RECEIVED by MSC 10/18/2023 9:08:17 PM

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

MATTHEW E. GRONDA (P73693)
Counsel for the Certified Class
PO Box 70
St. Charles, Michigan 48655
Phone: 989-249-0350
matt@matthewgronda.com

E. POWELL MILLER (P39487)
SHARON S. ALMONRODE (P33938)
CHRISTOPHER D. KAYE (P61918)
THE MILLER LAW FIRM PC
Counsel for the Certified Class
950 West University Drive, #300
Rochester, MI 48307
Phone: 248-841-2200
epm@millerlawpc.com
ssa@millerlawpc.com
cdk@millerlawpc.com

MATTHEW B. HODGES (P72193)
MICHAEL S. HILL (P73084)
DEP'T OF ATTORNEY GENERAL
Counsel for the State of Michigan
PO Box 30754
Lansing, MI 48919
Phone: (517) 335-7584
hodgesm@michigan.gov
hillm19@michigan.gov

OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
Counsel for the Certified Class
PO Box 107
Hemlock, MI 48626
Phone: (989) 642-0055
pellison@olcplc.com

THE *HATHON* CERTIFIED CLASS'S SUPPLEMENTAL BRIEF

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

RECEIVED by MSC 10/18/2023 9:08:17 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT IDENTIFYING THE ORDER APPEALED AND THE DATE OF ITS ENTRY vii

STATEMENT OF JURISDICTION viii

COUNTER-STATEMENT OF QUESTION(S) PRESENTED ix

INTRODUCTION 1

STATEMENT OF FACTS AND PROCEEDINGS 1

STANDARD OF REVIEW 7

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. PA 256 cannot be the exclusive method of adjudicating the Class's claims, and therefore it cannot interfere with this case or its certification as a class action 10

A. This Court and the United State Supreme Court have affirmed that the State committed a taking 10

B. PA 256 does not yet apply to pre-*Rafaeli* class members 11

C. Section 78t is unconstitutional 11

1. Any application of Section 78t to pre-*Rafaeli* claimants would be unconstitutional 11

2. Section 78t is unconstitutional as to everyone, including post-*Rafaeli* claimants 15

a. The State cannot legislatively extinguish a federal takings claim 15

b. PA 256 purports to impair equity victims' rights to interest and full surplus proceeds 16

c. The Legislature cannot abrogate the Michigan Court Rules 16

d. The PA 256 notice-and-claims process unconstitutionally impedes victims' rights 16

