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STATE OF MICHIGAN
IN THE SUPREME COURT

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

v.

STATE OF MICHIGAN
Defendant/ Appellant
_____/

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

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PLAINTIFFS/APPELLEES' SECOND APPENDIX (APP 2)

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Michigan Association of County Treasurers

FOR IMMEDIATE RELEASE
27 July 2020

Contact: Bob Robinson
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County treasurers studying impact of supreme court ruling on tax foreclosure and public services

Charlotte, MI – Tax foreclosure is a tragedy, and the way county treasurers handle tax foreclosure and deliver public services may change as the result of a Michigan Supreme Court ruling on Friday, July 17.

The court's decision affects the rights of people formerly holding an interest in tax-foreclosed properties to remaining proceeds after sale of the properties.

The decision may affect the ability of counties to perform tax foreclosure functions for the state. Specifically, in a 6-1 decision in Rafaeli LLC v. Oakland County (MSC Docket No. 156849), the high court stated that when the government forecloses on property to satisfy an unpaid tax debt, Michigan's Taking Clause requires the government return any remaining proceeds from the sale, in excess of the delinquent taxes, interest, penalties and fees, as compensation to the previous owner.

The Michigan Association of County Treasurers is reviewing the decision issued last Friday by the Michigan Supreme Court in the Rafaeli case with each other and with legal counsel.

"County treasurers will continue to do what we have done on the state's behalf for 20 years now: prevent foreclosure, educate owners and tenants, and adhere to the law fairly and consistently," Jenny Beemer-Fritzinger, MACT President and Clare County Treasurer said. "We are studying the court's decision in order to implement future requirements needed to conform with the court's order."

"We hate foreclosing property," Beemer-Fritzinger explained. "Our goal is always to prevent tax foreclosure whenever possible."

-End-

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Michigan Association of County Treasurers

13 October 2020
FOR IMMEDIATE RELEASE

Contact: Jennifer Nash
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County treasurers support bills to update tax foreclosure legislation

Charlotte, Mich. – Today the Michigan Association of County Treasurers moved to support Senate Bill 1137, proposed by Michigan Senator Jim Runestad (R-White Lake) and Senate Bill 676 proposed Peter J. Lucido (R–Macomb) and House Bill 6268 by State Representative Brandt Iden (R-Kalamazoo). The bills would allow for a fair and equitable solution to the Michigan Supreme Court's July 17 ruling that those who have property foreclosed for unpaid property taxes have a common-law right to any remaining proceeds from the sale of the property, after taxes, interest, penalties, fees and costs have been paid.

The proposed legislation changes current tax law and would allow people to request the remaining proceeds from the sale of tax-foreclosed property through the judge who ordered the foreclosure. Current tax law requires excess funds of sold properties to be deposited with the county treasurer. If passed, the new law would let people who cannot pay their property taxes to avoid foreclosure receive any remaining proceeds resulting from the sale of the property. Once a judge determines the amount owed to a claimant, the county treasurer would disburse the funds in accordance with the judge's order within 21 days. Anyone with interest in the property could file a claim to remaining sale proceeds after required taxes, interest, penalties, fees and costs have been covered.

"The Michigan Association of County Treasurers wants to follow the direction of the supreme court," said Jennifer Nash, Livingston County Treasurer and president for the association. "We want to help taxpayers who go through the unfortunate process of property tax foreclosure with fair and equitable recovery of remaining foreclosure sale proceeds."

MACT supports Senate Bills 1137 and 676 sponsored by Senators Runestad and Lucido, and House Bill 6268 by Rep. Iden so that tax law can comply with the Michigan Supreme Court decision.

"As county treasurers, we will continue to prevent foreclosure whenever possible," added Nash. "County treasurers across the state use a variety of methods and numerous community resources to help people pay their taxes and prevent foreclosure."

The work of county treasurers statewide prevented 97.5 percent of property tax foreclosures in 2019.

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Michigan Association OF County Treasurers

7 December 2020
FOR IMMEDIATE RELEASE

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Bob Robinson
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County treasurers support bills to update tax foreclosure legislation

Charlotte, Mich. – The Michigan Association of County Treasurers support the recent passage of Senate Bill 1137, proposed by Michigan Senator Jim Runestad (R-White Lake) and Senate Bill 676 proposed Peter J. Lucido (R–Macomb) and look forward to their passage in the House as well. House Bill 6268 by State Representative Brandt Iden (R-Kalamazoo), which also addresses tax foreclosure, is awaiting a vote by House members hopefully yet this week.

The bills allow for a fair and equitable solution to the Michigan Supreme Court's July 17 ruling that those who have property foreclosed for unpaid property taxes have a common-law right to any remaining proceeds from the sale of the property, after taxes, interest, penalties, fees and costs have been paid.

The work of county treasurers statewide prevented 97.5 percent of property tax foreclosures in 2019. As the experts in the state on tax foreclosure, MACT appreciates being closer to having clarity on how to proceed with implementing this most recent update to the General Property Tax Act. The Act is what dictates how treasurers do their jobs.

"The Michigan Association of County Treasurers wants to follow the direction of the supreme court as we continue to prevent foreclosure whenever possible," said Nash. "County treasurers across the state use a variety of methods and numerous community resources to help people pay their taxes and avoid foreclosure. We want to help taxpayers who go through the unfortunate process of property tax foreclosure while still maintaining a fair and equitable recovery of remaining foreclosure sale proceeds."

The proposed legislation changes current tax law and would allow people to request the remaining proceeds from the sale of tax-foreclosed property through the judge who ordered the foreclosure. Current tax law requires excess funds of sold properties to be deposited with the county treasurer. If passed, the new law would let people who cannot pay their property taxes to avoid foreclosure receive any remaining proceeds resulting from the sale of the property. Once a judge determines the amount owed to a claimant, the county treasurer would disburse the funds in accordance with the judge's order within 21 days. Anyone with interest in the property could file a claim to remaining sale proceeds after required taxes, interest, penalties, fees and costs have been covered.

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Michigan Association of County Treasurers

26 January 2021
FOR IMMEDIATE RELEASE

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What property owners can expect from revised tax foreclosure and poverty exemption laws

Reclaiming tax sale proceeds and longer timeframes for exemption are highlights

Charlotte, Mich. – Property owners – business and residential -- who have gone through the unfortunate foreclosure process now have the option to reclaim monies leftover from a tax sale. The law changed, so county treasurers are no longer required to keep those proceeds in a delinquent property tax fund. People who need poverty exemptions can also now breathe a sigh of relief because they won't have to go through the application process every year, according to the Michigan Association of County Treasurers.

Under Public Acts 255 and 256, county treasurers will notify property owners who lose their homes or businesses to foreclosure of the pathway to receive any remaining proceeds of the tax sale of their property after taxes, interest, penalties, fees and costs have been paid. The owner has until July 1 of the year in which the foreclosure took place to file a claim. The bills also allow for an additional 5 percent fee for treasurers from sale proceeds for their work to rehabilitate and sell properties.

"Taxpayers who've suffered through foreclosure now have new rights," said Jennifer Nash, MACT President and Livingston County Treasurer. "We are working to make sure people know what those rights are. We believe this is a fair and equitable solution to the Michigan Supreme Court's July ruling that said county treasurers couldn't keep proceeds of tax sales."

The work of county treasurers statewide prevented 97.5 percent of property tax foreclosures in 2019. Nash says treasurers use a variety of methods and numerous community resources to help people pay their taxes and prevent foreclosure.

In a separate piece of legislation – Public Act 253 – poverty exemptions will stay in effect for up to three years instead of one, retroactive to 2019, if the city or township adopts a resolution to allow longer poverty exemptions for homeowners who remain eligible.

According to the legislation, to get an exemption a person must be on a fixed income solely from public assistance that is not subject to significant annual increases beyond the rate of inflation. If the applicant ceases to own or occupy the principal residence or experiences a change in household assets or income that would make them ineligible for the exemption, they have 45 days to notify the county treasurer's office. Failing to do so could make them subject to repayment of taxes with interest.

# # #

The Michigan Association of Treasurers supports the state's 83 county treasurers through education, legislative advocacy, networking, protecting the interests of all taxpayers and speaking up for meaningful tax reform. Our treasurers are their county's chief financial officer, foreclosure expert and investment manager.

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STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT - CIVIL DIVISION

IN THE MATTER OF:

Case No. 2020-00105-CZ

PETITION OF BERRIEN COUNTY
TREASURER FOR FORECLOSURE OF
CERTAIN PARCELS OF PROPERTIES.
_____/

MOTION HEARING
BEFORE THE HONORABLE STERLING R. SCHROCK
St. Joseph, Michigan - Tuesday, April 18, 2023

APPEARANCES:

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None.

EXHIBITS: IDENTIFIED RECEIVED

None.

St. Joseph, Michigan

Tuesday, April 18, 2023 - At 2:05 p.m.

THE COURT: All right. This is 2020-0105 in the matter of the petition of the Berrien County Treasurer for the foreclosure of certain parcels of property, and the matter before the Court today is a Petition for Disbursements of Remaining Excess -- three different ways this has been described in various places in the law, right? -- remaining proceeds, exceeds proceeds, and the third one is escaping me.

MR. LAWLER: Surplus.

THE COURT: Surplus proceeds, right, and I think it's actually remaining in surplus proceeds that are most frequently referred to -- following tax foreclosure in this 2020 case and sale, with remaining or surplus proceeds. The claimants requesting disbursement are Ronald Arndt, II; the Eileen H. Globinski (ph) Children's Trust; the Marianne Heinzie (ph) Romano Children's Trust; the Mary Ellen Heinzie Trust; The Estate of Jackie Eldon Snow -- Jackie Eldon Snow; The Estate of Diane M. Woodford; The Estate of Jane Whetstone; Elizabeth Kell; The Sandra K. Nimmits (ph) Living Trust; The Benjamin E. Marshal Trust; and The Estate of William Kanalos. It's K-a-n-a-l-o-s, Kanalos.

These claimants, which is I think the appropriate way to refer to them, are represented by Mr. Visser, who is

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present. The Treasurer is represented by Mr. Lawlor, who is present. So this is the matter of the request for the disbursement of surplus or excess proceeds for those named 11 claimants, correct? Are we getting off on the right foot here, Mr. Lawler?

MR. LAWLER: We're both headed in the same direction.

THE COURT: Okay. Mr. Visser says yes?

MR. VISSER: The only question I had, Your Honor, is we also had an Estate of Arthur Petroskey (ph) on our list of the ones we were going to hear today. That's with a separate attorney.

THE COURT: I did not notice that for hearing. Is that the matter with the most -- that was most recently filed?

MR. VISSER: Yeah. Well, I think that -- well, I don't know if it was the most recently filed. It was the most recently filed in this case. It was a Brasswell was the attorney on that one.

THE COURT: Ms. Brasswell. I haven't seen or heard from her. That was not set for hearing today.

MR. VISSER: Okay, good.

THE COURT: You filed an Answer under the Statute 78t very recently to that.

MR. VISSER: Yep.

THE COURT: Within the last what, less than a month, probably.

MR. VISSER: Yeah.

THE COURT: And, yeah, so no. She has not contacted the Court and asked for a hearing on that matter, and there is also, just for housekeeping purposes, one other claimant that I'm aware of relative to this case, and counsel -- you know, just full disclosure here for the record, counsel, Mr. Lawler, Mr. Visser, and I have had at least one communication in the form of a phone conference to discuss issues and timing and things like that, and what was actually pending and what wasn't pending, and those sorts of things, and I got a recent letter from Mr. Lawler identifying that -- because, frankly, I didn't see it wading through this -- that one of the issue -- one of the cases that I been -- that I was aware of when I assumed this docket was a claimant whose case had been resolved, Modasonto (ph) or something of that nature, and so Mr. Lawler brought that to my attention.

Also, there was -- there's a claim, a motion that I found in the file that was filed by a law firm representing a claim -- claimant. That attorney is Mr. Shek, and after I got your letter and went back and started to look at these issues, Mr. Lawler, what I noted was that actually Mr. Shek had filed that motion, I think, on the

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Treasurer's previous attorney and not on you, but rather on the attorneys who had represented the Treasurer at the time of the 2020 foreclosure.

That would have been Attorney DeWayne (ph), I believe, or his firm.

MR. VISSER: That's right, Your Honor, and I do have a copy.

THE COURT: Okay. You did get a copy of it.

MR. VISSER: We're taking care of that with Mr. Shek.

THE COURT: Okay. All right.

MR. VISSER: The reason I brought up Petroskey is because I thought we talked about that when we had the discussion amongst the three of us.

THE COURT: Well, correct. We talked about it in the sense that hey, I just saw this motion, but -- but I haven't heard anything from counsel for that claimant asking to be a part of this hearing, or even setting the matter for a hearing, and we'll have to get to that at some point. So, all right. I think we're now off on the correct foot. So, as -- as is my practice, I have probably read both of your briefs with your -- motion and briefs with your exhibits on more than one occasion, so I've done the best I could to digest what the issues here -- what the issues are here before we got on the record today.

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So I don't know what your intentions are in the form of a presentation today, but given that I have now had the time to digest, I think as well as I can, given the complexity of the issues, I don't need to hear what's in your briefs, so if -- but certainly, if there's any information that you want me to have to amplify what you've otherwise argued in your briefs, I am happy to hear from you. So, I'll hear from Mr. Visser.

MR. VISSER: Your Honor, am I picked up if I speak from here?

THE COURT: Yes, I believe so. Okay, sure.

MR. VISSER: Let me know if for somehow I am not picked up. As Your Honor is quite aware, the central issue here is that the County has asserted that the claimants that are before you today did not timely file the notice of intention and that is the flaw. In response to that, we have asserted two things. One is that there's a settlement in this matter in which the County indicated it was not going to be asserting a defense based upon the notice of intention. It would make the payment. And secondly, that if that settlement is not enforced, that the statute at least as interpreted by the County would thus be unconstitutional, and that's contained in a principle in our briefs, I think fairly well covered.

Underlying that, however, is a real question as to

why the County is even here, and that's based on a reading of the statute and just simply going through the statute. The County really does not have standing to be here for anything other than the five percent that's asserted in the statute.

I've broken it down. If I could approach the Bench, I've got a copy of the statute, which I'm sure you've read several times, consisting of four pages, but then I've also attached on it in the paperclips, kind of trying to break it down. The first couple of sections, one and two, talk about notice of intention. But then as you move down the statute, the next page is claims under Subsection 4, and that basically talks about when the claims may be filed after February 1 and prior to May 15.

Now, there's nothing in there that requires a notice of intention. Then we come to Subsection 6, which is really where we are in this particular situation. It's for a claimant seeking proceeds from the transfer of sale or foreclosed property transferred or sold under Section 78(M), pursuant to this subsection. Now what we have is we have a very defined envelope regarding what process we're looking at. We are looking under Subsection 6 only under the subsection.

Remember the previous subsections address notice of intention. This now says you're not looking at the

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section, you're only looking at the claims under the subsection, and what does it have to include? It says the motion must be certified and include all of the following: The name of the claimant, all the way down through a sworn -- being a sworn statement.

You will note there is nothing in there about a notice of intention. It does not have to be asserted and it's not -- this subsection is not predicated upon a notice of intention. Then we go to the next page, which I have. It's called the roll of the foreclosing governmental unit. That's described in Subsection 7 of the statute. That statute says that the end of the claim period, which was described in Subsection 4, this is what the County -- or the FGU, in this case the County Treasurer, has to provide.

As you will notice there, there's a whole bunch of information on there, again nothing having to do with a notice of intention. You have to give the parcel description. You have to give the amount that it was sold for, all of the information that you're going to be looking at today to make distribution, but that information has to be sent out. And the last thing is, the name and address provided by each claimant for their property, pursuant to either Subsection 2 or 6. Notable, however, is nothing regarding a notice of intention.

Then Subsection 8, which describes what has to be

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done. Again, this is what -- this is what needs to be asserted, and the claimant -- again, there's no mention in this section -- or in this subsection about a notice of intention. And then finally, we get to Subsection 9, which is the last page of my handout and I have highlighted a couple of things in color there. Again, there's nothing in this subsection about a notice of intention.

Here's where I get to the question about what the County Treasurer's role is in this matter. As you come down about seven lines, it says the statute allows the foreclosing governmental unit may appear at the hearing. It may appear. This is -- it's interesting, because if you look at the entire scope of the statute, the County does not play a role in anything except for the next sentence: The Court shall require a payment to the foreclosing governmental unit of a sale commission equal to 5 percent of the amount for which the property was sold by the foreclosing governmental unit, end of the foreclosing governmental unit's relationship to this particular hearing.

There is nothing in this hearing that asks this Court to determine whether a notice of intention was sent. It's not part of this -- of the function. What's happened, the Plaintiff or the claimant has to prove or bear the burden of proof on that they had an interest in the property. The second part, then what happens is the Court,

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after allocating 5 percent, the Court shall -- this is mandatory language -- allocate any remaining proceeds, based upon its determination and order that the foreclosing governmental unit pay applicable remaining proceeds to one or more claimants consistent with this determination under the subsection.

So the Court's role at this stage, once a timely motion -- we're not talking about a timely notice of intent. The only thing that impacts this Court's hearing is the timely motion, that is it's by May 15, so we -- once that occurs, you can ignore the notice of intention. It has nothing. The count -- the FGU has nothing to say about whether a notice of intention was given timely or untimely. It simply is not relevant to the Court's hearing under this particular subsection.

So, other than -- to make sure that the Court gives the 5 percent, the foreclosing governmental unit then steps out of the way and it's up to the Court then to determine between one or more claimants as to the remaining proceeds. The fact that the FGU doesn't fit within that definition -- you can look down. I think it's Subsection 12 of the act, which says -- which defines what a claimant is, and the FGU cannot and does not fit that definition of being a claimant, so once the 5 percent is taken out, you have 95 percent to work with and you by statute are mandated to

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disburse that to the one or more claimants related to that property.

In this particular instance, we believe it does not allow for all of these other issues that have come up that obviates the necessity to -- to discuss whether we had a settlement or not. It obviates the necessity to declare the statute unconstitutional. If, however, the Court doesn't agree with me, obviously those issues come into play and I'm more than happy at this point to answer any questions that the Court may have relative to either of those -- well, actually or the things I just brought up regarding interpretation of the statute.

We just -- the statute is clear. It's not ambiguity. We know who a claimant is. We know who the FGU is, and so the rules of interpretation doesn't really allow us to go and say, well, the legislature meant or should have meant; we have to read a statute exactly as it is, and nothing more and nothing less, and so it's our interpretation that we don't get to even allowing, in this instance, the FGU to take a position on who the money gets distributed to after the 5 percent is out.

That, of course, makes sense. It's not their money. I mean, Rafaeli made that very, very, clear is that it belonged to somebody else. They're really just holding somebody else's money, and so in this particular sense, that

interpretation makes -- is entirely consistent with Rafaeli.

THE COURT: All right. Thank you. Mr. Lawler?

MR. LAWLER: Your Honor, that's the first I've heard that novel argument and --

THE COURT: Well, yeah. I wish it would have been flushed out a little bit in a brief to give me an opportunity to think about that, because it's the first, of course, that I've heard it as well, but it is what it is.

MR. LAWLER: But I would point you to the statute. I mean, 78t(2) says, you know, that any property -- foreclosed property transferred or sold after July 17th, 2020, by the July 1st immediately following the effective day of the foreclosure, a claimant seeking proceeds for the property must -- I think that's a pretty simple term, must, notify the foreclosing governmental unit using the forms prescribed by the Treasury.

THE COURT: So you're arguing that contrary to what Mr. Visser is saying, that Section 2 incorporates the balance of the statutory scheme --

MR. LAWLER: Yep.

THE COURT: -- such as it must be followed, including submission of a notice of intention.

MR. LAWLER: That's part of it.

THE COURT: Okay.

MR. LAWLER: The other thing, Your Honor, is

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78t(9), and you can see my book is a little more weathered than Mr. Visser's there, and I really wasn't prepared for this, so I don't have it highlighted or anything, but I know it's there. Oh, I guess I do have it highlighted.

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. The reason the Treasurer is here, Your Honor, regardless of whatever Mr. Visser says, is she doesn't want to pay more than once, so there's a -- the litigation that spawned out of this Rafaeli and out of the statute is -- I couldn't even describe it. I mean, some people would say it's a gift to attorneys like me, and some people would say it's a bane.

We've litigated this thing. In fact, I just got another class action from Mr. Visser, a federal one, I don't know a few days ago for another year, but the Treasurer is not -- you know, they're not against paying. They just want to make sure they pay the right people, and what really happened here is in the first one that we did the stip and order with Mr. Visser, we made a mistake. We didn't -- the reason we didn't -- the reason we stipped to that is we were concerned that there wasn't enough notice provided to these people of their opportunity to get their remaining proceeds and the process.

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The reason that was, was because I didn't represent the Treasurer at that time. They had prior counsel, and what us treasurers who represent -- or us attorneys who represent a number of treasurers did is we got together and provided a judgment of foreclosure that included the whole process so everybody got notice, but after the first stip and order that we did with Mr. Visser, then we got into the Treasurer's records and we found out that they had taken extra steps, as you saw it in our briefs and everything else. I don't need to into that, but I gave Mr. Visser a copy of the judgment of foreclosure that we use in other areas, and if you would allow me, I would approach and give you one too because I'm not sure it's in the file.

THE COURT: Well, I don't think it was attached as an exhibit to your brief --

MR. LAWLER: Yep.

THE COURT: -- but I have no reason to dispute what you're saying.

MR. LAWLER: Okay.

THE COURT: The question is whether or not -- I think the question in my mind is whether or not under some -- the way the law is at this point in time, particularly in light of Rafaeli, that cures any of the issues that are concerning to me. I guess that's what the question is. Is there anything more you wanted to say, Mr. Visser?

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MR. VISSER: Your Honor, I would just simply reference a couple of the comments that were just made. Obviously, the order that's entered by this Court follow -- will follow the statute. That really pretty well protects the FGU from paying twice. I mean, there's no issue with paying twice. That's cured or uncured by analysis of whether notice of intention was timely filed or not. I mean, the options --

THE COURT: Unless the entire statute is unconstitutional -- unconstitutional and invalid, the foreclosure process eliminates all other claims.

MR. VISSER: That's correct, so I don't see that issue as rearing its head at all in this. What the FGU is currently telling you is, well, we're worried about paying twice, so why don't you just let us keep the money, and that seems totally antithetical to what -- what Rafaeli has said, so it's not -- it's not their money and, well, we would like to keep it because you -- you didn't file a notice of intention.

I will address the comment about the -- about notice, that the FGU is saying, well, after the fact we found out that we think that we gave enough notice to satisfy. Obviously, we have -- we have a significant problem here. Unlike many other counties, this County did not include any language in its foreclosure judgment about

preserving any rights for remaining or -- remaining proceeds.

THE COURT: Under the statute, remaining proceeds.

MR. VISSER: Yes. They did not. Most of the other statutes -- counties across the state did include language advising of the remaining proceeds and keeping the case open. This case is absolute done, over with. There is no remaining proceeds, despite what the statute says, nothing preserved in the order, so we have some real notice issue there coming out of the foreclosure judgment itself.

But more particular to the whole constitutional analysis that PA 256 puts itself into, and that is the juxtaposition of the claim that 256 is the exclusive measure to get the remaining proceeds or surplus proceeds, versus jumping through the hoops. If it's -- if it's not the exclusive remedy, which some of the judges have found, that PA 256 simply did not effectively codify Rafaeli, so it's an alternative measure.

Surplus proceeds still remains a viable method, but by separate lawsuit. I understand that, but if you look at it otherwise, Rafaeli tells us that the surplus proceeds -- there's no claim to surplus proceeds until there's a sale. We're getting a little bit in the weeds here, but I'll just give the Court a little idea of what I think has happened since we've briefed this.

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The Sixth Circuit came down with a decision called Hall versus Meisner. It came out of Oakland County, which is fertile ground, I think, for a lot of these, but it was a piece of property that did not sell, so it never got to the position of generating surplus proceeds. The Sixth Circuit said that nonetheless, the Fifth Amendment under the federal law protects -- it protects that former property owner, and that they -- there was a violation of the Fifth Amendment there and they sent it back down.

Now, add one additional layer to that. I think it was in early January -- like January -- early part of January, the United States Supreme Court granted cert to an Eighth Circuit decision out of Minnesota in which the Circuit -- they have a similar statute to what Michigan had. The district court and the circuit court denied relief to the property owner, and the United States Supreme Court has granted cert now on that issue for violation of the Fifth Amendment and the Eighth Amendment, and in the application cited the conflict between the Eighth Circuit and the Hall versus Meisner Decision out of the Sixth Circuit, roughly the very same issues, but coming to different -- different ends.

The interesting part to us was that the United States Supreme Court deemed it prudent to address also six -- I mean, Eighth Amendment, taking fines and penalties --

excessive fines and penalties out of that, so it suggests that -- we never know where they're going, but it suggests that there's probably a significant adjustment in all of our thinkings as to what the federal remedy is, in addition to what's happening under Rafaeli.

But for Rafaeli, it's real clear under state law the claim doesn't exist until the sale, so if we look at that, so now if you can identify what the property is at the date of sale, not before, you look at this sequence, you have the effective date of foreclosure, March 31, this supposed notice of intention of July 1, and your sale a couple months later. You can't file a claim. You can't do anything as far as anyone is concerned because that property does not exist. Under Michigan law you cannot file a claim.

Rafaeli says no more and no less under the State Constitution than the surplus proceeds. You don't have -- it also says you don't have a claim until it sells. It seems to me that in the real world, due process really has to issue -- once you identify, give notice, once you identify the property and say I'm going to take it. Otherwise, we could all give notices at the time of your birth and say we're going to take your property whenever we want to down the road, and you've got notice.

You can't do that without having some relationship between the property that you're taking and the notice that

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you're trying to give by it -- or give in relationship to it. And, of course, it's our position that even if you get there, you still -- you still have problems with the Article 10, Section 2 of the Michigan Constitution.

If you take it, you still have to pay for it. That's just compensation, so let's say you get all the way there and, yeah, we took your property. I'm not sure it happens, because if you look at PA 256, it never addresses ownership -- transferee, and I have tried and eventually I will get this I think in some of the appellate decisions. I have tried to get the FGUs to define when is it that ownership transfers from the claimant to the FGU. I had one treasurer tell me it doesn't happen.

It was a clever argument to avoid the taking issue, we just keep it in escrow, and then eventually --

THE COURT: I think Rafaeli said that interest doesn't transfer, did it not?

MR. VISSER: Rafaeli says it does not transfer, so now PA 256 is apparently, although it never addresses it, at the end of the process, you look at this -- we know Rafaeli at the beginning of the process says it belongs to the claimant. We would suspect, anyway, we're not sure, but up at least until July 1, I would probably suspect it still belongs to the claimant.

Now, if we get -- if we walk out of this courtroom

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and Your Honor does not order the funds turned over, effectively it's become -- because we can't get it, effectively it's become the County's property. That's really what -- it just by osmosis gets over there, but the Constitution doesn't allow osmosis.

So we try to define when did it occur so we can -- if we can do a freezeframe analysis, what happened on that date; was due process good for that -- for that day of taking? What about the constitutional analysis for compensation? If we can define what it is, but the whole statutory sequence here is it really never addresses it, and that's real -- that's a real problem. So if we're taking something, defining when we take it helps with the analysis of due process because, okay, if you're going to take it, now ought to have due process.

It also helps with the setting okay, when does Article 10, Section 2 kick in for compensation, so I identify a whole lot of problems that I see. I don't know that -- in fact, there's more than one. I don't know that I can say this is the particular issue with the statute, but I do know that when you say this is an exclusive remedy and if you buy into the County's position that you have to give notice of intention by July 1, now I can identify some real issues that are inconsistent with due process and inconsistent with just compensation.

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THE COURT: And I think not as completely as you just argued your point there, you covered most of that in your brief. Did you have anything further, Mr. Lawler?

MR. LAWLER: I've got a couple comments, Your Honor, and I guess the first thing I'd say, Mr. Visser, I'm a little disappointed that I didn't do a better job when I participated in drafting the statute, but a couple things. The Hall case is an interesting case. The thing to point out is there was actually eight properties in that case when they started, and a bunch of them were dumped.

Judge Kethledge actually said that the Hall case was a classic example of why these shouldn't be class actions, because each property is individual, each one has individual things but that's not before us today. I don't personally think the fact that the Supreme Court took it gives us any indication of what they're going to do one way or the other. There's obviously a circuit split and they want to clean up some of these issues, so whether they side with Mr. Visser's side of the V or my side of the V, we're going to find out here pretty quick because the argument is the 26th.

The one thing I would point out, Your Honor, and Mr. Visser and I have debated this continually, the July 1st deadline was put in there for a specific purpose, and there is a rational basis for them having that. The reason it was

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put in there is so the local units of government who had an opportunity -- you understand the process, and through the process the locals have an opportunity to pay the minimum bid in the old days.

But now -- now what they have to do is if there is a notice of intention of claim form, they've got to pay the fair market value or the minimum bid, whichever is greater. The reason they put that July 1st deadline in there is to keep the process moving. So there's nothing -- you know, anybody who thinks they may have a claim or their property is foreclosed, they should all file a 5743. I mean, that's why the Treasurer sent out those two written notices after -- after the fact. You know, it wasn't in their judgment, that's true, but she did send two written notices to every parcel -- every individual who had a parcel foreclosed, telling them that, hey, you've got to file a claim by July 1st.

I guess that's pretty much all I have to say, unless you have any specific questions about our -- our briefs. I mean, the one thing I would say is that most of these parcels that Mr. Visser has here are fraught with issues. You know, there's no notice of intention filed on some of them. They're all late. There are some of them that have a number of other mortgages, other parties of interest that aren't here. Now -- now, the Plaintiffs

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always argue that, well, they didn't file their notice, so.

Okay, well, if they didn't file their notice and they shouldn't be here, then why -- why does that let them off the hook of filing notice? But I've got a whole list of these that we did, which I'm happy to share with the Court that outlines all of the issues with every single one of them. And contrary to what Mr. Visser said, you know, the Treasurer is not here to hold the money or keep the money, or ant else. You know, they're a fiduciary of all these funds. Their duty is to make sure it gets to the right person. If nobody makes a claim, sure, it goes back to the County, and then the County uses it to serve all of the citizens.

But the statute specifically says, again in 78t(9), that nobody should be unjustly enriched, so what some of the Plaintiffs' lawyers have suggested is that I own a house and, you know, I happen to own a house in Okemos, Michigan, right now. Let's say it's $200,000 house, and I've got $150,000 mortgage. If I don't pay my taxes, I've got to go through the process and my mortgage company doesn't show up, I should get whatever it's sold for, so if it's sold for 200,000, that's what I should get. That's just not equitable and there's no way the statute or anything was ever intended to do that.

So the biggest thing we have done is trying to

make --

THE COURT: Doesn't -- I understand what that issue is and the concern there, but has -- I mean would that other interest in the property, if the remaining proceeds, surplus proceeds, whatever you want to call them, goes to the original owner of the property, doesn't that other entity then have a cause of action against them? Isn't the Court available to resolve those issues for them?

MR. LAWLER: They could be. Yes, Your Honor.

THE COURT: Yeah, so I don't see how that is any kind of a compelling argument for the application of the statute here, I guess. I'm not tracking.

MR. LAWLER: Well, what we found isn't --

THE COURT: It's complicated. It's a mess.

MR. LAWLER: Well, what really happened is -- no offense to the -- as Mr. Visser said, the circuit courts are kind of -- they're not all on the same page on this yet.

THE COURT: Well, you're darned right they're not.

MR. LAWLER: So we've had some --

THE COURT: You both demonstrated that with the -- with the variety of opinions from other jurisdictions that you attached to your briefs, and I wish I could say that's helpful, but it certainly is not. It just shows the confusion over the application of the statute.

MR. LAWLER: Right.

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THE COURT: Right.

MR. LAWLER: Yeah. Yeah, because we've had other circuit courts order us to provide notice to some -- truthfully, they were all governmental entities that they were probably trying to protect, but we did have to provide notice on numerous occasions to other parties who had an interest prior to the foreclosure. So, I don't really have anything else, Your Honor, unless you have something specifically you'd like to ask or you'd like further clarification. I'm happy to brief any issues if we have to brief something else for you too.

THE COURT: I'm not convinced that I -- the way things lie, that I need anything else from either of you. I mean, I don't think any of us can -- I mean, Mr. Lawler said it, Mr. Visser certainly shook his head and agreed on the record; it's created quite an issue, the application of the statute since the issuance of the Rafaeli Decision. You know, counsel, if you wouldn't mind giving me about five minutes, I'm -- there's -- I want to discuss a couple things with my law clerk, all right? So we'll go off the record for just a few minutes.

THE BAILIFF: All rise. Berrien County Trial Court stands in recess.

(At 2:43 p.m., court recesses)

(At 2:46 p.m., court reconvenes)

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THE BAILIFF: Trial Court is now in session, the Honorable Sterling R. Schrock presiding. You may be seated.

THE COURT: All right. We're back on the record on 2020-105. So, counselors, I've spent enough time with this that I'm prepared to rule, and I think I should start by saying that just as we discussed at the end of our previous session before I took that brief recess, there's not a lot of clarity coming from the courts that need to weigh in on this, the higher courts, to give the circuit courts some guidance in the interpretation of the statute.

Where that is the case, this Court is left with reaching a conclusion based upon the way it understands the application of the law, and in this particular situation, of course, that's 78t of MCL 211. So this matter involves 11 named claimants who present a joint Motion for Distribution of Remaining Proceeds, as defined by MCL 28 -- I'm sorry, 211.78t of the Michigan General Property Tax Act. That act defines remaining proceeds, quote, which for purposes of this decision may also be referred to as surplus proceeds.

The Court is referring to the surplus remaining from the foreclosure sale of the parcels after deduction of taxes owed, interest, penalties and fees reasonably associated with the foreclosure sales of the parcels. All of these 11 claimants owned -- owed -- I'm sorry, owned taxed parcels that were the subject of a Judgment of

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Foreclosure, which was entered March 8, 2021 and became effective March 31, 2021.

The parcels were then sold at a foreclosure sale on August 6th, 2021. In each of these instances, the parcels sold for in excess of the tax owed and the Berrien County Treasurer is the foreclosing governmental unit in these case. The principal question for the Court raised in the claimant's motion is whether the amendments to MCL 211.78t enacted and made effective December 22, 2022, in response to the Michigan Supreme Court Decision in Rafaeli versus Oakland County, decided July 17, 2020, precludes the claimants from recovering surplus or remaining proceeds generated by the tax foreclosure and sale of their properties.

On the facts presented in this case, I find that the statutory scheme created by the amendment to MCL 211.78t does not preclude the claims for surplus or remaining proceeds of these 11 claimants for the following reasons: The Rafaeli Decision clearly establishes the following: Holders of forfeited properties do not forfeit all rights, titles, and interests that they had in their properties by failing to pay their property taxes. The Michigan and United States Constitutions require protections of due process. Failure to do so and the statutory retention of surplus proceeds following a tax foreclosure and sale under

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the General Property Tax Act is an unconstitutional taking.

The property owner has a common law property right to the surplus proceeds from a tax foreclosure sale. That property right is vested in the property owner and survives the tax foreclosure process. This common law property right is constitutionally protected by the Takings Claus of the 1963 Michigan Constitution. The legislature is powerless to override a right protected by the Constitution. The takings claim for surplus proceeds is not compensable until the property is sold for an amount in excess of the tax debt. A property owner has a takings claim if, and only if, the tax foreclosure sale produces a surplus.

Once the sale produces a surplus, the former owner has a claim to make, even though that former owner no longer holds title to the property. Those are the essential principles from Rafaeli on which this Court relies. There are, of course, others. In my words, there is no basis, nor is there a vested property right that is subject to the protections of the Takings Claus of the Constitution until the sale occurs and the claim accrues. On the facts applicable to these claimants, that did not occur until the sale took place on August 8, 2021. There was no vested property right for which a claim could be made until that date.

This is where the legislature's effort to fix the

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General Property Tax Act with its amendments to Section 78t fails to correct the issues with the General Property Tax Act addressed by Rafaeli -- or by the Rafaeli Decision, and again, that's my understanding and interpretation of the law as it currently exists, which is the law I have to rely on in reaching this conclusion and rendering this opinion.

As amended and now applied to these claimants, 78t continues to deny these claimants their vested property right to the surplus or remaining proceeds because they failed to file a notice -- file a notice of intention by July 1, 2021, a date well before their claims accrued and before their vested property right even existed. I find, therefore, that retention of surplus proceeds or remaining proceeds for failure of claimants to provide the notice of intention before their vested common law property right even existed amounts to an unconstitutional taking of that property.

MCL 211.78t and its notice requirement is unconstitutional as applied to these claimants because it results in the taking of their property without due process by requiring notice to retain their vested property before such vested interest in the property even existed. To be clear, I am not ruling that the General Property Tax Act or, in particular, 78t, is unconstitutional as a general matter. Rather, I am only ruling that the application of 78t to

these claimants results on an unconstitutional taking of their vested property rights.

The Court is not persuaded that a constructive trust theory is applicable under an equitable theory, nor to prevent unjust enrichment, as it is not evident on this record that the foreclosing governmental unit, the Treasurer in this case, acquired the property under such circumstances warranting a construct -- warranting a constructive trust. Further, the Court does not find that the claimants' attorney's affidavit nor the e-mails submitted as exhibits to their brief are sufficient to establish an enforceable agreement to disburse the surplus proceeds of the tax sales.

Finally, given the Court's ruling on the principal issues, the Court does not find it necessary to address the other theories raised in claimant's motion and brief. Now, as a result of this order, this ruling, I order the Petitioner, Berrien County Treasurer, to submit an affidavit as to each individual claimant, setting forth the interest, penalties, and fees that are reasonably related to the foreclosure and sale of their parcels. Because I find the provision of 78t as applied to these claimants is an unconstitutional taking, the 5 percent commission afforded the foreclosing governmental unit by 78t is also inapplicable to these claimants.

The claimants, through their attorneys, shall

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submit proposed orders for each individual claimant for the disbursal of the related surplus proceeds for each parcel. If either party has an objection to the amount to be disbursed, they may raise -- they may request a hearing with the Court upon filing of a written objection and motion. That's the Court's ruling. Any clarification either party needs?

MR. LAWLER: I do, Your Honor. What do we do about the ones where there's not an estate opened or, you know, there's not proof that somebody is actually deceased? I mean, some of these, there's -- some of these other --

THE COURT: That involves some of these 11 claimants?

MR. LAWLER: Yeah, and we can't pay -- we can't --

THE COURT: Yeah. I mean, this -- I don't know how to address that at this point. That's a good point. Your motion makes no mention -- I'm trying, to the extent possible, to follow what the existent scheme is that can be applied here, and that requires that an individual order be issued in each case. I mean, the Court, under the GPTA, is supposed to issue a ruling as to each. You combined these 11. There is no mention of any such issue. I'd have to assume, based upon the way this matter was filed, there's an identifiable claimant in each case.

If you have one of these claimants is not -- is

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not identifiable as either not having been deceased and/or deceased and there's no estate, then how can -- how can you file a motion to request a disbursal to that entity?

MR. VISSER: Your Honor, just --

THE COURT: Is that --

MR. VISSER: I obviously have not -- I'm just looking right now at our motion that was filed.

MR. LAWLER: I mean, I've got a detail on each one of them. I can tell you which ones they are.

MR. VISSER: I have no -- if the Court feels that additional information is necessary, I can provide death certificates and letters of --

THE COURT: Well, you need to provide that based upon my ruling today to Mr. Lawler so that the Treasurer can put together an affidavit so that they can collect the costs associated with the foreclosure sales that they're entitled to, whether --

MR. VISSER: Sure.

THE COURT: I mean, I'm not giving them 5 percent, but on the other hand, they're entitled to the costs of interest and penalties associated with the foreclosure sale.

MR. VISSER: Your Honor, for any of the estates I'll be happy to -- I thought we had them, but I'll be happy to provide both the Court and Mr. Lawler with copies of each of the letters of authority and the death certificates for

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the parties. I believe -- if we haven't, I will, but I believe we've attached D showing vesting of all of the properties, but I'll be happy to double down on all of that to show a trial right from --

THE COURT: That clearly has to occur before the Treasurer can be required to follow my order.

