, each delinquent property must pay its own way. To hold otherwise "would . . . be taking money away from the public as a whole," and would wrongly permit delinquent taxpayers to "benefit from their tax [own] delinquency." 505 Mich 429 at 484. The Legislature agreed: "an order for the payment of remaining proceeds must not unjustly enrich a claimant at the expense of the public." MCL 211.78t(9). In short: Plaintiffs have a vested right (if any) in the net proceeds, which includes new fees to account for services, new and old, the FGU must expend to complete this tax collection action.

Nor does the fee serve as an unconstitutional excessive fine, in violation of the Eighth Amendment or Michigan's equivalent, Const. 1963, Art 1, § 16. First, while it may serve some deterrent purpose it is not punitive; it is a fee for services that prohibits a tax debtor from securing public services without paying. And the fee is not applied prior to foreclosure (to all parcels like a tax) but only as a part of the new claim-making process under MCL 211.78t. Second, it is hardly excessive: realtors, title companies, closing agents, auctioneers, and other real estate professionals routinely charge such fees in private transactions. This Court should

not allow Plaintiffs to avail themselves of the new process without paying their own way.

C. This law included a two-year statute of repose before and after Public Act 256. That limitation does not divest any vested right.

Under MCL 211.78*l*, the prior version of this taxing statute included a two-year statute of repose that provided a money damages claim for a due process violation (foreclosure without notice). However, any such "action to recover monetary damages" was limited in time and could "not be brought more than 2 years after a judgment for foreclosure is entered under section 78k." See former version MCL 211.78*l*(3). The Legislature prioritized certainty in title to tax-foreclosed property but recognized a potential wrong—a tax foreclosure without sufficient notice and opportunity to be heard to avoid the loss—and provided a damages remedy for what amounted to constitutional violations. Id.

Under Public Act 256, the Legislature accounted for a newly identified statutory void: a property right that survived tax foreclosure and required additional processes within the taxing law. Thus, it reworked § 78*l* by clarifying the two-year limitation period applies to all claims arising from property tax foreclosure:

> [T]he owner of any extinguished recorded or unrecorded interest in that property shall not bring an action, including an action for possession or recovery of the property or any interests in the property or of any proceeds from the sale or transfer of the property under this act, or other violation of this act or other law of this state, the state constitution of 1963, or the Constitution of the United States more

> than 2 years after the judgment of foreclosure of the property is effective under section 78k. [MCL 211.78*l*(1).]

"The rule is: '[w]here a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there.' " *Rookledge v Garwood*, 340 Mich 444, 455 (1954) (citations omitted). "[T]he old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not from the former." *Id.* Such legislative action serves to "abolish[ ] the prior section" and the Legislature "must, therefore, have intended that the amendment to the act would have sufficient retroactive effect to apply to claims which had arisen prior to the enactment." *Id.* at 454.

Here, the limiting provision is not in any sense new; the time period is still two years, and it is still applicable only in this tax foreclosure context. The prior language and present language are consistent with a statute of repose, which like statutes of limitation, "are construed to advance the policy that they are designed to promote. They prevent stale claims and relieve defendants of the protracted fear of litigation." *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515 (1998) (internal quotations and citation omitted). In 1999, the Legislature expressed its intent as to opening and closing the books on tax foreclosure related claims: claims must be brought within two years. The same is true now, only the universe of claims has been expanded post-*Rafaeli* and the Legislature clarified that it intended the same limitation to apply to all claims arising from this tax law.

D. Because Public Act 256 applies here, the Court of Claims lacks jurisdiction. Litigation via class action, or even original actions, is prohibited.

Under the statute's plain language, "an action to recover any proceeds from the sale or transfer of property foreclosed for nonpayment of real property taxes under this act must be brought as provided under section 78t." MCL 211.78*l*. Later, the law again provides that § 78t is "the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state." MCL 211.78t. It thus operates as a continuation of the circuit court tax foreclosure case in which the property was foreclosed.

After providing a notice of intent to make such a claim, a claimant must then file a "motion with the circuit court in the same proceeding in which the judgment of foreclosure of the property was effective under section 78k to claim any portion of the remaining proceeds that the claimant is entitled to under this section." MCL 211.78t(4). Now, settling any remaining proceeds from a tax foreclosure and sale is, rightfully, part of a self-contained process in one case, in one court, and likely before the same circuit court judge. The statute precludes original actions, and its operation precludes class actions.