RECEIVED by MSC 10/18/2023 9:08:17 PM

i. The process is unconstitutionally burdensome 16

ii. The process impairs claimants' state rights 18

iii. The process impairs claimants' federal rights 19

e. PA 256 purports to improperly resurrect extinguished liens 19

D. PA 256 cannot order a class decertified by legislative fiat 20

E. The State's arguments for Section 78t's constitutionality fail 24

1. The Legislature's intentions as to retroactivity cannot justify an unconstitutional provision 24

2. PA 256 is inconsistent with *Rafaeli* 24

3. The State's "final order" argument fails 25

4. PA 256 is not merely "procedural and remedial" 26

5. Section 78t purports to divest takings victims of vested rights 28

6. The State's defense of the five percent fee fails 29

F. PA 256 is only viable as an optional claims process 32

G. The Court of Claims has jurisdiction over this case 33

II. The Court of Claims did not abuse its discretion in certifying the Class 33

A. The Class satisfies the court rule and its purpose 33

1. The Class satisfies the purpose of MCR 3.501 33

2. The Class meets the MCR 3.501 requirements 34

a) Numerosity 34

b) Commonality 34

c) Typicality 34

d) Adequacy 34

e) Superiority.....35

3. The Court of Claims did not abuse its discretion in defining the Class.....35

B. Classwide litigation is the superior method for litigating this dispute.....36

III. The six-year statute of limitations for takings claims applies to claims for taken property 38

A. The proper limitation period is six years 38

1. The six-year period applies.....38

2. The State's argument for a two-year statute of repose fails.....41

B. The State's equitable tolling argument fails 42

CONCLUSION AND RELIEF REQUESTED 47

WORD COUNT STATEMENT.....48

RECEIVED by MSC 10/18/2023 9:08:17 PM

RECEIVED by MSC 10/18/2023 9:08:17 PM

TABLE OF AUTHORITIES

Cases

Aguirre v Dep't of Corrections,
307 Mich App 315 (2014) 7
Andary v USAA Casualty Ins Co,
--- Mich ---; 978 NW2d 875 (2023) 36
Antoni v Greenshow,
107 US 769 (1883) 26, 27
Ardt v Titan Ins Co,
233 Mich App 685 (1999) 7
Bank Markazi v Peterson,
578 US 212 (2016) 25
Bauserman v Unemployment Ins Agency,
509 Mich 673 (2022) 12, 14, 33, 40
Block v N Dakota ex rel Bd of Univ & Sch Lands,
461 US 273 (1983) 19
Breiner v State,
--- Mich App ---; --- NW2d --- (December 1, 2022) 19, 35, 40
California Public Employees' Retirement System v ANZ Securities, Inc,
582 US 497 (2017) 45
Cedar Point Nursery v Hassid,
141 S Ct 2063 (2021) 18
Cowles v Bank West,
263 Mich App 213 (2004) 20
Devlin v Scardelletti,
536 US 1 (2002) 23
Edelman v Jordan,
415 US 651 (1974) 14
Felder v Casey,
487 US 131 (1988) 40
First English Evangelical Lutheran Church v Cnty of Los Angeles,
482 US 304 (1987) 35, 38
Fox v Cnty of Saginaw,
unpublished opinion of the Sixth Circuit Court of Appeals, issued February 22, 2022 (Docket No. 21-1108) 33
Fox v Saginaw Cnty,
unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 16, 2020 (Case No. 1:19-cv-1187) 15, 19
Fox v Saginaw Cnty,
unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 13, 2021 (Case No. 1:19-cv-1187) 13
Frank v Linkner,
500 Mich 133 (2017) 42, 45
Freed v Thomas,
976 F3d 729 (CA 6, 2020) 16, 23, 39

Freed v Thomas,
unpublished opinion of the Sixth Circuit Court of Appeals, issued September 6, 2023 (Docket No. 21-1248) 2
Grainger v Ottawa Cnty,
unpublished opinion of the United States District Court for the Western District of Michigan, issued March 2, 2021 (Case No. 1:19-cv-00501) 13
Hall v Meisner,
51 F4th 185 (CA 6, 2022) ..... passim
Hanton v Hantz Fin Servs, Inc,
306 Mich App 654 (2014) 7
Harrison v Montgomery Cnty, Ohio,
997 F3d 643 (CA 6, 2021) 23
Hart v City of Detroit,
416 Mich 488 (1982) 39
Hathon v State of Michigan,
990 NW2d 876 (Mich 2023) 38, 42
Haywood v Drown,
556 US 729 (2009) 12
Hevesi v Citigroup Inc,
366 F3d 70 (CA 2, 2004) 7
In re Advisory Opinion on Constitutionality of Act No. 346 of Pub. Acts of 1966,
380 Mich 554 (1968) 20
In the Matter of the Petition of the Berrien County Treasurer for the Foreclosure of Certain Parcels,
Order and Opinion of Berrien County Trial Court, issued May 24, 2023 (Docket No. 2020-0105-CH) 18
Ingram v Wayne Cnty, Michigan,
81 F4th 603 (CA 6, 2023) 17, 18
Johnson v VanderKooi,
502 Mich 751 (2018) 12
Knick v Twp of Scott, Penn,
139 S Ct 2162 (2019) ..... passim
Landgraf v USI Film Products,
511 US 244 (1994) 26
Lansing Schools Educ Ass'n v Lansing Bd of Educ,
487 Mich 349 (2010) 36
League of Women Voters of Mich v Sec'y of State,
508 Mich 520 (2022) 44
Maine v Thiboutot,
448 US 1 (1980) 12
Mathews v Eldridge,
424 US 319 (1976) 25
Mays v Gov'r of Michigan,
506 Mich 157 (2020) ..... passim
Mays v Snyder,
323 Mich App 1 (2018) 17, 41