MR. VISSER: Sure.

MR. LAWLER: We've also got things where we've got deeds with two people's names on them, one claimant, but did I understand your order, for clarification, to say that the 5 percent is inapplicable in this matter only --

THE COURT: Yes.

MR. LAWLER: -- or that the 5 percent is unconstitutional?

THE COURT: No. I did not say it was -- I said it's unconstitutional as applied in this matter, because I cannot apply the statute in that way, given that the claim had not yet accrued. I'm not finding any part of the statute unconstitutional, only its application to these claimants because of the factual scenario here as to when the claim accrued.

MR. VISSER: So it's an as-applied ruling, as opposed to per se.

THE COURT: Correct.

MR. LAWLER: Will we get a written opinion too, or

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THE COURT: No. That's my opinion.

MR. LAWLER: Then I can order a transcript from your office?

THE COURT: Certainly, absolutely.

MR. LAWLER: Okay.

THE COURT: Absolutely.

MR. LAWLER: Thank you, Your Honor.

MR. VISSER: I will just say for the record where Mr. Lawler says that there's two people on, like husband and wife where one has deceased, in fact, I think the one that you're talking about --

THE COURT: You're confident that there's clarification that there's only one entity that can claim, whether it be an individual or an estate?

MR. VISSER: Absolutely, Your Honor.

THE COURT: And in each of these 11 claimants' cases, there is clarification there?

MR. VISSER: Yes.

THE COURT: Okay.

MR. LAWLER: I just gave him -- for the record, Your Honor, I just gave him our list with all the issues.

THE COURT: Okay. All right. Thank you. We'll go off the record.

(At 3:00 p.m., proceedings concluded)

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TRANSCRIBER'S CERTIFICATE

I do hereby certify that the foregoing transcript was prepared by me from audio supplied by the Berrien County Trial Court, and that said transcript is true and correct to best of my ability to prepare.

I further certify that I am not related to or employed by any party to this cause or their respective counsel.



Janice M. Hanes

Janice Hanes

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STATE OF MICHIGAN
COURT OF CLAIMS

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

Plaintiffs,

v

STATE OF MICHIGAN,

Defendant.

Case No. 19-000023-MZ

Honorable Michael J. Kelly

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DEFENDANT'S 02/11/2021 RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING PUBLIC ACT 256

Whether the named Plaintiffs have a viable claim for excess proceeds or not is not the test for whether 2020 PA 256 is constitutional or applies to claims arising from past and future tax

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foreclosure actions. The law is what it purports to be, Michigan law, and it is presumed to be both applicable and constitutional.

Laws passed with immediate effect and retrospective language and intent—whether curative or retroactive for rational policy reasons, or both—apply to all pending cases that are not subject to a final order that resolved all pending claims. Here, the only claims subject to a final order would be plaintiffs in *Rafaeli LLC v Oakland Co*, 505 Mich 429 (2020), and even then, the law would apply insofar as it does not violate the Michigan Supreme Court's order pertaining to the *Rafaeli* parties. But other potential claimants without final orders fall fully under PA 256.

Plaintiffs rely heavily on cases with language explaining why certain laws, rules, or regulations should not be applied retrospectively to existing claims. But those cases address primarily, and in fact almost exclusively, statutory language that did not express any retroactive intent. As a result, each case discussed the "presumption" that statutory provisions are not to be applied retrospectively. Presumptions, of course, are not outright prohibitions, and may be overcome. Courts considering retroactive legislation look at the facts and circumstances of each situation, law, and case. But arguing that line of cases misses the bigger point.

This is not about unclear legislative language, and as a result, not about presumptions for or against retroactive application of PA 256. The plain language of the law is clear as to intent; it sets forth the procedures—time, venue, court proceeding, and contours of the judicial procedures to be applied to all claims like this. The Legislature distinguished between two sets of potential claims based on timing: those potential claims accruing before the Michigan Supreme Court's decision in *Rafaeli* (July 17, 2020) and those accruing after the decision. The law is both rational and respectful of the separation of powers, deferring to the Michigan Supreme Court.

But Plaintiffs miss the bigger point: *regardless of when a potential claim accrued, this law applies to both time periods.* The question is not what procedures will apply if *Rafaeli* is

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found to be prospective only, the question is whether potential claims that accrued prior to July 17, 2020 are subject to relief at all. If *Rafaeli* does not apply retroactively, there are (and never were, under the Supreme Court's hypothetical holding) no vested claims for relief. And if *Rafaeli* is retroactive, PA 256 still applies. But Plaintiffs' attempt to make this about the constitutionality of the statute misses another point.

Respectfully, this Court need not decide that issue If the Court lacks jurisdiction over Plaintiffs' claims, which it does under provisions of PA 256 vesting jurisdiction in state circuit courts, provisions that are clearly constitutional, then this is not the proper action within which to challenge the constitutionality of the law. Laws that change jurisdiction, but do not wholly eliminate relief, are permissible and have been applied to pending cases before without impeding any "vested right." Plaintiffs must, instead, each file their individual notices of intent to seek proceeds in the appropriate circuit court. The remainder of Plaintiffs claims fail as a matter of law that do not turn on PA 256; they are simply not valid legal claims. In short, this Court should need not address the constitutional arguments because there is no remaining controversy.

Nor does the law's if-then reference to *Rafaeli*' take away vested claims or destroy any vested right. Rather, the Legislature respected the judicial branch and left it to the Michigan Supreme Court to decide whether its decision should apply retroactively or prospectively—a question courts often address when longstanding and relied upon laws are suddenly reversed. If the Michigan Supreme Court orders that *Rafaeli* applies retroactively, then the remaining curative language and procedures are just that; they set forth the Legislature's intended statute of limitations for claims based on the existing two-year period within this statute, and then set up a uniform, statewide, practical approach to handling claims for excess sales proceeds that is entirely consistent with *Rafaeli*. Under any scenario, "an action to recover any proceeds from

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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 211.78l(1).

And if *Rafaeli* does not apply retroactively, there will be no compensable claims. But that will be the result of a judicial order, not the law. Either way, the law applies right now, and it controls where and how claims like this must be brought: in the circuit court that handled the original foreclosure action, and in fact within that same proceeding, and they must be brought as individual claims by each claimant. The law supports and compliments the *Rafaeli* decision while clarifying the statute of limitations and rights of all interest holders with a potential claim to proceeds as identified in *Rafaeli*.

This Court lacks jurisdiction to address the underlying *Rafaeli*-based claims. And no matter the court or venue, the law expressly provides for individual claims not class actions. When a court lacks jurisdiction, it can take no other action but to dismiss, and jurisdiction is a matter that the Court must address, even *sua sponte*. The remaining "equity", excessive fine, and other non-*Rafaeli* claims lack legal merit and contradict Michigan law; PA 256 echoed the Court's *Rafaeli* decision as to the only vested right and measure of potential damages.

ARGUMENT

I. 2020 PA 256 is presumed to be constitutional and presumed to apply to pending actions and potential claims.

By passing a law with direct references to a recent Michigan Supreme Court decision that significantly changed Michigan law with regard to tax collection, public finance, and settled expectations about property rights and responsibilities, the Legislature was clear in its intent and how the law must be applied. It was also careful to defer to the judiciary, and specifically the Michigan Supreme Court, with regard to its decision in *Rafaeli* and how, or more accurately when, that decision should be applied to potential claims. Statutory language that the Legislature

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passed and the Governor signed into law is given the presumption of constitutionality, and the challenger bears the burden of proving that the statute cannot withstand constitutional scrutiny.

A. The law is presumed to be constitutional.

It is axiomatic that "statutes are presumed constitutional," and reviewing courts "exercise the power to declare a law unconstitutional with extreme caution" and "never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac Inc*, 470 Mich 415, 422 (2004) citing *Sears v Cottrell*, 5 Mich 251, 259 (1858); *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 6 (2003). Accordingly, " ' every reasonable presumption or intendment must be indulged in favor of 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.' " *Phillips*, 470 Mich at 423 quoting *Cady v Detroit,* 289 Mich 499, 505, 286 NW 805 (1939). "The party challenging the constitutionality of a statute has the burden of proving the invalidity of the law." *Zdrojewski v Murphy*, 254 Mich App 50, 75 (2002) citing *In re Trejo,* 462 Mich 341, 355 (2000).

Michigan courts have recognized that "a statute is not unconstitutional merely because it is undesirable, unfair, or unjust." *Zdrojewski,* 254 Mich App at 75 citing *In re Juvenile Commitment Costs,* 240 Mich App 420, 440, 613 NW2d 348 (2000). That includes laws that are pragmatic and further a legitimate state interest—like limiting liability. *Phillips*, 470 Mich at 436. That a law has been passed and applies to existing claims does not change the analysis if the Legislative intent, for retroactive application, is clear. The Act need only pass the rationale basis test, and "the party challenging a legislative enactment subject to rational basis review must 'negative every conceivable basis which might support it.' " *Wells Fargo Bank NA v Cherryland Mall Ltd Partnership*, 300 Mich App 361, 381 (2013) quoting *Lehnhausen v Lake Shore Auto Parts Co,* 410 US 356, 364 (1973) (internal citations omitted). In fact, it is "constitutionally

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irrelevant [what] reasoning in fact underlay the legislative decision" to pass a law with retroactive application. *Wells Fargo*, 300 Mich App at 381 citing *Craigmiles v Giles* 312 F3d 220, 224 (CA 6, 2002). That is because "if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny." *Wells Fargo*, 300 Mich App at 381-82 citing *Berger v City of Mayfield Heights,* 154 F3d 621, 624–626 (CA 6, 1998).

Here, the law's plain language and operational provisions show the Legislature's intent. The enacting sections call the law "curative" and express intention to "codify and give full effect to the right of a former holder of a legal interest in property . . . resulting from the foreclosure and sale of the property to satisfy delinquent real property taxes." 2020 PA 256, Enacting § 3. The law was intended to codify rights "as recognized in *Rafaeli, LLC v Oakland County*," but to do so "consistent with the legislative findings and intent under section 78 of the general property tax act, 1893 PA 206, MCL 211.78." *Id*. And PA 256 included the curative and clarifying language as to MCL 211.78l as well as setting the claims procedures, claimants, timing, and venue for rights recognized in *Rafaeli*. None of those provisions operate to thwart a constitutional right; they bolster and set forth the steps by which vested rights are adjudicated.

B. Plaintiffs fail to identify how this law fails the rational basis test.

Plaintiffs seek to avoid having the law apply to this case by arguing constitutional infirmity. In short, Plaintiffs assert the law interferes with vested rights. That is not accurate as the law does not address any vested right, rather it sets procedures and leaves the viability of claims before a certain date to the judiciary.

First, laws may change the jurisdiction where a claim must be brought. ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf v*

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USI, 511 US 244, 274 (1994).) New laws may clarify or cure legislative intent ("we disagree with plaintiffs' assertion that because the Legislature intended [a new law] to *clarify* rather than *change* the law, the statute violates separation-of-powers principles." *Mayor of Detroit v Arms Technology Inc,* 258 Mich App 48, 66 (2003)).

New laws may set procedures and processes, including deadlines and statutes of limitations that apply to existing litigation or existing sets of facts. Courts have upheld such laws when they do not direct an outcome in a particular case. ("The statute at issue does not directly interfere with judicial decision making because it does not direct the judiciary either to make specific findings of fact or to apply relevant facts to the law in a particular way." *Mayor of Detroit,* 258 Mich App at 66 citing *Hyundai Merchant Marine Co, Ltd v United States,* 888 F Supp 543, 549 (SDNY, 1995).) It is perfectly permissible for a law to, with retroactive application, " 'specif[y] the law to be applied to the relevant cases and leave[] to the courts the job of applying that law to the particular facts before them.' " *Mayor of Detroit*, 258 Mich App at 66 quoting *Hyundai,* 888 F Supp at 549.

Nor did this statute change the applicable statute of limitations; it clarified the Legislature's intent as to the applicable statute of limitations for all possible claims arising from tax foreclosures—including the instant claims. Contrary to Plaintiffs' arguments, which this Court already rejected, *Hart* did not set the statute of limitations in this case; this Court already held that six years was not applicable. Nor does Plaintiffs' unsupported "dormancy" argument apply to the statute of limitations clarified in PA 256; the clarification in MCL 211.78l has nothing to do with the retroactivity of *Rafaeli*; the statute of limitations stands as the law regardless. The Legislature has decided that MCL 211.78l is the law with regard to *all* post-tax, foreclosure-based claims—including but not limited to those identified in *Rafaeli*, a case the Legislature specifically cited to in passing this clarifying and curative law. " 'Courts have

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consistently upheld the retroactive application of "curative" legislation which corrects defects subsequently discovered in a statute and which restores what [the Legislature] had always believed the law to be.' " *Romein v General Motors Corp*, 436 Mich 515, 538 (1990) quoting *Long v US IRS*, 742 F2d 1173, 1183 (1984).

Plaintiffs also cite *GMC v Dep't of Treasury*, 290 Mich App 355 (2010) for the idea that statutes may not be enacted retroactively if they "affect substantive rights." (Pl's Br at 7.) But the *GMC* Court actually held that the retroactive legislation in that case did not " 'reverse a judicial decision or repeal [a] final judgment . . . .' " and thus did not affect a vested substantive right. *GMC v Dept of Treasury*, 290 Mich App 355, 373 (2010) quoting *Wylie,* 293 Mich at 582, 292 NW 668. But at a more fundamental level, the *GMC* court ultimately held that "it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted." *Id*. citing *Gen Motors v Romein,* 503 US 181, 191 (1992). The *GMC* Court further quoted a prior published court of appeals case, *GMAC,* 286 Mich App 365, 380 (2009), holding that "[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation." Here, the Legislature agreed with and gave mechanism to the *Rafaeli* Court's holding; the Legislature did not even seek to unwind *Rafaeli* as the *GMC* Court appeared to authorize, but instead set forth the method of seeking the proceeds that will apply, uniformly, statewide.

So, "while the Legislature may not reverse a judicial decision or repeal a final judgment" through retroactive legislation, just like in *GMC*, "that did not occur here." *GMC*, 290 Mich App at 372-73. There is no final decision in this case. And the Legislature left it to the Michigan Supreme Court to determine whether *Rafaeli* is retroactive such that a claim may be made for proceeds arising prior to July 17, 2020. In that regard, the Legislature respected the Michigan Supreme Court's role via a retroactive statute that did not presume retroactivity for *Rafaeli*.

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That makes sense; "[a] legislature's action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a judicial decision—with retroactive legislation has almost universally been recognized as 'rationally related to a legitimate legislative purpose.' " *GMC*, 290 Mich App at 373 quoting *Carlton,* 512 US 26, 35 (1994). "Retroactive economic legislation must satisfy this rational basis test both for its prospective as well as its retrospective application." *Id*. at 372. Here, like *GMC* and *Carlton*, the Legislature provided "only a modest period of retroactivity," a limitation which courts have applied as part of the rational basis test under "the totality of the facts and circumstances." *GMC*, 290 Mich App at 375. In part, that includes whether there was "reliance" by the parties on the prior law. Here, Plaintiffs had no reliance because the law clearly provided no right to make such claims. On the other hand, local and county governments statewide did rely on the law—statutes and caselaw—up until *Rafaeli* was issued.

When the Legislature set up a claims process, to be applied uniformly statewide, it clarified when claims could be brought but also declared how they must be brought. It further set the presumption that there is no claim prior to July 17, 2020, unless the Supreme Court holds such claims are compensable. That does not bar claims, it sets a legislative presumption that the *Rafaeli* Court had the power and authority to declare from the outset; when the law changes so abruptly and upsets statewide expectations, it may support purely prospective application. Michigan previously operated like a strict foreclosure state as it relates to tax collection, and that was the understanding and expectation. Only recently has that changed, based on concepts that had not been litigated under this statute in its 20 plus year history. While the Legislature could not and in fact did not attempt to overturn the *Rafaeli* plaintiff's relief, it could rationally restrict and clarify provisions in the statute for application in other pending cases. That is permissible.

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Plaintiffs also cite *Frank W Lynch* & Co *v Flex Technologies Inc*, 463 Mich 578 (2001) for the premise that statutes cannot be applied retroactively simply because the law "can also be characterized in a sense as 'remedial.' " That case is not helpful; the legislative language in *Frank* did *not* show any Legislative intent indicating retroactive application ("there is nothing in the language of the [act] suggesting a legislative intent that this statute be applied retroactively."). *Id*. 584. Rather, the *Frank* Court had been asked to find and apply retroactive intent because there was an alleged "remedial" aspect of the new law. *Id*. Here, PA 256 is both remedial and retroactive by its own language[1] and the stated intent.

Plaintiffs also argue that they had a vested right impaired by the new law. Plaintiffs first cite the statute of limitations, arguing that the Legislature then changed the applicable time period within which claims must be brought. Simply put, Plaintiffs did not have such a right, and as previously briefed, the Legislature did not *change* the applicable period. The Legislature clarified its intent as to the applicable time period, and members of a putative class that fall outside that clarified time period lose no vested right; it never existed in the first instance.

While the named Plaintiffs *may* have a vested right in excess sales proceeds under *Rafaeli*, the Legislature has not eliminated that right. It has merely legislated where, when, and how that claim must be brought. The statute of limitations does not interfere with the named Plaintiffs' claims, and there is no vested right in a class action lawsuit, either. That is born of a court rule, not a law, and the rule itself presumes that most actions are not appropriate for a class action. PA 256 follows *Rafaeli* and, likewise, presumes that individual claims are appropriate for resolving excess proceeds, not a class action. The law does not divest any right.

[1] The law directly cites *Rafaeli* and claims arising from it, sets a series of procedures to make claims but separates viability of claims based on the date of the *Rafaeli* decision, and describes the act as "curative" and intended to comport with the intent of MCL 211.78 as passed in 1999.

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Plaintiffs may still seek the excess proceeds from a sale–the same and only vested right identified in *Rafaeli*—but must do so procedurally within the requirements of the law. That does not destroy a cause of action, it codifies a cause of action that did not previously exist as such. That does not run afoul of the Michigan Supreme Court's precedent on this question. See *In re Certified Question from U.S. Court of Appeals for the Sixth Circuit*, 416 Mich 558, 573 (1982). ("The general rule against retrospective application has been applied in cases where a new statute abolishes an existing cause of action. It is clear that once a cause of action accrues,—*i.e.,* all the facts become operative and are known—it becomes a 'vested right' ".) But no "vested right" was abolished by this law. And, "notwithstanding the general proscription of rule three, this Court has recognized that new remedial or procedural statutes which do not destroy vested rights should be given retrospective application." *Id*. at 578. This statute addresses "remedies or modes of procedure," permissible retroactive subjects, and merely clarifies the Legislature's understanding as to other provisions like the statute of limitations. *Id*.

In essence, "the nature of plaintiff's argument is the undoing of his constitutional claim." The Michigan Supreme Court has resolved this question before; when a law was changed and then applied to an existing, pending case, even though it changed the amount the plaintiff could recover and included a new standard of comparative liability that did not exist when the claim was filed, the new law "did not destroy or bar plaintiff's cause of action." The same is true here as "the statute neither destroys nor bars plaintiff's cause of action." *Id*. at 579. Instead it codifies the only possible claim—that held in *Rafaeli*—and dictates how it must be brought.

Even Plaintiffs' attempt to invoke *Rafaeli* for some vested-right-now-lost fails; they claim that putative class members "had a property interest in their equity." (Pl's Br at 8, n 5.) No such vested right was recognized in *Rafaeli*, in fact it was directly rejected. Nor has the statute, or the statute of limitations in particular, changed any vested right. The Legislature set

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forth a clarification, while cases were pending, of its intention in the statute that *Rafaeli* simply did not address and therefore could not "vest" nor could the law divest.

C. 2020 PA 256 has retroactive and immediate application.

The Legislature's swift action in PA 256 followed directly from and even referenced the *Rafaeli* decision. See, e.g., n 1 above. The law codifies, bolsters, and compliments that decision, leaving open the question of application—retroactive, partially retroactive, or prospective only—to the Michigan Supreme Court. But the law clearly sets forth the only claims process available to claimants regardless of what the Michigan Supreme Court ultimately decides. It did so with retroactive provisions, statements of curative and clarifying intent, and with immediate effect. The law is clearly intended to apply retroactively.

It is well recognized that "[w]hen a new law makes clear that it is retroactive, 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." *Plaut v Spendthrift Farm, Inc*, 514 US 211 (1995) (italics added) citing *United States v Schooner Peggy*, 1 Cranch 103, 2 L Ed 49 (1801); *Landgraf v USI Film Products,* 511 US 244, 273–280, 114 S Ct 1483, 1501–1505, 128 L Ed 2d 229 (1994). If that is true of decisions subject to an order from a lower court and on appeal, respectfully, it is certainly true of matters subject to trial court orders that are not final and did not dispose of the case, and that are subject to appeals of right.

That premise is also consistent with Michigan caselaw, including the decision in *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394 (2015) after the Michigan Supreme Court's decision in *Int'l Business Machines, Corp v Dep't of Treasury*, 316 Mich App 346, 354-55 (2016). In *Gillette*, the Court addressed the plaintiff's claims that were nearly identical to, and had been held in abeyance pending the decision in, *IBM* and held that "once a judgment has achieved finality in the highest court in the hierarchy, the

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decision becomes the last word of the judicial department with regard to the particular case or controversy." That mattered because, after the *IBM* decision, the Legislature passed curative retroactive legislation controverting and negating relief based on the decision in *IBM*. As the leading case, *IBM* was not subject to the law—but *Gillette* and several dozen other plaintiffs' claims, in separate lawsuits, were subject to the new law, and their claims were dismissed because 2014 PA 282, passed with immediate and retroactive curative effect after the Michigan Supreme Court's decision in *IBM*, applied to other litigants with pending claims in other cases.[2]

The same holds true here; *Rafaeli* is beyond the Legislature's reach, even if it wanted to undercut that decision it could not because it is a final decision in that case. But non-final decisions that are in litigation, even on appeal, are not subject to that limitation. A "state court would be required to apply retroactive legislation to a pending case as long as the appeal process is ongoing." *Wells Fargo Bank NA v Cherryland Mall Ltd Partnership*, 300 Mich App 361, 384-85 (2013). Here, there is no decision that "constitute[s] a final judgment," because no order "dispose[d] of all claims and adjudicate[d] all the rights and liabilities of the parties." *Id*. at 383 citing MCR 7.202(7)(a)(i); *Allied Electric Supply Co, Inc v Tenaglia,* 461 Mich 285, 288 (1999).

Further undercutting Plaintiffs' argument, unlike 2014 PA 282 and the Supreme Court's decision in *IBM*, PA 256 did not purport to (nor did it in fact) undo or change anything within the *Rafaeli* Court's decision. PA 256 bolsters, clarifies, and compliments *Rafaeli*.

[2] "IBM is entitled to the protection afforded it under the *Int'l Business Machines* decision; however, *other taxes* not addressed in the opinion but caught under the umbrella of 2014 PA 282 would be subject to 2014 PA 282 as construed by the *Gillette* panel. There is a distinction between applying 2014 PA 282, as upheld in *Gillette,* to alter the specific resolution in *Int'l Business Machines* of the apportionment-formula question pertaining to IBM's 2008 taxes, which is not permissible under the ruling and remand directive and applying 2014 PA 282 to all other pending tax disputes, recognizing that the Legislature was free to change the law in response to *Int'l Business Machines*." *IBM*, 316 Mich App at 355.

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The question is whether *Rafaeli* applies retroactively[3], a matter that PA 256 presumes is not the case but ultimately leaves to the Michigan Supreme Court to decide. But either way, the statutory claims process will remain the same. While the law does leave an open question on pre-*Rafaeli* rights, that question is not as to what procedures apply to all *Rafaeli*-based claims. The question is whether there is a compensable claim to be made at all.

Plaintiffs wrongly assume that, if *Rafaeli* is not held to be retroactive, then there are no rules; they argue that the statute does not apply to them at all and thus there are no specific procedure controlling their claims. This Court, under that theory, would have to devise a set of rules and procedures that will vary from the statute, and likely from the processes implemented by other courts hearing the same types of claims. Defendant disagrees; that dormancy premise is without legal merit and defies common sense. But more importantly, it contradicts the Legislature's clear intent.

Plaintiffs' assertion that the law is "dormant" or that "its operation depends on a condition precedent that cannot happen until the statute is operating," are simply wrong and of no moment, respectively. (e.g., Pl's Br at 4-5.) PA 256 was passed with immediate effect, directly cited the *Rafaeli* decision, and used explicit retroactive language to set conditions for all claims—those that may be brought in the future and those that may be brought if the Supreme Court so rules. The law *is* operating. And the condition precedent is that the Michigan Supreme Court must first establish that claims arising before *Rafaeli* are compensable.

[3] Defendant previously briefed that pure prospective application of a court decision is rare; the presumption and the overwhelming majority or court decisions are given retroactive effect. Through PA 256, the Legislature flipped that presumption. The Legislature's presumption may be rebutted—claims accruing prior to July 17, 2020 may be compensable under *Rafaeli*'s holding and PA 256's process if the Michigan Supreme Court holds that the *Rafaeli* decision was intended for retroactive application.

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As to Plaintiffs' timing argument that no claims could be brought because the Michigan Supreme Court has not held that its decision is retroactive, potential claims arising before July 17, 2020 must be brought within 180 days of an order certifying that the claims are valid, i.e., that *Rafaeli* is retroactive. MCL 211.78t(6). Regardless, that does not make the law unconstitutional, and it is not an issue to be decided in this action.

Plaintiffs end their brief by asserting a pseudo-estoppel argument; that Defendant cannot argue that the circuit courts have jurisdiction over these claims because, under the old law, the circuit courts did not have jurisdiction over claims against the State. (Pl's Br at 13). Or put another way, filing an original action against the State required a filing in this Court. Plaintiffs assert that, having argued that the notice requirements under the Court of Claims Act apply, Defendant cannot now argue these claims belong in circuit courts. (Pl's Br at 13.)

That argument ignores the legal reality that PA 256 requires an action to recover *Rafaeli*'s only recognized damages (thus the only damages under Michigan or any other known law) be brought by a motion filed by a claimant in the circuit court action in which the property was foreclosed. See MCL 211.78t(4), (6). The FGU is already a party to that action—it was the petitioner—and that original circuit court filing is what the tax law required. See MCL 211.78h. That eviscerates any argument that excess sales proceeds claims belong in this Court.

PA 256 gives circuit courts exclusive jurisdiction, and Plaintiffs' allegation that Defendant changed legal positions, as if the law never changed, is misguided. Plaintiffs also ignore the practice of arguing in the alternative; Plaintiffs *have* argued that these claims should be addressed by circuit courts that first handled the foreclosure actions, where the foreclosed properties are located, and in individual filings based on claims relative to each foreclosed and sold parcel with excess. Plaintiffs also argued, because the matter is pending in this Court, that

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certain notice requirements apply. Arguing in the alternative is not grounds for estoppel. Regardless, it is the law that changed, not Defendant's position on a static law.

II. This Court lacks jurisdiction over this case and must dismiss.

The fact remains that if PA 256 applies, which it does, then this Court is without jurisdiction over Plaintiffs' *Rafaeli*-based claims. The remaining "equity" and excessive fines claims may not fall under PA 256's circuit court requirement, but they have already been rejected by the Michigan Supreme Court and by this Court. Any challenge to the constitutionality of PA 256 itself is a separate cause of action; Plaintiffs raise the matter here, but if the Court lacks jurisdiction in the first instance (and over all such *Rafaeli*-based claims, past and present) and there is no relief to be had for "equity" or excessive fines under any known law. This Court should decline the invitation to address an ancillary issue on the constitutionality of a law, declarations that courts avoid if the law allows for another resolution. Here, dismissal is appropriate for lack of jurisdiction (*Rafaeli* proceeds claims) and lack of legal merit (equity, excessive fine, and all other claims that conflict with *Rafaeli*'s holding).

But if this Court is inclined to address the statute's constitutionality, the Legislature did not destroy any vested right. It merely clarified and codified existing rights, taking care not to presume retroactive intent by the *Rafaeli* Court. If a right is "impaired," as Plaintiffs insist, it will only be because the Michigan Supreme Court determines that claims accruing prior to July 17, 2020, for public policy reasons due to the sea change in law, should not be allowed to recover. That is not legislation impairing a private right or interfering with the courts, it is the Legislature respecting the public fisc and separation of powers.

As argued herein, the Legislature can change the law in response to a court's decision. Michigan Courts have favorably cited US Supreme Court precedent that:

> Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply

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> that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. . . . [A] distinction between judgments from which all appeals have been foregone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.' Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. 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.' [*Wells Fargo,* 300 Mich App at 384 quoting *Mayor of* Detroit, 258 Mich App at 65–66 (2003), in turn quoting *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226-27 (1995). (Internal citations omitted.)]

Plaintiffs' claims belong in circuit court, as do any putative class members' claims.

In reviewing retroactive legislation, and how it applies to pending cases, the courts have likewise held that " 'consistent with the principles articulated in *Plaut,* . . . plaintiffs cannot show that the enactment of [the new law] violates the Michigan Constitution simply because it was enacted after the trial court ruled on the applicability of [an prior law].' " *Wells Fargo*, 300 Mich at 384 quoting *Mayor of Detroit*, 258 Mich App at 66.

The same is true here; passing a law that applies to pending cases and clarifies processes and procedures by outlining how the very vested right discussed in *Rafaeli* must be adjudicated, without replacing or changing any existing process, procedure, or timeline, is wholly consistent with constitutional principles and precedent under Michigan law. PA 256 is presumed to be constitutional, and Plaintiffs fail to meet their heavy burden of overcoming that presumption. This Court lacks jurisdiction over the only claims that could be viable—*Rafaeli*-based relief, and the rest of the claims are contrary to the holding in *Rafaeli* and should also be dismissed.

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CONCLUSION AND RELIEF REQUESTED

Through MCL 211.78t and MCL 211.78l, as amended by 2020 PA 256, the Legislature codified the rights set forth in *Rafaeli* leaving only the question of whether claims arising prior to July 17, 2020 are viable. If viable, the law applies. If not viable, that will be because the Michigan Supreme Court has ruled that the holding in *Rafaeli* is for prospective relief only. Under that condition, the law is equally clear that there is no other path to recovery. Either way, the law is constitutional, applies now, and deprives this Court of jurisdiction over excess proceeds claims. The remaining claims are not legally viable.

The law complies with the Michigan Supreme Court's holding in *Rafaeli* and does not violate the Fifth Amendment of the United States Constitution. Defendant respectfully requests that this Court dismiss Plaintiffs' request for *Rafaeli*-based relief for lack of jurisdiction, and dismiss Plaintiffs' requests based on equity, or excessive fines, or any other unsupported theory for lack of merit, and with prejudice, granting Defendant any other relief the Court deems appropriate under the circumstances.

Respectfully submitted,

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Dated: February 11, 2021

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

STATE OF MICHIGAN
IN THE COURT OF APPEALS

LYNETTE HATHON, et al,
Plaintiffs-Appellees-Cross Appellants

v.

STATE OF MICHIGAN,
Defendant-Appellant-Cross Appellee

APPELLEES/CROSS-APPELLANTS' COMBINED BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Plaintiffs-Appellees agree with Defendant-Appellant's statements regarding jurisdiction over Defendant-Appellant's appeal. Plaintiffs-Appellants add that they have cross appealed. This Court has jurisdiction over Plaintiffs-Appellants' cross appeal under MCR 7.207.

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COUNTER-STATEMENT OF QUESTION(S) PRESENTED

1. **Did the Court of Claims correctly hold that PA 256 does not preclude class certification?**

   Appellant's Answer: No.

   Appellees' Answer: Yes.

   Trial Court's Answer: Yes.

   This Court Should Answer: Yes.

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

   Appellant's Answer: No.

   Appellees' Answer: Yes but used the wrong class period.

   Trial Court's Answer: Yes.

   This Court Should Answer: Yes but used the wrong class period.

3. **Should the *Rafaeli* court's holding have a retroactive effect when determining a takings claim?**

   Appellant's Answer: No.

   Appellees' Answer: Yes.

   Trial Court's Answer: Yes.

   This Court Should Answer: Yes.

4. **Did the Court of Claims err when it failed to hold the applicable statute of limitations to be six years, and instead, limited the class period pursuant to MCL 600.6431(1)?**

   Appellant's Answer: No.

   Appellees' Answer: Yes.

   Trial Court's Answer: No.

   This Court Should Answer: Yes.

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INTRODUCTION

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

Appellant responds that, acting through its legislature, it has managed to retrospectively immunize itself for its unconstitutional takings. It also claims that it should be excused for its unconstitutional takings because it did not expect the Supreme Court's decision. These arguments ignore the central issue before this Court: the government committed an unquestioned taking on a massive scale, and it seeks unfounded immunity.

Appellant asks the Court to apply the self-immunizing legislation it enacted to retroactively extinguish pending claims. In doing so, it asks this Court to treat the statute like an anodyne change to economic regulations or court procedures. Then, it turns on its heels and asks this Court to decline to apply the Supreme Court decision retroactively, arguing that it was surprised by the decision and should be forgiven for the takings it committed precisely because they were so substantial. The constitutions that bind the State lack such loopholes.

Appellant also asks this Court to second-guess the Court of Claims' decision to certify this case as a class action. But as shown below, this case is an archetypical class action: all of the Class Members suffered an identical injury due to Appellant's single course of conduct. Appellant's arguments for why this Court should invade the Court of Claims' prerogative are red herrings. This Court should not deprive the Class Members of their best – and, for many of them, their only – opportunity to vindicate their constitutional rights.

Finally, the Court of Claims' actual mistake was that it applied the wrong limitations period to the Class, improperly truncating the class period. The Court should rectify this error and allow all claimants with timely claims to seek the return of their illegally taken property.

STATEMENT OF FACTS

Under Michigan's General Property Tax Act (the "GPTA"), unpaid property taxes are collected by a "foreclosing governmental unit" (the "FGU"). MCL 211.78 *et seq*. Usually, the local county serves as FGU. But eight counties – Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch – declined to do so and accepted the State's invitation to serve in that role. App p 7. These are called "opt-out" counties. For them, the State continued to serve as the FGU due to these counties' decision not to opt-in. MCL 211.78(3)-(6). The State, as the FGU, proceeded to foreclose on properties with unpaid tax debts and sell the foreclosed properties at auction. App p 8. When it did so, it kept the entire amount of the auction proceeds, even if they vastly exceeded the tax debt owed; it never returned any of the surplus to the foreclosed property owners or in any way accounted to them for the difference between the values of their properties and the taxes owed. App p 8.

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

Based on this debt, the State seized full and complete ownership of their Michigan Avenue property via a statutory *in-rem* civil forfeiture. However, that residence and property had a fair market value of at least $66,600 as determined by the government's own selected assessors. App p 7. Instead of selling the property for its fair market value or even a close approximation, the State

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sold the Michigan Avenue property at tax auction for only $28,250, which was about 40% of its fair market value. App p 7. From the auction proceeds, the $5,200 in taxes-plus-penalties were paid in full, leaving a remaining proceeds surplus of $23,050. The State kept that too.

In short, to pay off an outstanding debt of about $5,000, the State seized Plaintiffs' $66,600 in equity, cashed out the property to only 40% of its value, and then kept the surplus auction proceeds of $23,147.46. All told, the State took $61,497.46 in equity. That has occurred, albeit with different damages amounts, thousands of times since 2013.

On January 9, 2019, Appellees filed a notice of intent in the Court of Claims. App pp 1-4. On January 26, 2019, they filed their Class Action Complaint. App pp 5-24. On June 7, 2019, the Court of Claims granted Appellees' Motion for Class Certification. This decision was followed by multiple other courts, all of which have either granted certification or denied it on plaintiff-specific grounds. See, e.g., *Fox v Saginaw Co*, opinion of the United States District Court for the Eastern District of Michigan, issued October 16, 2020 (Case No. 19-cv-11887), p 8 (certifying) (unpublished cases attached at App pp 111-207); *Arkona, LLC v Cheboygan Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued July 30, 2020 (Case No. 1:19-cv-12372) (same) (App pp 135-139); *Zettel v Charlevoix Co*, Case No. 18-0591-26-CZ, Tr at 9:21-23, 11:11-12 (Charlevoix Cir Ct August 31, 2020) (App pp 87-110) (same); *Grainger, Jr v Ottawa Co*, unpublished opinion of the United States District Court for the Western District of Michigan, issued March 2, 2021 (Case No. 1:19-cv-501) (reasoning that class certification criteria supported certification but that named plaintiff had unique infirmity) (App pp 140-153).

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

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

As to the Michigan constitutional takings theory, our Supreme Court affirmed the Court of Claims' correct foresight. *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020). As the Supreme Court explained, "when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less." *Id.* at 483-484.

Appellant then moved in the Court of Claims to revoke class certification, arguing that, even if *Rafaeli* found for the Class on the merits, it limited the scope of the potential class and, therefore, Appellees could no longer establish that the class was sufficiently numerous. See Appellant's Appendix pp 81-83. On December 4, 2020, the Court of Claims rejected Appellant's argument that *Rafaeli* should only be applied prospectively, but granted Appellant's motion to decertify. App pp 72-74. Appellees moved for reconsideration of the decertification decision and for renewed certification. App pp 208-217.

Meanwhile, while Appellees' motion was pending, in response to *Rafaeli*, the Michigan Legislature amended the GPTA through Public Act 256 of 2020 ("PA 256") in December 2020,

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which purported to establish a new claims process for the recovery of surplus auction proceeds, excluding large portions of the Class and providing for lower recoveries than *Rafaeli* required. On February 22, 2021, the Court of Claims considered the impact of PA 256 on this case, and re-certified the Class. See Appellant's Appendix at 2-11. The Class, as certified, has over 200 members.[1] See Appellant's Appendix at 8.

Also after the enactment of PA 256, multiple courts have found that plaintiffs situated similarly to Appellees here have stated cognizable claims. See, e.g., *Fox v Saginaw Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 13, 2021 (Case No. 19-cv-11887); *Grainger*. Meanwhile, a federal court held that, under the Fifth Amendment to the United States Constitution, the *Rafaeli* damages were not enough, and the FGU minimally owed additional interest from the time of the taking. *Freed v Thomas*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 26, 2021 (Case No. 17-cv-13519), p 4; see also *Knick v Twp of Scott*, 139 S Ct 2162, 2170; 204 L Ed 558 (2019) ("the compensation must generally consist of the total value of the property when taken, plus interest from that time").[2]

Appellant has appealed the Court of Claims' February 22, 2021 decision to recertify the class. App p 46. Appellees have cross appealed, seeking a determination that PA 256 is partially or wholly unconstitutional, and that the six-year statute of limitations for takings claims applies and defines the class period, instead of the more limited period under the Court of Claims Act.

ARGUMENT

I. The Court of Claims Was Right That PA 256 Does Not Preclude Certification

[1] Some parcels appear to have two owners. (See Appellant's Appendix at 8). Hence, "at least."
[2] *Freed* is on appeal, arguing that the correct amount of Fifth Amendment damages is not merely surplus proceeds but the difference between the fair market value and the total tax delinquency.

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PA 256 does not preclude Certification. For most of the Class, whose foreclosures precede *Rafaeli*, the statute is not yet operative. But even when it becomes operative, PA 256 is constitutionally insufficient. At the least, it would be unconstitutional to require these Class Members to abandon cognizable takings claims for an inferior statutory mechanism.

A. Standard of Review

"[W]here a party challenges a trial court's factual findings, a review for clear error is appropriate, and where a party challenges a trial court's exercise of discretion, a review for abuse of discretion is appropriate." *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009) (citations omitted). "Given that the analysis a trial court must undertake in order to determine whether to certify a proposed class may involve making both findings of fact and discretionary determinations," in considering a class certification decision, appellate courts "review the trial court's factual findings for clear error and the decisions within the trial court's discretion for abuse of discretion." *Id.* at 495-496. Meanwhile, this Court "review[s] *de novo* . . . questions of statutory interpretation." *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009) (emphasis added), citing *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003) and *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

B. PA 256 Purports to Establish a Claims Process to Address the Takings at Issue, but It Is Inapplicable Here

By the end of 2020, the Michigan Supreme Court had found that the State and its fellow FGUs had committed widespread takings. By the State's account, though, it was able to retroactively excuse its constitutional violations and immunize itself from the vested takings

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claims in this case through new legislation. After expedited consideration during a lame duck session, the Legislature enacted PA 256 in the days before Christmas 2020.[3]

PA 256 purports to establish a specialized claims process for surplus auction proceeds, but it is in many cases illusory and in all cases constitutionally insufficient. Thus, the Court of Claims was correct to disregard it in certifying the Class.