Rather, just like the process leading up to tax foreclosure (see, e.g., MCL 211.78k), interested parties for each property must come forward to raise their own claims, defenses, and seek their own relief from the circuit court under MCL 211.78t(4). An owner or lienholder for one property seeking to avoid foreclosure by based on their specific circumstances, as provided in MCL 211.78k(4), is not representative of any other person's financial hardship and does not secure

relief for any other property. This property-by-property adjudication is necessary in the claim-making process, too, only now there is the added adversarial component of competing claimants seeking finite funds from each sold property—requiring an adjudication of priority when appropriate. MCL 211.78t(9).

II. Even if Public Act 256 does not control, the Court of Claims abused its discretion when it certified a class. The class definition represents an error of law.

The Court of Claims certified a class here, which at present includes:

> All persons and entities who, from January 15, 2018, through the final order in this matter, had real property in the counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch that was foreclosed upon by the State of Michigan under the General Property Tax Act, MCL 211.78, which was then subsequently sold at tax auction for an amount exceeding the minimum bid and who were not refunded the excess/surplus equity as described by the Michigan Supreme Court in *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020). [Appellant's Appx, pp 101–110.]

In addition to the fact that Public Act 256 forecloses certification of a class as the Court of Claims did here, certifying any class in this context is also an abuse of discretion because these actions cannot satisfy the criteria or purpose of class litigation; it will not serve as a mechanism to achieve greater efficiency and fails under the Court Rules. In short, it runs contrary to nearly every consideration under MCR 3.501(1).

This particular class definition omits every potential claimant except "owners", thus allowing those owners to benefit from their own delinquency by cutting out senior lienholders. For the same reasons, it also fails to provide finality for Defendant or the judiciary. Finally, class litigation here with the attendant

right to opt out does not work; two courts or actions cannot decide the same set of facts or claims or distribute finite funds from a sold property. In sum, certification here also fails nearly every consideration under MCR 3.501(2) and creates irreconcilable legal conflicts, not merely procedural inconveniences.

A. The class does not satisfy the court rule or its purpose.

For a class action to be of benefit, there must be common questions that predominate, such that " 'resolution' " of those common questions via common proofs " 'will advance the litigation.' " *Tinman*, 264 Mich App at 565 (2008), quoting *Sprague v General Motors Corp*, 133 F3d 388, 397 (CA 6, 1998). The "party moving for class certification," bears the burden of showing commonality and has the burden "to find a method of common proof." *A&M*, 252 Mich App at 631–32. *Rafaeli* resolved the common question of law, and there can be no common proof because each sum of money from each sold parcel will turn on each claimant's rights *before* foreclosure based on deeds, liens, contracts, etc., property by property, claimant by claimant. See, e.g., MCL 211.78t(9).

The Michigan Court of Appeals has held that "there being little Michigan case law construing MCR 3.501, it is appropriate to consider federal cases construing the similar federal court rule (F R Civ P 23) for guidance." *Zine v Chrysler Corp*, 236 Mich App 261, 288 n 12 (1999). Yet, it is clear that "while federal case law may be helpful in interpreting a similarly worded but ambiguous provision in the Michigan Court Rules, courts must not forget that it is the *Michigan* Court Rules that they are interpreting." *Henry v Dow Chemical Co*, 484

Mich 483, 521 n 18 (Young, J., concurring in part). Thus, a federal interpretation of the federal rule is "ultimately of less import than the actual text of the Michigan Court Rules." *Id.*

With that in mind, the Sixth Circuit Court of Appeals recently considered a similar question arising from Ohio's property tax foreclosure laws, and whether those takings claims should be heard as a class action. *Tarrify Properties, LLC v Cuyahoga County*, Ohio, 37 F4th 1101 (CA 6, 2023). Chief Judge Sutton authored an opinion rejecting class certification because:

> Common questions subject to classwide proof must predominate over individualized questions, prompting us to ask whether the proposed class action beats the conventional approach of resolving disputes on a case-by-case basis in terms of efficiency and administrability.