RECEIVED by MSC 10/18/2023 9:08:17 PM

McCullough v Com of Virginia,
172 US 102 (1898) 26
Michigan Ass'n of Chiropractors v Blue Cross and Blue Shield of Mich,
300 Mich App 551 (2013) 7
Minty v State,
336 Mich 370 (1953) 11
People v Cameron,
319 Mich App 215 (2017) 32
People v Hayes,
323 Mich App 470 (2018) 4
Perez v Campbell,
402 US 637 (1971) 13
Phillips Petroleum Co v Shutts,
472 US 797 (1985) 23
Poindexter v Greenhow,
114 US 270 (1885) 27
Proctor v Saginaw Cnty Bd of Comm'rs,
340 Mich App 1 (2022) 36
Rafaeli, LLC v Oakland Cnty,
505 Mich 429 (2020) ..... passim
Redmond v Heller,
332 Mich App 415 (2020) 42
Rusha v Dep't of Corrections,
307 Mich App 300 (2014) 33, 41
Schellenberg v Rochester Elks,
228 Mich App 20 (1998) 36
Seifeddine v Jaber,
327 Mich App 514 (2019) 30, 38
Smith v Dep't of Pub Health,
428 Mich 540 (1987) 12, 13
Tahoe-Sierra Pres Council, Inc v Tahoe Reg'l Plan Agency,
535 US 302 (2002) 18
Tarrify Properties, LLC v Cuyahoga County, Ohio,
37 F4th 1101 (CA 6, 2023) 37
Tyler v Hennepin Cnty, Minn,
598 US 631 (2023) ..... passim
Von Hoffman v City of Quincy,
71 US 535 (1866) 27
Walker v Whitehead,
83 US 314 (1872) 27
Will v Michigan Dep't of State Police,
491 US 58 (1989) 12
Williamson Cnty Reg'l Planning Comm'n v Hamilton Bank of Johnson City,
473 US 172 (1985) 12

RECEIVED by MSC 10/18/2023 9:08:17 PM

RECEIVED by MSC 10/18/2023 9:08:17 PM

Statutes

42 USC § 1983 ..... 38, 40
Const 1963, art X, § 2 20
MCL 8.5 32
MCL 211.78k(5)(c) 19
MCL 211.78k(6) 2
MCL 211.78l ..... passim
MCL 211.78l(1) 3
MCL 211.78t 38
MCL 211.78t(1)(a)-(b) 3
MCL 211.78t(1)(b)(i) 3
MCL 211.78t(2) 3, 6, 19
MCL 211.78t(3) 3
MCL 211.78t(4) 3
MCL 211.78t(6) 5, 6, 43
MCL 211.78t(9) 29, 34
MCL 211.78t(11) 35
MCL 213.1 28
MCL 600.5813 ..... 38, 39, 40
MCL 600.5856 45
MCL 600.5856(a) 45
MCL 600.6419(1)(a) 40
MCL 600.6421 40
MCL 600.6431 40
MCL 600.6431(3) 40
MCL 600.6452(1) 38, 39, 40
Public Act 256 ..... passim

Other Authorities

Black's Law Dictionary 42
Alan W. Clarke, The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct, 7 Scholar: St. Mary's L. Rev. Minority Issues 151 (2005) 14

Rules

FR Civ P 23 7
MCR 3.501 ..... 23, 34
MCR 3.501(F)(1) 44
MCR 7.312(E) 6

RECEIVED by MSC 10/18/2023 9:08:17 PM

STATEMENT IDENTIFYING THE ORDER APPEALED AND THE DATE OF ITS ENTRY

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

RECEIVED by MSC 10/18/2023 9:08:17 PM

STATEMENT OF JURISDICTION

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

RECEIVED by MSC 10/18/2023 9:08:17 PM

COUNTER-STATEMENT OF QUESTION(S) PRESENTED

1. Public Act 256 of 2020 ("PA 256") purports to extinguish vested constitutional claims, impose unconstitutional procedural requirements, and provide less relief than this Court required in *Rafaeli v Oakland County*. Did the Court of Appeals correctly hold that PA 256 does not preclude class certification or otherwise interfere with the Class Members' claims?

Appellant's Answer: No.
Appellees' Answer: Yes.
Trial Court's Answer: Yes.
Court of Appeals' Answer: Yes.
This Court Should Answer: Yes.

2. This is a straightforward class action in which all of the class members suffered identical injuries from Defendant's single course of conduct. Did the Court of Claims properly certify this matter as a class action and properly define the Class?

Appellant's Answer: No.
Appellees' Answer: Yes.
Trial Court's Answer: Yes.
Court of Appeals' Answer: Yes.
This Court Should Answer: Yes.