The PA 256 process is illusory for equity takings victims whose foreclosures took place before the *Rafaeli* decision, and these persons comprise the vast majority of the Class. The new claims process only becomes activated upon a future, specific contingent event:

> (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…:**
> >
> > > **(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.** [MCL 211.78t(1)(a)-(b)(i) (all emphasis added).]

To date, the Michigan Supreme Court has not determined the retroactivity of *Rafaeli*—except, of course, through the clear implication of the *Rafaeli* decision itself. PA 256 thus asks the Supreme Court to affirm its own opinion as a condition of activating the process, thereby creating an obstacle to these claims. But there is no pending Supreme Court case which seeks to determine

[3] Appellant quotes *Rafaeli*'s language that "[n]othing in our holding today prevents the Legislature from . . . requir[ing] former property owners to avail themselves of certain procedural avenues to recovery the surplus proceeds." Appellant's Br at 11 (citing *Rafaeli*, 505 Mich at 473 n 108). But this is not a blank check: any such requirements would of course need to be constitutional.

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this issue, and it seems highly unlikely that the Supreme Court will issue any such opinion. Indeed, the Supreme Court denied the bypass application in this case. App p 47.

Moreover, as discussed below, PA 256 purports to change the statute of limitations from six years to two years. The interaction of these two provisions—the requirement of a new Supreme Court decision and the new shorter limitations period—would preclude nearly all the Class Members from recovery under the statute's processes. This was seemingly no accident.

Moreover, for those who have claims based on foreclosures *after* July 2020, the statutory process created by the Act, at best, results in just a 95% return of proceeds and no payment of required Fifth Amendment interest. Thus, the Court of Claims was correct that PA 256 does not preclude certification as to these Class Members. At the very least, these equity takings victims have the right to pursue a full remedy for the takings they have suffered.

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

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

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

> The statute unambiguously declares that the statutory claims process for excess proceeds applies to foreclosed property transferred or sold before July 18, 2020, but "*only if* the Michigan supreme court orders that its decision in *Rafaeli, LLC v Oakland County*, docket no. 156849, applies retroactively." MCL 211.78t(1)(b)(i) (emphasis added). The "only if" language clearly signifies that the new statutory process for claims that predate *Rafaeli* is applicable if, and only if, this state's Supreme Court declares that *Rafaeli* is retroactive. To date, that condition precedent has not been satisfied. Thus, there is nothing within the plain language of MCL 211.78t(1)(b)(i) that would permit the Court to apply the new statutory claims process to plaintiffs' claims or to any claims that pre-date *Rafaeli*. [Court of Claims Certification Order at 4, Appellant's Appendix at 5 (citing *People v Hayes*, 323 Mich App 470, 473; 917 NW2d 748 (2018) as "analyzing similar conditional language . . . as being 'triggered' if and only if the statutory condition were satisfied").]

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Appellant responds that "whether the new law *applies* is a distinct question from whether there is retroactive *recovery* under that new law." Appellant's Br. at 12 (emphasis in original). In other words: the statute applies; and it extinguishes the pre-2020 Class Members' claims, unless "[t]he Michigan Supreme Court … rebut[s] the standard applicable to older sales by holding that *Rafaeli* applies retroactively." *Id.* This argument fails.

First, the Court of Claims' reading of the statute was correct. The statute's plain language is that "a claim may be made" for such Class Members "only if" the Supreme Court explicitly applies *Rafaeli* retroactively. This renders the process inapplicable prior to such a triggering decision. For example, in the *Hayes* case that the Court of Claims cited, this Court considered MCL 769.25a. As this Court explained, "[i]n *Miller v Alabama* [], the United States Supreme Court held that mandatory punishment of life in prison absent the possibility of parole for a defendant who was under the age of 18 at the time of the sentencing offense violates the Eighth Amendment's prohibition against cruel and unusual punishments" but left open the issue of "whether its decision was to be retroactively applied to closed cases involving juvenile offenders." *Hayes*, 323 Mich App at 473, citing *Miller v Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012). "Anticipating the possibility of *Miller*'s retroactive application for closed cases, the Legislature . . . enacted MCL 769.25a, which would be triggered if our Supreme Court or the United States Supreme Court were to hold that *Miller* applied retroactively." *Id.* When the United States Supreme Court later did so, "MCL 769.25a took effect." *Id.* at 473-474. Thus, a statutory provision conditioned upon a potential judicial decision does not "[take] effect" until that decision.

Second, Appellant's argument that the Court of Claims failed to give effect to certain statutory language fails. Appellant never identifies the words that it says the Court ignored. Indeed, it is Appellant that ignores "only if." Thus, it is Appellant's reasoning that runs afoul of the

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admonition in *Apsey v Memorial Hosp*, 477 Mich 120; 730 NW2d 695 (2007) to give all statutory words effect. *Third*, as discussed below, the Legislature could not constitutionally eliminate a vested takings claim. But Appellant's reasoning would result in just such an outcome. Under its theory, the Legislature could require takings victims to employ a certain procedure to recover their compensation; make the procedure unavailable until a condition precedent happens; impose a deadline that is sure to run before the condition precedent can take place; and thereby deprive victims of any recovery for their vested takings claims. Thus, if the new statute "applies" to the Class Members whose claims it bars, it is unconstitutional as to them.[4]

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

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

The State suggests that PA 256 changed the applicable statute of limitations in its favor to extinguish vested claims, including those being pursued by the Class Members here. But changing the rules mid-litigation is impermissible. At the time Plaintiffs filed their lawsuit, the statute of limitations was six years. *Hart v Detroit*, 416 Mich 488, 503; 331 NW2d 438 (1982). PA 256 purports to amend the GPTA's statute of limitations to only two years to bar all claims, even constitutional-based claims. MCL 211.78l(1) (as amended eff 12/22/2020). However, as discussed below, a statute of limitations cannot be amended to destroy a vested claim.[5]

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[4] Appellant also claims that "[o]ne cannot presume the Legislature went to the trouble of crafting an entire claim-making process specific to this scenario as an academic exercise." Appellant's Br at 12. But this Court need not make any "presumptions" to see that the statute gives the superficial appearance of providing a remedy for these Class Members while ensuring that it will be impossible for them to ever secure it. The effort seems designed to give the appearance of a remedy while ensuring it is never exercised.

[5] Appellant claims that "§ 78t(1)(b) treats that uncertainty with caution by leaving the question of *Rafaeli*'s application (and, thus, any recovery) to the *Rafaeli* Court." Appellant's Br at 14-15. But the imposition of a purported two-year statute of limitations here ensures that "the *Rafaeli* Court" will never have occasion to address the question.

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PA 256 purports to extinguish pending cases and to prohibit most Class Members from filing claims before the new deadline. For those Class Members whose foreclosures were already two-years past in December 2020, PA 256 purported to extinguish their claims immediately.

For those with pre-*Rafaeli* foreclosures within the past two years, the Act purports to bar a timely claim by forbidding it until the requisite Supreme Court decision on *Rafaeli*'s retroactivity. For example, a Class Member whose foreclosure judgment was entered on December 31, 2019 would be "timely" today, but unable to bring a PA 256 petition because the Supreme Court has not issued the requisite opinion. They would also be putatively barred from bringing an inverse condemnation claim by PA 256's "exclusive remedy" provision. MCL 211.78l.

Pre-*Rafaeli* Class Members comprise the vast majority of the Class, and PA 256 already purports to extinguish most of their claims. The exceptions are those whose foreclosure judgments were entered from the date of this Brief through the July 2022 two-year anniversary of *Rafaeli* – and it is very unlikely that the Supreme Court will issue the statutorily mandated opinion by next July. The process remains dormant until this "chicken and egg" condition is met. Thus, the Court of Claims was correct that PA 256 does not bar certification as to these pre-*Rafaeli* Class Members.

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

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

Moreover, as Appellant concedes, a legislative intent for retrospective application applies only if "no vested right is impaired by this retroactive law." Appellant's Br at 19. Here, retrospective application would impair the Class Members' vested rights to their claims.

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

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

Thus, Appellant's repeated assertions that "no vested right is impaired by this retroactive law," Appellant's Br at 19, are incorrect. See also *id.* at 13. Put simply, "the statute of limitations in effect at the time the cause of action arose govern[s]." *Weiss v Bigman*, 84 Mich App 487, 495; 270 NW2d 5 (1978), citing *Quinlan v Gudes*, 2 Mich App 506; 140 NW2d 782 (1966).

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

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be applied to extinguish a previously accrued action unless prospective plaintiffs have been given a reasonable opportunity to commence existing actions after a shortened period has taken effect").[6]

The amendments to MCL 211.78l purport to deprive the Class Members of their "vested" takings claims—for those over the six years preceding this suit. The State seeks to destroy them via PA 256 by changing the applicable statute of limitations after this suit has already been filed and commenced as well as the class certified. While a change of the statute of limitations may occur, it can only occur *prospectively* and only after a reasonable time has passed since the effective date—to allow for the commencement of suits upon existing causes of action.[7]

Appellant responds that "MCL 211.78t(1)(b) squares with [a] measured legislative approach" because "[i]t does not completely deny a remedy." Appellant's Br at 22, citing *In re Certified Questions (Karl)*, 416 Mich at 575. Again, though, this is simply wrong – its effect is to retroactively extinguish Class Members' vested rights such that the bulk of the Class is "completely den[ied] a remedy." *In re Certified Questions (Karl)*, 416 Mich at 575. Even if *some* persons' rights survive, the vested rights of many persons would not.[8]

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

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

[6] Even Appellant's *Etefia v Credit Tech, Inc*, 245 Mich App 466; 628 NW2d 577 (2001) finds that application of a new statute to a pending case requires that "no . . . right is violated" by so doing. Appellant's Br at 13, citing *Etefia*, 245 Mich App at 474. Its *GMAC* case agreed. *GMAC LLC v Treasury Dep't*, 286 Mich App 365, 377; 781 NW2d 310 (2009).

[7] *Block* also likely renders MCL 211.78t(1)(a) unlawful, or at least limits its temporal scope.

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

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The State argues that an exception to the general rule presuming prospective application of statute applies, claiming that the statutory amendment is remedial or procedural in nature. *Davis*, 272 Mich App at 158. Again, though, that exception cannot be used to "deny vested rights." *Id.*[9]

"'An amendment may apply retroactively where the Legislature enacts an amendment to *clarify* an existing statute and to resolve a controversy regarding its meaning.'" *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 371-372; 803 NW2d 698 (2010), citing *Mtg Electronic Registration Sys, Inc v Pickrell*, 271 Mich App 119, 126; 721 NW2d 276 (2006) (emphasis added). Appellant argues, in substance, that because PA 256 has some procedural provisions, it meets this standard. But the Supreme Court has "rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as 'remedial.'" *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 585; 624 NW2d 180 (2001) (citation omitted). Even Appellant concedes that "[t]he 'remedial' designation means ''[s]tatutes related to remedies or modes of procedure,'' and which 'do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing.'" Appellant's Br at 16, quoting *In re Certified Questions (Karl)*, 416 Mich at 572. Here, as discussed throughout, PA 256 decidedly does "take away vested rights"; rather than "operat[ing] in furtherance of a remedy or confirmation of rights already existing," it purports to deprive Class Members of such rights. *In re Certified Questions (Karl)*, 416 Mich at 572. And "[a] statute may not be applied retroactively if it abrogates or impairs vested rights, creates new obligations, or attaches new disabilities concerning transactions or considerations

[9] Appellant claims that "[n]o vested right can exist to keep statutory procedural law unchanged [and] free from amendment." Appellant's Br at 17-18, citing *Cichecki v City of Hamtramck, Police Dept*, 382 Mich 428, 436; 170 NW2d 58 (1969). But the Class Members assert a vested right to their accrued constitutional claims, which the State is trying to extinguish.

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occurring in the past." *Davis*, 272 Mich App at 158. See also *Doe v Dep't of Corrections (On Remand)*, 249 Mich App 49, 61; 641 NW2d 269 (2001); *Gen Motors*, 290 Mich App at 371-372 (when an "amendment affect[s] substantive rights or obligations" like a vested claim in court, "it cannot come within the rule permitting retroactive 'remedial' amendments").[10]

(2) Appellant cannot use PA 256 to immunize itself as an ordinary "economic regulation."

Appellant also claims that "even if" a vested right "were impacted, economic laws 'adjusting the burdens and benefits of economic life' may impact settled expectations or rights retroactively without necessarily violating the constitution." Appellant's Br at 20 (quoting *Romein v General Motors Corp*, 436 Mich 515, 525; 462 NW2d 555 (1990)).

Appellant then suggests that, because PA 256 touches on economic issues, the "due process" inquiry here involves application of the rational basis test, arguing that "[w]hen a litigant challenges the application of economic legislation, 'the burden is on one complaining of a Due Process violation to establish that the Legislature has acted in an arbitrary and irrational way.'" Appellant's Br at 20, citing *Romein*, 436 Mich at 525, elsewhere citing *Wells Fargo Bank, NA v Cherryland Mall Ltd P'ship (On Remand)*, 300 Mich App 361; 835 NW2d 593 (2013) for the same principle. Again, though, this misses the forest for the trees. PA 256 is not an adjustment to the regulation of economic interactions between private sector actors. It is a statute through which Appellant purports to extinguish already vested and commenced takings claims against it

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

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stemming from unquestioned constitutional violations.[11] If this is an "economic regulation" subject only to a rational basis review, then the Takings Clauses are dead letter.[12]

(3) Appellant could not justifiably rely on PA 256.

Similarly, Appellant asks this Court to apply PA 256 retroactively based on the parties' supposed "well-settled" pre-*Rafaeli* "expectations." But the State cannot destroy vested constitutional rights because its officials mistakenly thought they could take property without compensation. And even if the Class Members needed to show "justifiable reliance" – they do not – Appellant's argument that "Plaintiffs . . . cannot [claim] justifiable reliance as 'reliance on an area of the law that is in flux is not reasonable reliance,'" Appellant's Br at 22, quoting *Romein*, 436 Mich at 531, fails. Reliance upon constitutional protections is inherently justified. And the Takings Clauses are not recent innovations. If the "flux" around takings jurisprudence is enough to preclude "justifiable reliance," then governments can always get out of paying takings claims by retroactively amending them out of existence as the State seeks to do here.

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

[11] Appellant's argument that "swiftly and unanimously enacting a uniform claim-making provision, covering all claims arising from an unexpected Court ruling, is a rational legislative purpose," Appellant's Br at 23, is therefore irrelevant. And Appellant provides no support for the radical proposition that the speed of a statute's enactment bears on its constitutionality. Appellant's claim that the Legislature's "[d]oing so in the narrowest way possible, to comply with the new rule while still limiting the potential impact on public finance, is a legitimate legislative purpose for economic legislation," Appellant's Br at 23, also fails. The enactment here is *too* narrow – it purports to deprive Class Members of any relief whatsoever.

[12] *Romein* held that the "challenged statute [in that case] satisfies the rational relationship test *and* does not abrogate any vested rights of the employers" challenging it. *Romein*, 436 Mich at 525 (emphasis added). Here, as discussed throughout, PA 256 does purport to abrogate vested rights. Likewise, while *Wells Fargo* challenged a statute on substantive due process grounds, the Court never even considered whether it affected a "vested right." *Wells Fargo Bank*, 300 Mich App at 379. To put Appellant's error another way: the government cannot abrogate vested rights through a statute that otherwise rationally relates to a legitimate public interest.

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As discussed above, PA 256 is irrelevant to the Class Members with pre-*Rafaeli* foreclosures and, to the extent it is relevant, it is unconstitutional. As to the minority of Class Members with post-*Rafaeli* foreclosures, it would likewise be unconstitutional to require the Class Members to use the PA 256 process. Thus, this Court should uphold the Court of Claims' decision to include these Class Members in the Class. In doing so, it should go beyond the Court of Claims' reasoning and find that the PA 256 claims process is unconstitutional or that, at the very least, PA 256's "exclusive remedy" provision, MCL 211.78l, is unconstitutional. See also *Knick*, 139 S Ct at 2171 ("The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right.").

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

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

Similarly, the State cannot extinguish a vested takings claim by providing a process for partial recovery. Imagine if the State took houses to build a road. It would be absurd for the State to offer the homeowners anything less than the value of their property on a take-it-or-leave-it basis—and then to argue that the fact of its offer extinguishes the takings claims altogether.

Likewise, here, despite "labelling" PA 256 as "curative," the State, as FGU, will be seeking five percent of the surplus proceeds. MCL 211.78t(9) ("the court shall require payment to the foreclosing governmental unit of a sale commission equal to 5% of the amount for which the

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property was sold by the foreclosing governmental unit"). That is less than "no more, no less" than the surplus proceeds required be paid. Moreover, the State has *already* recouped the cost of the sale by establishing the "minimum bid" at the auction. MCL 211.78m(16) (in effect prior to PA 256). Even more, expenses were already paid by the auction buyers through imposition of a "buyer's premium" collected by the State's auctioneer company, Title Check, LLC.[13] Neither *Rafaeli* nor federal takings jurisprudence permit such deductions. *Knick*, 139 S Ct 2162 (full value of taken property plus interest must be paid).

In addition, the Fifth Amendment, separate from the Michigan Constitution, expressly requires the payment of constitutional "interest" from the time of the taking to the time of payment. *Knick*, 139 S Ct at 2170; *DLX, Inc v Kentucky*, 381 F3d 511, 528 (CA 6, 2004) ("where the Constitution requires a particular remedy, such as . . . through the Takings Clause as indicated in *First English* [*Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 US 304, 315; 107 S Ct 2378; 96 L Ed 2d 250 (1987)], the state is required to provide that remedy in its own courts"). This interest is due here. See *Freed*, discussed earlier. PA 256 does not contain this constitutional requirement and purports to impair Plaintiffs' federal rights.[14]

2. State law may not extinguish federal rights.

The Supremacy Clause of the US Constitution bars a legislature from abolishing federal constitutional rights by state statute or through alternate, "preclusive" causes of actions. "[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v Campbell*, 402 US 637, 652; 91 S Ct 1704; 29 L Ed 2d 233 (1971). The Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner

[13] https://tax-sale.info/forms/Standard-Rules.pdf. App pp 364-369.
[14] Indeed, the Class Members also have a claim under federal law for the even larger measure of damages, based not on the auction proceeds secured by the State, but the properties' fair market value. *Knick*, 139 S Ct at 2170.

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that all the substantial rights of the parties under controlling federal law are protected." *Felder v Casey*, 487 US 131, 151; 108 S Ct 2302; 101 L Ed 2d 123 (1988). "A state court" when reviewing state laws "may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'" *Howlett By & Through Howlett v Rose*, 496 US 356, 369; 110 S Ct 2430, 110 L Ed 2d 332 (1990) (citation omitted). "The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content . . ." *Id.* at 371. And where compliance with state law and compliance with federal law are impossible, the state law is preempted. US Const, art VI, § 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). See also *DLX*, 381 F3d at 528.

The Fifth Amendment creates a "self-executing" cause of action for the value of property taken by governments, *First English*, 482 US at 315, meaning "the State already indicated its consent to be sued when adequate payment to an owner did not follow a taking." *In re Venoco LLC*, 998 F3d 94, 110 (CA 3, 2021). The Fifth Amendment also requires the payment of interest along with the total value of the property taken. *Knick*, 139 S Ct at 2170.

The portions of PA 256 discussed throughout are clearly preempted and rendered invalid by the Supremacy Clause and rights provided by the Fifth Amendment. Neither the Legislature nor any state court can take those rights away.

3. The Legislature cannot abrogate the Michigan Court Rules.

PA 256 also cannot deprive the Class of its right to class-wide adjudication by requiring a different procedure for the Class Members to seek recovery, because the Legislature cannot simply overwrite a court rule such as MCR 3.501. "It is beyond question that the authority to determine rules of practice and procedure rests exclusively with [the Michigan Supreme] Court," and its "primacy in such matters is established in our 1963 Constitution." *McDougall v Schanz*, 461 Mich

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15, 26; 597 NW2d 148 (1999), citing Const 1963, art 6, § 5. "This exclusive rule-making authority in matters of practice and procedure is further reinforced by separation of powers principles." *Id*., citing Const 1963, art 3, § 2; *In re 1976 PA 267*, 400 Mich 660; 255 NW2d 635 (1977). Thus, "'the function of enacting and amending judicial rules or practice and procedure has been committed exclusively to this Court . . . ; a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will.'" *Id*. at 26-27, quoting *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964). Yet PA 256 directly contradicts the Court Rules, laying out a detailed set of procedures at odds with them. The Legislature cannot abrogate class action procedures generally—let alone a pending class action—and impose a specialized process on pending claims.[15]

E. Appellant's Jurisdictional Argument Fails

Appellant claims that "[b]ecause the State is a party, the Court of Claims Act would normally be implicated. But that is not so here." Appellant's Br at 26. But Appellant does not show where it challenged the Court of Claims' jurisdiction below. The State's argument in this Court appears premised on the enactment of PA 256. But Appellant never explains how PA 256 could have amended the Court of Claims Act to divest the Court of Claims of jurisdiction. Indeed, the statute never mentions the Court of Claims Act or any litigation against the State as FGU.

II. The Court of Claims properly certified a Class

A. Standard of Review

[15] Appellant claims that "[t]he statute should apply, now, but claimants from 2020 and 2021 sales are in limbo as no class notice has been issued and, thus, there is no court-approved opt out provision," and concludes that "[t]hose claimants are improperly ensnared in this class action." Appellant's Br at 14 n 14. For all the reasons discussed throughout, these Class Members are not "ensnared": the PA 256 process is "plainly inferior to a class action," *Fox*, op at 11 (October 16, 2020), and, at least, the requirement to use it unconstitutional. And Appellant never explains how the lack of a notice in this case precludes the pursuit of PA 256 remedies.

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As discussed above, "where a party challenges a trial court's factual findings, a review for clear error is appropriate, and where a party challenges a trial court's exercise of discretion, a review for abuse of discretion is appropriate." *Henry*, 484 Mich at 495 (citations omitted). "Given that the analysis a trial court must undertake in order to determine whether to certify a proposed class may involve making both findings of fact and discretionary determinations," in considering class certification, appellate courts "review the trial court's factual findings for clear error and the decisions within the trial court's discretion for abuse of discretion." *Id.* at 495-496. Trial courts have broad discretion to define the scope of a class and enter orders for the case's management. See *Hevesi v Citigroup Inc*, 366 F3d 70, 83 (CA 2, 2004) (court's "managerial judgment . . . is entitled to deference" given its broad authority to manage class actions, citations omitted).[16]

B. The Court of Claims correctly applied MCR 3.501

1. MCR 3.501 provides for class certification.

While Michigan courts "are not bound by federal decisions regarding requirements for class actions," and while MCR 3.501 diverges from the federal rule on some issues, Michigan courts often look to federal case law regarding Rule 23 of the Federal Rules of Civil Procedure when interpreting MCR 3.501 given the similar "'purposes, goals, and cautions . . . applicable to both.'" *Hanton v Hantz Fin Servs, Inc*, 306 Mich App 654, 665; 858 NW2d 481 (2014) (citation omitted). One difference is that Michigan does not follow a "rigorous analysis" approach in determining whether class prerequisites are met. *Michigan Ass'n of Chiropractors v Blue Cross and Blue Shield of Mich*, 300 Mich App 551, 560; 834 NW2d 148 (2013).

[16] The Court of Claims limited the scope of the class to a class of less than the six-year statute of limitation period, an issue this Court is called upon to address. See Section IV(B), *infra*. By correcting the applicable statute of limitations issue, restoration of the prior full class can be effectuated by a further motion for class certification in the Court of Claims.

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2. All Courts to consider the issue have agreed with the Court of Claims.

As discussed above, numerous courts have considered class certification as to parallel class actions, and all of them have agreed with the Court of Claims here. See, e.g., *Fox*, op at 8 (October 16, 2020) (certifying analogous case); *Arkona*, unpub op at 6 (same); *Zettel*, tr at 11 (same), discussed earlier. The only arguable exception is *Grainger*, in which the United States District Court for the Western District of Michigan favorably considered the class certification factors, but decided against certification based on a unique timing-based defense it believed was applicable to the particular named plaintiff in that case. See generally *Grainger*. Indeed, this is a paradigmatic class action, in which all of the Class Members suffered identical injuries due to Appellant's single course of conduct.

3. The Class meets the MCR 3.501 requirements.

a) Numerosity.

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

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

The Class here easily meets this requirement. The Court of Claims considered the auction data from January 15, 2018 onwards. See Appellant's Appendix p 9. It showed that at least 200 parcels in the counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch were foreclosed by the State of Michigan under the Michigan GPTA; and were subsequently sold at tax auction for an amount exceeding the minimum bid; and whose prior owners were not refunded these surplus proceeds as described by the Michigan Supreme Court in *Rafaeli*.

b) Commonality.

The second requirement is that "there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). The common question factor is concerned with whether there is a common issue the resolution of which will advance the litigation. It requires that the issues in the class action be subject to generalized proof, and thus applicable to the class as a whole, and that the common issue predominate over those issues that are subject only to individualized proof. *Zine v Chrysler Corp*,

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236 Mich App 261, 289-290; 600 NW2d 384 (1999). This "standard is not that demanding," requiring only a single common question of law or fact. *Beattie v CenturyTel, Inc*, 234 FRD 160, 168 (ED Mich, 2006), aff'd in part, remanded in part, 511 F3d 554 (CA 6, 2007). In fact, the Court Rule explicitly provides that "[w]hen appropriate the court may order that . . . the action be maintained as a class action limited to particular issues or forms of relief." MCR 3.501(B)(3)(d)(ii).

Moreover, "there is no requirement . . . that all questions necessary for ultimate resolution be common to the members of the class." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599; 654 NW2d 572 (2002). See also *Grigg v Michigan Nat'l Bank*, 405 Mich 148, 184; 274 NW2d 752 (1979); *Hill*, 276 Mich App at 311; *Dix v Am Bankers Life Assurance Co*, 429 Mich 410, 416; 415 NW2d 206 (1987). Where, as here, defendant's conduct affected a group, one or more of the claim's elements will generally be common to every member. *Rodriguez*, 672 F Supp at 1015.[17]

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

Here, the core common question is the legality of Appellant retaining surplus proceeds following the sale of tax-foreclosed property. The only "individualized" issue would be the amount of damages and, again, any differences in the amount of damages do not disturb a commonality

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

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finding. See App 60 (original class certification opinion at 7) (finding commonality); see also *Fox*, op at 8 (October 16, 2020) (commonality in analogous case).

Appellant claims that commonality is absent here, because, it says, *Rafaeli* has resolved the common issue. This is backwards: the fact that the Supreme Court has resolved this core liability issue in favor of the Class *supports* a commonality finding. "[R]esolved questions" should factor into a predominance analysis, and "eliminating conceded issues . . . would undermine the goal of efficiency by requiring plaintiffs who share a 'commonality of the violation and the harm,' nonetheless to pursue separate and potentially numerous actions because, ironically, liability is so clear." *In re Nassau Co Strip Search Cases*, 461 F3d 219, 227-228 (CA 2, 2006) (holding that "a concession does not eliminate a common issue from the predominance calculus"). Thus, for example, in *Gulino v Bd of Educ of City Sch Dist of City of New York*, unpublished opinion of the United States District Court for the Southern District of New York, issued August 29, 2013 (Case No. 96 CV 8414 KMW), the court held that resolved issues can satisfy the commonality requirement. *Gulino*, unpub op at 6, citing *In re Nassau Co*, 461 F3d at 227-228. See also *In re MF Glob Inc*, 512 BR 757, 766 (Bankr SDNY, 2014), citing *Gulino*, unpub op at 6; *Kalish v Karp & Kalamotousakis, LLP*, 246 FRD 461, 462 (Bankr SDNY, 2007) (class certified where "Defendant concede[d] liability on the underlying [] claim"); *DeMons v United States*, 119 Fed Cl 345, 353 (2014) (class certified against federal government despite "the Government's argument that because it concedes liability, there are no common questions for the court to decide").

c) Typicality.

"The typicality requirement directs the court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *Nowacki v Dep't of Corrections*, unpublished per curiam opinion of the Court of Appeals, issued

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August 19, 2014 (Docket No. 315969), p 4. Thus, "the representative's claim must arise from the same event or practice or course of conduct that gives rise to the claims of the other class members and be based on the same legal theory." *Id.* "'So long as there is a nexus between the class representatives' claims [and] defenses and the common questions of fact or law which unite the class, the typicality requirement is satisfied.'" *Henry*, 484 Mich at 516 (citation omitted). Factual differences between the class members' claims are okay as long as their "claims . . . share a legal theory" and "core of allegation." *Hill*, 276 Mich App at 313.

Here, the class members' legal theories are the same. The class members' "core of allegation" is also the exact same: after Appellant foreclosed upon each member of the class, it failed to return the surplus equity. For this reason and for the same reasons outlined as to commonality, the claims between all class members are identical – that is, they have the same essential characteristics – and thus are typical to the named representatives' claims.[18]

d) Adequacy.

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

e) Superiority.

[18] Appellant's conclusory claim that "[t]here is no 'typical' claim because no two parcels or their claimants' factual stances are the same," Appellant's Br at 25, fails to address this analysis.

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MCR 3.501(A)(2) provides that in determining whether the manageability requirements of MCR 3.501(A)(1)(e) are met, courts shall consider factors including:

> (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.. [MCR 3.501(A)(2)(a)-(f).]

So long as a case does not contain "issues . . . so disparate as to make a class action suit unmanageable," the class fulfills MCR 3.501(A)(1)(e). *Dix*, 429 Mich at 419; *Lee v Grand Rapids Bd of Educ*, 184 Mich App 502, 504-505; 459 NW2d 1 (1989); *Edgcumbe v Cessna Aircraft Co*, 171 Mich App 573, 575; 430 NW2d 788 (1988).[19] As "[n]o two claims are likely to be exactly similar" and "[a]lmost all claims will involve disparate issues of law and fact to some degree," the

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

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"criterion does not preclude the maintenance of a class action where the individual claims differ slightly with regard to such specifics as the time, place, and exact nature of the injury." *Dix*, 429 Mich at 418-419. Instead, it "is essentially a practicality test" that looks at "'whether the issues are so disparate as to make a class action unmanageable.'" *Hill*, 276 Mich App at 314.

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

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

1. PA 256 cannot abrogate MCR 3.501.

As discussed above, PA 256 could not abrogate MCR 3.501. Therefore, the statute's enactment cannot impede this case's litigation as a class action.

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

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Appellant's primary class certification argument is that the Court of Claims improperly failed to address the prior holders of liens on the Class Members' properties. For all of the reasons discussed below, any such lienholders are irrelevant. And even if, *arguendo*, there is a possibility that lienholders will interject themselves into this case, that is not a reason to overturn the Court of Claims. There is always a possibility that other people outside the class will be aggrieved by the defendants' conduct. There is also always the possibility that third parties might have their own claims against the Class Members. But that is the case in any damages case – and this is a damages case, not an in rem proceeding to adjudicate real property interests. At most, these present the sort of class action management issues that trial courts are competent and authorized to address. See *Hevesi*, 366 F3d at 83 (trial court has broad discretion to certify and manage a class action). Appellant's request that this Court second-guess the Court of Claims treatment of the lienholder issue is fundamentally a request for this Court to assert superintending control. This Court should decline to do so.

a) Liens are irrelevant.

Under the pre-PA 256 GPTA's MCL 211.78k(5)(c), the underlying foreclosure judgment extinguished a parcel's liens. See *Barry Co Treasurer v Klinge*, unpublished per curiam opinion of the Court of Appeals, issued January 8, 2013 (Docket No. 308783), p 3 ("trial court's judgment of foreclosure extinguishes all liens against and interests in the subject property, except for those specifically enumerated in the statute").[20] See App p 46. (Plaintiffs' foreclosure judgment).

Thus, as the Court of Claims found, "the GPTA accounts for, and extinguishes, all liens–with limited exceptions–upon foreclosure." App p 61 (original class certification decision) (citing MCL 211.78k(5)(c)). See also *Rafaeli*, 505 Mich at 445 (after foreclosure, "the foreclosing

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

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governmental unit's title to the property is not subject to any recorded or unrecorded lien," citing MCL 211.78k(6)). These liens cannot be "resurrected" against the Class Members' equity without subjecting them to yet another taking. Indeed, the taking of the Class Members' equity to provide it to private sector lienholders is also barred by Art. X § 2 of the Michigan Constitution, which expressly prohibits any such takings for private use. Const 1963, art X, § 2.

Accordingly, "the interests of the former lienholders are just that: former or expired." App pp 61-62 (original class certification decision at 8-9). The Court of Claims also recognized that the fact that third-party creditors might have claims against some Class Members' recoveries (though highly unlikely) is hardly an obstacle to certification. The "[rights of] former lienholders . . . 'do not raise inquiries for this case that predominate over the interests of the class members,'" and "Defendants' apparent concern for the rights of former lienholders whose rights were extinguished by operation of law are unconvincing." App p 62 (original class certification decision at 9). See also *Zettel*, tr at 9:21-23, 11:11-12 (App pp 87-110) (*Zettel* court, after inviting special briefing on the issue of lienholders, certifies the Class, "adopting [*Hathon*]'s analysis").[21]

b) Any hypothetical former lienholders are outside the scope of the Class because lienholders are not "property owners."

Any former lienholder is outside the proposed class, which is defined as "property owners." A lien "is not a property right in, or right to, the thing itself." *Aetna Cas & Sur Co v Starkey*, 116

[21] Appellant claims that when "[t]he Court of Claims ruled that intervening liens were extinguished by the foreclosure," its conclusion "represent[ed] an error of law and violate[d] the *Rafaeli* holding" because it "allow[ed] former owners to 'benefit from their tax delinquency.'" Appellant's Br at 25, citing *Rafaeli*, 505 Mich at 483. But when the Supreme Court concluded that "former owners" should not "benefit from their tax delinquency," it was addressing the possibility that former owners might secure more from the FGU than the FGU actually took. *Rafaeli*, 505 Mich at 483. It was not discussing the possibility that a former owner might benefit from the extinguishment of a lien held by a third party. Moreover, the State never explains why it would have standing to assert that the liens survived the foreclosure process.

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Mich App 640, 645; 323 NW2d 325 (1982). Thus, lienholders are not "property owners." See, e.g., *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 124; 560 NW2d 43 (1997) (discussing protecting "property owners" from liens). The former lienholders are not and simply never were "property owners," and thus they fall outside of the proposed class.

c) Former lienholders are little different from other creditors.

The Court does not need to account for any claims by former lienholders. As the Court of Claims found, "[i]n essence, defendants are arguing that if there are any creditors of the plaintiffs, the very existence of those creditors will defeat the class action." App p 63 (original class certification decision at 10). But "the Court decline[d] to give credence to hypothetical actions of potential creditors that might be taken post-judgment." *Id.* at 10-11. Rather, "[t]he common and controlling legal questions [here] . . . are not affected by actions former lienholders *might* take against class members in the event those class members succeed in this action," because "whether former lienholders, in the event plaintiffs ultimately succeed in obtaining recovery in this case, seek to subsequently recover against plaintiffs or class members does not alter the common legal questions raised in this case." App p 62 (original class certification decision at 9) (emphasis added). A former lienholder is no different from any other creditor with a claim against a class member, such as a bill collector. Any collection effort would be extrinsic to this case and is therefore irrelevant. For example, the Court would not withhold judgment in a personal injury case because the plaintiff owes money to third party creditors like a credit card issuer.[22]

d) Defendants' theories fail as a practical matter.

[22] Even if any non-class-member title claimants have a "property interest," then, "to the extent those lienholders would even have a claim, it would be against the statutory framework that extinguished their liens," which would be a different case than this. App p 62 (original class certification decision at 9).

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As a practical matter, the primary lien on many properties is a mortgage lien, and mortgaged properties will rarely enter tax foreclosure. "A feature of many mortgage agreements is a provision which requires the mortgagor to pay to the mortgagee, in addition to the stated installments for principal and interest, certain amounts which would be used by the mortgagee primarily to purchase insurance upon the mortgaged property and to meet the obligations for taxes upon the property as these accrue." 50 ALR3d 697 (Originally published in 1973). If there are lienholders, where were they when the State sold the properties?

In short, the unsupported speculation that the existence of former lienholders will interfere with a class action is no basis to deny certification. It is unlikely that there were many, if any, such lienholders at the time of foreclosure. And even if there were outlier liens, they would be able to pursue claims for their debt. Conversely, under Appellants' theory, the possibility that parcels had liens would preclude class certification against any of the FGUs. This would plunge the State into a morass of litigation: thousands of lawsuits, surely rife with attorney opportunism and massive inefficiency. The scenario is exactly what Rule 3.501 is intended to avoid, and it would allow countless victims of the Defendants to fall through the cracks. See, e.g., *Fox*, op at 10 (October 16, 2020) ("the risk of involving lienholders is insufficient to defeat class certification . . . even if Defendants are correct and a substantial number of creditors emerge, Defendants have failed to show that litigation scattered across the Michigan courts would be preferable to a class action.").

e) Even if lienholders emerged and intervened in the case, it would still be a manageable class action.

Even if, *arguendo*, there are former lienholders who seek to intervene, the case would remain manageable. The existence of a stray lien holder does not preclude a finding that common issues predominate and would pose minimal disruption. In the extremely unlikely event that an unexpected substantial number of former lienholders were to emerge and seek to intervene, the

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Court could manage that scenario.[23] Damages would still be arithmetic: if the Court found that the liens should still be recognized, then instead of comparing the property value to the tax delinquency, the Court would simply need to factor in a given parcel's liens as well. And if, somehow, after certification former lienholders *do* become an unmanageable complication, which is extremely unlikely, then the Court would have a host of tools to modify or otherwise manage the class. See Newberg on Class Actions § 7:38.

f) Plaintiffs need only establish a single common issue that will advance the litigation.

The Court of Claims was "also unmoved by defendants' contention that the potential existence of former lienholders destroys commonality." App p 61 (original class certification decision at 8). As Judge Ludington found, this is at most an issue of "a dissimilarity in damages," and "'[n]o matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment with the question of liability tried as a class action.'" *Fox*, op at 8 (October 16, 2020) (quotation omitted; citing the Court of Claims' original class certification decision (App pp 117), that "[t]he common and controlling legal questions of whether the

[23] They would need to intervene because mandatory joinder does not apply to class actions. See MCR 2.205(A) (mandatory joinder rule is "subject to MCR 3.501"); *Thompson v Board of Education*, 71 FRD 398, 412 (WD Mich, 1976) (analogous federal rule makes mandatory joinder inapplicable to class actions). Even without this exception, former lienholders are not indispensable. "'[C]omplete relief' is determined as between persons already parties, and not as between 'a party and the absent person whose joinder is sought.'" *May v CitiMortgage, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued December 13, 2013 (Case No. 12-CV-14603), p 2 (citations omitted). And "factors such as judicial economy or avoidance of multiple litigation are not enough to compel joinder." *Mather Inv'rs, LLC v Larson*, 271 Mich App 254, 257-258; 720 NW2d 575 (2006) (quotations omitted). The current roster of parties allows the Court of Claims to adjudicate the dispute between Plaintiffs and the class on the one hand, and Appellant on the other. This is an action for money damages – not an *in rem* proceeding to establish the rights of potential property claimants.

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[foreclosure statute's] retention procedures are constitutionally infirm are not affected by actions former lienholders might take . . . in the event [the plaintiffs succeed.]").

3. Appellant's "inclusiveness" arguments fail.

Appellant argues that "the current class is both overinclusive, as it includes sales after July 17, 2020, that clearly fall under the new law, and underinclusive, as it omits every interest holder other than the 'owners.'" Appellant's Br at 25. This argument is wrong on both counts.