The Chief Judge went on to note that resolution would require proof that are:

> variable in nature and ripe for variation in application. The shifting facts and circumstances about the value of each property likely will dominate the proceedings, as the district court found, and run the risk of undercutting the efficiencies and ease of administration that otherwise might favor classwide resolution of the claims. Look at what you wish—ascertainability, predominance, or superiority—the district court reasonably rejected this class-certification motion given the individualized nature of each inquiry into the fair market value of each property at the time of transfer. [*Tarrify*, 37 F4th at 1106–1107.]

Thus, class litigation would be less not more efficient as "problems emerge on these predominance and superiority fronts, most acutely, when a controlling issue requires individualized determinations ill-equipped for classwide proof." *Id.* at 1106.

Plaintiffs have argued that damages are not determined by the public sale proceeds—the "equity" damages theory as if no foreclosure occurred. This Court has

already determined that theory to be contrary to law in *Rafaeli*. 505 Mich at 483–484 ("We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties," based on the value before foreclosure, instead, "just compensation" in these collection actions (when there is a public sale under the statute) is coextensive with "any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees.") *Tarrify* was focused on the value of property that still required measuring; the foreclosed properties were abandoned properties without public sales.

Even considering the valuation question raised in *Tarrify* as resolved under Michigan law, however, the idea that each property had multiple interest holders prior to foreclosure that, after sale, may step forward to seek those proceeds in order of priority raises a similar specter, i.e., mini-trials, property by property, over who may claim the finite funds and possibly in which court (if there is a class action and an opt out method in circuit court).

"If 'mini-trials' become necessary to determine who is in and who is out, the class-action vehicle imposes inefficiencies rather than ameliorates them." *Tarrify*, 37 F4th at 1106. Like *Tarrify*, this case will require "an independent and individualized assessment of each absent class member's property." *Id.* So, even though the concept of the case is fairly simple, i.e., the "claims turn on a question that is easy to understand" conceptually, still "they require proof that is variable in nature and ripe for variation in application." *Id*. at 1106–1107. "The shifting facts

and circumstances," here as to claimants and how limited funds should be allocated, "likely will dominate the proceedings." *Id.* at 1107.

"That is, individualized assessments makes ascertaining the class members more of an adversarial process akin to separate lawsuits, which is makes the class-action mechanism inferior and with separate issues involving each individual class member predominating." *Id.* at 1106. The same is true here; there is no economic advantage to litigating via class action. Our courts have held that "the superiority and commonality requirements are related because 'if individual questions of fact predominate over common questions, the case will be unmanageable as a class action.' " *Duskin v Dep't of Human Services*, 304 Mich App 645, 658 (2014), quoting *Zine v Chrysler Corp*, 236 Mich App 261, 289 n 14 (1999). But a judicially created "in group" at the expense of other interested parties creates an unworkable two-tier, multiple court approach; a single statute with no opt out that accounts for adversarial claims is more efficient.

Public Act 256 is tailored to tax foreclosure and makes the claims process part of the existing litigation, in the same court and case. MCL 211.78t(4). Moreover, it does not result in one attorney representing adverse clients, or the possibility of two courts adjudicating a single sum of money.

For all the same reasons, the named Plaintiffs (and, likely, any proposed lead plaintiff) fail "typicality," which "is concerned with whether the claims of the named representatives 'have the same essential characteristics of the claims of the class at large.' " *Duskin*, 304 Mich App 645 (2014), quoting *Neal v James*, 252 Mich App 12,

21 (2002) overruled in part on other grounds by *Henry v Dow Chemical Co*, 484 Mich 483, 505 n 39 (2009). By way of example, if a parcel had only one owner and no liens the distribution is simple.

But once that property's proceeds are adjudicated, the result does nothing to resolve any other parcel's proceeds claim(s) that may have multiple claimants. MCL 211.78t(8)–(9) handles all claims arising from each parcel together, but also covers lienholders consistent with this Court's analysis in *Rafaeli*, and equitably so that owners do not use tax foreclosure to step ahead of creditors. 505 Mich at 484.

B. Class action litigation here simply does not work, particularly where lienholders are not members of the class and would otherwise be governed by Public Act 256.