3. Did the Court of Appeals correctly decline to apply the time limitation in MCL 211.78l to the Class's claims here?

Appellant's Answer: No.
Appellees' Answer: Yes.
Trial Court's Answer: Yes.
Court of Appeals' Answer: Yes.
This Court Should Answer: Yes.

4. Should this Court adopt the State's proposed *de facto* rewrite of PA 256 by adopting its complex tolling proposal?

Appellant's Answer: Yes.
Appellees' Answer: No.
Trial Court's Answer: Appellant did not make this argument to trial court.
Court of Appeals' Answer: Appellant did not make this argument to Court of Appeals.
This Court Should Answer: No.

RECEIVED by MSC 10/18/2023 9:08:17 PM

INTRODUCTION

This Court found that tax foreclosure victims have a property interest in the proceeds from their properties beyond the outstanding tax debts. And it found that foreclosing governments committed a taking when they refused to return the extra proceeds. But in response, the State doubled down. Faced with this class action lawsuit for the return of the illegally-taken funds, it enacted a new law, Public Act 256, clearly intended to kill this action and let it keep almost all of its ill-gotten money. The statute, when read as proposed by the attorney general, purports to extinguish the vested claims of takings victims from before 2020. And it requires later victims to use a convoluted claims process that it obviously designed to fail and that, even if followed through the completion, returns less money than this Court said was required. Now, after consistently defending the statute and arguing that it can indeed immunize itself from responsibility for the takings, the State seeks to make a tactical retreat, arguing – for the first time – that the Court can read the statute to permit some pre-2020 Class Members to make claims under the new process. This is too little, too late. The answer to the statute's unconstitutionality is not to judicially rewrite it to the State's specification, especially not when doing so would still destroy this class action and unconstitutionally require victims to use the insufficient statutory claims process. The answer is to uphold the decisions of the Court of Claims and Court of Appeals and allow this case to proceed.

STATEMENT OF FACTS AND PROCEEDINGS

The Class relies upon the Statement of Facts set forth in its Response to the State's Application. Response at 1-6. To summarize, this case involves takings committed with respect to property tax foreclosures. The State serves as "foreclosing government unit," or "FGU," for a handful of counties that have opted out of doing so. See MCL 211.78(3)-(6). When it foreclosed properties for nonpayment of taxes, it kept the entire proceeds, even if they exceeded the

RECEIVED by MSC 10/18/2023 9:08:17 PM

outstanding tax debt. This Court confirmed that this was a taking under the Michigan Constitution. *Rafaeli, LLC v Oakland Cnty*, 505 Mich 429 (2020). The federal courts have confirmed it is a Fifth Amendment taking too. *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), aff'd, 81 F.4th 655 (CA 6, 2023).

On January 9, 2019, Plaintiffs filed their notice of intent in the Court of Claims, and later filed their Class Action Complaint. On June 7, 2019, the Court of Claims certified the Class. The Court of Claims later decertified, but then re-certified, the Class.

In the meantime, the State, through its Legislature, enacted Public Act 256 ("PA 256") in December 2020. Given that nearly all counties serve as their own FGU instead of deferring to the State, PA 256 was an issue of obvious interest to the counties and their treasurers – who lent it strong support. (Materials from Michigan Association of County Treasurers) (App 2 pp 1-4). Indeed, counsel for one of the FGUs in another case recently conceded the obvious, that the defense team was behind the statute's drafting, musing that "I'm a little disappointed that I didn't do a better job when I participated in drafting the statute." *In the Matter of the Petition of the Berrien County Treasurer for the Foreclosure of Certain Parcels*, No. 2020-00105-CH (Berrien Cnty. Trial Court, April 18, 2023), Transcript of Motion Hearing, at p 22 (App 2 p 26).[1]

Under both the old General Property Tax Act (the "GPTA") statute and the GPTA as amended by PA 256, the FGU takes title to the property upon foreclosure, which is March 31. MCL 211.78k(6).

[1] The Class recognizes that these materials were not in the record before the Court of Claims, but believes that they provide helpful context for an analysis of PA 256. It, therefore, asks this Court to take judicial notice of them.

RECEIVED by MSC 10/18/2023 9:08:17 PM

In PA 256, the State purported to establish a mandatory process for securing the return of excess sales proceeds after a tax foreclosure —"[a]n 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).