As to the "overinclusivity" argument, as explained above, the post-2020 victims are properly part of the Class because Appellant cannot, acting through its Legislature, compel them to use the inferior PA 256 process to seek less money than the State owes them. The "underinclusivity" argument also fails. There is no obligation that a Class contain every possible person wronged by a defendants' conduct. "[T]he [trial] court may choose one possible class definition over another in order to ensure that the requirements of [the court rule] are best satisfied." *Bertulli v Indep Ass'n of Cont'l Pilots*, 242 F3d 290, 296 (CA 5, 2001) (rejecting underinclusiveness argument) (citations omitted). "[P]ersons left out of the class definition remain[] free to assert their rights as they s[ee] fit." *In re Syngenta AG MIR 162 Corn Litig*, unpublished opinion of the United States District Court for Kansas, issued April 3, 2020 (Case No. 14-MD-2591-JWL), p 4, citing *Bertulli*, 242 F3d at 296 n 25. And the other "interest holders" are presumably the hypothetical lienholders. As explained throughout, they are irrelevant.

4. Appellant's impracticability arguments fail.

Appellant claims that "some claimants have filed notices of intention, and some have already filed actual claims, in circuit courts. Treasury cannot comply with [PA 256] to adjudicate those claims without running afoul of the Court of Claims order declaring that it, not the circuit courts, has jurisdiction over these claims and holding that the new law does not apply," and that "[f]urther complicating matters, no class notice was authorized, so under the controlling court rule

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there is no court approved opt out mechanism for claimants wishing to file under the new law in circuit court." Appellant's Br at 32. But these are issues for the Court of Claims to manage within the ambit of its broad authority to manage the practicalities of class actions. See *Hevesi*, 366 F3d at 83. It is hardly a reason for this Court to require decertification.[24]

III. *Rafaeli* Applies Retroactively

Appellant argues, in effect, that prior to *Rafaeli*, it did not realize it was committing a taking. Therefore, it reasons, it should be able to keep the money it illegally took. In other words, *Rafaeli*'s application should only be prospective, and it should not have any retrospective effect. Appellant's argument fails for several reasons.

A. Standard of Review

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

B. *Rafaeli* Is Explicitly Retroactive

Rafaeli itself is, on its own terms, retroactive. Its inquiry was retrospective; the conduct in question had already happened, and thus the Court of course discussed it in the past tense. See, e.g., *Rafaeli*, 505 Mich at 474 ("Defendant's retention of the surplus proceeds *was* an unconstitutional taking"); *id.* at 479 ("we hold that defendants *were* required to return the surplus

[24] Appellant argues that, "even if there was a class notice with an opt out provision, it is unclear what should happen if one claimant opts out (filing a claim in circuit court) while some other 'owner' claimant(s) for that same parcel's proceeds may remain in the class action in the Court of Claims." Appellant's Br at 32. But this Court need not address this hypothetical. If this situation presents itself, it will be an issue for the Court of Claims to address in its broad practical class action case management authority. Appellant then claims that "[t]here is only one sum of money from each sold property, and the relative interests of multiple claimants cannot be adjudicated in two actions by two separate courts." Appellant's Br at 32. But for all of the reasons discussed throughout, this supposed concern about the lienholders is inapt. And the discussion of "only one sum of money from each sold property" is likewise inapt. The issue is not how to allocate a "sum of money" – it is how to compensate the Class Members for the taking committed by Appellant.

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proceeds"); *id.* at 484-485 ("defendants' retention and subsequent transfer of those proceeds into the county general fund *amounted* to a taking of plaintiffs' properties under Article 10, § 2 of our 1963 Constitution") (emphasis in all quotes added).

Moreover, the Supreme Court proceeded to consider and decide the appropriate "just compensation" for the specific plaintiffs before it – who, again, had suffered the taking in the past. *Id.* at 485 ("plaintiffs are entitled to just compensation . . ."). If *Rafaeli* were to only apply prospectively, it would not have considered the *Rafaeli* plaintiffs' damages. A decision that only applied prospectively could not have resulted in a damage award for the litigant.

Appellant ignores all of this. Instead, it treats *Rafaeli* as if it were a case seeking to enjoin enforcement of an allegedly-unconstitutional statute. But that is simply not what *Rafaeli* was.

C. A Takings Determination Is Inherently Retroactive

Takings claims are fundamentally damage claims, deciding on whether past conduct should be compensated; the amount constitutionally required is just compensation. Thus, a finding that the government has illegally taken property without paying compensation (or enough compensation) is inherently retroactive.

This issue arises in federal courts because the Eleventh Amendment generally bars retroactive damage claims against states in federal court, while prospective-only relief against them is permitted by the *Ex parte Young* exception. See, e.g., *O'Neil v California Coastal Comm'n*, unpublished opinion of the United States District Court for the Central District of California, issued May 18, 2020 (Case No. 2:19-CV-07749-ODW (AFMx)), p 8 ("Per *Ex parte Young*, claims can proceed despite the Eleventh Amendment, where a plaintiff seeks prospective injunctive relief," citing *Ex parte Young*, 209 US 123, 156–157; 28 S Ct 441; 52 L Ed 714 (1908)). Courts find that takings claims are retroactive for purposes of this analysis. *Id.* ("the Court cannot characterize

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[plaintiff's] relief request as prospective as he seeks just compensation, or damages, for the prior allegedly unconstitutional taking," citing *City of Monterey v Del Monte Dunes at Monterey, Ltd*, 526 US 687, 710–711; 119 S Ct 1624; 143 L Ed 2d 882 (1999) for its language that "[J]ust compensation is, like ordinary money damages, a compensatory remedy . . . [and therefore] legal relief") (additional citation omitted). Put simply, "'just compensation,'" the takings remedy that the Court determined in *Rafaeli*, "is on all fours with traditional monetary damages, which are the *quintessential form of retrospective relief*." *Seven Up Pete Venture v Schweitzer*, 523 F3d 948, 956 (CA 9, 2008) (emphasis added). *Rafaeli* was inherently retroactive.[25]

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

1. Judicial decisions presumptively apply retroactively.

As Appellant concedes, "[g]enerally, 'judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved.'" Appellant's Br at 37-38 (quoting *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006) (additional citation omitted).

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

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

As Appellant concedes, "complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law.'" Appellant's Br at 34, citing *Lincoln*

[25] Because *Rafaeli* was inherently and expressly retroactive, and found a taking, courts do not have "unfettered discretion to apply [it] . . . purely prospectively . . ." Appellant's Br at 37, quoting *Placek v City of Sterling Heights*, 405 Mich 638, 664; 275 NW2d 511 (1979) (additional citations omitted). Even if, *arguendo*, the finding of a state-law taking could somehow be prospective-only, the Supremacy Clause would require all courts to retroactively apply the Class Members' federal takings-law rights. See, e.g., *Felder*, 487 US at 151 (state courts have a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected") (quotation omitted).

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v General Motors Corp, 461 Mich 483, 491; 607 NW2d 73 (2000). Here, Appellant can cite to no decision that *Rafaeli* "overrule[d]" except for the decision before it on appeal. Indeed, prior to *Rafaeli*, neither our Supreme Court nor this Court had ever considered the issue.

Instead, Appellant refers to "numerous decisions by this Court" that it says were "contrary" to *Rafaeli*. Appellant's Br at 34. But none of them were on point. Instead, they dealt with the finality of foreclosure judgments. See *Wayne Co Treasurer v Westhaven Manor Ltd Dividend Hous Dev Ass'n*, 265 Mich App 285, 300; 698 NW2d 879 (2005) (judgment would not be disturbed unless notice was inadequate); *In re Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 8; 732 NW2d 458 (2007) (judgment's finality turns on notice); *In re Petition of Tuscola Co Treasurer for Foreclosure*, 317 Mich App 688, 699-700; 895 NW2d 569 (2016) (same). So did the unpublished cases cited at page 44 of Appellant's Brief. Here, the Class is not challenging any of the underlying foreclosures; it is saying that, regardless of the foreclosures' validity, the State could not take the excess equity. As the U.S. District Court for the Eastern District of Michigan found, "the property at issue [here]—the right to collect surplus proceeds—is distinct from title to the foreclosed property and is not extinguished in the foreclosure process." *Fox*, op at 15 (October 16, 2020).

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

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Thus, as the Court of Claims correctly found, "*Rafaeli* . . . did not, contrary to [Appellant]'s assertions, create a 'new' rule of law." Court of Claims December 4, 2020 Opinion (App p 73) at 5. "Instead, there was no published authority on point, and the Supreme Court traced its rationale for finding a protected property right in surplus proceeds all the way back to the Magna Carta, continuing through this state's Common Law, and recognizing the same right under this state's Constitution." *Id.* at 5-6, citing *Rafaeli*. "Indeed," the Court of Claims noted, it "was able to issue the decision it did prior to *Rafaeli*" because the Michigan Constitution barred Appellant's conduct. *Id.* at 6. Thus, Appellant's "arguments about prospective-only application of *Rafaeli* fall flat . . ." *Id.*, citing *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002) as explaining that whether the decision "clearly established a new principle of law" was a "threshold question" to any retroactivity issue.

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

If, *arguendo*, there is a new rule, then the Court should consider (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Pohutski*, 465 Mich at 696-697 (cited in Appellant's Br at 38).

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

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

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

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

Appellant claims that "FGU's also relied on cases holding that persons can be deprived of property if they are provided due process." Appellant's Br at 46. This argument fails for two reasons. *First*, it ignores the fact that there was insufficient due process here. The FGUs in *Fox* argued that the Court should dismiss the procedural due process claims of the certified class in that case because the pre-foreclosure notice was sufficient. *Fox*, op at 14 (October 16, 2020). The court rejected this argument, noting that "[p]laintiff challenges the post-foreclosure process; specifically, [the] failure to furnish adequate procedures before retaining the surplus proceeds." *Id.* at 15. As in *Fox*, "[i]nsofar as [Appellant] argue[s] that an adequate process for certain property before foreclosure should enable [it] to seize different property after foreclosure, [it] offer[s] no authority in support." *Id. Second*, did Appellant really believe that, even if it provided procedural due process, it could take property without due compensation? Again, any such "reliance" on due process jurisprudence would be entirely unjustified.[26]

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

Rafaeli was unanimous, and based on well-settled jurisprudence. Yet, Appellant cherry-picks pre-*Rafaeli* precedent, arguing that while "*Rafaeli* distinguished *Nelson* [*v New York*] and

[26] Appellant cites *Grimes v Dep't of Transp*, as finding that "[t]his Court must . . . consider whether that law and interpreting case law 'foster[ed] a reliance interest [and] shaped future . . . conduct.'" Appellant's Br at 44, citing *Grimes v Dep't of Transp*, 475 Mich 72, 88 n 49; 715 NW2d 275 (2006). But *Grimes* was discussing whether to overturn a case despite the principle of *stare decisis*, and even then concluded, as here, there were "no reliance interests at work." *Id.*

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Bennis [*v Michigan*] . . . before that, both U.S. Supreme Court decisions supported FGUs' actions under Public Act 123." Appellant's Br at 46.[27] If this was truly Appellant's mindset, it was mistaken. For example, in *United States v Lawton*, 110 US 146; 3 S Ct 545; 28 L Ed 100 (1884), the federal government defended a tax auction process similar to the Defendants' here. The Court found that "[t]o withhold the surplus from the owner would be to violate the fifth amendment to the constitution and deprive him of his property without due process of law or take his property for public use without just compensation." *Id*. at 150. Other courts have agreed. See *Thomas Tool Servs v Town of Croydon*, 145 NH 218, 220 (2000); *Bogie v Town of Barnet*, 129 Vt 46, 49-50; 761 A2d 439 (1970) (following *Lawton*); *Lake Co Auditor v Burks*, 802 NE2d 896, 899–900 (Ind 2004). It was Appellant – not the Supreme Court – that acted outside the established jurisprudence.

Moreover, as discussed throughout, none of the pre-*Rafaeli* Michigan cases are inconsistent with *Rafaeli.* As the Court of Claims found, "defendant's arguments about reliance on a purported 'old rule' are unconvincing, as there were no prior judicial decisions on which to rely." Court of Claims December 4, 2020 Opinion (App p 74) at 6 n 3.[28]

Meanwhile, *Bennis v Michigan*, 516 US 442; 116 S Ct 994; 134 L Ed 2d 68 (1996) permitted the forfeiture of a vehicle involved in criminal activity, but never permitted Appellant to take the Class Members' equity. See *Rafaeli, LLC v Oakland Co*, unpublished per curiam

[27] Appellant claims that "[i]n *Nelson*, the U.S. Supreme Court" considered a statute it says is similar to the one here, and found that "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed." Appellant's Br. at 40-41, quoting *Nelson v City of New York*, 352 US 103, 110–111; 77 S Ct 195; 1 L Ed 2d 171 (1956). But this ignores the fact that the Michigan Supreme Court found that the statute here did indeed infringe on a constitutional guarantee.

[28] Appellant claims that, under *2 Crooked Creek LLC v Cass Co Treasurer*, ___ Mich ___; ___ NW2d ___ (March 16, 2021) (Docket No. 159856), there were only two types of claims under tax law prior to *Rafaeli*, both stemming from a lack of pre-foreclosure notice. This is a red herring: here, as in *Rafaeli*, the issue is what happens after foreclosure.

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opinion of the Court of Appeals, issued October 24, 2017 (Docket No. 330696) (Shapiro, J, concurring), p 5-6 ("this case bears little, if any, relation to *Bennis*, and that it is a mistake to conclude that *Bennis* addresses, let alone controls, the issues in this case"); *Rafaeli*, 505 Mich at 448-450 (rejecting "forfeiture" analysis of tax foreclosure process and finding that "*Bennis* is distinguishable because the purpose of civil-asset forfeiture is different than the purpose of the GPTA provisions at issue here," because "the GPTA is not punitive in nature.").

Ultimately, *Rafaeli* was consistent with previous Michigan caselaw. For example, in *Dean v Michigan Dep't of Nat Res*, 399 Mich 84; 247 NW2d 876 (1976), a state agency executed a tax foreclosure and sold the property for more than the tax delinquency. The taxpayer sued for unjust enrichment. *Id.* at 93. The trial court summarily dismissed the claim as an impermissible attack on the foreclosure judgment. *Id.* The Supreme Court reversed, finding that "the subject matter of that judgment, i.e. the validity of the taxes of the state and the delinquency of plaintiff in the payment of those taxes, is completely independent of the subject matter of plaintiff's instant suit for restitution due to the unjust enrichment of the state." *Id.* at 94.[29]

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

Appellant claims that "[e]veryone also understood that 'a statute is presumed to be constitutional unless its unconstitutionality is clearly apparent.'" Appellant's Br at 40, quoting *McDougall*, 461 Mich at 24.[30] But the supposedly "relying" party here is the same state that

[29] Appellant also argues that *Rafaeli* surprised it because prior foreclosure-related constitutional claims involved pre-foreclosure notice. But, again, the post-foreclosure takings issue is distinct.

[30] Appellant's unsupported *ipse dixit* that "stakeholders" generally "understood [the pre-amendment General Property Tax Act] to mean that the property satisfied the debt, period," Appellant's Br at 41, is also unpersuasive. Nothing in this pronouncement suggests that such reliance was justified. Indeed, it was not. How could these stakeholders reasonably – let alone justifiably – believe that tax debts would require properties for satisfaction even if the properties'

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enacted the unconstitutional statute in the first place. A state's reliance upon an unconstitutional statute is never "justified" – if so, then states could eviscerate their constitutional obligations by enacting unconstitutional statutes, "relying" upon them, and then claiming "justified reliance."[31]

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

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

Appellant suggests that *Rafaeli* should be limited to prospective application "[b]ecause in some instances 'considerations of convenience, of utility, and of the deepest sentiments of justice' militate against the retroactive application of a new rule." Appellant's Br at 35, quoting *Placek v City of Sterling Heights*, 405 Mich 638, 686; 275 NW2d 511 (1979) (Coleman, J, Fitzgerald and Ryan, JJ, concurring in part; dissenting in part). But this turns the *Placek* concurrence's reasoning on its head. "[T]he deepest sentiments of justice" cannot "militate" in favor of an outcome in which the government gets away with having systematically violated constitutional rights and gets to keep illegally taken property. The State's "convenience" and "utility," *id.*, must yield to the "fundamental and paramount law of the nation." *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803). Even Appellant concedes that its proposed inquiry would consider "'the involvement of vested property rights.'" Appellant's Br at 37, citing *Placek*, 405 Mich at 665. Here, the "involvement of vested property rights" is determinative – Appellant committed a taking.[32]

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values were many multiples of the underlying debt? And the idea that the equity takings victims shared this "understanding" is belied by the very fact of this litigation.

[31] Appellant's claim that "a statute is not unconstitutional . . . merely because it is allegedly undesirable, unfair, or unjust," Appellant's Br at 40, citing *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000), ignores *Rafaeli*'s finding of a taking.

[32] Appellant asks the Court's indulgence based on the "magnitude of the impact" of it, Appellant Br at 37, but the "magnitude" of the taking is all the more reason to remedy it, not a reason to excuse it. The idea that of a taking "too big to fail" is noxious to the constitutional order.

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Ultimately, as Appellant concedes, "'[c]ourts have acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy.'" Appellant's Br at 47, quoting *Riley v Northland Geriatric Ctr*., 431 Mich 632, 644; 433 NW2d 787, 788 (1988), amended sub nom *Juncaj v C & H Indus*, 432 Mich 1219 (1989). "Fairness and public policy" dictate that the government follow the constitutions that govern it; that takings be compensated; and that the government not retain money it illegally took.

(b) *Rafaeli*'s impact on "property law" does not warrant excusing Appellant's takings.

Appellant suggests that less important considerations should outweigh enforcement of the Takings Clause. For example, it argues that "'[t]here is perhaps no area of law in which certainty, clarity, and predictability are more essential than in the realm of property law.'" Appellant's Br at 45, quoting *In re Certified Question from US Bankruptcy Court of Eastern Dist of Mich*, 477 Mich 1210, 1214; 722 NW2d 423 (2006) (Markman, J dissenting). But the issue in *Rafaeli* was not "property law" *per se*. It was whether the government could take property in which a person had a vested interest. Likewise, Appellant argues that, "[i]n terms of important public questions, municipal budgeting and finance are equally important." Appellant's Br at 45. But, again, this cannot excuse unconstitutional conduct. Otherwise, governments could take property freely in order to satisfy "the lifeblood of government." Appellant's Br at 45, quoting *GM Leasing Corp v US*, 429 US 338, 350; 97 S Ct 619; 50 L Ed 2d 530 (1977), which quoted *Bull v US*, 295 US 247, 259; 55 S Ct 695; 79 L Ed 1421 (1935). And because Appellant would have its interest in public finance prevail over the constitution, under its theory, the offending governments would never need to give back any of their ill-gotten gains.

(c) Appellant's interest in predictable budgeting does not excuse its takings.

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Appellant likewise claims that its taking should be excused because, it says, "[g]overnment must know what funds are available before it can responsibly implement a balanced budget each year." Appellant's Br at 45. But this unsupported claim is belied by the common knowledge that both tax receipts and expenditures vary throughout the year. The idea that the takings here were necessary for budgetary planning is unconvincing.[33]

Appellants' cases on this issue are easily distinguishable. It cites *Bolt v City Lansing* (*On Remand*), 238 Mich App 37; 604 NW2d 745 (1999), in which this Court applied a tax decision prospectively. But *Bolt* was not a takings case. Appellant also notes that, "[i]n *Cipriano v City of Houma* . . . , the Supreme Court gave only prospective effect to its decision declaring as unconstitutional a Louisiana law that only permitted 'property taxpayers' the right to vote on issuance of certain bonds where retroactive application of the opinion would require unwinding municipal bonds that hinged on those elections. *Id*. at 702, 706." Appellant's Br at 45, citing *Cipriano v City of Houma*, 395 US 701, 702, 706; 89 S Ct 1897; 23 L Ed 2d 647 (1969). But this was a voting rights case, not a takings case. The Court's declination to undo the products of a too-restricted vote hardly means that the State here should get away with an illegal taking.[34]

(d) Appellant's interest in applying statutes as written does preclude judicial review.

[33] Appellant claims that "[f]ew Michigan cases come to mind that reversed nearly 20 years of practice under an unambiguous law that applied statewide and impacted the finances of every county and municipality." Appellant's Br at 49. The converse is just as true: the State and its fellow FGUs have illegally taken funds and are not entitled to retain their ill-gotten gains. Appellant's argument amounts to: an illegal taking is rendered nonjusticiable by the scope of the government's misconduct.

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

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Appellant claims that "[r]eliance on the law as written is significant as '[t]he people of this state, as well as their public officials, deserve to be able to read and to comprehend their own laws.'" Appellant's Br at 48, quoting *In re Certified Questions From US Dist Court, W Dist of Mich, S Div*, 506 Mich 332, 354; 958 NW2d 1 (2020), which cited *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284 n 10; 696 NW2d 646 (2005). But reliance on the Constitution matters more. See *Marbury*, 5 US at 177. In this case, Appellant's argument that "[w]here 'the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts,'" Appellant's Br at 48, quoting *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000), amounts to an argument against judicial review. In particular, it suggests that, as long as a taking was committed pursuant to a clearly worded statute, it is not compensable. The State provides no authority that either applicable Takings Clause entails such a loophole.

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

Appellant cites *Bezeau v Palace Sports & Entertainment, Inc* for its language that "the correct interpretation of a statute is better given prospective application when retroactive application . . . disrupts the administration of justice." Appellant's Br. at 46-47, quoting *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 465 n 6; 795 NW2d 797 (2010). See also Appellant's Br at 47 ("The third consideration when weighing prospective versus retroactive application of a judicial decision is 'the effect on the administration of justice,'" quoting *People v Auer*, 393 Mich 667, 676–677; 227 NW2d 52 (1975), which quoted *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971)). Here, though, the process for takings claims is well-suited to adjudicate claims. As the Court of Claims found, "given that the subject of this case is an uncompensated taking of surplus proceeds, [Appellant]'s appeals to the administration of justice

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are unconvincing." Court of Claims December 4, 2020 Opinion (App p 74) at 6 n 3. Indeed, it is curious that Appellant complains about the inefficiency of litigating the takings claims against it at the same time as it does all it can to avoid a class action that would make such litigation efficient.

IV. The Court of Claims Applied the Incorrect Limitations Period

A. Standard of Review

The interpretation and application of a statute of limitations presents a question of law, which is reviewed *de novo* on appeal. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). More generally, this Court "review[s] *de novo* . . . questions of statutory interpretation." *PNC Nat'l Bank Ass'n*, 285 Mich App at 505 (emphasis added).

B. The Class Period Should Go Back at Least Six Years

For an inverse condemnation claim, the Supreme Court had held the applicable statute of limitations is six years. *Hart*, 416 Mich at 503. The Court of Claims was bound by this decision. *Ratliff v Gen Motors Corp*, 127 Mich App 410, 416-417; 339 NW2d 196 (1983). Yet, the Court of Claims nonetheless truncated the class period because of MCL 600.6431(1). Under that statute,

> a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies.

The Court below found that "[c]ompliance with § 6431 is an "unambiguous condition precedent to sue the state, . . . and a claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted[.]" Court of Claims December 4, 2020 Order, (App p 74) at 6, quoting *Rusha v Dep't of Corrections*, 307 Mich App 300, 307; 859 NW2d 735 (2014) (additional citation and quotation marks omitted).

Thus, the Court of Claims "[saw] no reason why the notice requirements contained in § 6431 should not apply to the class members as well." February 22, 2021 Order at 7-8. "As a result,"

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it found, "any class members whose claims accrued more than 1 year before the filing of the January 15, 2019 verified notice of intent filed by plaintiff Lynette Hathon are barred by operation of § 6431." *Id.* at 8. The Court of Claims also rejected Plaintiffs' argument that the "harsh-and-unreasonable-consequences exception" should apply "because," it found, "it is not apparent any of the putative plaintiffs were ever prevented from seeking a return of the proceeds." *Id.*

However, while the Court of Claims cited *Rusha* for the proposition that MCL 600.6431(1) can apply to constitutional claims, the better view is that it cannot. As Justice Bernstein explained,

> [Earlier cases] each demanded strict compliance with statutory limitations and notice requirements in the context of legislatively granted rights rather than rights granted under the Constitution. However, this Court has never held that constitutional claims against the state . . . should be treated like the personal-injury claims . . . [*Mays v Governor of Michigan*, 506 Mich 157, 204-205; 954 NW2d 139 (2020) (Bernstein, J, concurring) (cleaned up).]

Justice Bernstein proceeded to discuss Chief Justice McCormick's concurrence in *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 195; 931 NW2d 539 (2019). She explained there that "the state enjoys broad immunity from suit unless it waives its immunity by creating a statutory right of action; the Legislature may place whatever conditions it wishes on rights of its own creation, including a notice requirement." *Bauserman*, 503 Mich at 195 (McCormack, CJ, concurring). But "[t]he Legislature is not the source of the [constitutional] rights, so the fundamental principle that animated our decisions in [earlier cases applying notice requirements] isn't implicated here." *Id*. "[W]e have not held that the same [procedural rules] true of constitutional claims generally . . . [a]nd I'm not sure we should," because "[a] strict-compliance interpretation of the MCL 600.6431(3) notice requirement applied to a [constitutional] claim will

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permit the Legislature to burden or curtail constitutional rights." *Id.* at 195-196. See also *Felder*, 487 US at 151 (state statute's notice rules could not apply to federal action under 42 USC 1983).[35]

Similarly, here, the Court of Claims' application of MCL 600.6431(3) deprived a substantial number of would-be class members of their ability to secure redress for the violation of their constitutional rights. This constitutes an impermissible misapplication of the statute. Moreover, the notice of intent provision and the application of the statute of limitations is subject to the "harsh and unreasonable consequences" doctrine. See *Rusha*, 307 Mich App at 311. *Rusha* observed that enforcement of a limitations period may be excused when the consequences of procedural barriers are so harsh and unreasonable that they effectively divest plaintiffs of the access to the courts. *Id.* The *Rusha* Court then reasoned that doctrine could apply to statutes of limitations and statutory notice requirements. *Id.* at 311-313.[36]

In *Mays*, this Court further agreed with *Rusha's* characterization of the harsh-and-unreasonable-consequences exception, and clarified that "*Rusha* should not be read as advocating for the creation of a judicial saving construction to supplement an otherwise valid statute." *Mays v Snyder*, 323 Mich App 1, 32; 916 NW2d 227 (2018), aff'd 506 Mich 157 (2020). "Rather, it seems that the *Rusha* Court properly recognized the longstanding principle that while the Legislature retains the authority to impose reasonable procedural restrictions on a claimant's pursuit of claims under self-executing constitutional provisions, 'the right guaranteed shall not be curtailed or any undue burden placed thereon.'" *Id.*, quoting *Rusha*, 307 Mich App at 308.

[35] The Court of Claims "conclude[d] that *Felder* is inapposite because plaintiffs' inverse condemnation claim against the state is not brought pursuant to § 1983[, a]nd there are no federal civil rights claims at issue here." Court of Claims December 4, 2020 Opinion, App p 75, at 7. But as discussed above, Plaintiff has pled a federal takings claims.

[36] Such rules are procedural. *Gleason v Mich DOT*, 256 Mich App 1, 2; 662 NW2d 822 (2003).

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Here, allowing the State to retain the value of the destroyed and taken equity is manifestly unjust. At least one federal judge has perceptively characterized Appellant's actions in the keeping of and destroying its citizens' equity "theft." *Wayside Church v Van Buren Co*, 847 F3d 812, 823 (CA 6, 2017) (Kethledge, J, dissenting). For MCL 600.6431(3) to deprive would-be class members of redress for this conduct, and thus eviscerate the Takings Clause as to them, would be "harsh and unreasonable." Accordingly, in accordance with *Hart*, 416 Mich at 503, the class period should encompass all would-be members whose claims accrued within the six years before the complaint.

CONCLUSION

Appellees respectfully request that this Court uphold the Court of Claims' decision to certify the class; rule that the PA 256 claims process is unconstitutional or, in the alternative, that its "exclusive remedy" provision is unconstitutional; reject Appellant's argument that *Rafaeli* should only be applied prospectively; overturn the Court of Claims' decision that the Court of Claims Act limitation period applies and therefore extend the class period back until six years prior to the Complaint; and remand this case for further proceedings consistent with such an opinion.

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STATE OF MICHIGAN
COURT OF CLAIMS

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

Plaintiffs,

v

STATE OF MICHIGAN,

Defendant.

Case No. 19-000023-MZ

Honorable Michael J. Kelly

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DEFENDANT'S 03/12/2021 MOTION FOR RECONSIDERATION OF 02/22/2021 ORDER

Defendant, the State of Michigan through its Department of Treasury, through its counsel, Attorney General Dana Nessel and Assistant Attorneys General Matthew B. Hodges and

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Michael S. Hill, files its motion for reconsideration of this Court's February 22, 2021 Opinion and Order under MCR 2.119(F) and the corresponding Local Rule. Consistent with Local Rule 2.119(A)(2), Treasury requested, but did not obtain, concurrence from opposing counsel.

INTRODUCTION

Defendant seeks reconsideration, in part, of this Court's February 22, 2021 ruling regarding the application of 2020 PA 256 and certifying Plaintiffs' class. Defendant respectfully asserts that the decision represents palpable error in the application of law because the ruling does not apply MCL 211.78l based on its plain language and misapplies the conditional language in MCL 211.78t(1), and correction of the errors will change the outcome of the ruling and ultimately dispose of this case. Defendant also asks for reconsideration or clarification as to Plaintiffs' having met all the requirements under MCR 3.501, and inclusion of sales that post-date July 17, 2020 in its certified class. Defendant thus seeks reconsideration and/or clarification as to the following portions of this Court's ruling:

1. That 2020 PA 256 includes a condition that controls whether the law applies as opposed to whether a claim is currently compensable, and that because the law does not apply this Court may exercise jurisdiction and fashion its own remedies (02/22/2021 Op and Order at 4, passim); and

2. That the requirements under the court rules for certifying Plaintiffs' class were clearly satisfied, and specifically the requirements for commonality, fairness, and superiority, which do not appear to be fully addressed in the February 22, 2021 Order or this Court's December 4, 2020 Opinion and Order decertifying the class; and

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3. That the class includes sales that occurred after July 17, 2020, because PA 256 and its conditional language do not have any impact on those claims as they post-date *Rafaeli*, and no further Michigan Supreme Court determination is required as to those potential claims.

Defendant respectfully seeks reconsideration and clarification on each such ruling and, ultimately, asks that upon reconsideration the Court deny the request to certify a class action, that the Court apply the only possible claim as held in *Rafaeli—one for excess sales proceeds*, and then apply MCL 211.78l, which identifies the only way to make a claim for excess proceeds is found in MCL 211.78t, and then apply MCL 211.78t, which provides the only process to bring such a claim. The law provides a process over which this Court lacks jurisdiction, and which does not allow for class action litigation. And regardless of any conditional language in the new law, that condition does not impact sales occurring after July 17, 2020, because 2020 PA 256 clearly applies, and this Court does not have jurisdiction over the claims.

SUMMARY OF ARGUMENT

In *Rafaeli LLC v Oakland Co*, 505 Mich 429 (2020), the Michigan Supreme Court held that there was a taking requiring just compensation when the *Rafaeli* plaintiffs' property was foreclosed for unpaid taxes and sold at auction, but once the tax debt and related collection expenses and costs had been satisfied, the excess realized from the sale was not returned to the former owners. The only right subject to compensation is for remaining proceeds.

On December 22, 2020, PA 256 was signed into law with immediate effect. That law recognizes and supports the *Rafaeli* Court's decision with specific and comprehensive implementing provisions, and it provides that "an action to recover any proceeds from the sale or transfer of property foreclosed for nonpayment of real property taxes under this act must be brought as provided under section 78t." MCL 211.78l(1).

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Except for the actual *Rafaeli* plaintiffs, all claims for relief premised on the law as set forth in *Rafaeli*—including the claims before this Court—are subject to MCL 211.78l. And because those claims fall exclusively under § 78t, "a claim [for excess sales proceeds] may be made only if the Michigan supreme court orders that its decision in Rafaeli, LLC v Oakland County, docket no. 156849, applies retroactively." MCL 211.78t(1)(b)(i).

Our Supreme Court has held that:

> "It is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers." To determine whether a plaintiff may bring a cause of action for a specific remedy, this Court "must determine whether [the Legislature] intended to create such a cause of action." " 'Where a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only.' " Accordingly, this Court has previously declined to establish a remedy that the Legislature has not provided. [*City of South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 528-29 (2007) (internal citations omitted).]

In short: under *Rafaeli*, a claim for excess sales proceeds is the only right subject to potential recovery, and the law requires that all such claims must be brought under MCL 211.78t. Thus, 2020 PA 256 occupies the entire legal landscape; there is no space or void for this Court to fill in creating or implementing its own remedies. And the Legislature's enactment of a statutory presumption, claims procedures, clarification of the statute of limitations, nor any other statutory requirement changes that outcome.

Defendant agrees that when § 78l sends potential claimants to § 78t, the law does create an *if-then* analysis for claims that arose before July 18, 2020. But in considering that statutory delineation, this Court's analysis appears to start with MCL 211.78t in holding that the *if-then* is as follows: if the Michigan Supreme Court does not first hold that *Rafaeli* is retroactive, then MCL 211.78t simply does not apply. The takeaway being that this Court is left to fashion a remedy and adjudicate excess proceeds claims.

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That is not the *if-then* scenario provided for in 2020 PA 256. Instead, § 78l is the starting point for the analysis and it applies right now, including to all pending claims not subject to a final order. There is no question that MCL 211.78t, then, is the only avenue for the relief Plaintiffs seek. The Legislature's *if-then* scenario is: *if* the Michigan Supreme Court holds that *Rafaeli* is to be applied retroactively *then* potential claims accruing before July 18, 2020 are compensable. The *if* is not what law applies, but whether there is a compensable claim at all. The concept of prospective application of seismic Court decisions, rare as that outcome may be, provides for that very outcome; the underlying event occurred but there is no compensation by law. In that way, prospective application of a court's decision operates like a statute of limitations; the event occurred, we may be able to agree that it meets the criteria for a taking, but it may not be compensable if the claim is not brought within the statutorily required time period.

In short, the Legislature has enacted a law the preserves the Michigan Supreme Court's authority to determine if its *Rafaeli* decision is for prospective or retroactive application. If the Michigan Supreme Court had unequivocally held its decision in *Rafaeli* was for prospective application only, the instant claims would have to be dismissed because no relief could be granted; the events happened, they simply would not be compensable. The Court may so hold.

But even if it is more likely, statistically, that the Michigan Supreme Court rebuts PA 256's presumption by holding that its decision was for retroactive application, then PA 256's claim provisions will still apply, including to these claims. Either way, the law applies.

STANDARD OF REVIEW

Under MCR 2.119(F)(3), a motion for reconsideration should be granted where the moving party demonstrates "a palpable error by which the court and the parties have been misled and show[s] that a different disposition of the motion must result from correction of the error."

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However, that standard does not restrict the discretion of the court to give a party a second chance on a motion. *In re Estate of Moukalled*, 269 Mich App 708, 714 (2006). Instead, the court rule "allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga,* 241 Mich App 655, 659 (2000).

ARGUMENT

I. *Rafaeli* identifies the only claim under these facts: a claim for remaining sales proceeds. MCL 211.78l provides the only method for making such a claim: MCL 211.78t. 2020 PA 256 applies to the instant claims.

In 2019, this Court held that Michigan's tax foreclosure law effectuated a taking under Article 10, Section 2 of Michigan's Constitution when property is foreclosed for unpaid taxes and the prior owner(s) are completely cut off from the property's proceeds from the eventual sale. (08/13/2019 Op and Order at 13-18.) The case was then held in abeyance pending the outcome of a Michigan Supreme Court case addressing the same claims and questions.

That this Court held there was a taking prior to the Michigan Supreme Court's holding in *Rafaeli* does not change the law's requirement. This Court has already determined that, with regard to Plaintiffs' claims for relief that conflicted with *Rafaeli*'s holding, "this Court is bound by *Rafaeli*." (12/04/2020 Op and Order at 15.) The same is true about 2020 PA 256.

Now, the only right subject to a takings claim is the excess sales proceeds, and that is where the analysis starts in this case. In so holding, the Michigan Supreme Court did not set any process, procedure, timeline, or application for its decision. It left those matters to the Legislature, which has spoken.

Through 2020 PA 256, the Legislature created a comprehensive, statewide law and set of procedures to provide clarity and uniformity for all potential claims arising out of the *Rafaeli*

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Court's holding. This Court's holding inferred that the statute does not apply here based on the retroactivity presumption language in MCL 211.78t. That is contrary to the Legislature's intent, and the result will be inconsistency rather than uniformity and confusion rather than clarity.

The singular claim identified in *Rafaeli* falls entirely under MCL 211.78l(1), which provides that the only way to make such a claim is via MCL 211.78t. Under that law, this Court plays no role; this court lacks jurisdiction over these claims. The state's circuit courts, and specifically the court and case in which the foreclosure was effectuated, are the only place where these claims may be made. *Id*.

The Michigan Supreme Court expressly recognized the Legislature's role in setting procedural guidelines—that includes when and how a claim based on the *Rafaeli* right could be made at all. ("Nothing 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." *Rafaeli*, 505 Mich at n 108.) Here, the Legislature set those uniform statewide procedures and began by requiring all claims for excess sales proceeds (the only right available post-foreclosure when notice has been provided) be brought pursuant to MCL 211.78t. See MCL 211.78l(1). The claims provision includes a presumption, not Legislatively mandated outcome but a mandated starting point, that claims accruing before a certain date are not compensable unless the Michigan Supreme Court holds that they are retroactively compensable under 2020 PA 256. MCL 211.78t(1).

While § 78t(2) provides a presumption that potential claims that accrued before July 17, 2020 are not compensable, that is not a matter for this Court to review. The conditional language in PA 256 does not remove these claims from the statute's requirements such that they must find vindication elsewhere; the statute presumes that *Rafaeli* is prospective, as a matter of law, subject

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to rebuttal by the Michigan Supreme Court. Whatever the Michigan Supreme Court decides, right now this Court must apply MCL 211.78l, and thus MCL 211.78t. That is not Defendant's interpretation, that is the plain language of the statute.

Under 2020 PA 256, this Court lacks jurisdiction over these claims; they must be brought in the State's circuit courts. See MCL 211.78t(4), (6). The second result is that claimants are not just former "owners" as argued and currently certified in this case. MCL 211.78t(12)(a). The third result is that individuals must make claims via motion in an existing court action—the one from which the foreclosure arose—and not as a class in an original action. See MCL 211.78t(4).

The law passed with immediate effect and retroactive language and intent, and it applies to all pending cases that are not subject to a final order that resolved all pending claims. In *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394 (2015), the Court held that:

> 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).]

And in *Bank Markazi v Peterson*, 136 S Ct 1310 (2016) the Court similarly held that "Congress may amend a law and make the amended prescription retroactively applicable in pending cases." *Id*. citing *Landgraf v USI Film Products,* 511 US 244, 267–268 (1994). The same is true, here. Only a final court order would shield litigants from PA 256, and only insofar as the new law conflicted with the Court's holding in that final order.

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Only the plaintiffs in the *Rafaeli* case have such a final order, and the remainder of PA 256's requirements would still apply to the *Rafaeli* plaintiffs insofar as it does not violate the Michigan Supreme Court's order in that case. Either way, all other present and potential litigants with claims arising out of a tax foreclosure, but without final orders, are subject to PA 256.

The law's *if-then* reference to *Rafaeli* does not take away or destroy any vested right. The law codified what was already true; Courts have the authority to decide whether decisions should apply retroactively or prospectively. This law merely provides that one specific Court has the authority to overcome the presumption of prospective application: the Michigan Supreme Court. This Court's February 22, 2021 Order held that Defendant had not identified any law prohibiting this Court from deciding how *Rafaeli* should be applied, that it had already made that decision and held it was fully retroactive, and that the Court would not revisit the decision. Defendant asks the Court to reconsider given that the Legislature has directed the standard to be applied here; *Rafaeli* is statutorily presumed to be prospective, and only the Michigan Supreme Court may hold otherwise. If this Court holds as the law requires, Plaintiffs will have the opportunity to appeal that decision; it is not an impossibility but, rather, a probability that the matter is addressed by the Michigan Supreme Court.