The decision to certify a class, here, also allows for multiple courts to adjudicate the same underlying claims and funds; one claimant may opt out of the Court of Claims litigation to pursue proceeds in circuit court under § 78t while others stay in the class. Or, if a statutory claimant is a lienholder and thus excluded from the class definition, two courts will have authority over a single sum of funds, which must be distributed based on priority. MCL 211.78t(9). As it stands, "owners" stand to benefit from their own delinquency by stripping out senior liens through foreclosure, then stepping to the front of the proceeds line, holding the door closed to lienholders. This Court cautioned against such inequitable actions. 505 Mich 429 at 483.

Yet, even if the class definition were expanded to include lienholders it does not solve the "opt out" problem—adversarial claimants cannot force each other to

choose one action or another. And even when the lienholders stay in the class it introduces a new problem: competing interests that do *not* have commonality, or typicality, or even aligned interests. Rather, they represent adversarial interests.

Finally, the present class definition is open ended, including members on a rolling basis ("All persons and entities who, from January 15, 2018, *through the final order in this matter*...") Appellant's Appx, pp 101–110. That definition purports to include claims arising from foreclosures and sales in 2021 and later, that accrued after the new law was passed and could proceed under § 78t without any ruling of this Court. This Court should reverse the class certification decision regardless of its decision as to the application of Public Act 256. It represents an abuse of discretion and in this context represents an unworkable situation.

III. MCL 211.78*l* and MCL 211.78t are tax-foreclosure specific and govern here.

This Court's June 9, 2023 order asks: *whether the time to make claims under § 78t are subject to the limitations period found in MCL 211.78l, or as provided in MCL 600.5813, or as found in MCL 600.6452(1)*? This has not been previously briefed by the parties, at least not directly, and it was not addressed by the lower court orders. MCL 211.78*l* is the applicable provision.

But the question asks about timing for claims made under § 78t, a provision of Public Act 256. If that law is applicable at all, it is applicable in total, and it applies to the exclusion of other, general provisions. Put differently, MCL 600.6452 applies only if the action is brought outside MCL 211.78t; if the action is properly

pending in the Court of Claims as an original action against the State for a taking, in *lieu* of applying MCL 211.78t, then MCL 600.6452 would apply along with the notice of intention requirement found in MCL 600.6419. But under Public Act 256, this dispute cannot be maintained as an original action and cannot be a takings claim because MCL 211.78l(1) plainly states, "[a]n action to recover any proceeds from the sale or transfer of property foreclosed [for unpaid taxes] must be brought as provided under section 78t." And it should not be applied, regardless, because the prior version of MCL 211.78*l* already included a two-year statute of repose for a damages claim based on a due process violation. Thus, MCL 600.6452 should not be applied here.

Nor does MCL 600.5813 apply because it provides "all other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards *unless a different period is stated in the statutes*." (Emphasis added.) Here, a different period applies. MCL 211.78*l* is part of the same section of the General Property Tax Act, and was passed to apply to these exact circumstances, i.e., claims arising from Michigan's tax foreclosure law, MCL 211.78 *et seq*.

Although it sets a different time period than MCL 600.5813, MCL 211.78*l* is like § 5813 in that both serve as statutes of repose. A review of Michigan case law on equitable tolling uncovers two camps and divergent application, and thus different results. For example, " 'equitable tolling' " has at times been referred to as synonymous with " 'judicial tolling,' 'the doctrine of *contra non valentem*.' " *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 594 (2005) (Cavanagh, J, dissenting). The

same dissenting justice penned an entire section under the heading "Equitable Tolling is an Equitable Remedy that Needs no Basis in Statutory Language." *Id.*

However, just three years later this Court distinguished and disentangled the two remedies, holding that "equitable tolling, unlike judicial tolling, has a legal basis arising out of our common law, and it may be invoked when traditional equitable reasons compel such a result." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204 (2008).[6] The majority holdings, of course, control. At present, equitable tolling appears to remain viable, generally.

And so, determining that the two-year statute of repose should apply to claims under MCL 211.78t does not end the inquiry, or at least does not address the underlying questions: *How does this process take shape if MCL 211.78t controls?* That is, *which tax years' foreclosures and/or sales' proceeds still have viable claims, and should equitable tolling play a role for sales occurring before this statute was enacted?*

The two-year statute of repose represents the Legislature's intent that claims must be brought timely, or they expire. Yet, the Legislature also expressed its intent that this Court decide how its decision in *Rafaeli* should apply, prospectively, or retroactively. MCL 211.78t(1)(b).