PA 256 was an issue at the Court of Claims; the parties engaged in supplemental briefing regarding its impact. (Court of Claims, Pls' PA 256 Supplemental Briefing; Appellee's 3/3/23 App to Ans pp 339-375) (App 2 pp 42-59).

The statute creates two classes of claimants— those who suffered a taking prior to July 2020 and those who suffered a taking after *Rafaeli*'s issuance in July 2020. MCL 211.78t(1)(a)-(b).

The PA 256 claims process is complicated. For post-*Rafaeli* foreclosure victims, the claimant must file a notice with the foreclosing treasurer by the first July 1 after the foreclosure, MCL 211.78t(2), which will come *before* the property's auction or the existence of any surplus proceeds. Then, after the auction—which is usually the following August or September—the Treasurer must provide a notice back to the former property owner by the next January 31. MCL 211.78t(3). Then, the former property owner must file a motion for the surplus auction proceeds' partial return between the next February 1 and the next May 15. MCL 211.78t(4).

In addition to the claims process's multiple interlocking deadlines, the statute purports to establish an additional deadline of two years from the foreclosure date. MCL 211.78l.

For those with takings before July 2020, the victims would supposedly be able to submit a claim "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). However, as the Class noted at the Court of Claims, this language appeared illusory, because there was no apparent

RECEIVED by MSC 10/18/2023 9:08:17 PM

provision in the statute for anyone to make a claim after this Court issued such a decision.[2] (Court of Claims, Pls' PA 256 Supp Br at p 2; Appellee's 3/3/23 App to Ans p 340). Throughout the briefing, the State did not identify any such *de facto* grace period, instead arguing that "the statute presumes that *Rafaeli* is prospective, as a matter of law, subject to rebuttal by the Michigan Supreme Court," and that "[w]hatever the Michigan Supreme Court decides, right now this Court must apply" PA 256. (State's Motion for Reconsideration of Court of Claims 2/22/21 Order applying PA 256 and Certifying Class at 7-8) (App 2 p 133-134).

Moreover, as of July 2022, the two-year deadline had run as to such claimants, and this Court had not yet issued any such order. Thus, if PA 256 is actually an exclusive remedy, and if all of its terms are enforceable as the State suggests, then even if there were a system for pre-*Rafaeli* victims to make claims, they would be nonetheless barred by the statute's independent two-year limitation period. Because this Court had not, to use the State's term, "rebutted" the "presumption" of PA 256's prospective-only application within two years, any such claims would be barred as untimely with no legal accessibility to such process in the first place.

In any event, the Court of Claims found that, because this Court had not yet issued such an order, PA 256 was inactive as the bulk of the Class have pre-*Rafaeli* claims:

> 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, Application Ex E (citing *People v Hayes*, 323 Mich App 470, 473 (2018) as "analyzing similar conditional language … as being 'triggered' if and only if the statutory condition were satisfied").]

[2] The Class has also argued throughout that *Rafaeli* was inherently retroactive. (Response at 23-26; Class's 12/28/21 COA Br at 35-37) (App 2 pp 111-113).

RECEIVED by MSC 10/18/2023 9:08:17 PM

The State appealed this decision. (State's 4/9/21 COA App for Leave to Appeal) (App 2 pp 140-181). At the Court of Appeals, it argued for the first time that PA 256 in fact permits pre-*Rafaeli* claimants to make claims were this Court to decide that *Rafaeli* applies retroactively: "[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 2/14/22 COA Br at 16 (citing MCL 211.78t(6)) (App 2 p 203). The Class noted that the cited provision does not actually provide for a 180-day "grace period" and that the State's analysis was otherwise unconvincing. (Class's 5-12-22, COA Br at 6-7) (App 2 pp 253-254).

The provision the State cited, 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, spelled out]. (emphasis added).

As the Class argued, the State *seemed* 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 in PA 256, in context it clearly seems to refer to the underlying foreclosure

RECEIVED by MSC 10/18/2023 9:08:17 PM

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 suggests a repeating, annual claims process, as opposed to a one-time provision for pre-*Rafaeli* claimants. (Class's 5-12-22, COA Br at 5-6) (App 3 pp 252-253).