Even if this Court were to find that parts of the law did not or could not be applied—that certain notice provisions cannot be met, or some other requirement cannot be satisfied because of timing—the remainder of the law must be upheld and applied. Courts avoid holding a statute unconstitutional if possible, but when it cannot be avoided, courts must sever only those parts of a law that are unconstitutional—preserving the remainder. MCL 8.5; see also *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38* " '[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete

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and operative then such remainder of the ordinance be permitted to stand.' " *Id*. quoting *Eastwood Park Amusement Co v East Detroit Mayor,* 325 Mich 60, 72, 38 NW2d 77 (1949).

And "[i]f necessary, a court must give a statute a narrow construction to render it constitutional if such a construction can be possible without harming the intent of the Legislature." *People v F.P. and News, Inc* 210 Mich App 205, 209 (1995) citing *Thompson v Merritt*, 192 Mich App 412, 424 (1991). There is nothing unconstitutional about giving circuit courts exclusive jurisdiction over all claims arising out of tax foreclosure that relate to alleged takings. There is nothing unconstitutional about setting a statutory presumption that recognizes what the law already provides: that the State's highest Court may decide its decisions apply retroactively or prospectively.

This Court's February 22, 2021 ruling did not properly consider the law's conditional language in context and thus held that the condition controlled whether the law applied at all. Respectfully, that ruling represents palpable error; the law applies to all potential claims under *Rafaeli* as provided in MCL 211.78l. That statute directs *all* such claims must be brought under § 78t, which provides a statutory presumption that certain claims are not compensable, subject to rebuttal by the Michigan Supreme Court. The claims all must be brought in circuit courts, individually, and within the existing cases in which the underlying properties were first foreclosed. Correcting that error of law will change the disposition of the request to certify a class action and, ultimately, deprives this court of jurisdiction over these claims.

II. Including 2020-21 sales with excess proceeds that occurred after July 17, 2020 in the class represents palpable error.

This Court's February 22, 2021 ruling represents palpable error by including claims falling after the date provided in the statute. Irrespective of how this Court treats the July 17,

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2020 delineation and statutory presumption in PA 256 regarding which claims are compensable, sales occurring after that date (as all 2020 sales did and all 2021 and later years' sales will) fall exclusively under PA 256.

This Court's February 22, 2021 ruling includes within the class claims from 2020 sales, all of which happened after July 17, 2020, as well as claims that may accrue in the future while this case is pending, which directly conflicts with PA 256 and which years are not impacted by the prospective presumption in the law. ("All persons and entities who, from January 15, 2018, *through the final order in this matter* . . ." 02/22/2021 Op and Order at 9.) This conflicts with the statute, but it also delays the existing claim rights, and even eliminates others, provided by law.[1]

Further, under PA 255 and PA 256, companion public acts, the Michigan Department of Treasury must prepare and distribute forms to effectuate this process that will be used by every FGU in this state. See, e.g., MCL 211.78g(2); § 78t(2); § 78t(3). But by this Court's ruling, Treasury would not be able to use those same forms when it acts as FGU, and the very preparation and publication of the forms would, undoubtedly, have Plaintiffs claiming some impropriety. Defendant asks that this Court reconsider its decision as to the application of PA 256 and class certification and reverse based on palpable error that, if corrected, would change the outcome of the motion to certify the class and would ultimately dispose of this case.

[1] Theoretically, with appeals, a final Order in this matter will most likely not be entered for another year or longer. Thus, the class as currently defined, will include individuals that could claim excess proceeds under PA 256 long before that. Including those claimants in this case (while rejecting other claimants) would cause undue delay in returning excess proceeds to the rightful claimants and also reduce the amount those claimants would receive because a portion may be subject to class counsel, all of which will eliminate funds for "claimants" in circuit court as defined by the Legislature.

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III. Defendant seeks reconsideration or clarification as to how Plaintiffs satisfied their burden to meet each factor of MCR 3.501.

Defendant also seeks reconsideration and clarification on the requirements of MCR 3.501 not addressed in this Court's February 22, 2021 Order; the Court's December 4, 2020 Opinion and Order de-certifying the prior class noted Defendants' arguments regarding class certification on all of the grounds required by the Court rule. (See 12/04/2020 Op and Order at 14.) But the Court's December ruling turned on numerosity only. (*Id*.) It did not go into detail on any other required factors under MCR 3.501, such as *what* common questions of law or fact Plaintiffs identified that remain open, how Plaintiffs will fairly represent all members (especially given that PA 256 defines claimants to include lienholders), whether the named Plaintiffs' claims are "typical" given the factual differences that vary from property to property, and how a class action would be superior to other methods of resolving claims, again, especially given the claim process set forth in PA 256.

In its February 22, 2021 Order, this Court held that "[a]s for the remaining factors, the Court adopts and incorporates its discussion on pages 6-14 of its June 7, 2019 opinion and order in which it previously discussed these same factors." (02/22/2021 Op and Order at 8.) Defendant respectfully asks that the Court reconsider or clarify how Plaintiffs satisfied those factors given PA 256, which requires a separate claims process and provides for a different universe of potential claimants.

CONCLUSION AND RELIEF REQUESTED

Through MCL 211.78l and then MCL 211.78t, as amended by 2020 PA 256, the Legislature codified the rights set forth in *Rafaeli* leaving only the question of whether claims arising prior to July 17, 2020, are subject to compensation. If those older claims are

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compensable, the law and its claims process apply. If those claims are not compensable, that will be because the Michigan Supreme Court has ruled that the holding in *Rafaeli* is for prospective relief only. Under either condition, the law is equally clear that there is no other path to recovery. And either way, the law is constitutional, applies now, and deprives this Court of jurisdiction over excess proceeds claims. Defendant respectfully asks that this Court reconsider that part of its February 22, 2021 decision that held PA 256 does not apply, and that as a result this Court has jurisdiction over these claims, and that certified a class action and then included sales occurring after July 17, 2020.

Respectfully submitted,

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

LYNETTE HATHON and AMY JO DENKINS and all those similarly situated in the Counties of Keweenaw, Luce, Iosco, Mecosta, Clinton, Shiawassee, Livingston, and Branch, Plaintiffs-Appellees, v STATE OF MICHIGAN, Defendant-Appellant. _____/	Court of Appeals No. Michigan Court of Claims No. 19-000023-MZ

STATE OF MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Defendant-Appellant State of Michigan seeks leave to appeal the lower court's February 22, 2021 opinion and order holding that 2020 PA 256 does not apply to the instant case and claims, asserting jurisdiction over the claims, certifying a class action, and holding that *Rafaeli* applies retroactively. Appellant timely sought reconsideration of that ruling, which the lower court denied on March 19, 2021. (Ex C.) The lower court's opinion and order was not a final order in this case but is consequential not only in this case but for claimants, foreclosing governmental units (FGUs), and trial courts statewide.

This Court has jurisdiction over Appellant's application for leave to appeal under MCL 600.309 addressing appeals to this Court from orders that are not "final orders" appealable by right, and through MCR 7.205(A)(1) because this filing comes within 21 days of the lower court's opinion and order.

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STATEMENT OF QUESTIONS PRESENTED

1. Did the lower court err when it held that 2020 PA 256 does not apply to plaintiffs' claims?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

2. Did the lower court err when it certified a class action?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

3. Did the lower court err when it held that *Rafaeli* applies retroactively?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

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CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

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

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

MCL 211.78t provides, in part:

> (1) A claimant may submit a notice of intention to claim an interest in any applicable remaining proceeds from the transfer or sale of foreclosed property under section 78m, subject to the following:
>
> (a) For foreclosed property transferred or sold under section 78m after July 17, 2020, the notice of intention must be submitted pursuant to subsection (2).
>
> (b) For foreclosed property transferred or sold under section 78m before July 18, 2020, both of the following:
>
> (i) A claim may be made only if the Michigan supreme court orders that its decision in Rafaeli, LLC v Oakland County, docket no. 156849, applies retroactively.
>
> * * *
>
> (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

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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.

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MCR 3.501 provides that:

(A)(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;

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(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.

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INTRODUCTION

This case presents an issue of statewide and immediate importance. Under Michigan law, any surplus proceeds that result from the auction of property foreclosed for unpaid property taxes represents a separate vested property right, distinct from the real property itself, that is subject to a takings claim as set forth in *Rafaeli LLC v Oakland Co*, 505 Mich 429 (2020). While *Rafaeli* held that there is a property right in the excess, it did not decide how, when, where, or by whom a claim could be made. Instead, the Court deferred to the Legislature.

Less than six months after the *Rafaeli* decision was issued, the Legislature passed 2020 PA 256 with curative and clarifying language and immediate effect. Through PA 256, and companion 2020 PA 255, the Legislature declared when, where, how, and by whom a claim for excess sales proceeds may be made. This law occupies the entire space for *Rafaeli*-based claims, and it applies to all pending and future claims for excess sales proceeds—the only right recognized in *Rafaeli*.

The instant action, along with several others filed in various circuit courts, do not comply with Michigan law. Under PA 256, claims may be made up to two years from the date of the circuit court judgment of foreclosure. MCL 211.78*l*. Those claims must be filed by motion in the circuit court action in which the underlying real property was foreclosed. MCL 211.78t(4).

And "claimants" are defined as interest holders as of the date of foreclosure. MCL 211.78t(12). The law provides that foreclosure sales that happened before July 18, 2020 (and that resulted in excess proceeds) are not compensable unless the Michigan Supreme Court first holds that *Rafaeli* applies retroactively; the law sets

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a statutory presumption that *Rafaeli*-based claims are not compensable unless the Michigan Supreme Court first holds to the contrary.

PA 256 was passed with retroactive language and intent and immediate effect; the law applies, right now, to all pending claims arising from tax foreclosure, including the claims made in this case. Under PA 256, the Court of Claims lacks jurisdiction, this case cannot be maintained as an original action, nor as a class action, and even if it could be so maintained, the class must include lienholder claimants, which would create irreconcilable conflicts between class members. Instead, these claims must be brought as motions filed by individual claimants in the circuit court which entered the relevant judgment of foreclosure.

The lower court ruled that the law does not apply to these claims, asserted jurisdiction, and certified a class that excludes lienholders but includes proceeds from properties that were foreclosed and sold before *and after* July 17, 2020. That ruling is contrary to law and should be reversed.

This appeal is not an attempt to avoid liability or delay resolution of valid claims. To the contrary, Appellant seeks an expeditious resolution to these important threshold legal questions so that litigants and courts, statewide, may begin implementing the *Rafaeli* Court's holding consistent with PA 256. In fact, Appellant intends to seek bypass application review by the Michigan Supreme Court, given the language in MCL 211.78t(2).

This same argument is playing out across the State; there are putative or certified class actions just like this one pending in local circuit courts involving

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nearly every county (as FGU) in the State. While circuit courts have jurisdiction to hear these claims under PA 256, the claims cannot be brought as original actions or class actions, and no sales from before July 18, 2020 are compensable until the Michigan Supreme Court declares they are subject to *Rafaeli*-based relief.

Appellant also seeks to avoid the potential for delay to rightful claimants that should be able to seek relief in their local circuit courts by filing a simple motion. Finally, Appellant hopes to avoid needlessly expending time and resources on an impermissible class action filed in a court that lacks jurisdiction for claims that by law cannot proceed as an original action, some of which are not currently compensable under the law. A published decision would provide clarity in this case, but also for claimants, FGUs, and courts statewide faced with the same questions.

Appellant asks that this Court grant its application for leave to appeal and reverse, holding that *Rafaeli* is not fully retroactive, that 2020 PA 256 applies to all claims regardless of how *Rafaeli* is applied, that the Court of Claims lacks jurisdiction and must dismiss this case so that claimants may make proper claims in the appropriate circuit court actions, and that regardless of which court or action it is adjudicated in, this matter is not appropriate for class action resolution.

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STATEMENT OF FACTS AND PROCEEDINGS

1999 PA 123 changed how property taxes are collected in Michigan.

Michigan's property tax collection laws were significantly rewritten by 1999 PA 123; the law repealed the existing notice, hearing, and lien sale procedures and created an entirely new process whereby properties, not liens, were foreclosed and sold to collect unpaid tax and tax collection debts. See Smith, *Foreclosure of Real Property Tax Liens Under Michigan's New Foreclosure Process*, 29 Mich Real Prop Rev 51, 51 (2002).

Because the tax collection laws operate on a multi-year lag (taxes are delinquent, then forfeited, then foreclosed after one, two, and three years respectively), there was a transition period before PA 123 became fully effective. The predecessor statute and process were not fully repealed until December 31, 2003. See Enacting Section 4, PA 123. Under the 1999 law, the circuit court's judgment for foreclosure cut off all right, title, and interest in the property and, so long as due process was satisfied, there was no claim to the property or its proceeds from subsequent sale. In essence, after notice, it acted like a strict foreclosure.

Proceeds from sales under the 1999 law were distributed to a specific fund to compensate for unpaid taxes, costs associated with foreclosure and foreclosed properties, and then if there was any excess, for transfer to a county general fund or, if the State was the FGU, to the land reutilization fund created by statute. That meant that if a few properties sold for more than the tax debt, those proceeds were

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

The subject property was foreclosed and sold under PA 123 in 2018 for unpaid 2015 (and subsequent years') property taxes.

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

Plaintiffs did not redeem, and title vested in the State of Michigan, which later sold the Property at public auction for $28,250.00. (Ex D, Compl Ex C.) Plaintiffs do not dispute notice; this foreclosure was the result of a statutory tax collection process that was preceded by due process. So, under MCL 211.78m(8), the sales proceeds first reimbursed the county treasurer for the $5,200 tax debt for the parcel (funds it had prepaid to the local tax collecting units so they could maintain operations) and any other associated collection costs for the property; next, any remainder was used to cover shortfalls for other properties in Shiawassee County that foreclosed that year but did not sell for enough to cover their debt; then

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any remainder was used to cover shortfalls in other counties where Treasury was FGU that year, then any remainder was deposited in the land reutilization fund under MCL 211.78m.

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

On January 9, 2019, Plaintiffs filed a notice of intent in the Michigan Court of Claims asserting an unconstitutional taking, excessive fine, and other claims. (Ex E.) No other litigants besides Hathon and Denkins were identified, signed, or filed a notice of intent.

On January 26, 2019, Hathon and Denkins filed a putative class action seeking relief based on tax foreclosures in the counties wherein the State of Michigan was at one time the FGU, but without specifying the alleged years at issue.[1] On June 7, 2019, the Court of Claims certified a class, defined as:

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

The parties briefed the threshold legal question that was then unresolved: is there a valid claim for an unconstitutional taking under this taxing statute when adequate notice is provided prior to foreclosure? The Court of Claims held that

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

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Plaintiffs' taking theory was viable. (Ex G, August 13, 2019 Op and Order.) At Appellant's request, the Court of Claims held the case in abeyance pending the Michigan Supreme Court's action in *Rafaeli*; at that time, the *Rafaeli* application had been granted but neither the briefing nor the argument were complete.

The Michigan Supreme Court holds that surplus sales proceeds are a property right subject to a takings claim.

On July 17, 2020, seventeen years after 1999 PA 123 became fully effective, the Michigan Supreme Court held:

> To the extent the GPTA permits defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties. [*Rafaeli*, 505 Mich at 474–475.]

The Court further held that:

> [A] former property owner only has a right to collect the surplus proceeds from the tax-foreclosure sale; that is, a former property owner has a compensable takings claim if and only if the tax-foreclosure sale produces a surplus. [*Id*. at 477.]

The Court rejected the argument that "just compensation requires that plaintiffs be awarded the fair market value of their properties," because "the property improperly taken was the surplus proceeds, not plaintiffs' real properties." *Id*. at 483. Nor would that relief be appropriate since the former property owners are "largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full." *Id*. Thus, "[i]f plaintiffs were entitled to collect more

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than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency." *Id.*

The Court also held that "[n]othing in this opinion impedes defendants' right to hold citizens accountable for failing to pay property taxes by taking citizens' properties in satisfaction of their tax debts." *Id.* at 479–480. It further held that "[n]othing in our holding today prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id.* at 473 n 108.

The *Rafaeli* decision changed long-settled expectations after nearly two decades of tax collection practices and court decisions under PA 123. The decision was based on the Court's recognition of a state common-law right in excess proceeds, which was incorporated in the State's constitutional takings provision. Prior to the Court's decision taxpayers, municipal treasurers, county treasurers, the State Treasurer, and courts throughout the State had operated under the statute's plain language and a line of cases like the U.S. Supreme Court's *Nelson*[2] decision, believing PA 123 was constitutional so long as due process was satisfied.

On December 22, 2020, PA 256 is signed into law with immediate effect.

Within six months of the Michigan Supreme Court's decision in *Rafaeli*, the Legislature passed PA 255 and PA 256, with immediate effect, which were signed

[2] *Nelson v City of New York*, 352 US 103 (1956).

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into law four days later on December 22, 2020. PA 256 clarifies the statute of limitations (MCL 211.78*l*), defines "claimants" (MCL 211.78t(12)), and provides how and where a claim may be made (MCL 211.78t(4), (6)).

The Court of Claims holds that PA 256 does not apply and certifies a class.

On February 22, 2021, the lower court held that PA 256 does not apply. (Ex B.) As a result, the lower court held that it had jurisdiction to hear these claims, certified a class of claimants that excluded lienholders and included sales from 2018 forward. That class is described as:

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

Appellant sought reconsideration of that decision on March 12, 2021, which the lower court denied on March 19, 2021. This application for leave to appeal follows from the lower court's March 19, 2021 ruling.

STANDARD OF REVIEW

Michigan appellate courts review a lower court's decision involving jurisdiction and statutory interpretation de novo. *Reynolds v Robert Hasbany MD PLLC*, 323 Mich App 426, 431 (2018). This Court also reviews a lower court's

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decision applying the court rules applicable in class actions and class certification decisions de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495 (2009).

ISSUE PRESERVATION

Appellant argued application of *Rafaeli*, PA 256, and rules and law applicable in class action and class certification in the lower court.

ARGUMENT

I. These claims are defined by *Rafaeli* and are subject to 2020 PA 256.

The only claim arising out of a tax foreclosure, when there is notice sufficient to satisfy due process, is in the one described in *Rafaeli*: a claim for excess sales proceeds. Foreclosing properties for unpaid taxes was and remains a valid and lawful tax collection method under statute and under *Rafaeli*; that process does not effectuate a taking as it relates to the real property that is foreclosed. Any surplus sales proceeds, if they exist, are a separate property right.

All claims for sales proceeds must be brought within the time frame provided by MCL 211.78*l* and may only be brought consistent with the procedures provided in MCL 211.78t. Section 78t gives exclusive jurisdiction to the State's circuit courts and provides that each individual claimant must file a motion in the existing circuit court foreclosure case to secure that claimant's share of excess proceeds. The law further provides that claims arising from foreclosures and sales that happened before July 18, 2020, are not compensable unless the Michigan Supreme Court first holds that *Rafaeli* provides retroactive relief. MCL 211.78t(2).

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A. *Rafaeli* defines the only claim and relief available here.

Claims arising out of a tax foreclosure are limited. Michigan law used to provide a cause of action for interest holders (e.g., owners, lienholders) that claimed they did not receive constitutionally adequate notice prior to the foreclosure, which claim could seek money damages or ask the circuit court to set aside the foreclosure to retain ownership of the specific property. See *2 Crooked Creek, LLC v Cass Cty Treasurer*, __ Mich __; 2021 WL 974012 (2021) (attached as Ex H). Now, under *Rafaeli* and through PA 256, there is a claim for excess sales proceeds after a property is otherwise properly foreclosed and sold or transferred, if the amount realized via that sale or transfer exceeds the tax and related collection costs.

Tax foreclosure remains a valid tax collection method. *Rafaeli*, 505 Mich at 479–480. And the real property itself is *not* the subject or the measure of a taking. *Id*. at 483. In fact, "a former property owner has a compensable takings claim if and only if the tax-foreclosure sale produces a surplus." *Id*. at 477. Property tax delinquency is not a crime, nor is the tax foreclosure law criminal or punitive in nature or intent. *Id*. at 449. Thus, the "surplus" is the only property right subject to a taking claim and is also the measure of damages, "no more, no less." *Id*. at 484.

B. The lower court erred in holding that PA 256 does not apply to pending cases, including this case.

Unlike the *Rafaeli* plaintiffs, this case is not subject to a final order. Because this case was still pending when 2020 PA 256 was passed with clarifying, curative, and retroactive language and intent, and with immediate effect, the law applies to

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this case and all like claims, potential or pending, statewide. The lower court erred when it held that PA 256 does not apply.

1. The lower court erred when it did not start with *Rafaeli* and then apply MCL 211.78*l* and then MCL 211.78t.

In *Rafaeli*, the Michigan Supreme Court held that the only claim arising out of these facts is one for excess sale proceeds, "no more, no less." *Rafaeli*, 505 Mich at 484. The Court did not address how, when, or where such a claim should be made, instead holding that "[n]othing in our holding today prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id*. at 473, n 108. All such claims are subject to MCL 211.78*l* and may only be brought within two years of the judgment of foreclosure.

Under that same provision, a claim may only be brought under MCL 211.78t. ("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*.) Within § 78t(2), the Legislature provided that:

> 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).

The lower court held that this language in § 78t(2) created a "condition" that had to be satisfied before the law became effective. (Ex B, p 4.) It then held that

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because the law-triggering condition had not occurred yet—because the Michigan Supreme Court had not addressed retroactive application of *Rafaeli* yet—the condition was not satisfied and, thus, the law did not apply to this case or these claims. (*Id.*) Respectfully, that reading, and application of the law is wrong.

2. Laws passed with retroactive intent apply to pending cases. This law applies, now, to all claims including those made in this case.

Within six months of the Court's *Rafaeli* decision, the Legislature passed PA 256 with immediate effect. The law sets the only procedure by which the instant claims may be made, and to the extent it was not merely procedural, it included retroactive language and intent. It was signed into law within days, and it applies to all pending cases that are not subject to a final order.

Both state and federal courts recognize that laws passed during the pendency of a dispute, when that dispute is not subject to a final order, apply so long as the statute is intended for retroactive application. See, e.g., *Bank Markazi v Peterson*, 136 S Ct 1310, 1325 (2016), reaffirming that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." *Id.* citing *Landgraf v USI Film Products,* 511 US 244, 267–268 (1994), and *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226 (1995); see also *Cichecki v City of Hamtramck, Police Dept*, 382 Mich 428, 436 (1969), holding that:

> The statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then

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> pending . . . . No vested right can exist to keep statutory procedural law unchanged the free from amendment. [*Id*. quoting *Hansen-Snyder Company v General Motors Corporation*, 371 Mich 480, 485 (1963).]

The same is true here. Only a final court order would shield litigants from the requirements of PA 256, and even then, only insofar as the new law conflicted with the Court's holding in that final order (i.e., as it relates to the actual *Rafaeli* plaintiffs). PA 256 sets the procedural requirements for all claims, and the conditional language in § 78t(2) cited by the lower court and applicable to foreclosures before July 18, 2020, is akin to a statute of limitations *controlled by the Michigan Supreme Court*; the law does not eliminate any vested right but leaves application of *Rafaeli*-based relief to that Court. In the meantime, the Legislature crafted a single, uniform claims process that, for some foreclosures, is triggered only if retroactive relief is held to be available. Absent that trigger, the law still applies, it simply provides that there is no relief.

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

> 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*

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case was something other than what the courts said it was. [*Id.*, quoting *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226–227 (1995).]

PA 256 applies to all claims, both pending and future. The "conditional" language in § 78t(2) addresses whether potential claims are compensable, not whether the law applies at all. The provision, in application, operates as a presumption that sales occurring before a certain date are not compensable (which is the same result as if the Michigan Supreme Court had held that *Rafaeli* is for prospective relief only). The law also set, or in some instances clarified, a uniform, statewide procedure for the very claims at issue in this case, and cases just like it that are pending throughout the State. All potential claims must be brought under § 78t, and some simply may not be brought until the Michigan Supreme Court holds that its decision triggers a right to compensation under the new rule in *Rafaeli*.

Nor does the law operate as some sleight of hand or create a statutory impossibility for potential claimants; the statutory presumption does not conclusively preclude older claims which, like this case proves, are subject to Supreme Court review. *This case is a valid vehicle to take these important questions to the Michigan Supreme Court*. Depending on the result of such review, claims that accrued prior to July 18, 2020 may begin the claims process "by the March 31 at least 180 days after any qualified order." MCL 211.78t(6).

In short: MCL 211.78t applies to all cases like this arising from a tax foreclosure (except due process claims seeking a return of the actual real property), and it provides that claims from before July 18, 2020 (the date of the *Rafaeli* decision) are not compensable unless the Michigan Supreme Court first holds that

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its decision was intended for retroactive relief. MCL 211.78t(2). Like any analysis regarding prospective or retroactive application of a court's decision, the motivation for the argument is whether a litigant will be allowed to recover under the new legal rule set forth in the controlling court decision.

Here, the Legislature effectively set a statutory presumption that *Rafaeli*-based relief is only available prospectively, a right the Michigan Supreme Court always had. Courts have held that a statutory "conclusive presumption" may "actually [operate as] a substantive rule of law." *Kidd v General Motors*, 414 Mich 578, 587–588 (1982). Here, the presumption operates like a statute of limitations as no claim may be made before a certain date, notwithstanding the fact that the underlying events that would give rise to such a claim (e.g., the foreclosure and sales producing surplus proceeds) concededly occurred. Here, the limitation is tied to the Judiciary's inherent authority to announce that a new rule of law set forth in a court's decision is for prospective application, only.[3] When "a [state] court refused to make a ruling retroactive," and a "novel stand is taken [in federal court] that the Constitution of the United States is infringed by such refusal," the U.S. Supreme Court has held that "the Federal Constitution has no voice upon the subject." *Great Northern Ry Co v Sunburst Oil & Refining Co,* 287 U.S. 358, 364 (1932).

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

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That is because a "state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Id.* "It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed, there are cases intimating, too broadly . . . that it must give them [retroactive] effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted." *Id.* This is true whether the "subject of the new decision is common law . . . or statute." *Id.* at 365.

PA 256 merely codifies the judicial branch's inherent authority through a clear presumption, rebuttable only by the Michigan Supreme Court, that *Rafaeli* only provides prospective relief. "It is axiomatic that when the language of an act clearly enunciates a standard and a definition which coincidentally also comport with the spirit and purpose of the act, it is repugnant to attempt to judicially read into the act other requirements or conditions that operate to defeat or limit its aim." *Kidd*, 441 Mich at 588. Here, since the Michigan Supreme Court is the only Court that may rebut the presumption, respectfully, the lower courts must apply the law as written.

But the Legislature did not wholly eliminate relief via PA 256; the presumption is rebuttable, and potential claimants are not without recourse. Either way the Court decides how *Rafaeli* applies for purposes of defining which claims are compensable, PA 256 unquestionably applies to all potential claims arising out of tax foreclosure and the Court of Claims lacks jurisdiction.

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That is because if the Michigan Supreme Court holds that *Rafaeli* is, indeed, only for prospective application, then no compensable claims ever existed even before PA 256 became law. All claims accruing after July 17, 2020 post-date the Court's *Rafaeli* decision and fall squarely under the law without condition.

And finally, if the Michigan Supreme Court holds that *Rafaeli* is for retroactive application, rebutting the statutory presumption against recovery for older foreclosures, then the statutory claims process still applies to those older foreclosures and sales. In that contingency, PA 256 still provides the only method of making a claim under these facts and this tax collection law. MCL 211.78*l*.

There is no doubt that PA 256 is intended for retroactive application based on its plain language limiting all claims for excess proceeds (the only vested right recognized under *Rafaeli*) to two years, at most. MCL 211.78*l*(1). That same provision provides that the *only* way to make a claim for excess proceeds is via MCL 211.78t. *Id*. Once directed to § 78t(2), the law separates claims that accrued before and after a certain date, July 17, 2020; those accruing after are compensable under the claims process in the law and those occurring before July 18, 2020, are presumed to not be compensable (i.e., *Rafaeli* did not provide relief to that class of claimants) unless the Michigan Supreme Court holds to the contrary. MCL 211.78t(2). Legislative intent is further evidenced by the fact that PA 256 explicitly referenced the *Rafaeli* decision by name and date, creating different presumptions for compensation before and after. *Id*.

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And, if there were any doubt about the Legislature's intent, the enacting sections call the law "curative" and express intention to "codify and give full effect to the right of a former holder of a legal interest in property . . . resulting from the foreclosure and sale of the property to satisfy delinquent real property taxes." 2020 PA 256, Enacting § 3. The law was intended to codify rights "as recognized in *Rafaeli, LLC v Oakland County*," but to do so "consistent with the legislative findings and intent under section 78 of the general property tax act, 1893 PA 206, MCL 211.78." *Id*. The law set the procedures for claims going forward and set a nearly identical framework for older claims *but* set a statutory presumption that those older claims are not compensable. There is both express and contextual evidence of retroactive legislative intent. See *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014).

What PA 256 does *not* provide is that, until the Michigan Supreme Court addresses prospective vs retroactive application of its *Rafaeli* decision, PA 256 does not apply at all. Indeed, a law passed with immediate effect and retroactive dates, references, and clarifying language but having no application to any pending case is neither logical nor viable under any standard of statutory construction, separation of powers, or caselaw.

But that is what the Court of Claims held: the law is null and void as to pre-July 17, 2020 foreclosure sales until the Michigan Supreme Court determines if *Rafaeli* is retroactive. MCL 211.78t does not set a condition precedent to the law's application, it is a condition precedent to having a compensable claim at all.

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II. The lower court erred when it asserted jurisdiction over these claims and certified a class.

The lower court asserted jurisdiction over these claims, despite PA 256, and then certified a class action. Both decisions are erroneous. First, as argued above, PA 256 controls and deprives the lower court of jurisdiction, does not allow for original actions, and dose not comport with class action resolution.

Second, even if the law does not apply, this matter does not satisfy the class action court rules or caselaw. Here, there are concerns with nearly every requirement under the controlling court rule, MCR 3.501.

Finally, even if a class action were appropriate here, the current class definition is both underinclusive and overinclusive. The class definition purposefully excludes lawful "claimants" under PA 256, MCL 211.78t(12) (liens, lienors, and lienholders as referenced in *Rafaeli*). But correcting that error by bringing those claimants into the case only makes class resolution less viable because of competing adversarial claims.

At the same time, the current class includes 2020 and potentially 2021 sales, years that post-date the "conditional" language in PA 256. Without question, those claims must be brought in the circuit court; nothing about those claims turns on the "conditional" language in the law and may only be adjudicated in circuit courts by motions filed by individual claimants and within existing circuit court cases, as provided in MCL 211.78t(1).

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A. The lower court erred in certifying a class.

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

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

Here, Plaintiffs failed to satisfy these requirements, and the lower court erred in certifying a class action, and further erred in defining a class that is underinclusive (omitting lienholders) and overinclusive (including 2020 and potentially 2021 sales). At the most basic level, because PA 256 controls, the lower court erred in allowing an original action to proceed in the Court of Claims rather

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than in circuits court, and further erred by certifying a class when the law requires individual claimants to file a motion within the circuit court action wherein the property was foreclosed. MCL 211.78t.

1. Plaintiffs did not and cannot satisfy the court rule for class certification. The current class excludes lawful claimants while including tax years that unquestionably fall under PA 256.

Even if the Court of Claims has jurisdiction to hear these claims, it erred when it certified a class because Plaintiffs fail to satisfy the requirements of MCR 3.501. First, there are no common issues of fact or law left to adjudicate; *Rafaeli* decided the only common legal question, and what remains are individualized inquiries specific to each foreclosed property, the proceeds from that property's sale, and priority as amongst any claimants to those specific proceeds.

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

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

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

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

By way of example, each parcel subject to tax foreclosure may have three, four, or more interest holders entitled to notice because they have a record interest in the property. See MCL 211.78i(1). When a tax-foreclosed property later sells for more than the aggregate debt, each of those noticed parties is a likely claimant for

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the finite funds arising from that sold parcel. MCL 211.78t(12). Those claimants are all vying for the same finite funds, based on priority or other legal claims.

Those adverse claimants cannot all be represented by the same legal counsel. And once a court adjudicates how the funds from one sold parcel should be distributed as amongst all claimants, that decision will have no bearing on the remaining parcels' claims. MCR 3.501(A)(1)(b) "prescribes that, to certify a class action, there must be common questions of law or fact that predominate over individual questions." *A&M*, 252 Mich App at 582.

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

Here, there is no common question of law after *Rafaeli*, and there can be no common proof because each sum of money from each sold parcel will turn on the each claimant's competing property interests in the sold parcel; deeds, liens, contracts, and other claims of an interest in the property will be considered property by property, claim by claim. MCL 211.78t(9). Here, there is no economic advantage to litigating via class action. "The superiority and commonality requirements are related because 'if individual questions of fact predominate over common questions,

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the case will be unmanageable as a class action.' " *Duskin v Dep't of Human Services*, 304 Mich App 645, 658 (2014) quoting *Zine v Chrysler Corp*, 236 Mich App 261, 289 n 14 (1999). In this instance a class action is disadvantageous and far inferior to the process provided by PA 256.

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

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

Plaintiffs have not (and frankly cannot) show that their specific ownership interests vis-à-vis competing lienholders' claims are typical of the class, or that any

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set of claims for any parcel could by "typical" of any other set of facts and claims for another parcel such that class resolution improves judicial economy. Each parcel's proceeds and related claimants is a standalone dispute turning on unique facts.

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

Relatedly, there is no common question or law or fact remaining in this case. While "almost any set of claims can be said to display commonality," an element Appellant disputes can even be satisfied, here, courts have cautioned that " 'it is not every common question that will suffice.' " *Tinman*, 264 Mich App at 563 quoting *Sprague*, 133 F3d at 397. *Rafaeli* resolved the common legal questions, leaving only highly factual, individualized claims to finite proceeds. There are thus issues with commonality, typicality, superiority, and Appellant believes propriety given exclusion of some claimants and conflicting interests once they are included.

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Finally, the lower court included 2020 and potentially subsequent years' sales in the class. (Ex B, p 9.) Even if the lower court is correct that PA 256 does not apply because of its interpretation of the unmet "condition" in § 78t(2), that condition has no relevance to sales occurring after July 17, 2020. Those sales and any related claims for proceeds, without question, must be brought in the State's circuit courts under the requirements of MCL 211.78t(2) and § 78t(4).

Illustrative of how the lower court's ruling conflicts with the law, Treasury is the FGU in six counties but is also the body that must create statewide forms to comply with the new law. See MCL 211.78t(2), (3), (6). In that role and under that statutory mandate, Treasury has created or updated various notices explaining the claims process under MCL 211.78t. Each FGU must use those uniform notices.

Yet, acting as FGU, Treasury cannot send those forms to potential claimants like the law now requires because the Court of Claims has asserted jurisdiction over those claims. That is because the notices, consistent with the law, inform claimants of the notice of intent and motion that must be filed in the circuit court action. For 2020 (and soon 2021 sales) Treasury cannot comply with existing state law without running afoul of the lower court's order declaring that it, not the circuit courts, has jurisdiction over these claims. And as time passes, Treasury cannot provide potential claimants the notice they need to begin the claims process—lost time that cannot be undone and may result in claimants missing deadlines and being barred from making a timely claim.

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2. The lower court erred in certifying a class action because PA 256 controls. It provides for individualized claims filed by claimants as motions in existing circuit court actions.

Under 2020 PA 256, claims for excess proceeds must be brought in the State's circuit courts, not in the Court of Claims. MCL 211.78t(4), (6). And, because they must be filed within the existing circuit court foreclosure case in which the property was foreclosed, these claims do not run afoul of the Court of Claims Act. As the "petitioner" in the underlying foreclosure action, the State Treasurer acting as FGU is the moving party on behalf of the county's funds under MCL 211.78h. The Legislature has granted exclusive jurisdiction to hear the claims arising out of that foreclosure action to that same circuit court, within the same case. *Id.*

This case was filed as an original action, as a putative class action, and in the Michigan Court of Claims. None of that is allowed under 2020 PA 256.

III. The lower court erred in holding that *Rafaeli* applies retroactively.

The lower court held that *Rafaeli* applies retroactively, or in the alternative, that it had already addressed that question of law in a prior ruling (before PA 256 became law) and did not need to revisit that ruling. (Ex B, pp 4–5.)

However, PA 256 provides a statutory presumption, applicable in this case and all potential claims not subject to a final court order, that *Rafaeli* is *not* for retroactive application for purposes of monetary recovery. MCL 211.78t(2). ("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

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retroactively.") The conditional language does not negate the entire statute, leaving the Court of Claims to fashion its own remedies. Rather, the statute applies to all potential and existing claims (even the *Rafaeli* claimants to the extent the law does not conflict with the *Rafaeli* Court's decision) and the conditional language determines whether claim prior to July 18, 2020, are compensable at all.

Only the Michigan Supreme Court may rebut that statutory presumption. *Id.* The lower court, and all courts except the Michigan Supreme Court, are bound to apply the law, and the lower court's holding should be reversed. If claims accruing prior to July 17, 2020 are compensable, it will be because the Michigan Supreme Court holds that its decision in *Rafaeli* is for retroactive application.

Because Appellant believes that the law controls the lower court's decision on this question, the merits of the retroactivity argument are not fully argued here; respectfully, the statute controls this court's decision on the question, too. However, should the court grant this application and the Michigan Supreme Court does not grant bypass application on the issue, Appellant is prepared to brief the merits of prospective application if this Court so directs.

Appellant filed this application for interlocutory review and intends to file a bypass application to the Michigan Supreme Court, to expedite these important threshold legal questions of statewide importance. The language in MCL 211.78t(2) does not create an impossible condition or a catch-22 for claimants; it creates a rebuttable presumption that the Michigan Supreme Court can resolve and that Appellant hopes to have resolved in this case.

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CONCLUSION AND RELIEF REQUESTED

Appellant asks that this Court grant its application for leave to appeal and hold that PA 256 applies to these and all pending or future claims; that the court of claims lacks jurisdiction and must dismiss; that class resolution is not appropriate here; and that even if it were, the class is currently underinclusive by omitting lienholder claimants and overinclusive by including 2020 and later sales; and that, should it reach the issue, *Rafaeli* is appropriate for prospective application only.

Respectfully submitted,

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Dated: April 9, 2021

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellees-Cross-Appellants,

v

STATE OF MICHIGAN,

Defendant-Appellant-Cross-Appellee.
_____/

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.

APPELLANT STATE OF MICHIGAN'S COMBINED REPLY BRIEF AND REPONSE TO APPELLANTS' CROSS APPEAL

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INTRODUCTION

This case is about the only right that exists after a valid tax foreclosure, which the Michigan Supreme Court has identified as the "proceeds from the tax-foreclosure sale in excess of the [statutory tax and collection fees]—no more, no less." *Rafaeli LLC v Oakland County*, 505 Mich 429, 483–484 (2020).

In response to *Rafaeli*, the Legislature enacted PA 256, providing in part that "[a]n action to recover any proceeds from the sale . . . of [tax-foreclosed] property. . . must be brought as provided under section 78t." MCL 211.78*l*(1). And in § 78t, the Legislature restated that that 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(12).

That claim-making process in § 78t applies to tax-foreclosed properties "transferred or sold under section 78m after July 17, 2020," MCL 211.78t(1)(a), and to tax-foreclosed properties "transferred or sold under section 78m before July 18, 2020," MCL 211.78t(1)(b).

The new law is the entire ball game. It is remedial, curative, and procedural and thus presumed to apply retroactively; and the Legislature intended the law be applied retroactively. The law codified *Rafaeli*'s holding and thus cured a shortcoming in the prior law. If *Rafaeli* applies retroactively, § 78t provides the procedures to affect any remedy. If *Rafaeli* is not retroactive, (which it should not be so applied) then § 78t divests no right. In restating the two-year claim period and providing a remedy for the only right available, the law is constitutional.

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APPELLATE UPDATE AND SUMMARY OF ARGUMENT

This is the only known state-court action with a certified class involving multiple counties' property owners and which includes claims from tax-foreclosed property sales that occurred after July 18, 2020. It is also believed to be the first appellate case to directly address the constitutionality of 2020 PA 256.