[6] The dissenting Justice also noted that "what I call 'judicial tolling' is often referred to as 'equitable tolling' and 'intervening tolling." *Id.* at 209–210, n 1 (Kelly, J, dissenting), citing *In re Certified Question (Ford Motor Co v Lumbermens Mut Cas Co),* 413 Mich 22, 30 (1982).

This Court should limit potential claims to properties foreclosed within two years of this Court's July 17, 2020, ruling in *Rafaeli*. That would include only the 2019 foreclosures, as the 2018 foreclosures were effective March 31, 2018, more than two years before *Rafaeli*. Those interest holders ("claimants" under § 78t) who had property sold in 2019 should have 180 days from the date this Court decides that such sales should be compensable to make a claim. Or, at the most, this Court should allow claimants in this case from 2018 foreclosures to use the new law based on the one-year lookback for the notice of intent filed in this case on January 15, 2019, in the court of claims, thus allowing for the class currently comprised in terms of years to proceed in their respective circuit courts, individually, as provided in § 78t. If that is the result, then this Court should apply equitable tolling only for lienholders from that same time period as they do not benefit from the same statutory or class action tolling as "owners."

A. If this Court holds that *Rafaeli* has some retroactive application covering sales before July 18, 2020, the law provides that the notice of intent must be filed within 180 days of such ruling, starting the claim process.

Under MCL 211.78t(1)(b), the claims process is as follows:

> (b) For foreclosed property transferred or sold under section 78m before July 18, 2020, both of the following:
>
> > (i) A claim may be made only if the Michigan supreme court orders that its decision in *Rafaeli, LLC v Oakland County*, docket no. 156849, applies retroactively.
> >
> > (ii) Subject to subparagraph (i), the notice of intention must be submitted pursuant to subsection (6).

If this Court holds that *Rafaeli* has some retroactive application, the law provides that a "claimant must notify the foreclosing governmental unit using the form prescribed by the department of treasury under subsection (2) in the manner prescribed under subsection (2) by the March 31 at least 180 days after any qualified order." The potential claimants have at least 180 days from this Court's qualifying order to provide a notice of intention to make a claim, and thereafter, the FGU must provide the claimant sales information by the following July 1. MCL 211.78t(6). That includes the tax debt, deducted statutory amounts, the sale date and amount, names of other claimants, and remaining proceeds. See MCL 211.78t(3). Then, "to claim any applicable remaining proceeds to which the claimant is entitled, the claimant must file a motion with the circuit court in the same proceeding in which a judgement of foreclosure was effective under section 78k by the following October 1." MCL 211.78t(6). The FGU responds (MCL 211.78t(7); § 78t(9)), providing the circuit court specific information as required by the statute, and the circuit court then sets the parcel's competing claims for a hearing. MCL 211.78t(9). The Court will then hear from the claimants and the FGU, which may also appear at the hearing. *Id.* The circuit court determines which claims are valid and "the relative priority and value of the interest of each claimant in the foreclosed property immediately before the foreclosure was effective." *Id.*

But the question remains, *how far back* does this right extend? That is, should a 2002 tax sale be eligible to file a notice of intention within 180 days of a

ruling by this Court regarding *Rafaeli*? If MCL 211.78t applies, then so too should MCL 211.78*l*, which is specific to this area of law and provides a two-year limitation period.

B. The time limit in § 78*l* applies and allows claims from up to two years prior to this Court's decision in *Rafaeli*, unless this Court holds that a shorter time is appropriate based on equitable considerations.

The limitation in § 78*l* operates as a statute of repose. The question posed is whether some claims should be subject to equitable tolling, while this Court decides the proper application of the *Rafaeli* decision. The answer is likely yes, although limited and consistent with the statute's overall intent.

Here, the Court of Claims had jurisdiction over the case when originally filed but did not have jurisdiction over the case when it entered its order re-certifying the current class on February 22, 2021, two months after Public Act 256 was signed into law with retroactive intent and provisions. That law divested the Court of Claims (and any other court besides the appropriate circuit court) of jurisdiction. The Court of Claims had previously certified a class under a different order and definition on June 7, 2019, but revoked that certification on December 4, 2020.

C. Equitable tolling may be applicable, here, but only to effectuate the overall Legislative intent and claim-making process, and only for potential claims not already subject to statutory or class action tolling.