But this is not the only case before this Court involving Michigan's tax foreclosure laws—past and present versions—after the Michigan Supreme Court's *Rafaeli* decision. Just after plaintiffs filed their combined response-cross appeal brief, this Court issued its decision in *Proctor v Saginaw County Board of Commissioners*, __ Mich App __; 2022 WL 67248 (2022), a case with a few similarities and a few key differences from this case. (Slip Copy, Ex. 1.) *Proctor* involved several counties that acted as their own foreclosing governmental units and former property owners challenging those counties' actions. Like this case, the *Proctor* plaintiffs also made claims for the "value" or "equity" using causes of action other than MCL 211.78t.

Proctor rejected some of the theories plaintiffs raise here. Of note, *Proctor* held that the prior statute's unconstitutionality was not clearly established prior to *Rafaeli*; that plaintiffs' "value" and/or "equity" theory was contrary to law; that plaintiffs' excessive fine claims were without merit; and that the trial court's order denying class certification was correct. It held that unnamed, putative class members should use the process the Legislature intended – § 78t.

Proctor also held that the *named* plaintiffs (not any putative class members) had alleged viable inverse-condemnation and unjust enrichment claims and

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remanded along with plaintiffs' interest claim. *Proctor* held that *Rafaeli* applies retroactively, and that Public Act 256 does not apply retroactively to claimants with pending cases since the Legislature did not express retroactive intent. So, while the relief first outlined in *Rafaeli* (remaining proceeds) was retroactively available, some claimants had to pursue their claims under the new law while others could proceed in their pending litigation under different causes of action.

On that last point the decision is internally conflicting. This Court held that the Legislature did not press retroactive intent in PA 256 (i.e., application to older sales) but later in its decision held that unnamed class members (including those claimants from properties sold prior to *Rafaeli*) must use PA 256 to claim proceeds. *Proctor* did not declare the statute or any of its parts unconstitutional.

Defendant's Renewed Request to this Court

While Defendant agrees with in part, respectfully, the decision is internally inconsistent and conflicts with the plain language of the statute. First, Public Act 256 is not only *an option* for claims like this (selectively retroactive); rather, it is entirely retroactive and is *the only* way to claim *Rafaeli*-based proceeds. That intent is clear in the statute, its operation, and its declaration that "this section is the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state."

Second, the *Rafaeli* decision does represent a new and unexpected ruling that overturned the statute and overturned an entire body of case law; there was not a single state appellate court decision under this law to the contrary before *Rafaeli*.

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The *Proctor* Court relied almost exclusively on the Michigan Supreme Court's decision in *County of Wayne v Hathcock*, 471 Mich 445 (2004), and the *Hathcock* Court's retroactive application of its decision, to hold that *Rafaeli* is also retroactive. But unlike *Hathcock*'s limited reach, *Rafaeli's* new rule would invalidate actions taken by *every* county in this state, *every* single year. Not all municipalities used condemnation, annually, for private development—the issue decided in *Hathcock*. Those differences matter in this analysis. And *Hathcock* addressed the Legislature redefining *explicit* constitutional language—"public use"—whereas *Rafaeli* relied on decisions spread apart by decades arising under various legal theories and under a series of different laws. *Rafaeli* analyzed these various sources to arrive at an "inherent" or "implied" right to proceeds. *Hathcock* considered two words found in the Constitution, "public use," and in the context of eminent domain law.

Finally, *Proctor* either did not involve or did not address other important questions. That is: Whether a class action is viable and appropriate in this context at all. Why *Gillette Co v Department of Treasury*, 198 Mich App 303 (2015), which instructs that laws like PA 256 apply to pending actions, was not considered or applied. And apart from when the law applies if PA 256 is constitutional at all.

These and other questions remain matters of statewide importance. Even if this Court is bound by *Proctor* on some points of law, the questions are important enough that a full and fresh review is still needed. And if this Court disagrees with *Proctor* on these important questions, then it should convene a conflict panel to resolve the dispute.

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ARGUMENT

I. Public Act 256 must be applied to all claims for proceeds.

Through PA 256, the Legislature remedied an error and codified a uniform statewide claim-making procedure. *Rafaeli* made it clear that there is only one property right or claim in this context. This law is the exclusive method to raise that claim. The law is remedial, curative, procedural, and shows legislative intent that it applies retroactively *as the sole* method to claim *Rafaeli*-based proceeds.

Plaintiffs argue that the law should not apply because:

- It is an "illusory" remedy for sales under § 78t(1)(b) (Appellees' Br at 6–7);
- It is unconstitutional because it divests the right to use a specific cause of action (Appellees' Br at 11); divests or abrogates the class action court rule *(Id.* at 19); and the limitation period divests rights *(Id.* at 10–11 and passim);
- It is also unconstitutional because it would not allow recovery of "equity," and relief is incomplete (allows only a "partial recovery") because a former owner cannot, automatically, claim all the proceeds net of costs or other claimants' competing or senior interest in those same funds. (Appellees' Br at 17; 26, passim.)

Plaintiffs appear to concede that the Legislature intended PA 256 to apply retroactively; they characterize the law as an attempt to retroactively immunize FGUs from damages. (Appellees' Br at 6) But PA 256 does not retroactively unwind *Rafaeli*-based liability. Rather, the new law *provides* a comprehensive

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claim-making system that cures a defect in the prior law. Plaintiffs' spin on the new law's purpose is inapt and, in its logic, concedes retroactive legislative intent.

This Court should reverse the lower court and hold that PA 256 applies retroactively and governs the only claim under *Rafaeli*—a claim for remaining sale proceeds after an otherwise valid tax foreclosure.

A. PA 256 occupies this entire area of law. It neither violates nor divests any right and is constitutional.

In Public Act 256, the Legislature set up *the* single claim-making process for sales held before and after July 18, 2020. The question for older sales is whether there is any vested property right that may be claimed under *Rafaeli's* ruling. Either way, PA 256 is curative, remedial, and procedural; it creates a process where none existed and codifies *Rafaeli*. Its procedures do not divest rights.

1. The law is remedial, curative, and procedural.

Defendant has already briefed that this new law is remedial: it addresses a shortcoming in the law as written and codifies the right identified in *Rafaeli*. "A statute is remedial if it operates in furtherance of an existing remedy and neither creates nor destroys existing rights." *People v Campbell*, 289 Mich App 533, 535 (2010). Despite plaintiffs' circular argument that there already is a vested right in proceeds for older sales, whether such a right exists in the first place is one of the issues before this Court.

That misses the point: this law strengthens and codifies a claim process, including for those older sales *if* such a right is held to exist. MCL 211.78t(1)(b).

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This remedial law is "designed to correct an existing oversight in the law or redress an existing grievance," and it "neither creates nor destroys existing rights." *People v Conyer*, 281 Mich App 526, 529 (2008). The right, if any, is to proceeds and this law codifies that right. It is presumed to apply retroactively. *Id.*

It is also curative. "[C]urative statutes . . . usually point out defects and express the legislative intention to cure them." *People ex rel Butler v Board of Sup'rs of Saginaw County*, 26 Mich 22, 28 (1872). The prior version of the statute did not contemplate a separate property right to proceeds and this law cures that defect. The law itself states as much, providing that "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 . . . as recognized by the Michigan Supreme Court in Rafaeli, LLC v Oakland County." 2020 Public Act 256 Enacting section 3. "Courts have consistently upheld the retroactive application of 'curative' legislation which corrects defects subsequently discovered in a statute." *Romein v General Motors*, 436 Mich 515, 538 (1990) quoting *Long v IRS*, 742 F.2d 1173, 1183 (9 Cir 1984).

Finally, the law creates an entire claim-making procedure to adjudicate the rights that survive a tax foreclosure. It defines the processes to assist the claimants, FGUs, and courts statewide. See, e.g., MCL 211.78t(2), §78t(3), §78t(6–10). These uniform rules will apply in any circuit court adjudicating competing claims to the same limited funds after tax foreclosure; the law defines claimants,

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their priority position, and gives each an opportunity for a hearing to adjudicate all competing claims to finality in one action.

2. The legislation shows clear retroactive intent.

The enacting section of PA 256 references *Rafaeli* and purports to be curative in response to that Court's decision, its provisions directly addressing sales prior to July 18, 2020, showing clear legislative intent that the law apply retroactively. This Court has recently agreed, at least in part, that the law has retroactive application. See *Proctor*, 2022 WL 67248, at *8–9. Moreover, some of these procedures explicitly apply to sales predating *Rafaeli*, and these portions of the statute would be rendered superfluous and without meaning unless this law is applied retroactively. See MCL 211.78t(1)(b); 78t(6).

3. The legislation does not divest any other right.

As developed more fully below, the new law does not abrogate, divest, or otherwise harm any existing vested right. Plaintiffs' statute of limitations argument is unavailing. Plaintiffs have no vested right to raise claims in a manner that allows them to benefit from their delinquency, i.e., by excluding other, senior claimants. *Rafaeli* at 483. Nor do they have a vested right in a particular litigation vehicle in this context; the only right set in stone is a claim for remaining proceeds, "no more, no less." *Id.* at 484. How litigants reach that right—a specific cause of action—is not vested. This law sets up a unified method of adjudicating that right.

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4. The two-year claim limitation already existed.

The two-year claims period under MCL 211.78l(1) is not new. "The monetary-damages remedy in MCL 211.78*l*(1)," even before Public Act 256, "provided an alternative avenue of relief available *only* to those former property owners and interest holders who did not receive constitutionally adequate notice of the foreclosure proceedings as required under the GPTA." See 2 *Crooked Creek LLC v Cass County Treasurer*, 507 Mich 1, 578–579 (2021). It was a claims period for a constitutional violation that the Legislature anticipated might happen. That the Legislature intended it to apply to all constitutional claims under this tax foreclosure law is not surprising and does not make it new.

5. Older sales do not, yet, have any claim to divest.

The Legislature did not intend to create a claim where the Court did not intend such a right. It left *Rafaeli's* application to the courts: "a claim may be made only if the Michigan supreme court orders that its decision in Rafaeli, LLC v Oakland County, docket no. 156849, applies retroactively." MCL 211.78t(1)(b). That provision sets up the exclusive claim-making process that is contingent only because it was unclear if older sales may make such claims. The Legislature adhered to the rule that remedial laws do not destroy rights *or create new rights*. *Conyer*, 281 Mich App at 529. Similarly, the law provides that "nothing in this section authorizes an action not otherwise authorized under the laws of this state." MCL 211.78*l*(1). And it set up that provision as a curative measure "consistent with the legislative findings and intent under section 78," which itself already provided

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that any failure "relating to the return, forfeiture, or foreclosure of property" does not "create a claim or cause of action against this state or a political subdivision of this state" absent a constitutional violation. MCL 211.78(2).

The statute itself divests nothing; claims arising from older sales are contingent on a court first holding such a right exists. If that happens, the law has *the* claim-making procedure at the ready. If *Rafaeli* does not apply retroactively, then the statute divests nothing.

6. Plaintiffs do not have, and never had, a right to "equity" under this law.

Plaintiffs' repeated use of words like "equity" and "full value" to describe their claims is contrary to law. *Proctor* reaffirmed[1] what *Rafaeli* already decided: there is no such right. A person cannot be divested of a thing she has no vested right to in the first place.

7. PA 256 codifies a right and the process to claim it.

Plaintiffs claim that they have a right to a specific cause of action. (Br at 12 and passim.) That broad statement conflates the subject of the "vested right" analysis required here. The new law does not destroy the right to claim remaining sale proceeds; rather it codifies that right and creates a unified mechanism to do so.

[1] "Plaintiffs argue that, under the state Constitution, more is due . . . than merely the [remaining proceeds after sale] . . . Plaintiffs claim that they are entitled to recover their loss of equity. . . . The *Rafaeli* Court, however, already considered this issue and ruled to the contrary." *Proctor* at 16.

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Plaintiffs' argument elevates a cause of action—a specific method to vindicate a vested right—above the sought property right itself. (Appellee's Br at 11.) In essence, Plaintiffs argue that they have a right in both the proceeds and a specific manner of making a claim for those proceeds. A surface-level review of case law appears to support Plaintiffs' broad assertion. But on closer review the result is not so clear. Rather, a new and retroactive law that abrogates a prior cause of action *and in so doing wholly eliminates* every manner of claiming a vested right (i.e., leaves no other method of recovery) is impermissible retroactive legislation. Simply put, a new law cannot abrogate an existing cause of action *and* all access to the remedy the law would have afforded.

If a new law replaces or modifies a cause of action but reaches the same underlying "vested right" there is no constitutional infirmity. Here, regardless of the cause of action the remedy is always the same: the claimant's portion of any remaining sale proceeds.

In *Minty v State*, the Michigan Supreme Court held that 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). *Minty* addressed a new law passed 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 cause of action (in tort) but purported to claw back the state's prior waiver of liability in such a lawsuit. *Id.* at 389. The *Minty* Court thus focused on whether the

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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* did not address any change in application of tort laws but instead addressed state liability at all due to immunity), *Minty's* analysis is helpful here.

The *Minty* Court 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.*

While a vested right arising under a law must be recoverable, 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" but the right to a specific law's procedures is something different. A vested right "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.* Here, the "right" to be vindicated is defined by *Rafaeli* as the proceeds from the sale after the tax and statutory collection costs are satisfied.

This analysis is not new or uncommon. The U.S. Supreme Court held nearly 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

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by the contract is thereby impaired." *Antoni v Greenshow*, 107 US 769, 775 (1883). In *Antoni*, the Court addressed retroactive laws that addressed contractual agreements formed under older law. The Court first laid 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, "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. (Italics added)

Looking to prior cases addressing retroactive "change of remedies," the *Antoni* Court noted that "'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 relevant distinction is between a final court order and pending proceedings, 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

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and efficacious, the taking away of the old right" does not violate any vested right. *Id.* at 124.

The *Antoni* Court's reasoning is consistent with *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.") The old cause of action is not the focus, it is whether the new law "takes from the party his whole" vested right; if the absence of the old law eviscerates with it "all the rights which it was intended to confer." *Id* at 301. The prohibition is against a "wrong . . . without remedy" – here it would prohibit a law that retroactively "defeat[s] entirely the right" to remaining sale proceeds, which this law clearly does not do. *Id.* at 302.

The *Rafaeli* 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. So, the use of contract principles and case law is not new in this context, either.

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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 (4th Cir 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. That is: "'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).

That is not what happened, here. The new law is remedial and creates a process to vindicate a claim; "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). So, while some courts have implied that causes of action themselves are subject to "vesting" as if a separate right, the focus is properly placed on whether the right to be vindicated through that cause of action remains under a retroactive, remedial, procedural law like 2020 Public Act 256.

Such laws, "designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good, 'will be regarded as remedial in nature.'" *Id.* quoting *Rookledge v Garwood*, 340 Mich 444, 453 (1954). (Additional quotation marks omitted) And "a remedial or procedural act

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which does not destroy a vested right will be given effect where the injury or claim is antecedent to the enactment of the statute." *In re Certified Question,* 416 Mich 558, 571 (1982). Aside from plaintiffs' summary assertions regarding older sales, the issue of what property right is vested, and which former interest holders may make a claim is part of this litigation and unresolved. If that right is affirmed to exist under *Rafaeli*, then the law still does not divest any right because it provides a claim system that starts 180 days after the affirming decision. MCL 211.78t(6).

The fact that courts even consider whether a new law may retroactively replace an older law means that the "vested right" to be considered is not the old law itself but the exact cause of action. If that were true, then *no* retroactive laws would be permissible. Instead, this Court must consider whether the underlying remedy—here the proceeds—is harmed by this curative and remedial law.

The Michigan Supreme Court has made this distinction before. In *Hansen-Snyder Co. v. General Motors*, the Court cited its prior decision in which it gave "a statutory amendment retroactive effect," and in doing so reasoned that "a statute which furnishes a new remedy, but does not impair or affect any contractual obligations, nor disturb any vested rights, is naturally applicable to proceedings begun after its passage, though relating to acts done previously thereto." 371 Mich 480, 485 (1963), quoting *Nash v Robinson*, 226 Mich 146, 150 (1924) (additional citations omitted).

This case represents a multi-count, multi-theory approach to recovery of one known thing: proceeds from a tax foreclosure sale. It is not unconstitutional for the

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Legislature to replace those myriad, ill-fitting causes of action with " 'one theory' " of recovery that speaks to these facts and *Rafaeli's* holding. *In re Certified Question*, 416 Mich 558, 566 (1982), quoting *Cova v Harley Davidson Motor Co.,* 26 Mich App 602, 614 (1970). MCL 211.78t is that single unified procedure.

Finally, litigating via class action is not a vested right either. 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 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. But it is the exception not the rule, and its application cannot be considered any vested right when such application will allow certain members to prejudice the rights of other claimants under the law.

Here the only "common" issue was decided in *Rafaeli.* What remains is a parcel-by-parcel analysis for which there was no vested right to proceed in the first place. The rule is permissive, and the proponent bears the burden of showing that every element of the court rule is satisfied. *Henry v Dow*, 484 Mich at 488. *Rafaeli's* holding relied on cases protecting lienholders' rights and indicated that claimants cannot use the law to "benefit from their [own] tax delinquency." *Rafaeli*,

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505 Mich at 476, 483. The Legislature then codified that holding defining claimants to include not only the "owners" but all lienholders at the time of foreclosure. MCL 211.78t(12)(a). A class action is not only not vested, here, it is ill-fitting.

Litigating via class action is not "superior" once "the Legislature has expressed its clear intent as to how claims for surplus proceeds must be made." *Proctor* at 23. That process is found in PA 256 which is more finely tuned to these claims and is assigned to the same court and action that decided the underlying tax foreclosure; that is a policy decision appropriate for the Legislature. *Matter of Estate of Hillier*, 189 Mich App 716, 719–720 (1991). ("Where there is a conflict between a statute and a court rule, the court rule prevails only if it governs practice or procedure.") While this law is procedural, designating the court with jurisdiction is not.

But PA 256 does not even address class actions, much less abrogate the court rule governing them. Nor does it intrude on the judicial branch's authority to create such rules of practice; it merely vests jurisdiction over these claims within an existing action. If, as a result, class action litigation is not applicable or practical, that does not mean the court rule has been abrogated any more than the rules applicable to filing original actions are abrogated. They simply do not apply.

B. New laws like this one must be applied to pending cases.

Neither Plaintiffs nor the *Proctor* Court squarely address the interplay of *Int'l Business Machines Corp v Dep't of Treasury,* 496 Mich 642, (2014), 2014 Public Act 282, and *Gillette Commercial Operations North America & Subsidiaries v Dep't*

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of Treasury, 312 Mich App 394; 878 NW2d 891 (2015). The application of a curative, retroactive law in that scenario including to then pending cases is relevant given Plaintiffs' cross appeal on constitutionality and *Proctor*'s holding that the new law is retroactive but does not apply to pending cases.

1. Because PA 256 does not divest any right, *Gillette* is instructive here.

Plaintiffs summarily state that PA 256 divests various rights, and thus this Court's decision in *Gillette* does not apply. (Br at p15, n 10.) That is, application of the tax law at issue in *Gillette* was not a vested right. Again, plaintiffs' conclusory statement regarding how this law divests rights is unsupported. And while it is true that taxpayers have no vested right in the continued application of tax laws, *Gillette* relied on case law addressing more than just tax laws.

Some tax laws *do* result in vested rights that cannot be retroactively altered. *Gillette*, relying on U.S. Supreme Court precedent, held that states "could not engage in a 'bait and switch' by holding out what appeared to be a clear and certain remedy, i.e., a tax appeal that could be pursued after paying disputed taxes, and then later declare that no such remedy exists." *Gillette,* 878 NW2d at 911–912, quoting *Newsweek Inc v Florida Dep't of Revenue,* 522 US 442, 444 (1998). That analysis applies here; this law does not operate as a complete abolition of any right to proceeds but operates in furtherance of that right.

By rejecting the "bait and switch" the U.S. Supreme Court recognized the right to "a remedy." *Newsweek,* 522 US at 444. Florida could not promise relief

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under its tax laws only later to declare by retroactive law that "no such remedy exists." *Id*. Even though it involved a state's tax law, the state could not pull the rug out from under taxpayers retroactively by declaring there was *no remedy at all.* That is in line with the 4th Circuit's holding that a state can retroactively change the applicable cause of action but if "the repealing statute . . . wipes out all rights of the appellants with respect to the moneys paid under protest," i.e., a vested right recoverable under that prior cause of action, while giving "no separate provision [in] the repealing statute dealing with the remedy," then "the entire statute would necessarily be held invalid in so far as it applied to transactions occurring prior to its passage." *Duke*, supra, 81 F.2d at 517.

Gillette held that the 2014 PA 282 did not violate that prohibition even though the retroactive law eviscerated the Michigan Supreme Court's interpretation of the state's law in *IBM* (which provided the *IBM* plaintiff relief while Gillette and dozens of other plaintiffs with pending cases got no relief). *Gillette,* at 912. The new law wrote the relief out of the statute while the cases were pending. Plaintiffs argue that there was no vested right in the tax law at issue in *Gillette* and do no more work to consider the case; that misses the mark. Here, the vested right is in any applicable proceeds that may be claimed under *Rafaeli.* The new law here does not divest that property right. Plaintiffs' remaining allegations do not involve vested rights, making this just like *Gillette.*

The right identified in *Rafaeli* is not written out of existence; rather than "bait and switch," PA 256 identifies and remedies. *Newsweek*, 522 U.S. at 444. The

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statute does not attempt to unwind *Rafaeli's* holding but enacts a uniform claim mechanism consistent with the Michigan Supreme Court's holding.

Like the *IBM* litigants, the named plaintiffs in *Rafaeli* have a final order on their causes of action. Thus "having achieved finality . . . 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." *Gillette* at 914 quoting *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226–227 (1995). Absent such a final order, "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.'" *Id.*

PA 256 does not apply to those with a final order on the specific issue of a taking, but absent such an order, Legislative bodies "may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." *Bank Markazi v Peterson*, 136 S Ct 1310, 1325 (2016), citing *Landgraf v USI Film Products,* 511 US 244, 267–268 (1994) and *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226 (1995).

Like *Gillette*, these litigants' claims are still pending and are subject to the new law's claim-making procedures. And with that process in place there is no taking or unjust enrichment; *Rafaeli* found a viable taking because the law did not "provide for any disbursement of the surplus proceeds to the former property owner,

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nor does it provide former owners a right to make a claim for these surplus proceeds." *Rafaeli*, 505 Mich at 447. That is, "to the extent the GPTA permits [counties] to retain these surplus proceeds" without any mechanism for former interest holders to make a claim, "the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed." *Id* at 434–475. That is no longer the reality under PA 256.

Finally, the "criterion for permissible retroactive legislation require that the 'purpose in enacting the amendment was neither illegitimate nor arbitrary.'" *General Motors Corp v Department of Treasury,* 290 Mich App at 372 quoting *Carlton,* 512 US 26 at 32 (2018). First, that retroactive law cannot "affect a suspect classification or involve the deprivation of a fundamental right," but if those criteria are met (and Defendant has explained why that is true here) then the new law "must merely bear a reasonable relation to a permissible legislative objective." *Gen Motors,* 290 Mich App at 372 citing *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 479 Mich 378, 404 (2007).

Here, no fundamental right is impaired and, in fact, the only available remedy—return of remaining proceeds—has been codified and made effective through uniform claim-making procedures. How the Legislature implements the claim-making process is a matter of policy, so long as the right to seek proceeds exists consistent with the holding and pending application of *Rafaeli*.

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2. *Proctor* and application of PA 256.

The Court of Claims erred in this case when it held that PA 256 simply does not apply, including to claims that arose fully after the law was passed. (02/22/2021 Opinion and Order at 4-5.) The *Proctor* Court took a middle ground, holding that the new law applies and that it covers older claims, just not all of them; PA 256 does not apply if a claim was part of a pending case when the law was "effective." *Proctor* at 14. Yet, the "effective" date of a law reflects when a law was passed, not when the Legislature intended it apply, nor is the effective date a part of a court's analysis. That is, when a court holds that a law applies retroactively the law is not assigned an "effective date" as if it were passed on an earlier date. See, e.g., 2014 PA 282, effective date September 12, 2014, but held to apply to cases filed prior to its enactment and procedural "effective" date.

Proctor also held that any claims "pending on appeal at the time of the *Rafaeli* decision and the enactment of 2020 PA 256" brought under other legal theories could proceed. *Proctor* at 15. That is, PA 256 did not apply to those claims because its application would "deny plaintiffs an avenue for relief under Rafaeli," thus, "denying them existing rights." *Id* at 15 n 13. The Court further reasoned, "It would neither be logical nor just for the plaintiffs in *Rafaeli* to be entitled to relief . . . but the present plaintiffs denied relief, even though both sets of plaintiffs raised and preserved the pertinent issue." *Id*. at 15. Respectfully, neither the lower court in this case nor the *Proctor* Court properly analyzed or applied this new statute.

First, no right is divested under PA 256 as it sets up a claims process for all vested claimants, it merely waits for the court to confirm who those parties are.

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Second, *Proctor* itself decided *Rafaeli* applies retroactively (stating that the Supreme Court had already "indicated its intent" on the issue), and under that logic triggered the claims process in MCL 211.78t(1)(b). *Id*. at 15. Third, the thing that the Court found to be illogical and unjust is exactly what happened in *Gillette* and dozens of cases like it that were pending at the same time as *IBM* that were subject to 2014 PA 282—the "new law"— while the *IBM* plaintiff was not.

The Legislature has no "authority to reverse a judicial decision or to repeal a final judgment," but that only extends to litigants in that action subject to the final court order. *Gillette* at 913. So, while PA 256 may have "rendered moot the effect of the judicial interpretation" in *Rafaeli*, by removing the predicate for a taking—lack of a remedy in the statute to seek the proceeds—this new law "did not overturn that Court's judgment" and is thus permissible. *Id* at 913–914. In *Gillette*, the new law's curative provision *unwound* the Michigan Supreme Court's interpretation of the prior. By contrast, PA 256 works hand in glove with *Rafaeli*, to the extent it demurred to the Court's judgment whether its holding should apply retroactively given the profound change in law and wide impact it would have.

That is the analysis *Proctor* misses in discussing the *Rafaeli* plaintiffs which have a final court order. Yet, as to putative class members' claims (i.e., those from older foreclosure sales that were not made members of a certified class) *Proctor* held that those "unnamed persons and their still-to-be-made claims should be subject, instead, to the requirements of 2020 PA 256, MCL 211.78t." *Proctor* at 23. *Proctor* held that the Legislature had "expressed its clear intent as to how claims for

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surplus proceeds must be made," through PA 256. *Id.* Ultimately, then, *Proctor* held that the new law does apply retroactively—just selectively. Respectfully, that is inconsistent with the exclusivity language in MCL 211.78*l* and MCL 211.78t(11). It is also based on the false premise that PA 256, itself, divests some vested right.

II. *Rafaeli* presents a new rule and should apply prospectively only.

Plaintiffs argue, and the lower court (and the *Proctor* Court) agree; *Rafaeli* applies retroactively. *Proctor* relied heavily on *County of Wayne v Hathcock,* 471 Mich 445 (2004), and its determination that the facts of that case favored retroactive application of the ruling in that case. Plaintiffs assert that *Rafaeli* is already retroactive under its own language (Appellee's Br at 35) and like *Proctor*, plaintiffs also rely on prior takings cases, which decisions are "inherently retroactive." *(Id.* at 36.)

First, that judicial decisions are generally applied retroactively does not end the inquiry here because an exception applies. Defendant's recitation of the general rule before asserting the exception is no concession. (*Id.* at 37.) Second, plaintiffs' argument that *Rafaeli* addressed prior time periods ("its inquiry was retrospective" and "the conduct in question had already happened" *(Id.* at 35)) implying the decision was on its face retroactive does no work to answer the question here.

That has been true in every prior instance in which a court has considered whether a current ruling should apply to *all* such prior events; indeed, every case addresses prior events to meet standing and redressability requirements. After a particular case is decided, application of that holding to other potential litigants is

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decided as set forth in *Pohutski v City of Allen Park*, 465 Mich 685, 696 (2002): is the ruling a "new rule" overruling well-established law and if so what is "the purpose to be served by the new rule . . . the extent of reliance on the old rule" and what will be the "effect of retroactivity on the administration of justice." In short—was the overruled law so well-worn and so widely used and relied on that the new ruling should apply going forward, only? This is a multi-factor, equitable, balancing analysis. The fact that *Hathcock* involved a takings claim, and the Court even undertook the prospective analysis undercuts the idea that takings rulings are any more "inherently retroactive" than any other subject matter. Defendant has briefed why *Rafaeli* presents a new rule and the other reasons it requires prospective application.

The *Proctor* Court's reliance on *Hathcock* is understandable given the subject matter (alleged taking) and some of similarities in the procedural histories between *Hathcock* and *Rafaeli*. But the cases are different in important ways. *Hathcock* involved the Legislature's attempt to redefine "public use" for purposes of eminent domain. The revised statutory provision defined "public use" to include use of eminent domain to acquire property for the purpose of private development; turning the property over to private parties to stimulate the local economy.

However, in *Hathcock*, Article 10, § 2 of the Michigan Constitution (the takings clause) already included the phrase "public use." So, when the Legislature purported to change the definition of an explicit constitutional phrase it was a readily apparent departure from what the Constitution required. *Hathcock*, 471

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Mich at 451. While both *Hathcock* and *Rafaeli* overturned a statute (and numerous cases that had upheld each law), *Hathcock* did so based on explicit constitutional language, not an inferred common law right silently incorporated in Article 10, § 2. *Rafaeli*, 505 Mich at 470-472. That is: the *Hathcock* Court was faced with a statute that "rendered nugatory the constitutional public use requirement." *Id*. at 483. The *Rafaeli* Court was not faced with the same explicit language or quandary (nor were those FGU's that applied the tax foreclosure law so readily aware of the explicit constitutional requirement as the government actors in *Hathcock*).

A second and significant difference between *Rafaeli* and *Hathcock* is just how impactful retroactive application will be here; that is, how widespread and uniform the use of this tax foreclosure law was. *Proctor* held that the takings for private development in *Hathcock* were widespread ("[t]he *Hathcock* Court stated that many government actors had relied on the" prior court rulings and law. *Proctor* at 12.) That is *likely* true in a vacuum since the eminent domain law was addressed in the Michigan Supreme Court's *Poletown* decision issued 23 years before *Hathcock* reversed course. But scope of reliance is a relative consideration; there is virtually no way that improper use of the eminent domain statute in *Hathcock* approached the scope and breadth of use of the tax law at issue in *Rafaeli*.

Technically, the *Hathcock* Court held that "it is a certainty that state and local government actors have acted in reliance on [the *Poletown* Court's prior] broad, but erroneous, interpretation of art. 10, § 2." *Hathcock*, 471 Mich at 484. It does not appear that the *Hathcock* Court did any inquiry as to actual use of the old

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rule, but reasonably presumed that in over two decades of application it was likely that numerous governmental entities utilized the unconstitutional "public use" law.

Proctor read that as "many" being impacted by the *Hathcock* ruling, and presumably used that to justify the many that will be impacted if *Rafaeli* is applied retroactively, too; it appears that the Court deemed the two impacts as relatively equivalent.

Relative to the impact of *Rafaeli's* holding, *Hathcock*'s retroactive application was negligible. To be sure, those the ruling did impact were subject to significant losses; Wayne County had invested hundreds of millions of dollars in a property it was forced to return. *Hathcock*, 471 Mich at 506. But the eminent domain law was not nearly as widespread in application nor as frequent in use as this tax law. The ruling in *Rafaeli* impacts *every* county and the state as FGU, which acted under that law *every year* since 1999 Public Act 123 took effect. While the rejected law in *Hathcock* was available for nearly the same amount of time as this taxing statute—roughly two decades—this law was not just *a* tool that could be utilized but *the* tool uniformly used to collect delinquent property taxes, statewide, every year.

Finally, none of the cases plaintiffs rely on involved statutes passed immediately after the court's ruling to uphold and implement the "purpose of the new rule." *Pohutski*, 465 Mich at 697. Here, the Legislature implemented the purpose of *Rafaeli*: to stop this law from unwittingly effectuating takings. Together, "prospective application" of *Rafaeli* and application of the new claim-making statute "would further this purpose." *Id.* To hold that the Court's ruling should apply

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retroactively upsets the applecart for every county, and most if not every local unit of government in this State, each having budgeted and spent funds on public services already provided. If *Rafaeli* applies to re-open those prior budget years, the buck stops with the taxpayers in each local unit of government that will be burdened with higher taxes, fewer services, or both. On the other hand, claimants for those older sales (i.e., those that had an interest in the property at the time of foreclosure but did not pay to redeem and maintain that right) would not have access to the proceeds if *Rafaeli* applies prospectively, only. Yet, until 2020, they had no such expectation and in fact expected that result under this system.

In these scenarios, i.e., when "injustice might result from full retroactivity," courts have "adopted a more flexible approach, giving holdings limited retroactive or prospective effect." *Lindsey v Harper Hosp*, 455 Mich 56, 68 (1997). "This flexibility is intended to accomplish the 'maximum of justice' *under varied circumstances*." *Id.*, quoting *Tebo v. Havlik,* 418 Mich. 350, 360 (1984) (emphasis added). Looking to prior cases addressing this question when those cases address vastly different scenarios does not necessarily achieve "maximum justice." Here, the balancing is not easy; balancing these competing interests is likely a zero sum proposition. But overall, this situation favors prospective application of the *Rafaeli* Court's holding that there is a separate property right in remaining proceeds after tax foreclosure.

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III. The lower court erred in asserting jurisdiction and certifying a class.

When PA 256 is applied, this action should not proceed in this manner or even this lower court at all. Even if PA 256 does not apply in full, the remainder of the law is valid. And the new law applies without question to sales occurring after July 18, 2020; their inclusion in this class is an error of law and this Court should summarily reverse so that claims may proceed under the statute. Plaintiffs' "incomplete" relief misses a fundamental point: "to the extent the GPTA permits defendants to retain these surplus proceeds and transfer them into the county general fund," the prior law effectuated a taking as to the *Rafaeli* plaintiffs. *Rafaeli*, 505 Mich at 474–75. But now the statute does provide that mechanism; there can be no taking under *Rafaeli*. Moreover, the new collection-related expenses required by *Rafaeli,* and PA 256 are reasonably added to the recoverable amounts; that does not mean recovery is incomplete it means that if taxpayers force the FGU to use foreclosure and sale to collect taxes then the reasonably related expenses, as determined by the Legislature, are part of that tax collection process.

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CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, defendant respectfully requests that this Court hold that PA 256 is constitutional, applies, and controls all claims. This Court should further hold that *Rafaeli* is for prospective application only and remand with orders that the case be dismissed or, in the alternative, that the class be decertified.

Respectfully submitted,

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Dated: February 14, 2022

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Exhibit A

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

DELORES PROCTOR, and all others similarly situated,

Plaintiff-Appellant,

v

SAGINAW COUNTY BOARD OF COMMISSIONERS, TIMOTHY M. NOVAK, BAY COUNTY BOARD OF COMMISSIONERS, RICHARD F. BRZEZINSKI, GRATIOT COUNTY BOARD OF COMMISSIONERS, MICHELLE THOMAS, MIDLAND COUNTY BOARD OF COMMISSIONERS, CATHY LUNSFORD, ISABELLA COUNTY BOARD OF COMMISSIONERS, STEVEN W. PICKENS, TUSCOLA COUNTY BOARD OF COMMISSIONERS, PATRICIA DONOVAN-GRAY, and SHAWNA S. WALRAVEN,

Defendants-Appellees.

FOR PUBLICATION
January 6, 2022
9:00 a.m.

No. 349557
Tuscola Circuit Court
LC No. 18-030544-CZ

RONALD MAYNARD, and all others similarly situated,

Plaintiff-Appellant,

v

COUNTY OF BENZIE, MICHELLE L. THOMPSON, COUNTY OF MANISTEE, RUSSELL POMEROY, COUNTY OF WEXFORD, JAYNE E. STANTON, COUNTY OF MISSAUKEE, LORI COX, COUNTY OF MASON, ELISABETH FRAZIER, COUNTY OF LAKE, BRENDA KUTCHINSKI, COUNTY OF

No. 349633
Newaygo Circuit Court
LC No. 18-020435-CZ

OSCEOLA, LORI LEUDEMAN, COUNTY OF OCEANA, MARY LOU PHILLIPS, COUNTY OF NEWAYGO, HOLLY MOON, and ANDREW KMETZ,

Defendants-Appellees.

STEPHEN MORRIS and ROBIN MORRIS, and all others similarly situated,

Plaintiffs-Appellants,

v

No. 349636
Roscommon Circuit Court
LC No. 18-724294-CZ

COUNTY OF MONTMORENCY, JEAN M. KLEIN, COUNTY OF ALPENA, KIMBERLY LUDLOW, COUNTY OF OSCODA, WILLIAM KENDALL, COUNTY OF ROSCOMMON, REBECCA RAGAN, COUNTY OF ARENAC, DENNIS STAWOWY, COUNTY OF CLARE, JENNY BEEMER-FRITZINGER, COUNTY OF GLADWIN, CHRISTY VAN TIEM, COUNTY OF ALCONA, CHERYL FRANKS, COUNTY OF OGEMAW, and DWIGHT MCINTYRE,

Defendants-Appellees.

LARRY CARLSON and MARY JO CARLSON, and all others similarly situated,

Plaintiffs-Appellants,

v

No. 350394
Berrien Circuit Court
LC No. 18-000260-CZ

BRET E. WITKOWSKI, COUNTY OF BERRIEN, COUNTY OF CASS, HOPE ANDERSON, COUNTY OF KALAMAZOO, MARY BALKEMA, COUNTY OF ST. JOSEPH, JUDITH RATERING, COUNTY OF VAN BUREN, TRISHA NESBITT, and KAREN MAKAY,

Defendants-Appellees.

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JOANNE SMITH, and all others similarly situated,

Plaintiff-Appellant,

v

No. 350406
Monroe Circuit Court
LC No. 18-141556-CZ

COUNTY OF WASHTENAW, CATHERINE MCCLARY, COUNTY OF HILLSDALE, STEPHENIE KYSER, COUNTY OF LENAWEE, MARILYN J. WOODS, COUNTY OF MONROE, and KAY SISUNG,

Defendants-Appellees.

Before: STEPHENS, P.J., and LETICA and REDFORD, JJ.

REDFORD, J.

In these consolidated appeals involving the General Property Tax Act (GPTA), MCL 211.1 *et seq*., the named plaintiffs[1] appeal as of right from orders in each case granting summary disposition to defendants under MCR 2.116(C)(7) and (8). For each case, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL BACKGROUND

The underlying operative facts in each of these cases are not in dispute. Each named plaintiff failed to pay property taxes on his or her real property and forfeited their properties to their respective county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. Their defaults resulted in the county treasurers in the county where their properties were located to initiate tax foreclosures pursuant to MCL 211.78 *et seq*. The county treasurers foreclosed upon the properties and circuit court judgments of foreclosure were entered. Each plaintiff failed to redeem his or her respective property by the statutory deadline resulting in the vesting of title to the properties in the respective county treasurers. The county treasurers thereafter sold the properties at auction. In accordance with the GPTA, each county retained the proceeds beyond those needed to satisfy outstanding taxes and associated fees or penalties.[2] In

[1] Although parties sought class certification in each case, no court granted such motion.