There is and always was a two-year statute of repose for claims arising from tax foreclosure; MCL 211.78*l*, part of the very same delinquent tax collection law and General Property Tax Act included such a limitation applied on claims before and after PA 256. As outlined above, § 78t contemplates a process (including a timeline) for claims arising from foreclosures that occurred before July 18, 2020. MCL 211.78t(6). But even if this Court holds that its decision in *Rafaeli* makes foreclosures and sales from before July 18, 2020, compensable, if that ruling comes in 2024, the two-year statute of repose would appear to render some of those older claims expired.

For claims pending in this certified class action, subject to a notice of intent under MCL 600.6431 dated January 15, 2019, and later plead in the complaint on January 29, 2019, as a putative class action, no tolling is needed or appropriate. Under MCL 600.5856 and MCR 3.501(F), those claims are likely already tolled and covers 2018 and 2019 foreclosures and subsequent sales.

However, as outlined above not all potential claimants are included in the class definition; lienholders are omitted by design and ruling. Those claimants should have equal footing with present class members, lest the delinquent property owners benefit from their own delinquency *and* expose the FGU to potential takings claims, valid or not, from lienholders in the future. The Legislature prohibited that result, too. In other words, it did not allow a wrongful "benefit at the expense of the

public," e.g., by giving all funds to the "owner," while the FGU is left to defend other claims for the same finite funds. See MCL 211.78t(9).

But whether claims should expire before this Court rules on application of *Rafaeli* is a separate question; the Legislature clearly intended that it not so expire, creating a 180-day window for such claims. MCL 211.78t(6).

The question, then, is which years' claims may enter through that 180 window? To answer that question, this Court need not apply equitable tolling. If *Rafaeli* allows claims arising from sales held before July 18, 2020, to move forward under § 78t then the outside window for such claims should be based on foreclosures effective by circuit court order within two years prior to July 18, 2020. Specific to this case, this Court should allow *statutory* tolling and *class action* tolling of all potential claims to remaining proceeds based on the January 15, 2019 notice of intention, which would include *all* potential claimants (owners of an interest in a property immediately prior to tax foreclosure) from January 15, 2018 through enactment of Public Act 256; the Court of Claims never had jurisdiction over foreclosure sale proceeds (or their claimants) that arose after the new law was enacted.

Generally, equity should not supplant a clear Legislative mandate. See, e.g., *Martin v Secretary of State,* 482 Mich 956 (2008) (reversing for the reasons stated in the Court of Appeals dissenting opinion as to application of equity.) However, courts have long recognized equitable tolling, which allows a litigant to proceed in court despite failing to satisfy the applicable statute of limitations or other

statutory time bar on making a claim. See *American Pipe & Const Co v Utah*, 414 US 538 (1974). Yet, its application remains somewhat rare; its use to thwart an otherwise clear legislative limitation period should only occur when such application would be "consonant with the legislative purpose of a statute to which it is applied." *Devillers v Auto Club Ins Assn*, 473 Mich 562, 598 (2005) (Cavanaugh, J, dissenting), citing *American Pipe*, supra. See also *Browning v Buko*, __ Mich __, 979 Mich 196, 198–199 (Memorandum) (2022) (reasoning that "our court rules and orders cannot trump a statute of limitations. And since nothing in the relevant statutory framework allows for the tolling that occurred here, the only potential grounds for the tolling order is under our equitable powers. But equitable tolling has been largely discredited.").

Here, however, the bulk of the analysis need not turn on either equitable or judicial tolling; Michigan provides tolling under MCL 600.5856. For claims based on sales held before July 18, 2020, *that were within the jurisdiction of the Court of Claims due to the January 15, 2019 notice of intent* (i.e., circuit court judgments entered within one year prior to the NOI) no equitable tolling is needed. For claims arising from sales held after July 17, 2020, although a class was certified, no class notice issued due to interlocutory appeals and a stay in the trial court. Thus, none of those parties knew of this case and many filed claims under the new act. And, after all, those claimants were not under the Court of Claims' jurisdiction at the time of certification.

The same is true under Michigan's class action rule. Under MCR 3.501(F)(1), "the statute of limitations is tolled as to all persons within the class described in the complaint on the commencement of an action asserting a class action." The problem, however, is that the class only encompasses "owners"; although lienholders are claimants under the new law their ability to make claims alongside "owners" is in question. This Court should consider tolling the claims process for older sales, but in this circumstance for the lienholders to effectuate the Legislature's intent.