[2] Defendants, in foreclosing on the properties and retaining "surplus proceeds," acted in accordance with then-existing provisions of the GPTA. Later, in *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 446-448; 952 NW2d 434 (2020), our Supreme Court explained the statutory procedure for distributing tax-foreclosure proceeds under the version of MCL 211.78m that defendants adhered to in these cases:

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each case, the named plaintiff or plaintiffs sued the involved county and the involved county's treasurer[3] for the deprivation of such monies but also filed a putative class action against several additional counties and their respective treasurers,[4] in an attempt to obtain relief for purported similarly situated persons. In each case, the lower court granted summary disposition to defendants under MCR 2.116(C)(7)[5] and (8). Later, but before the filing of the briefs in these

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> The foreclosing governmental unit then distributes the proceeds in [the account designated as the 'delinquent tax property sales proceeds for the year that the taxes became delinquent'] in a specific order of priority. The first priority is to reimburse the delinquent tax revolving fund for the full amount of unpaid taxes, interest, and fees owed on the property. This is followed by the annual costs incurred as a result of conducting foreclosure sales and general overhead in conducting the foreclosure proceedings for the year. The statutory scheme for reimbursement is quite exhaustive and even includes costs for maintaining property foreclosed under the GPTA, defending title actions, and administering the foreclosure and the disposition of forfeited property for delinquent taxes.
>
> * * *
>
> But when there are excess proceeds from individual sales, such as the sale of plaintiffs' properties in this case, those proceeds are used to subsidize the costs for *all* foreclosure proceedings and sales for the year of the tax delinquency, as well as any years prior or subsequent to the delinquency. Then, after the required statutory disbursements are made, surplus proceeds may be transferred to the county general fund in cases in which the county is the foreclosing governmental unit. Of particular importance here, the GPTA does not provide for any disbursement of the surplus proceeds to the former property owner, nor does it provide former owners a right to make a claim for these surplus proceeds. Michigan is one of nine states with a statutory scheme that requires the foreclosing governmental unit to disperse [sic] the surplus proceeds to someone other than the former owner.

[3] In some cases, former treasurers were also sued.

[4] In Docket No. 349557, Delores Proctor sued not only Tuscola County and its treasurer but also Bay, Midland, Gratiot, Saginaw, and Isabella counties and their treasurers. In Docket No. 349633, Ronald Maynard sued not only Newaygo County and its treasurer but also Benzie, Manistee, Wexford, Missaukee, Mason, Lake, Osceola, and Oceana counties and their treasurers. In Docket No. 349636, Stephen Morris and Robin Morris sued not only Roscommon County and its treasurer but also Montmorency, Alpena, Oscoda, Alcona, Arenac, Ogemaw, Clare, and Gladwin counties and their treasurers. In Docket No. 350394, Larry Carlson and Mary Jo Carlson sued not only Berrien County and its treasurer but also Cass, Van Buren, Kalamazoo, and St. Joseph counties and their treasurers. In Docket No. 350406, JoAnn Smith sued not only Monroe County and its treasurer but also Washtenaw, Hillsdale, and Lenawee counties and their treasurers.

[5] The grants of summary disposition under MCR 2.116(C)(7) involved immunity for certain claims against the individual treasurers.

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appeals, our Supreme Court decided *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020), wherein it concluded that a government unit's retention of surplus proceeds after a tax-foreclosure sale amounts to an unconstitutional taking. Later still, in response to *Rafaeli*, the Michigan Legislature amended the GPTA to provide a limited mechanism for persons to obtain surplus proceeds after a tax-foreclosure sale. These appeals involve, among other issues, a consideration of whether *Rafaeli* or the amendments of the GPTA apply to plaintiffs' cases.[6]

II. ANALYSIS

A. QUALIFIED IMMUNITY

Plaintiffs contend that the lower courts erred by concluding that the individual officials sued in their personal capacities were entitled to qualified immunity. We disagree and affirm on this issue.

We review de novo a trial court's decision regarding a motion for summary disposition. *Spohn v Van Dyke Pub Schs*, 296 Mich App 470, 479; 822 NW2d 239 (2012). We review de novo the applicability of government immunity. *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009). As stated in *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [Citations omitted.]

The identical complaints in these cases contained claims against the counties and individual government officials for inverse condemnation, taking in violation of the Fifth Amendment of the United States Constitution, unjust enrichment, excessive-fine in violation of the Eighth Amendment of the United States Constitution, and excessive-fine in violation of the state Constitution. Plaintiffs sued the county treasurers in their individual capacities related to their federal Constitutional claims. Plaintiffs asserted their state-law claims for unjust enrichment and

[6] The Court thanks and acknowledges appellants' and appellees' excellent initial briefs and oral arguments in this matter as well as the supplemental briefing following oral arguments, particularly in light of the ongoing federal litigation involving these same issues and attorneys.

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excessive fine under the state Constitution against the county treasurers in their "official capacity." The counties alone were sued under the inverse-condemnation claim.[7]

As stated in *Kentucky v Graham*, 473 US 159; 105 S Ct 3099; 87 L Ed 2d 114 (1985):

> As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *It is not a suit against the official personally, for the real party in interest is the entity*. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. [Citation omitted; emphasis added.]

In *Mays v Snyder*, 323 Mich App 1, 89; 916 NW2d 227 (2018), aff'd 506 Mich 157 (2020), this Court similarly explained that official-capacity lawsuits are "nominal only[.]" Plaintiffs admit on appeal that in an official-capacity claim, "the claim is actually against the official's office and thus the government entity itself despite being in the name of an individual."

The question on which plaintiffs focus is whether the claims under the Fifth and Eighth Amendments could be maintained against the individual officials or whether the lower courts could dismiss those claims on qualified immunity grounds. In relation to those claims, plaintiffs invoked 42 USC 1983. In *Harlow v Fitzgerald*, 457 US 800, 817-819; 102 S Ct 2727; 73 L Ed 2d 396 (1982), the United Sates Supreme Court stated:

> [W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is

[7] In *Lawson v Bouck*, 747 F Supp 376, 379-380 (WD Mich, 1990), the court considered the circumstances in which an individual would be deemed sued in his or her official capacity and that case is instructive here. In this case, plaintiffs' explicit wording in the complaints indicate that the unjust-enrichment and state-law-excessive-fine claims were asserted against the individual defendants in their official capacities.

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> resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors. [Citations omitted.]

In *Holeton v City of Livonia*, 328 Mich App 88, 102-103; 935 NW2d 601 (2019), this Court recently explained:

> An official has qualified immunity from suits under 42 USC 1983 when the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v Hughes*, 584 US ___, ___; 138 S Ct 1148, 1152; 200 L Ed 2d 449 (2018) (quotation marks and citation omitted). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v Callahan*, 555 US 223, 231; 129 S Ct 808; 172 L Ed 2d 565 (2009) (quotation marks and citation omitted). Before allowing a claim to proceed, courts must determine that the plaintiff has established two elements that defeat qualified immunity:
>
> > First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. [*Id*. at 232 (quotation marks and citations omitted).]
>
> The focus of the inquiry is on whether the official had "fair notice that her conduct was unlawful," and, for that reason, the reasonableness of the act must be judged against the backdrop of the law at the time of the conduct. *Kisela*, 584 US at ___; 138 S Ct at 1152 (quotation marks and citations omitted). The allegations and facts must show that it would have been clear to a reasonable official in the defendant's position that his or her conduct was unlawful under the situation that he or she confronted. *Wood* [*v Moss*], 572 US [744,] 758; 134 S Ct 2056[; 188 L Ed 2d 1039 (2014)]. The Supreme Court of the United States has also repeatedly admonished lower courts "not to define clearly established law at a high level of generality." *Kisela*, 584 US at ___; 138 S Ct at 1152 (quotation marks and citation omitted). Although there need not be a case directly on point for a right to be clearly established, "existing precedent must have placed the . . . constitutional question beyond debate." *Id*.

"Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Pearson v Callahan*, 555 US 223, 232, 243; 129 S Ct 808; 172 L Ed 2d 565 (2009). "A clearly established right is one that is sufficiently clear that every

reasonable official would have understood that what he is doing violates that right." *Mullenix v Luna*, 577 US 7, 11; 136 S Ct 305; 193 L Ed 2d 255 (2015) (quotation marks and citation omitted). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Id*. at 12 (quotation marks and citation omitted). "Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id*. (quotation marks and citation omitted).

At the time of the wrongdoing alleged in the cases at bar, our Supreme Court had not yet issued its decision in *Rafaeli*. Further, at the time, governmental entities and their officials could reasonably rely on *Nelson v City of New York*, 352 US 103; 77 S Ct 195; 1 L Ed 2d 171 (1956), which explained:

> What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.
>
> It is contended that this is a harsh statute. The New York Court of Appeals took cognizance of this claim and spoke of the "extreme hardships" resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed. [*Id*. at 110-111.[8]]

[8] The *Rafaeli* Court concluded that *Nelson* was not dispositive regarding the question facing the Michigan Supreme Court. The Court stated that in *Nelson*, there had been a statutory path for the plaintiff to obtain surplus proceeds, but the plaintiff had not followed it. *Rafaeli*, 505 Mich at 460. The *Rafaeli* Court explained:

> Read together, [*United States v Lawton*, 110 US 146; 3 S Ct 545; 28 L Ed 100 (1884)] and *Nelson* establish that the Takings Clause under the United States Constitution may afford former property owners a remedy when a tax-sale statute provides the divested property owner an interest in the surplus proceeds and the government does not honor that statutory interest. What [*People ex rel Seaman v Hammond*, 1 Doug 276 (Mich, 1844)] *Lawton* and *Nelson* do not tell us, however, is what occurs when the statutes governing foreclosure make no mention of, or expressly preclude, a divested property owner's right to the surplus proceeds, but the divested property owner establishes a property right to the surplus proceeds through some other legal source, such as the common law. . . . 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

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Moreover, in *Harbor Watch Condo Ass'n v Emmet Co Treasurer*, 308 Mich App 380, 386-387; 863 NW2d 745 (2014), this Court explained a county treasurer's obligation to follow the statutory scheme of MCL 211.78m and use funds only for limited, permitted purposes. Under the existing precedent applicable at the times when the lower courts made their respective decisions in the cases at bar, it cannot be said that any constitutional takings question was beyond debate. *Mullenix*, 577 US at 12. Accordingly, the individual government officers against whom plaintiffs made their allegations were entitled to qualified governmental immunity regarding plaintiffs' claims under the Fifth and Eighth Amendments.[9] Further, the lower courts did not err by ruling early in the cases that the government officials were protected by qualified governmental immunity. "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v Forsyth*, 472 US 511, 526; 105 S Ct 2806; 86 L Ed 2d 411 (1985). Plaintiffs' claims of error in this regard, therefore, fail as a matter of law.

B. VIABILITY OF INVERSE-CONDEMNATION AND UNJUST-ENRICHMENT CLAIMS

Plaintiffs contend that the lower courts erred by dismissing their unjust enrichment and inverse-condemnation claims because under the *Rafaeli* Court's interpretation of the Michigan Constitution such claims are viable.[10] We hold that, as explained in *Rafaeli*, in their inverse-condemnation and unjust-enrichment claims, plaintiffs alleged viable claims of violation of their common-law property rights protected under Michigan's Takings Clause to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. We therefore reverse the decision of the trial courts on this issue and remand to them for further proceedings.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Spohn*, 296 Mich App at 479. "A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

In *Rafaeli*, 505 Mich at 468-489, our Supreme Court discussed *Dean v Mich Dep't of Natural Resources*, 399 Mich 84; 247 NW2d 876 (1976), in analyzing whether Michigan law

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> 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.]

[9] As for the Eighth Amendment claim, plaintiffs have not established that an Eighth Amendment violation was apparent *at any time* (see part IV of this opinion, *infra*), including at the time the treasurers acted.

[10] "Michigan recognizes the theory of inverse condemnation as a means of enforcing the constitutional ban on uncompensated takings of property." *Bill's Grills, Inc v Mich State Hwy Comm*, 75 Mich App 154; 254 NW2d 824 (1997). Plaintiffs attempt to argue in these appeals that their inverse-condemnation claims are somehow separate from their state unconstitutional-takings claims, but this is not the case.

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recognized a former property owner's right to collect under a common-law claim of unjust enrichment the surplus proceeds following a failure to redeem property after a tax foreclosure and sale of the property. The *Rafaeli* Court stated:

> In *Dean*, the plaintiff-property owner failed to pay her property taxes for both the city of Flint and Genesee County in the amount of $230.68 and $146.90, respectively. After the plaintiff failed to appear at the foreclosure hearing, the court issued a judgment authorizing the sale of the plaintiff's property at a tax sale and stating that if the property was sold to the state, the state's title would become absolute unless the plaintiff timely redeemed the property. The state successfully bid on the plaintiff's property, starting the one-year redemption period for the plaintiff. During the redemption period, the plaintiff paid her delinquent city-property taxes in full but mistakenly failed to pay her delinquent county-property taxes. After she failed to timely redeem her property during the redemption period, the State Treasurer deeded the plaintiff's property to the state, which received absolute title to the property and then sold it to a private investor for $10,000. The plaintiff filed an action against the state, alleging, in relevant part, that the state had been unjustly enriched by retaining the $10,000 following the sale of her property. The circuit court granted summary disposition to the defendant, but this Court reversed, holding that the plaintiff could bring her suit for unjust enrichment[.]
>
> * * *
>
> *Dean* stands for more than just a recognition of the plaintiff's right to bring a claim under unjust enrichment for the surplus proceeds. Inherent in *Dean*'s holding is Michigan's protection under our common law of a property owner's right to collect the surplus proceeds that result from a tax-foreclosure sale. A viable claim for unjust enrichment requires the complaining party to show that the other party retained a benefit from the complaining party. In concluding that the plaintiff in *Dean* stated an actionable claim for unjust enrichment, this Court did not rely on any statutory right that the plaintiff had to collect the surplus proceeds. As is the case here, title to the plaintiff's property in *Dean* had already vested with the state. Without a statutory right, the plaintiff must have had a common-law right to these surplus proceeds. Otherwise, her claim of unjust enrichment would not be actionable because it could not have been said that the state retained a benefit at her expense. In sum, *Dean* supports the proposition that a property owner has a recognized common-law property right to the surplus proceeds from a tax-foreclosure sale.
>
> We conclude that our state's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. [*Id*. at 468-470 (citations omitted).]
>
> * * *

Further, the prohibitions against collecting excess taxes, selling more land than needed to collect such taxes, and taking more property than necessary to serve the

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public all underlie a property owner's right to collect the surplus proceeds and were well-established legal principles before 1963. Therefore, we hold that the ratifiers would have commonly understood this common-law property right to be protected under Michigan's Takings Clause at the time of the ratification of the Michigan Constitution in 1963. [*Id*. at 472 (citation omitted).]

* * *

It is clear that our 1963 Constitution protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, § 2. This right existed at common law; was commonly understood to exist in the common law before the 1963 ratification of our Constitution; and continues to exist after 1963, as our decision in *Dean* demonstrates. Because this common-law property right is constitutionally protected by our state's Takings Clause, the Legislature's amendments of the GPTA could not abrogate it. While the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause. [*Id*. at 473 (citations omitted).]

In the present cases, defendants contend that unjust-enrichment claims lacked viability, but *Rafaeli* plainly indicates otherwise as a common-law right that preexisted our state Constitution and continued to exist after the Constitution's ratification. *Rafaeli* clarified that an unjust-enrichment claim for recovery of the surplus proceeds following a tax-foreclosure sale is a right protected by and enforceable under our Constitution's Takings Clause and the Legislature could not abrogate that right through amendments to the GPTA. *Id*. Our Supreme Court concluded:

Once defendants foreclosed on plaintiffs' properties, obtained title to those properties, and sold them to satisfy plaintiffs' unpaid taxes, interest, penalties, and fees related to the foreclosures, any surplus resulting from those sales belonged to plaintiffs. That is, after the sale proceeds are distributed in accordance with the GPTA's order of priority, any surplus that remains is the property of plaintiffs, and defendants were required to return that property to plaintiffs. Defendants' retention of those surplus proceeds under the GPTA amounts to a taking of a vested property right requiring just compensation. To the extent the GPTA permits defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose 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. [*Id*. at 474-475.]

The concept of unjust enrichment is also important in analyzing defendants' contention that plaintiffs sued the wrong parties and that the state constituted the only proper defendant for an assertion of the GPTA's unconstitutionality and the return of the surplus proceeds. In these cases, the *counties* foreclosed and plaintiffs forfeited their properties to the counties and nominally the counties' treasurers who obtained judgments and later sold the properties at tax sales and the counties retained the surplus proceeds as permitted under the GPTA. We note, too, that in *Rafaeli*, wherein the plaintiffs asserted inverse condemnation and an unconstitutional taking, the named

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defendants were the county and its treasurer. Therefore, we reject defendants' argument about the wrong defendants having been sued.

Defendants also contend that any relief proposed by the *Rafaeli* decision is not available to plaintiffs because *Rafaeli*, decided on July 17, 2020, should be given prospective application only, and all the foreclosure proceedings in these cases occurred before July 17, 2020. We disagree.

In *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620-621; 722 NW2d 922 (2006), this Court stated:

> Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved. Prospective application of a judicial decision is a departure from the general rule and is only appropriate in exigent circumstances. Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law. The threshold question in determining the application of a new decision is whether the decision in fact clearly established a new principle of law. If that question is answered in the affirmative, then a court must weigh three factors in deciding whether a judicial decision warrants prospective application: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. [Citations omitted.]

In *Paul*, our Supreme Court overruled prior caselaw in concluding that defects in the shoulder of a highway do not fall within the duty of repair and maintenance set forth in MCL 691.1402(1). *Id*. at 619. The Court stated that the newer "shoulder" decision had been "foreshadowed" but that this newer decision did, in fact, establish a new rule of law requiring consideration of the three factors. *Id*. at 621. It therefore analyzed the three factors to determine whether retroactive application applied. *Id*. at 621-624.

Highly instructive is *Co of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), which bears some similarities to *Rafaeli*. In *Hathcock*, our Supreme Court ruled that although certain condemnations of property for a particular purpose were authorized *by statute*, they were unconstitutional. *Id*. at 451. In making this finding of unconstitutionality, the Court overruled one of its previous decisions. *Id*. at 483. The *Hathcock* Court stated that many government actors had relied on the prior decision, but added:

> Nevertheless, there is no reason to depart from the usual practice of applying our conclusions of law to the case at hand. Our decision today does not announce a new rule of law, but rather returns our law to that which existed before [the prior decision] *and which has been mandated by our Constitution since it took effect in 1963*. Our decision simply applies fundamental constitutional principles and enforces the "public use" requirement as that phrase was used at the time our 1963 Constitution was ratified.

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> Therefore, our decision to overrule [the prior decision] should have retroactive effect, *applying to all pending cases in which a challenge . . . has been raised and preserved*. [*Id*. at 484 (citations omitted; emphases added).]

Rafaeli, like *Hathcock*, involved an action authorized by statute which the Court held unconstitutional. The *Hathcock* Court emphasized that "complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Id*. at 484 n 98 (quotation marks, citation, and brackets omitted); see also *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986), disagreed with on other grounds by *McCummings v Hurley Med Ctr*, 433 Mich 404; 446 NW2d 114 (1989). Given the existence of cases such as *Dean* and *United States v Lawton*, 110 US 146, 150; 3 S Ct 545; 28 L Ed 100 (1884) (finding that a taking had occurred in connection with tax-sale proceeds), we do not conclude that our Supreme Court in *Rafaeli* overruled clear and uncontradicted caselaw or specifically announced a new rule that at least had not been previously foreshadowed. We hold that *Rafaeli*, like *Hathcock*, should be applied to pending cases, such as those of the named plaintiffs, in which a challenge has been raised and preserved.[11]

Relevant to our review of these matters is 2020 PA 256, which was clearly enacted in response to *Rafaeli*. MCL 211.78t(1), added by this public act, states:

> 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).
>
> * * *
>
> (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

[11] A ruling that *Rafaeli* was not establishing a new rule of law *for purposes of a retroactivity analysis*, however, does not mean that the unconstitutionality of the former version of MCL 211.78m was so clear such that individual officials could be held personally liable, as discussed in part II. A of this opinion.

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> subsection, the 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. By the following July 1, the foreclosing governmental unit shall provide each claimant seeking remaining proceeds for the property and notifying the foreclosing governmental unit under this subsection with a notice relating to the foreclosed property in the form and manner provided under subsection (3). 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 [sic] of foreclosure was effective under section 78k by the following October 1. The motion must be certified[.]
>
> * * *
>
> (11) This section is the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state. A right to claim remaining proceeds under this section is not transferable except by testate or intestate succession.[12]

The properties at issue in the present case were sold under § 78m "before July 18, 2020," which MCL 211.78t(1)(b)(*i*) now covers specifying a mechanism for claiming the surplus proceeds from a tax sale by former property owners. The statute indicates plaintiffs' claims would not be viable unless our Supreme Court issues a ruling that *Rafaeli* is to be applied retroactively. However, 2020 PA 256 had an effective date of December 22, 2020, and the Legislature did not

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[12] MCL 211.78*l* states:

> (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.

In addition, MCL 211.78i now states that notice must include a statement about a person's right to claim surplus proceeds under MCL 211.78t. See, e.g., MCL 211.78i(7)(i).

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specify that the new statute had retroactive application. Plaintiffs' lawsuits and claims of appeal were all filed well before the effective date. Further, despite the wording of MCL 211.78t(1)(b)(*i*), this Court is empowered to rule that *Rafaeli* applies to plaintiffs' claims because they were pending on appeal at the time of the *Rafaeli* decision and the enactment of 2020 PA 256. See *Hathcock*, 471 Mich at 484; see also *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155; 725 NW2d 56 (2006) ("[S]tatutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary.").[13] MCL 211.78t(1)(b)(*i*) sets forth when a claim can be made, but plaintiffs *had already made their claims* before the *Rafaeli* decision and before the enactment of the statute. It would neither be logical nor just for the plaintiffs in *Rafaeli* to be entitled to relief, see *Rafaeli*, 505 Mich at 485, but the present plaintiffs denied relief, even though both sets of plaintiffs raised and preserved the pertinent issue.[14] This result is further buttressed by the detailed analysis and conclusion in *Rafaeli* which our Supreme Court reached by consideration and application of the constitutional rights that existed at the time of the adoption of the 1963 Michigan Constitution.

Plaintiffs also cite *Jackson v Southfield Neighborhood Revitalization Initiative*, ___ Mich ___, ___; 953 NW2d 402, 403 (2021), in which our Supreme Court stated:

> On order of the Court, the application for leave to appeal the December 19, 2019 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Oakland Circuit Court for reconsideration of the defendants' motions for summary disposition in light of *Rafaeli* . . . . In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should now be reviewed by this Court.

Plaintiffs contend that if our Supreme Court intended that *Rafaeli* be prospective only in application, it would never have issued this order in *Jackson*. We agree 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.

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[13] "An exception to the general rule presuming retroactive [sic] application only is a statute that is remedial or procedural in nature and whose retroactive application will not deny vested rights." *Nortley v Hurst*, 321 Mich App 566, 571; 908 NW2d 919 (2017). Applying MCL 211.78t(1)(b)(*i*) to deny plaintiffs an avenue for relief under *Rafaeli* would be denying them existing rights.

[14] This result is further supported by *Buhl v City of Oak Park*, __ Mich __; __ NW2d __ (2021) (Docket No. 160355, rel'd June 9, 2021), in which the Supreme Court ruled an amendment to the governmental tort liability act which allowed governmental entities to plead the open-and-obvious doctrine in defense of claims, MCL 691.1402a(5), could "only be applied to causes of action that accrued after the effective date of the amendment."

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C. AVAILABLE REMEDIES AND FEDERAL TAKINGS CLAIMS

Plaintiffs contend that they are entitled to more relief than that set forth in *Rafaeli* on state-law grounds and on Fifth Amendment grounds.[15] We disagree with plaintiffs' contention that they are entitled to any recovery beyond the surplus proceeds from the tax-foreclosure sale but we agree that plaintiffs are entitled to post-tax sale interest on such surplus proceeds.

Plaintiffs argue that, under the state Constitution, more is due to plaintiffs than merely the difference between the foreclosure-sale price and the delinquent taxes (plus interest, costs, and penalty fees, etc.). Plaintiffs claim that they are entitled to recover their loss of equity that resulted from the properties forfeitures and sales for less than market value. The *Rafaeli* Court, however, already considered this issue and ruled to the contrary:

> Defendants submit that if plaintiffs have, in fact, pleaded a viable takings claim, then the amount of compensation due could be more than the surplus proceeds from the tax-foreclosure sale. Plaintiffs make this point in their postargument briefing, arguing that a full remedy for an unconstitutional taking requires property owners to be put in as good of position had their properties not been taken at all. That is, while the surplus proceeds from a tax-foreclosure sale are some evidence of the value of the property and compensation due, plaintiffs contend that it may be less than just compensation and may instead constitute the fair market value of their properties.
>
> We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of position had their properties not been taken at all. First, this would run contrary to the general principle that just compensation is measured by the value of the property taken. In this case, the property improperly taken was the surplus proceeds, not plaintiffs' real properties. Second, plaintiffs are largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full. If plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency.
>
> Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less. [*Rafaeli*, 505 Mich at 482-484 (citation omitted).]

Plaintiffs contend that they had viable federal takings claims and that these federal claims allowed for greater relief than that allowed by *Rafaeli*. The *Rafaeli* Court stated, in summarizing its holding, that it was operating under the state Constitution. See *id*. at 437 ("We hold that

[15] For this part of our opinion and for part IV of the opinion, the standard of review is the same as that set forth in part II.

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defendants' retention of . . . surplus proceeds is an unconstitutional taking without just compensation under Article 10, § 2 of our 1963 Constitution."). However, the Court noted that it had also asked the parties to brief a takings claim under the federal Constitution. *Id*. at 441. The Court then cited to the takings clauses of both the state and federal Constitutions. *Id*. at 453.[16] The Court stated:

> *While we draw on authority discussing and interpreting both clauses*, we must keep in mind that Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain. [*Id*. at 454 (emphasis added).]

The Court went on to address some federal cases, *id*. at 457-461, 476 n 112, and it again noted that the state takings clause had been interpreted as offering broader protection than the federal takings clause, *id*. at 477. Reading *Rafaeli* as a whole, it is apparent that our Supreme Court concluded that any federal claim would provide no greater relief than that provided by the state-Constitution-based relief set forth in *Rafaeli* itself. Also, *Freed v Thomas*, ___ F Supp 3d ___, ___; 2021 WL 942077, 3-4 (ED Mich, 2021), is instructive because the federal court, analyzing a Fifth Amendment takings claim, rejected the same argument being made by the current plaintiffs and stated that the relief available consisted of that specified in *Rafaeli*.[17] Moreover, in *Phillips v Washington Legal Foundation*, 524 US 156, 164; 118 S Ct 1925; 141 L Ed 2d 174 (1998), the United States Supreme Court explained, "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." (Quotation marks and citation omitted.) The *Rafaeli* Court found a property interest in "surplus proceeds," which it defined as "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." *Rafaeli*, 505 Mich at 482-484. Accordingly, *Rafaeli* clarified the extent of the property interest for Fifth Amendment purposes in cases such as the cases at bar.

We note, however, that the *Freed* court did state that interest from the date of the foreclosure sale would also be due. *Id*. at ___; 2021 WL 942077 at 4, 8. *Rafaeli* remained silent regarding the issue of interest from the date of the foreclosure sale. See, e.g., *Rafaeli*, 505 Mich at 484. The *Rafaeli* Court, however, stated that "*once the sale produces a surplus*, the former owner may make a claim for the surplus proceeds," *id*. at 477 (emphasis added). A reasonable implication from this latter statement is that a claimant would be due interest from the date of the

---

[16] The Fifth Amendment provides, in part, "[N]or shall private property be taken for public use, without just compensation." US Const, Am V. Const 1963, art 10, § 2, states, in part, that "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

[17] Decisions of lower federal courts are not binding on this Court, even for purposes of federal law, although they may be viewed as persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

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sale. Also, in *Knick v Twp of Scott, Pennsylvania*, ___ US ___, ___; 139 S Ct 2162, 2170; 204 L Ed 2d 558 (2019), the United States Supreme Court stated that, under the Fifth Amendment, interest is due from the time of a taking. *Knick* makes clear that, to the extent that plaintiffs' claims arise under the Fifth Amendment, interest would be due from the time that the counties obtained the surplus proceeds.

In *Fox v City of Saginaw*, ___ F Supp 3d ___, ___; 2021 WL 120855, 13 (ED Mich, 2021), the federal district court noted that a Fifth Amendment takings claim involving civil actions for the deprivation of rights must be made solely through 42 USC 1983.[18] Plaintiffs have conceded as much in the present appeal. The parties spend considerable time discussing whether plaintiffs satisfied the requirements for bringing a § 1983 claim as specified in *Monell v Dep't of Social Servs of City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978). In *Monell*, *id.* at 690, the United States Supreme Court stated:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels.

Defendants contend that the counties, in foreclosing on plaintiffs' properties, were simply following a law adopted by the Michigan Legislature, that no county policy was at issue, and that, therefore, no § 1983/Fifth Amendment claim was available for plaintiffs against the named defendants. In *Fox*, ___ F Supp 3d at ___; 2021 WL 120855 at 10-11, the federal district court

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[18] 42 USC 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [42 USC 1983.]

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rejected this same argument, stating that the county officials had a policy or practice of acting as the foreclosing governmental units, even though they were not required to do so.

MCL 211.78 states, in part:

> (3) Not later than December 1, 1999, the county board of commissioners of a county, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and the county executive, if any, may elect to have this state foreclose property under this act forfeited to the county treasurer under section 78g. At any time during December 2004, the county board of commissioners of a county, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, may do either of the following:
>
> (a) Elect to have this state foreclose property under this act forfeited to the county treasurer under section 78g.
>
> (b) Rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g.
>
> (4) Beginning January 1, 2009 through March 1, 2009, the county board of commissioners of a county in which is located an eligible city, as that term is defined in section 89d, may, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g.
>
> (5) The county board of commissioners of a county that has elected to have property forfeited under section 78g foreclosed by this state under this act may, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g. A county board of commissioners shall forward a copy of the resolution and any concurrence to the department of treasury not later than November 30 in the year in which the resolution is adopted. A county that rescinds its prior election under this subsection shall act as the foreclosing governmental unit under this act for all property forfeited to the county treasurer under section 78g after February 1 in the year immediately following the year in which the resolution is adopted.
>
> (6) The foreclosure of forfeited property by a county is voluntary and is not an activity or service required of units of local government for purposes of section 29 of article IX of the state constitution of 1963.

* * *

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(8) As used in this section and sections 78a through 1554 for purposes of the collection of taxes returned as delinquent:

(a) "Foreclosing governmental unit" means 1 of the following:

(*i*) The treasurer of a county.

(*ii*) This state if the county has elected under subsection (3) to have this state foreclose property under this act forfeited to the county treasurer under section 78g.

(b) "Forfeited" or "forfeiture" means a foreclosing governmental unit may seek a judgment of foreclosure under section 78k5 if the property is not redeemed as provided under this act, but does not acquire a right to possession or any other interest in the property.

From this statutory language, it can be deduced that the counties made the decision to act or had the custom of acting as the foreclosing governmental units.[19] We find that the reasoning of *Fox* is persuasive and that plaintiffs stated valid federal takings claims. Accordingly, interest should be added to any judgments if they prevail. *Knick*, ___ US at ___; 139 S Ct at 2170.

D. EXCESSIVE FINES

Plaintiffs claim that they had viable causes of action for excessive fines under the Eighth Amendment of the United States Constitution and under the state Constitution and that the trial courts' orders must be reversed accordingly. We disagree.

The Eighth Amendment of the United States Constitution prohibits "excessive fines[.]"[20] In *Ingraham v Wright*, 430 US 651, 664; 97 S Ct 1401; 51 L Ed 2d 711 (1977), the United States Supreme Court explained:

> The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government*. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to

[19] Also, plaintiffs pleaded as much in the complaints and provided certain opt-in documents. Defendants claim that, in light of the language of the GPTA, the counties had no discretion regarding what to do with the surplus proceeds. This is true, but the counties did have discretion regarding whether to act as the foreclosing governmental units.

[20] This provision is applicable to the states. See *Timbs v Indiana*, ___ US ___, ___; 139 S Ct 682, 687; 203 L Ed 2d 11 (2019).

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> this longstanding limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools. [Emphasis added.]

In *Austin v United States*, 509 US 602; 113 S Ct 2801; 125 L Ed 2d 488 (1993), the United States Supreme Court applied the excessive fines language of the Eighth Amendment to a criminal forfeiture of property related to the commission of a criminal offense. *Id*. at 620, 622. The application of the excessive fines language of the Eighth Amendment to a forfeiture of money in *United States v Bajakajian*, 524 US 321; 118 S Ct 2028; 141 L Ed 2d 314 (1998), superseded on other grounds by statute as recognized in *United States v Del Toro-Barboza*, 673 F3d 1136, 1154 (CA 9, 2012), also rested on the fact that the person in question committed a criminal offense. See *id*. at 328, 332.

The Michigan Constitution states that "[e]xcessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Const 1963, art 1, § 16. In *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App 255, 258-260; 654 NW2d 646 (2002), this Court noted that the state excessive fines clause applied to forfeitures associated with criminal activity. In *Rafaeli*, 505 Mich at 449, our Supreme Court, in distinguishing a case in which a forfeiture occurred in connection with criminal activity, stated, "the GPTA is not punitive in nature. Its aim is to encourage the timely payment of property taxes and to return tax-delinquent properties to their tax-generating status, not necessarily to punish property owners for failing to pay their property taxes."

In the cases at bar, the deprivation of property did not result from criminal activity. Plaintiffs have provided no legal basis for applying either the state Constitution or United States Constitution excessive fines clauses to a nonpunitive taking associated with noncriminal activity. The lower courts, therefore, did not err by dismissing plaintiffs' claims based on the excessive fines clauses

E. CLASS ACTIONS

Some of the lower courts concluded that plaintiffs' lawsuits were not properly structured and that claims against nonforum counties needed to be dismissed. Plaintiffs argue that their lawsuits were procedurally sound and that the lower courts erred by not certifying the cases as class actions.[21] We disagree.

[21] In Docket No. 350406, plaintiff moved for a stay of the class certification deadline but withdrew the motion without prejudice and the lower court extended the deadline until after it decided defendants' motion for summary disposition. The lower court granted Monroe County and its treasurer's motion for summary disposition and dismissed all other defendants without prejudice. In Docket Nos. 349557 and 349633, plaintiffs moved for a stay of the class certification deadline and the lower court did not address or decide the motion or the class certification issue. In Docket No. 349636, the lower courts concluded that a class action was not available to allow the joinder of the "additional" counties and their treasurers. In Docket No. 350394, the lower court concluded

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> We review de novo the proper interpretation and application of a court rule. We review for clear error the trial court's factual findings regarding class certification, and review for an abuse of discretion the trial court's discretionary decisions. A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake. [*Duskin v Dep't of Human Servs*, 304 Mich App 645, 651; 848 NW2d 455 (2014)(citations omitted).]

Plaintiffs claim entitlement to certification of their cases as class actions as a matter of law. We review questions of law—including questions of standing—de novo. *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011); *Palo Group Foster Care, Inc v Mich Dep't of Social Servs*, 228 Mich App 140, 145; 577 NW2d 200 (1998).

The parties spend time discussing jurisdiction, venue, and joinder, but the dispositive question, as acknowledged by plaintiffs, is whether class actions were appropriate. They concede, for example, that the class-action court rule, and not the general rules for joinder, govern this issue. In *Tucich v Dearborn Indoor Racquet Club*, 107 Mich App 398, 399-400; 309 NW2d 615 (1981),[22] this Court stated:

> In August, 1975, plaintiff, a member of defendant Dearborn Indoor Racquet Club, filed the instant class action suit in Wayne County Circuit Court on behalf of himself and all males similarly situated. Defendants are the Dearborn Indoor Racquet Club, five other tennis clubs in the Wayne County area, the Michigan Indoor Tennis Association and Edward C. Roney, Jr., its president. Suit against all defendants is based on the differential price charged for male and female memberships. In the case of the Dearborn Club the membership charge was $85 for males and $65 for females. Similar, though not identical, differential charges were made by the other five named defendant clubs.

The Court ruled that the plaintiff could maintain a class action against the Dearborn Indoor Racquet Club but not against the other defendants, stating that "one may not sue in a class action a defendant whom one could not sue individually." *Id*. at 406-407; see also *Magid v Oak Park Racquet Club Assoc, Ltd*, 84 Mich App 522, 531; 269 NW2d 661 (1978) ("[P]laintiffs may not sue in a class action a defendant whom they could not individually sue."). In *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999), this Court similarly stated that a "plaintiff who cannot

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that the plaintiffs had no standing to pursue claims against Van Buren County or its officials because those defendants had not harmed the named plaintiff and the claims were speculative. The court also concluded that the juridical-link doctrine (discussed in this opinion) was a federal doctrine and not applicable in Michigan courts. It concluded that the Van Buren defendants' motion for a change of venue was moot. Contrary to plaintiffs' suggestion, the lower courts were not relying on the venue rules in dismissing the "additional" counties and their treasurers.

[22] Cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), but they may be considered as persuasive authority. *Aroma Wines & Equip, Inc v Columbian Dist Servs, Inc*, 303 Mich App 441, 453 n 4; 844 NW2d 727 (2013).

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maintain the cause of action as an individual is not qualified to represent the proposed class." These cases stand for the proposition that the individual plaintiff who seeks to represent a class must in fact have standing to sue each of the named defendants.

Michigan law does not allow plaintiffs to bring class actions in the manner of the present cases. Plaintiffs contend that this Court should adopt the "juridical-link doctrine" to overcome the barrier to standing discussed in *Tucich* and *Magid*. This federal doctrine allows for dispensation of the traditional standing requirements in class actions in cases wherein a uniform policy is being applied consistently by state-actor defendants and is the sole basis for liability. See *Fox*, ___ F Supp 3d at ___; 2021 WL 120855 at 3-6; see also *Payton v Co of Kane*, 308 F3d 673, 678-682 (CA 7, 2002) (discussing the doctrine but declining to apply it directly and instead remanding the case for further development). The court in *Fox* applied the doctrine to allow for a class action opining that the counties' actions under the GPTA were juridically linked. *Fox*, ___ F Supp 3d at ___; 2021 WL 120855 at 6. The present cases, however, were brought in Michigan courts, so Michigan procedural rules apply.

Further, the Michigan Legislature has now adopted a specific procedure for a person to claim surplus proceeds under the GPTA. The Legislature has expressed its clear intent as to how claims for surplus proceeds must be made. As discussed in this opinion, we have concluded that the named plaintiffs, because their cases were pending on appeal at the time of the Supreme Court's *Rafaeli* decision and because their claims were made before the enactment of 2020 PA 256 and its effective date, should be allowed to pursue their claims. As noted, we relied in large part on *Hathcock*, 471 Mich at 484, wherein the Court applied its decision to "all pending cases in which a challenge . . . has been raised and preserved." (Citations omitted.) We decline to conclude that the unnamed putative class members "raised and preserved" claims to the surplus proceeds, given that the lower courts never granted class certification. Such unnamed persons and their still-to-be-made claims should be subject, instead, to the requirements of 2020 PA 256, MCL 211.78t.[23]

III. CONCLUSION

Therefore, in each case, we affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

We specifically conclude as follows:

[23] Plaintiffs have not argued in these appeals that class certification should go forward for counties involved with the named plaintiffs. They state only that "[r]eversal is minimally required for each plaintiff individually against each county/treasurer even if this Court declines to approve the juridical link doctrine." The putative plaintiffs had no pending claims such that the rule from *Hathcock* should be applied. As discussed in this opinion, any federal claim ultimately derives from *Rafaeli*'s conclusion that surplus proceeds after a foreclosure sale constitute a constitutionally protected property interest. Accordingly, it cannot be said that the putative class members have a federal claim in the absence of an application of *Rafaeli*.

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A. The individual officials sued in their personal capacities were entitled to qualified immunity and therefore we affirm all trial court decisions related to these claims.

B. Plaintiffs have alleged in their inverse-condemnation and unjust-enrichment claims, potentially viable claims of violation of their common-law property rights protected under Michigan's Takings Clause which if successful could allow them to collect the surplus proceeds that are realized from the tax-foreclosure sale of property, and therefore, we reverse all trial court decisions related to these claims.

C. Plaintiffs' claims that they are entitled to recovery beyond the surplus proceeds from the tax-foreclosure sale is unsupported by the law and therefore we affirm the trial courts' decisions to dismiss these claims. As to plaintiffs' claims that they are entitled to post-tax sale interest on any amounts that represent an inverse condemnation of their property, we agree these claims are potentially viable and we reverse the trial courts' decisions to dismiss those portions of the claims.

D. Plaintiffs' claims that they had viable causes of action for excessive fines under the Eighth Amendment of the United States Constitution and under the state Constitution are without merit and therefore we affirm the trial courts' decisions in this regard.

E. Plaintiffs' argument that their purported class action claims were sound and should have been certified by the trial courts is without merit and therefore we affirm the trial courts' decisions in this regard.

We do not retain jurisdiction.

/s/ James Robert Redford
/s/ Cynthia Diane Stephens
/s/ Anica Letica

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

STATE OF MICHIGAN
IN THE COURT OF APPEALS

LYNETTE HATHON; et al
Plaintiffs-Appellees-Cross Appellants

v.

STATE OF MICHIGAN; et al
Defendants-Appellants-Cross Appellees

PLAINTIFFS/APPELLEES' REPLY BRIEF

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REPLY

Public Act 256 of 2020 is unconstitutional. It purports to extinguish the vested claims of pre-*Rafaeli* takings victims; it provides insufficient compensation for all victims; and it improperly seeks to displace the Michigan Court Rules. Thus, the Court of Claims was correct to certify the Class in this case. Nothing in the State's combined Response and Reply Brief disturbs these conclusions.[1]

I. PA 256 is Unconstitutional as to Pre-*Rafaeli* Tax Equity Takings

Rafaeli applies retroactively. Thus, equity taking victims whose losses predated the decision had – and have – a vested right to secure compensation. The State is incorrect when it argues otherwise. And it is doubly incorrect when it suggests that PA 256 does not impair these rights. As Plaintiffs demonstrated in their initial brief, PA 256 purports to divest these victims of their claims by 1) requiring that the Supreme Court expressly greenlight their claims before they can file them; and 2) requiring them to file the claims within a two-year statute of limitations, which will run before the requisite Supreme Court decision.

A. *Rafaeli* applies retroactively

The State repeats the argument that "the *Rafaeli* decision does represent a new and unexpected ruling that overturned the statute and overturned an entire body of case law[.]" State's Br at 3. But as Plaintiffs previously showed, *Rafaeli* did not overturn any prior decisions other than those on appeal. And indeed, the State's Brief cannot and therefore, does not cite anything that *Rafaeli* overturned. Just because a decision disapproved of a litigant's prior practice does not mean it changed the law. Even if it had, it would still presumably apply retroactively. "The general

[1] Given this case's cross-appeal posture, for clarity, this Brief refers to the Plaintiffs/Appellees/Cross-Appellants as "Plaintiffs" and the Defendant/Appellant/Cross-Appellee as "the State."

principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law." *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 536; 821 NW2d 117 (2012) (citations and quotations omitted).[2]

The State also suggests that it reasonably relied on pre-*Rafaeli* jurisprudence when it assumed that it could take the foreclosed taxpayers' equity. But no binding precedent ever held the State's conduct constitutional. As Plaintiffs explained in their Brief, any such "reliance" on the jurisprudence was unreasonable, and the State's responses only underscores this conclusion. For example, it says that resolution of the issue requires a balancing test and that "the balancing is not easy" because "balancing the[] competing interests is likely a zero sum proposition." State's Br at 29. Again, though, because *Rafaeli* did not announce a new rule, this analysis is unnecessary. Even if it did, the State's approach to the issue is misguided. It claims that "injustice might result from full retroactivity," State's Br at 29, because "[t]o hold that the Court's ruling should apply retroactively upsets the applecart for every county, and most if not every local unit of government in this State, each having budgeted and spent funds on public services already provided." State's Br at 28-29. This amounts to: the taking at issue was so extensive that governments should not have to pay fair compensation. The takings clause lacks such a "too big to fail" exception.[3] Such

[2] The principle articulated in *Spectrum* is important because, "[a]bsent legislative revision, …law is immutable and unmalleable; its meaning does not ebb and flow with the waves of judicial preferences." *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 186; 909 NW2d 38 (2017), *aff'd in part, vacated in part*, 504 Mich 985 (2019) (citation omitted). "'For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*[.]'" *Id.* at 187, quoting 1 BLACKSTONE, *Commentaries on the Laws of England*, p. 70). Thus, even if, *arguendo*, *Rafaeli* was inconsistent with earlier caselaw, then *Rafaeli* renders the earlier inconsistent caselaw irrelevant.

[3] The State also claims that before *Rafaeli*, pre-*Rafaeli* claimants lacked any expectation that their property rights would be respected. State's Br at 29. This argument is belied by the very fact of this litigation.

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thinking – that paying compensable taking claims would be too costly to the government – has long been rejected as irrelevant. *Arkansas Game & Fish Comm'n v United States*, 568 US 23, 36-37; 133 S Ct 511; 184 L Ed 2d 417 (2012).

B. PA 256 improperly extinguishes the vested claims of pre-*Rafaeli* victims

The State concedes, as it must, that a new statute cannot extinguish vested claims. "[A] new and retroactive law that abrogates a prior cause of action *and in so doing wholly eliminates* every manner of claiming a vested right (i.e., leaves no other method of recovery) is impermissible retroactive legislation." State's Br at 11 (emphasis in original). See also State's Br at 15 ("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."); State's Br at 11-12 (discussing *Minty v State*, 336 Mich 370, 390; 58 NW2d 106 (1953), which found that a vested right survived attempted legislative extinguishment because "[i]t would be an act of absolute injustice to abolish with a law *all the effects which it had produced*."); State's Br at 12-14 (discussing *Antoni v Greenhow*, 107 US 769, 775; 2 S Ct 91; 27 L Ed 468 (1883) and *Poindexter v Greenhow*, 114 US 270, 299; 5 S Ct 903; 29 L Ed 185 (1885), which prohibited retroactive extinguishment of substantive claims).

As Plaintiffs have discussed throughout the briefing, PA 256 does just that: it purports to establish itself as the exclusive process for recovering equity taken in a tax foreclosure; it forbids pre-*Rafaeli* takings victims from bringing a claim until after a future Supreme Court decision affirmatively announcing that they may do so; and it imposes a two-year statute of limitations that will run before any such Supreme Court pronouncement.

Despite all this, the State argues that, assuming *Rafaeli*'s retroactive application, PA 256 does not impair the vested rights of pre-*Rafaeli* takings victims for two reasons. Both fail.

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First, the State claims that PA 256 could properly replace the extant six-year statute of limitations for takings claims with a new two-year period. It claims that "[t]he two-year claims period under MCL 211.78l(1) is not new," because "'[t]he monetary-damages remedy in MCL 211.78l(1),' even before Public Act 256, 'provided an alternative avenue of relief available *only* to those former property owners and interest holders who did not receive constitutionally adequate notice of the foreclosure proceedings as required under the GPTA.'" State's Br at 9 (quoting *2 Crooked Creek LLC v Cass Co Treasurer*, 507 Mich 1; 967 NW2d 577 (2021)). But the existing statute of limitations for inadequate notice claims is irrelevant. As Plaintiffs explained in their Brief, under *Rafaeli*, tax equity takings victims have takings claims, and the statute of limitations for such claims is six years.[4] By purporting to replace a six-year period with a two-year period, PA 256 purports to extinguish vested claims.[5] This renders the statute unconstitutional. See State's Br at 15 (because "'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,'" quoting *Minty*, 336 Mich at 396, which quoted *Duke Power v South Carolina Tax Comm'n*, 81 F2d 513, 517 (CA 4, 1936)).[6]

[4] This is one reason why it is important that Class Members retain a takings claim. The State is remarkably casual about the importance of this claim. See, e.g., State's Br at 11 (complaining that "Plaintiffs' argument elevates a cause of action" for a taking "above the sought property right itself."); State's Br at 17 (characterizing Plaintiffs' Complaint, which centers around their takings claim, as entailing "myriad, ill-fitting causes of action"). Indeed, if PA 256 simply changed the name of a takings claim to something different, that would be one thing. But as explained throughout, the statute pervasively purports to impair substantive takings claims rights.

[5] The State claims that "Plaintiffs appear to concede that the Legislature intended PA 256 to apply retroactively." State's Br at 5. But as Plaintiffs have explained throughout the briefing, any such retroactive application would be unconstitutional. The State cannot use the statute's purported invalidation of vested pre-*Rafaeli* claims as a point in the statute's favor.

[6] As the State concedes, PA 256 cannot be remediated by allowing the pre-*Rafaeli* claims to proceed but by requiring the claimants to use the PA 256 remedy process. "'A statute which attempts by the same provision to destroy both a right and a remedy succeeds in destroying neither.'" State's Br at 15 (quoting *Minty*, 336 Mich at 396, which cited *Duke*, 81 F2d at 586,

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Second, the State argues that "[i]f [the] right [to recovery] is affirmed to exist under *Rafaeli*, then the law still does not divest any right because it provides a claim system that starts 180 days after the affirming decision." State's Br at 16 (citing MCL 211.78t(6)). As far as Plaintiffs (or their counsel) know, this is the first time that any tax equity defendant has made this suggestion. It is clearly incorrect as stated, and even a "corrected" reading of the argument hardly reflects a plain reading of the statute.

The cited provision, MCL 211.78t(6), reads as follows:

> **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 under subsection (2) in the manner prescribed under subsection (2) **by the March 31 at least 180 days after any qualified order**. By the following July 1, the foreclosing governmental unit shall provide each claimant seeking remaining proceeds for the property and notifying the foreclosing governmental unit under this subsection with a notice relating to the foreclosed property in the form and manner provided under subsection (3). 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. The motion must be certified and include all of the following [requirements that are spelled out]. (emphasis added).

The State *seems* to be saying that a Supreme Court decision affirming *Rafaeli*'s retroactive application would constitute a "qualified order" that begins a 180-day period. Actually, though, the notice deadline is the first March 31st to occur 180 days after the "qualified order." Assuming that this is how the State meant to characterize the deadline, the State's reading of the statute is nonetheless problematic. Although the term "qualified order" is neither defined nor used elsewhere

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which in turn cited *Lynch v US*, 292 US 571, 586; 54 S Ct 840; 78 L Ed 1434 (1934)). Yet PA 256 purports to extinguish pre-*Rafaeli* claimants' claims, and to require such claimants to use PA 256 to vindicate whatever claims survive such extinguishment. Once it attempts the former, it cannot insist on the latter.

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in PA 256, in context it clearly seems to refer to the underlying foreclosure order – not the potential Supreme Court decision. The first "March 31st after 180 days" deadline is followed by a motion deadline the next October. *Id.* This clearly suggests a repeating, annual claims process, as opposed to a one-time provision for pre-*Rafaeli* claimants.

Moreover, even if the State's apparent reading of the statute is correct, it would still not solve the problem. This is because PA 256 requires compliance with the MCL 211.78t(6) claim deadline *and* the two-year statute of limitations under MCL 211.78l(1). See MCL 211.78l(1) ("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," and any constitutional claims are subject to the two-year limitation period). As Plaintiffs explained in their main brief, this statute of limitations, coupled with the "exclusive remedy" provision, will purport to bar all pre-*Rafaeli* claims by this coming July. In its brief, the State never disavows this independent bar. In fact, as discussed above, it defends it.

In other words, the State suggests that pre-*Rafaeli* claimants will have the opportunity to bring their claims if and when the Supreme Court affirms *Rafaeli*'s retroactive application. But the State bases this assurance on an undeveloped and strained reading of MCL 211.78t(6) to suggest a "grace period." And elsewhere in its brief, the State effectively disavows the assurance, arguing that the two-year statute of limitations is enforceable, presumably despite the grace period and despite the fact that the two-year limitations period would extinguish any grace period rights. Thus, the State's assurances that "PA 256 does not retroactively unwind *Rafaeli*-based liability," but "[r]ather… *provides* a comprehensive claim-making system that cures a defect in the prior law," State's Br at 5-6 (emphasis in original), and that "this law does not operate as a complete

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abolition of any right to proceeds but operates in furtherance of that right," State's Br at 19, are frankly Orwellian.

II. PA 256 Provides Insufficient Compensation

As Plaintiffs explained in their brief, the relief that PA 256 does provide to some claimants falls well short of the compensation required by *Rafaeli*, let alone by federal takings jurisprudence. The State's responses are not compelling.

For example, the State argues that "Plaintiffs' 'incomplete' relief [argument] misses a fundamental point," that, "'to the extent the GPTA permit[ted] defendants to retain these surplus proceeds and transfer them into the county general fund,' the prior law effectuated a taking as to the *Rafaeli* plaintiffs," but that "now the statute does provide that mechanism[,] there can be no taking under *Rafaeli*." State's Br at 30 (quoting *Rafaeli*, 505 Mich at 474–475). The argument seems to be that, because PA 256 provides some token of relief to some victims, there was no longer a taking to begin with. But the State offers no support for the extraordinary suggestion that it can immunize itself from takings claims through a *post facto and constitutionally deficient* remedy. Nor does it reconcile its argument with the fact that, under *Rafaeli* itself, an equity takings victim is entitled to at least the entire surplus proceeds: "just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, *no less*." *Rafaeli*, 505 Mich at 483-484 (emphasis added).

Nonetheless, PA 256 awards governments five percent of the surplus proceeds, MCL 211.78t(9). It also requires the victim to pay the Defendants' fees, such as attorneys' fees. MCL 211.78m(12)(b)(2). The State responds that "the new collection-related expenses required by *Rafaeli*, and PA 256 are reasonably added to the recoverable amounts; that does not mean recovery

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is incomplete it means that if taxpayers force the FGU to use foreclosure and sale to collect taxes then the reasonably related expenses, as determined by the Legislature, are part of that tax collection process." State's Br at 30. But these deductions are not "required by *Rafaeli*" – they are inconsistent with it, and in particular with its "no less" requirement. The State has already recouped the cost of the sale by establishing the "minimum bid" at the auction. MCL 211.78m(16) (in effect prior to PA 256). And how could a government's PA 256-process attorneys' fees be "reasonably related to the foreclosure and sale of the property?" See *Rafaeli*, 505 Mich at 484.

III. PA 256 Improperly Seeks to Displace the Michigan Court Rules

As Plaintiffs explained in their main brief, PA 256 improperly seeks to override the Michigan Court Rules by displacing the class action mechanism in favor of a specialized set of procedures containing several legal tripwires. The State responds that "PA 256 does not even address class actions, much less abrogate the court rule governing them." State's Br at 18. In light of PA 256, the State says, these rules "simply do not apply." State's Br at 18. But that is the point: the statute *effectively* purports to forbid class actions by replacing the ordinary court rules with a set of specialized procedures. This is improper. As the State concedes, "this law" – PA 256 – is procedural. *Id.* And as the State also implicitly concedes, "'[w]here there is a conflict between a statute and a court rule, the court rule prevails … if it governs practice or procedure.'" State's Br at 18 (quoting *Matter of Estate of Hillier*, 189 Mich App 716, 719–720; 473 NW2d 811 (1991)). Put another way: the statute and the court rule both govern "practice and procedure"; therefore, the court rules prevail; they do not require any specialized equity claims process; and they permit class actions.

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IV. The Court of Claims Properly Certified the Class

As Plaintiffs showed in their main brief, the Court of Claims properly certified the class. Indeed, this is a paradigmatic class action, in which all of the class members suffered a common injury because of the State's single course of conduct. None of the State's responses disturb this conclusion. For example, the State claims that "the only 'common' issue" in the case "was decided in *Rafaeli.*" State's Br at 17. But as Plaintiffs explained in their main brief, the resolution of a common issue does not render class litigation inappropriate. See, e.g., *In re Nassau Co Strip Search Cases*, 461 F3d 219, 227-228 (CA 2, 2006) (holding that "a concession does not eliminate a common issue from the predominance calculus"); *Gulino v Bd of Educ of City Sch Dist of City of New York*, unpublished opinion of the United States District Court for the Southern District of New York, issued August 29, 2013 (Case No. 96 CV 8414 KMW), p 6 (resolved issues can satisfy the commonality requirement, citing *In re Nassau Co*, 461 F3d at 227-228); *In re MF Global Inc*, 512 BR 757, 766 (Bankr SDNY, 2014), citing *Gulino*, unpub op at 6; *Kalish v Karp & Kalamotousakis, LLP*, 246 FRD 461, 462 (Bankr SDNY, 2007) (class certified where "Defendant concede[d] liability on the underlying [] claim"); *DeMons v United States*, 119 Fed Cl 345, 353 (2014) (class certified against federal government despite "the Government's argument that because it concedes liability, there are no common questions for the court to decide").

V. The Court of Claims Erred in Limiting the Class Period to the Court of Claims Act Period Instead of the Takings Statute of Limitations

As Plaintiffs explained in their brief, the Court of Claims erred in truncating the class period, which should be determined according to the statute of limitations for the constitutional cause of action instead of the time limit in MCL 600.6431(1). The State does not dispute this argument.

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CONCLUSION

For all of the reasons set forth above, and in Plaintiffs' prior briefing, Plaintiffs reiterate the request set forth in their primary brief.

RESPECTFULLY SUBMITTED,

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Dated: May 12, 2022

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STATE OF MICHIGAN

BERRIEN COUNTY TRIAL COURT - CIVIL DIVISION

811 Port Street, St. Joseph, MI 49085 | Telephone 269.983.7111

IN THE MATTER OF THE PETITION OF THE BERRIEN COUNTY, TREASURER FOR THE FORECLOSURE OF CERTAIN PARCELS OF PROPERTY DUE TO UNPAID 2018 AND PRIOR YEARS' TAXES, INTEREST, PENALTIES AND FEES.

Petitioner.

CASE NO. 2020-0105-CH
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Opinion and Order Denying Petitioner's Motion for Reconsideration

This matter is before the Court on Petitioner's Motion for Reconsideration of the Court's Order entered April 21, 2023, following a motion hearing regarding Claimants' Combined Amended Motions to Disburse Remaining Proceeds from Tax Foreclosure Sale Together with Enforcement of Agreement filed on December 19, 2022 and Petitioner's Brief in Support of its Response in Opposition to Claimants' Amended Motions to Disburse Remaining Proceeds from Tax Foreclosure Sale Together with Enforcement of Agreement filed on February 12, 2023. As the claims had not accrued at the time notice was required by the statute, this Court held that MCL 211.78t as applied to these Claimants amounts to an unconstitutional taking, ordered that the Berrien County Treasurer submit an affidavit as to each individual claimant setting forth the interest, penalties, and fees that are reasonably related to the foreclosure and sale of the parcels, and ordered that the Claimants, through their attorneys, shall submit proposed orders for each individual Claimant for the dispersal of the related surplus proceeds for each parcel.

Analysis

A motion for reconsideration is controlled by MCR 2.119(F) which provides the following:

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

A palpable error is defined as an error that is "'[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.'" *Stamp v. Mill Street Inn*, 152 Mich.App. 290, 294, (1986), quoting Black's Law Dictionary (5th ed.), p. 1000." A mere difference of opinion between two judges regarding equities of the matter does not constitute a palpable error. *Luckow v Luckow*, 291 Mich App 417, 427 (2011). The palpable error provision found in MCR 2.119(F)(3) is not mandatory. *People v Walters*, 266 Mich App 341, 350 (2005). It only provides guidance to a court in its determination as to whether it is appropriate to grant a motion for reconsideration. *Id.*

In Petitioner's Motion for Reconsideration, Petitioner asserts that reconsideration is appropriate because the Court erred in ruling that the MCL 211.78t is unconstitutional as applied to the Claimants of this case. Petitioner sets forth 4 primary arguments as restated here: (1) the deadline set forth in MCL 211.78t and other analogous deadlines have been consistently upheld by other courts; (2) MCL 211.78t provided a process by which claimants could avail themselves pursuant to *Rafaeli;* (3) the 5 percent commission fee was contemplated and approved by the court in *Rafaeli;* and (4) the Death Savings Doctrine is inapplicable.

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The Deadline Set Forth in MCL 211.78t and Other Analogous Deadlines Have Been Consistently Upheld by Other Courts

Petitioner first argues that the Court erred in holding that MCL 211.78t is unconstitutional as applied to the Claimants in this case because the deadline for a Notice of Claim and other analogous deadlines have been consistently upheld by other courts. [1] This issue was expressly ruled on by the Court. On April 21, 2023, this Court held that the July 1 deadline found in MCL 211.78t amounts to an unconstitutional taking when applied to the Claimants in this case based upon the reasoning set forth in *Rafaeli.* As noted in the Court's opinion, the Supreme Court of Michigan held in *Rafaeli* that a property owner has a common-law, vested property right to the surplus proceeds from a tax foreclosure sale and that right survives the foreclosure process; this is a property right that does not exist and for which a claim does not accrue, until the foreclosure sale produced a surplus. *Rafaeli, LLC v Oakland Cnty.*, 505 Mich 429, 476, 477 (2020). Further, the fact that other courts may not agree with this Court's ruling is irrelevant as a mere difference of opinion between judges does not amount to a palpable error. This argument is merely addressing an issue already expressly ruled on by this Court and presents no error by which the parties were misled.

MCL 211.78t Provided a Process by which Claimants Could Avail Themselves Pursuant to *Rafaeli*

Next, Petitioner argues that the Court erred in holding that MCL 211.78t is unconstitutional as applied to the Claimants because the statute provides a process by which claimants can avail themselves to recover surplus proceeds. Again, this issue was already ruled on by the Court. In its holding, this Court stated that a former property owner has a common law right to surplus proceeds that is not compensable until the property is sold for an amount in excess of the debt. [2] Additionally, Petitioner has not demonstrated how this ruling amounts to a palpable error. Petitioner argues that MCL 211.78t does not extinguish a claimant's vested right in surplus proceeds because it provides a method of recovery. However, there was no process by which the Claimants in the instant case could avail themselves. In *Rafaeli,* the Supreme Court of Michigan explained that a former property owner has a vested right to surplus proceeds and they may make a claim for those proceeds once the sale has produced a surplus. *Rafaeli,* 505 Mich at 477. The Claimants in this case did not have vested rights until the completion of the foreclosure sales, which did not occur until after the statutory deadline. One does not have a vested right to proceeds that do not exist. Once the foreclosure sales were completed, their rights vested and they had a constitutional right to make a claim for any surplus proceeds but MCL 211.78t failed to provide them an avenue to do so. Therefore, Petitioner again raises an issue already expressly ruled on by the Court and fails to demonstrate any error the correction of which would compel a different result.

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[1] Notably the Petitioner's brief cites MCL 600.6431 as discussed in cited cases; the statute at issue by its terms applies to "accrued" claims. It is entirely unclear whether other courts in the State of Michigan referred to in Petitioners Motion were ruling on the issues raised here; i.e. claims that had not yet accrued at the time of the statutory deadline for notice.

[2] As applied to these Claimants, the application of the statutory notice requirement would have been constitutional had the foreclosure sale occurred creating the surplus property right before the statutory deadline. It is, as ordered, in the application, not the process, that an unconstitutional taking occurred on these facts.

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The 5 Percent Commission Fee was Contemplated and Approved by the Court in Rafaeli

Petitioner also argues that the Court erred in holding that MCL 211.78t is unconstitutional as applied to these Claimants because the 5 percent commission fee is consistent with *Rafaeli.* Additionally, Petitioner asserts that other Michigan courts have found MCL 211.78t to be constitutional as applied so this Court should as well. First, this issue was already ruled on by the Court. As indicated in the Court's Order, Petitioner is required to submit an affidavit as to each individual Claimant setting forth the interest, penalties, and fees that are reasonably related to the foreclosure and sale of the parcels. That order is consistent with *Rafaeli.* The Supreme Court of Michigan stated in *Rafaeli* that "just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less." *Id.* at 483-484. *Rafaeli* provides for fees reasonably related to the foreclosure, not a blanket commission fee that may exceed that amount. Second, Petitioner fails to demonstrate how this ruling amounts to an obvious error. The fact that other judges may disagree with this ruling does not constitute a palpable error. *Luckow v Luckow,* at 427. As to their third argument, Petitioner fails to present an issue not already ruled on by the Court and does not demonstrate a palpable error.

The Death Savings Doctrine is Inapplicable

Finally, Petitioner argues that the Court erred in holding that MCL 211.78t is unconstitutional as applied to these Claimants because the claims cannot be saved by the Death Savings Doctrine. As stated in the Opinion, the Court did not find it necessary to address other theories raised by Claimants, such as the Death Savings Doctrine. It would have been superfluous of the Court to address the Death Savings Doctrine as that theory merely provided a way in which Claimants could avoid the statutory deadline set forth in MCL 211.78t, which the Court had already ruled was unconstitutional as applied to these Claimants. Furthermore, Petitioner failed to demonstrate that the Court's holding on this issue amounts to a palpable error. Petitioner argues that these Claimants had no standing, but does not explain how they lack an interest in the surplus proceeds that they have a vested right to and no method by which to claim them. Petitioner again raises an issue already ruled on by the Court and does not demonstrate a palpable error by which the court and the parties have been misled.

Conclusion

For the reasons stated above, and because it is clear that Petitioner's Motion for Reconsideration merely presents the same issues ruled on by the Court and demonstrates no palpable error, Petitioner's Motion must be denied.

Order

For the reasons stated in the above Opinion, Petitioner's Motion for Reconsideration is hereby denied.

It is so ordered.

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This is not a final order and does not close the case.

Dated: 5/24/2023

Hon Sterling R. Schrock

Berrien County Trial Court, Civil Division

Certificate of Service:

I certify that on this date, I served a copy of the foregoing document on the parties and/or their attorneys by:

e-mail / ~~first-class mail~~

5/24/23

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2022 WL 523023
Only the Westlaw citation is currently available.
United States Court of Appeals, Sixth Circuit.

Thomas A. FOX, and all those similarly situated, Plaintiff-Appellee,

v.

SAGINAW COUNTY, MICHIGAN, BY its BOARD OF COMMISSIONERS, et al., Defendants-Appellants.

Case No. 21-1108
|
FILED February 22, 2022

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

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BEFORE: GUY, COLE, and STRANCH, Circuit Judges.

OPINION

COLE, Circuit Judge.

***1** Thomas Fox, the class representative to this class action, alleges that twenty-seven Michigan counties unlawfully retained the surplus equity in class members' foreclosed properties without compensation, in violation of the Takings Clauses of the Michigan and United States Constitutions. The counties appeal the district court's partial denial of their motions to dismiss on the grounds that the counties are not entitled to sovereign immunity. The counties additionally argue that the district court erred in finding that plaintiff Fox had "juridical link" standing to represent the class, including those plaintiffs with claims against dozens of Michigan counties that never directly injured Fox. Finally, the counties argue that the district court erred in finding that Fox adequately pleaded a Fifth Amendment takings claim on behalf of the class under 42 U.S.C. § 1983. Because the counties are not entitled to sovereign immunity, and we lack jurisdiction to review the counties' other arguments, we affirm.

I. BACKGROUND

A. Factual Background

Thomas Fox was a property owner in Gratiot County, Michigan. By 2017, Fox had accrued a tax delinquency of over $3,000 on the property, which had an alleged fair market value of $50,400. In February 2017, Gratiot County "seized ownership of the Property," and sold it at auction for more

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than the value of Fox's tax delinquency as it was entitled to do under Michigan law.

Gratiot County was not required to foreclose on Fox's property. Michigan's General Property Tax Act ("the Act"), Mich. Comp. Laws § 211.78 *et seq.*, provides that "[t]he foreclosure of forfeited property by a county is voluntary and is not an activity or service required of units of local government[.]" Mich. Comp. Laws § 211.78(6). Foreclosures are initiated by a "foreclosing governmental unit" ("FGU"). Either "[t]he treasurer of a county" or the State of Michigan "if the county ... elected ... to have [Michigan] foreclose property under this act" can act as an FGU. *Id.* § 211.78(8)(a).

Counties initially had to decide whether to opt-out of becoming an FGU and instead elect to have Michigan foreclose real property "no[ ] later than December 1, 1999[.]" *Id.* § 211.78(3). In December 2004, counties had the opportunity to reconsider their status. *Id.* This was, by statute, the final chance for counties to opt-out of becoming an FGU. From January 1, 2009, through March 1, 2009, counties could reconsider their status and opt-in to becoming FGUs, but not opt-out. *Id.* § 211.78(4). After 2010, counties could opt-in to becoming an FGU in any given year after February of the following year "by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive[.]" *Id.* § 211.78(5). As of 2019, "[75] of Michigan's 83 counties elect[ed] to act as the [FGU.]" *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 442 n.11 (Mich. 2020) (citation omitted).

Once a county—like Gratiot—decides to foreclose on a property, the Act regulates the entire process, including what an FGU may do with the funds from the sale. *See* Mich. Comp. Laws § 211.78m; *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 824 (6th Cir. 2017) (Kethledge, J., dissenting) ("[T]he Michigan Act appears actually to *require* the County to short the taxpayer the difference between the value of the property forfeited and the amount of taxes and penalties owed.")

***2** At the time of Fox's foreclosure, the Act provided:

> (8) A foreclosing governmental unit *shall* deposit the proceeds from the sale of property under this section into a restricted account designated as the "delinquent tax property sales proceeds for the year _____". The foreclosing governmental unit shall direct the investment of the account. The foreclosing governmental unit shall credit to the account interest and earnings from account investments. Proceeds in that account *shall only* be used by the foreclosing governmental unit for the following purposes in the following order of priority:
>
> (a) The delinquent tax revolving fund shall be reimbursed for all taxes, interest, and fees on all of the property, whether or not all of the property was sold.
>
> ...
>
> (h) ... All or a portion of any remaining balance, less any contingent costs of title or other legal claims described in subdivisions (a) through (f), may subsequently be transferred into the general fund of the county by the board of commissioners.

Mich. Comp. Laws § 211.78m(8) (2015) (emphasis added). In Fox's case, Gratiot County retained the surplus funds as was required by the Act. *See id.* Fox contends that by retaining the funds, Gratiot County "took or destroyed" his equity in the property, and that other Michigan counties engaged in the same practice, harming other Michigan residents.

B. Procedural History

On June 25, 2019, Fox filed a complaint on behalf of himself and all others similarly situated against Gratiot County and several other Michigan counties and county treasurers in their individual and official capacities, seeking damages based on the counties' retention of surplus proceeds from tax foreclosure sales. On September 4, 2019, Fox filed an amended complaint that named more counties and county treasurers as defendants and brought three additional claims against them. In total, Fox brought eight claims against the county defendants, alleging that the destruction of his and other class members' equity was an unconstitutional taking under Michigan and federal law, that the retention of the surplus proceeds constituted an inverse condemnation of their property, that the class members' procedural and substantive due process rights were violated, and that the county defendants were unjustly enriched through this process.

On January 10, 2020, the district court stayed the case pending a decision from this court in *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020), which the district court believed presented nearly identical facts, substantive arguments, and jurisdictional questions. On July 17, 2020, the Michigan Supreme Court decided *Rafaeli, LLC v. Oakland County*, and concluded that the "retention of [ ] surplus proceeds under the [Act] amounts to a taking of a vested property right," in

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violation of the Michigan Constitution's takings clause, Mich. Const. art. 10, § 2. 952 N.W.2d at 474, 477. On September 30, 2020, we decided *Freed*, concluding that neither the Tax Injunction Act nor principles of comity precluded an action against Michigan counties for surplus proceeds retained under the Act. *Freed*, 976 F.3d at 737.

***3** On October 16, 2020—on Fox's motion—the district court lifted the stay, certified the proposed class, and appointed class counsel. Between September 2019 and October 2020, over fifty defendants moved to dismiss the amended complaint in part or in whole. On January 13, 2021, the district court—deciding the motions jointly—granted in part and denied in part the defendants' motions to dismiss. *See Fox v. Cnty. of Saginaw*, No. 19-cv-11887, 2021 WL 120855, at *1 (E.D. Mich. Jan. 13, 2021). Relevantly, while the district court found that the county treasurers were entitled to qualified immunity, the district court concluded that the counties themselves were not entitled to sovereign immunity. *Id.* at *7–8. Therefore, the district court determined that the class could proceed with their takings, inverse condemnation, due process, and unjust enrichment claims against the counties. *Id.* at *10–16.

The county defendants now appeal the district court's denial of sovereign immunity. The county defendants further argue that, because standing is a threshold jurisdictional issue, we should review the district court's finding that the non-Gratiot County defendants are "juridically linked" for the purposes of standing and reverse the district court's judgment that Fox may bring a class action against those counties that did not harm him. Finally, the county defendants argue that we should exercise pendent appellate jurisdiction to review the district court's finding that Fox adequately alleged a municipal policy or custom that was the moving force behind the alleged constitutional violation as is required to bring a cause of action under Section 1983 against a municipality. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

II. ANALYSIS

This is an interlocutory appeal. Normally, pursuant to 28 U.S.C. § 1291, our jurisdiction is limited to appeals from "final decisions" of the district court. When a decision "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action," however, this court may have jurisdiction under what has come to be known as the collateral order doctrine. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

"It is well-settled that the collateral order doctrine gives us jurisdiction over appeals of the denial of Eleventh Amendment sovereign immunity." *Town of Smyrna v. Mun. Gas Auth. of Ga.*, 723 F.3d 640, 645 (6th Cir. 2013) (first citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142–44, 147 (1993); and then citing *Mingus v. Butler*, 591 F.3d 474, 481 (6th Cir. 2010)). Therefore, we may consider the district court's denial of sovereign immunity to the counties. Our jurisdiction over the other issues raised is discussed below.

A. Standing

While we have an independent obligation to assure ourselves of our jurisdiction, there is no question here that—at a minimum—Fox has standing to bring a claim against Gratiot County. The counties argue, however, that the district court's determination that Fox has standing to represent a class of individuals harmed by other counties is reviewable even though it is not a final order. In their view, because Article III standing is a prerequisite to federal court jurisdiction, it is automatically reviewable on an interlocutory appeal. Defendants request that the court reverse and remand for dismissal of Fox's claims against all defendants except Gratiot County for lack of standing.

Unless otherwise provided by statute, the only way a court may maintain jurisdiction over an appeal from a non-final order is under the collateral order doctrine. *See Will v. Hallock*, 546 U.S. 345, 349 (2006). The "collateral order doctrine ... is best understood not as an exception to the final decision rule laid down by Congress in § 1291, but as a practical construction of it." *Id.* (quotations and citation omitted). For a court to maintain jurisdiction over an appeal from a non-final order pursuant to the collateral order doctrine, that order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Id.* (quotations and citation omitted). "[T]he finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

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***4** Because standing, as the Eleventh Circuit noted, "fails the last prong[,]" *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999), we lack jurisdiction to review this portion of the district court's order.

B. Monell Liability

The county defendants argue that we should exercise our pendent appellate jurisdiction to review whether Fox adequately pleaded a violation of federal law under *Monell*, because that issue is sufficiently intertwined with the Eleventh Amendment claim to invoke pendent jurisdiction.

If an issue is not a part of the " 'small category' of decisions that fall under the collateral order doctrine," this court may review it only if it exercises pendent appellate jurisdiction. *Lowe v. Hamilton Cnty. Dep't of Job & Fam. Servs.*, 610 F.3d 321, 323 (6th Cir. 2010). "The doctrine of pendent appellate jurisdiction allows an appellate court, in its discretion, to exercise jurisdiction over issues that are not independently appealable when those issues are 'inextricably intertwined' with matters over which the appellate court properly and independently has jurisdiction." *Charvat v. E. Ohio Reg'l Wastewater Auth.*, 246 F.3d 607, 613 (6th Cir. 2001) (quoting *Chambers v. Ohio Dep't of Hum. Servs.*, 145 F.3d 793, 797 (6th Cir. 1998)). "This circuit has interpreted 'inextricably intertwined' to mean that the resolution of the appealable issue 'necessarily and unavoidably' decides the nonappealable issue." *Lowe*, 610 F.3d at 324 (quoting *Summers v. Leis*, 368 F.3d 881, 889 (6th Cir. 2004)).

Here, the Eleventh Amendment issue can be resolved without resolving the counties' liability under *Monell*. While the two issues are similar, the sovereign immunity analysis requires an analysis of the nature of the entity and the discretion afforded to the county in undertaking a specific activity, while the *Monell* analysis requires an analysis of who implemented and adopted a policy, an issue which is not collateral to the merits of the case or necessary to determine whether the counties are entitled to sovereign immunity.

Therefore, we lack pendent appellate jurisdiction over the district court's denial of the counties' motions to dismiss as to *Monell* liability.

C. Sovereign Immunity

We now address the remaining issue over which we have jurisdiction—whether the counties are entitled to sovereign immunity. The court reviews the legal question of whether a body is entitled to sovereign immunity de novo but accepts the district court's underlying factual findings unless such findings are clearly erroneous. *S.J. v. Hamilton Cnty.*, 374 F.3d 416, 418 (6th Cir. 2004).

The United States Supreme Court "has repeatedly refused to extend sovereign immunity to counties." *N. Ins. Co. of N.Y v. Chatam Cnty*, 547 U.S. 189, 193 (2006) (collecting cases). Therefore, the county defendants are subject to suit unless they were acting as an "arm of the state" when foreclosing or electing to foreclose upon on plaintiffs' properties.[1] *Id.* at 194.

[1] Plaintiffs also argue, in the alternative, that the Eleventh Amendment cannot bar a federal takings claim against a local government. This argument is without merit, as we, along with several other circuits, have concluded that "the Fifth Amendment's Takings Clause does not abrogate sovereign immunity." *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1390 (2021); *see Zito v. N. C. Coastal Res. Comm'n*, 8 F.4th 281, 286–87 (4th Cir. 2021) (first citing *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019); and then citing *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456–57 (5th Cir. 2019)).

***5** The county defendants argue that because the Act mandated how they distributed surplus proceeds from tax-foreclosure sales, they were acting as an arm of the State and are entitled to sovereign immunity. Plaintiffs argue that the district court did not err when it determined that the counties were not acting as arms of the state because they voluntarily decided to become FGUs.

We have held that to determine whether an entity is an "arm of the State," we should consider the following factors:

> (1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government.

Ernst v. Rising, 427 F.3d 351, 359 (6th Cir. 2005) (en banc) (internal citations omitted). Considering the discretionary nature of the activity, the Supreme Court's clear preference for denying counties sovereign immunity, and viewing the other relevant factors in their entirety, we find that the counties are not entitled to sovereign immunity.

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The first factor—the State of Michigan's potential liability for a judgment—weighs against sovereign immunity. This is "the foremost factor," and "it is the state treasury's potential legal liability for the judgment, not whether the state treasury will pay for the judgment in that case, that controls the inquiry." *Id.* (emphasis omitted) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997)). There is no information that indicates that the state would incur any liability. The counties retained the funds, so the counties would likely be responsible for the judgment.

Factors two, three, and four also weigh against sovereign immunity. While counties are created by the Michigan Constitution, *see* Mich. Const. art. VII §§ 1–13 (outlining the rights and obligations of counties), they maintain a significant amount of autonomy. The counties' obligations and functions are those typical of local government, and the officials are elected locally rather than appointed by the state.

Despite this, the counties argue that the lack of discretion they are afforded once they become an FGU entitles them to sovereign immunity. *See Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999) ("Where county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the State."). The counties' situation here is different from most "arm of the State" analyses, however, as the counties are entities, not individual officers. *See, e.g. Ermold v. Davis*, 936 F.3d 429, 435 (6th Cir. 2019) (finding that a clerk who refused to issue marriage licenses was acting on behalf of the state, not the county, because state law required her to issue marriage licenses to eligible couples); *Crabbs v. Scott*, 786 F.3d 426, 430 (6th Cir. 2015) (finding that where a state law requiring the collection of DNA from those arrested for felony defenses did not require a county sheriff to collect an acquitted defendant's DNA, the sheriff was acting as a county official, not a state official); *Gottfried v. Med. Planning Servs., Inc.*, 280 F.3d 684, 693 (6th Cir. 2002) (finding a sheriff was acting on behalf of the state when enforcing a state court injunction that provided him no discretionary authority).

***6** Like these individual officers, the county defendants were obligated to follow Michigan law once they decided to foreclose upon property units. Unlike other county officials, however, their actions leading up to that point were entirely voluntary. The Act on its face is not a mandatory statutory scheme. *See* Mich. Comp. Laws § 211.78(6) (establishing that foreclosure is voluntary). The counties were not required to act as an FGU or to foreclose on any given property, and yet they chose to do so. Because it is clear that the counties "could have opted to act differently, or not to act," they did not act as an arm of the State of Michigan. *Brotherton*, 173 F.3d at 566. Accordingly, they are not entitled to sovereign immunity.

III. CONCLUSION

We affirm the denial of sovereign immunity and are precluded from addressing the other arguments raised because we lack jurisdiction.

All Citations

Not Reported in Fed. Rptr., 2022 WL 523023

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