Although equitable tolling "has traditionally been reserved for 'unusual circumstances' . . . " this situation may call for such consideration to fully, and fairly, adjudicate the rights of potential claimants to remaining proceeds from 2018 and 2019 foreclosures at issue in this case. See, e.g., *Browning,* 979 NW 2d at 199. Here, the Legislature properly left to this Court how its holding in *Rafaeli* should apply to older sales, imply that the precise limitation period is two years but, for the period of implementation (i.e., just before the law was enacted) this Court would know best how to apply its ruling. MCL 211.78t(1)(b).

Limited equitable tolling is consistent with the purpose of the statute, which was to codify the property right this Court identified in *Rafaeli* while not allowing delinquent taxpayers to benefit from their own inaction, using the statute meant to collect years' long tax debts to erase senior liens. And the Legislature invited this Court to decide how best to apply *Rafaeli*'s holding, while still expressing its understanding that the holding not automatically apply retroactively in

MCL 211.78t(1)(b), and its longstanding directive that claims be barred after the expiration of two years following tax foreclosure. MCL 211.78*l*.

This Court must also consider that class action lawsuits, during their pendency, also contemplate tolling under MCR 3.501(f), so long as the certifying court has jurisdiction. See, e.g., *Fox v Saginaw County,* 67 F4th 284, 292 (CA 6, 2023) (no power to certify without jurisdiction). The problem for Plaintiffs, here, is that the present class post-dates the court of claims jurisdictional divestment through Public Act 256; the law was signed with immediate effect on December 22, 2020, and the class was recertified to its present definition on February 22, 2021.

Those shortfalls aside, it appears the present class members with claims based on sales in the two-year period preceding July 18, 2020, have 180 days under § 78t(6) to initiate a claim if this Court rules they are eligible. That would include, as of now, properties foreclosed and sold after January 15, 2018 based on Plaintiffs' January 15, 2019 notice of intention—which time period nearly aligns with § 78*l*'s two-year statute of repose applied backward from this Court's 2020 ruling in *Rafaeli*. Although two years prior to July 18, 2020, would not reach the March 31, 2018 foreclosure effective date (the date the "judgment of foreclosure of the property is effective under section 78k" as provided in MCL 211.78*l*), it would encompass the subsequent sales held later that year in August and September, 2018. It is imperfect but this may be the best way to harmonize the statute, the present class, and equity under the circumstances.

* * *

In summary, presuming for purposes of this argument the Court holds *Rafaeli* has some retroactive application, any claimant, whether an "owner" or lienholder, must file a notice of intent "by the March 31 at least 180 days after" this Court's order as provided in MCL 211.78t(6). Again, assuming this Court rules that *Rafaeli* applies to some older claims, that Public Act 256 governs, and that this Court decertifies the class, the minimum 180 days would run from the date of the *Hathon* decision for class members—"owners"—based on statutory and class action tolling principles as applied to the present class. The same time period would apply for lienholders, but relevant tolling for them would be based on principles of equitable tolling. Here, this includes claims from foreclosure judgments entered on or after January 15, 2018, because of Appellees' January 15, 2019 notice of intention filed in this case, which is consistent with MCL 211.78*l* as applied to the date of the *Rafaeli* decision, both covering 2018 and 2019 foreclosure sales that produced surplus. Foreclosure orders and sales from before 2018 fall outside the two-year limitation, and such claims are barred.

CONCLUSION AND RELIEF REQUESTED

This is about what happens after a tax foreclosure and sale that results in funds above the tax debt. This law was passed to handle this exact thing and was created to cover this time period. Public Act 256 controls, and it deprives the Court of Claims of jurisdiction, prohibits original actions, and does not allow for class action litigation. And even if it does not control, the Court of Claims erred when it

certified a class—it was an abuse of discretion to certify this class and an error of law to apply the class action mechanism in this scenario in the first instance. This Court should reverse, holding that Public Act 256 applies and its processes are constitutional, allowing any compensable claims based on the application of *Rafaeli* to proceed by following MCL 211.78t, and applying the two-year statute of repose found in MCL 211.78*l* , beginning with this Court's holding in *Rafaeli* which first fully, and finally, articulated the scope of this right.

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