Even if the State's apparent reading of the statute is correct, it would still not solve the problem: again, PA 256 requires compliance with the MCL 211.78t(6) claim deadline *and* the two-year limitation period. The State never suggested that the "grace period" trumped the two-year deadline. Instead, it vigorously defended the two-year deadline. *Id*. at 6. Thus any grace period would be illusory.

In any event, the Court of Appeals upheld the Court of Claims' determination that PA 256 was not applicable to these pre-*Rafaeli* claimants. *Breiner v State*, --- Mich App ---; --- NW2d --- (December 1, 2022) (Appellee's 3/3/23 App to Ans pp 388-389).

The State appealed, arguing in its Application that "[t]he 'conditional' language in § 78t(2) addresses whether potential claims are compensable, not whether the new law applies at all," and that the "provision, in application, operates as a presumption that sales occurring before a certain date are not compensable[.]" (Application pp 15-16). It never suggested in its Application or its Reply in Support of the Application that any Class Members could avoid the application of the two-year deadline. In effect, it continued to maintain that any grace period was illusory because the two-year limit barred pre-*Rafaeli* victims from bringing a claim.

On June 9, this Court directed the parties to submit supplemental briefing in accordance with MCR 7.312(E). In its Supplemental Brief, the State argued for the first time that this Court should, in effect, try to salvage PA 256 by permitting the pre-*Rafaeli* Class Members to use the

RECEIVED by MSC 10/18/2023 9:08:17 PM

PA 256 process (and, in effect, destroy this class action) despite the two-year limitation period, so long as other non-litigants could also join them in making claims.

STANDARD OF REVIEW

While this appeal involves the interpretation and application of statutory language, it is at its core an appeal of a class certification decision. (COC 2/22/21 Order Certifying Class) (Application Ex E). This Court considers the interpretation of statutory and constitutional language *de novo*. *Ardt v Titan Ins Co*, 233 Mich App 685, 690 (1999). *Aguirre v Dep't of Corrections*, 307 Mich App 315, 320 (2014).

Nonetheless, the Court of Claims, as the trial court, is afforded broad deference in its class certification decisions. "Given that the analysis a trial court must undertake in order to determine whether to certify a proposed class may involve making both findings of fact and discretionary determinations," in considering class certification, appellate courts "review the trial court's factual findings for clear error and the decisions within the trial court's discretion for abuse of discretion." *Henry v Dow Chem Co*, 484 Mich 483, 495-496 (2009). Trial courts have broad discretion to define the scope of a class and enter orders for the case's management. See *Hevesi v Citigroup Inc*, 366 F3d 70, 83 (CA 2, 2004). Moreover, while Michigan courts "are not bound by federal decisions regarding requirements for class actions," Michigan courts often look to federal case law regarding Rule 23 of the Federal Rules of Civil Procedure when interpreting MCR 3.501 given the similar "purposes, goals, and cautions … applicable to both." *Hanton v Hantz Fin Servs, Inc*, 306 Mich App 654, 665-666 (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 (2013).

RECEIVED by MSC 10/18/2023 9:08:17 PM

SUMMARY OF ARGUMENT

PA 256 does not apply to the Class Members with pre-*Rafaeli* claims. The act does not apply to such claimants unless this Court rules that *Rafaeli* applied retroactively, and it has not done so. And if PA 256 did apply to such victims, it would be unconstitutional. The statute's plain language would purport to extinguish Class Members' vested property rights and constitutional claims.

Having long insisted that it can constitutionally extinguish the claims at issue, the State now proposes a *de facto* statutory rewrite. Its proposal would permit some pre-*Rafaeli* Class Members to initiate otherwise-untimely PA 256 claims. The proposal is too little, too late, and only serves to demonstrate the statute's unconstitutionality.

Indeed, it is unconstitutional to require any tax equity taking victims to use the PA 256 process. As explained throughout the briefing, the process seeks to improperly displace federal law and state constitutional mandates; it results in less compensation than this Court ordered in *Rafaeli*; it reflects an improper effort to legislatively abrogate the Michigan Court Rules; it violates the victims' rights to procedural due process by requiring them to suffer through a long, convoluted process; and it resurrects extinguished liens against the victims' properties.

In addition to these infirmities, PA 256 purports to effectively order the decertification of a pending class action – against the State itself, no less – by legislative fiat. The State offers no authority for the extraordinary suggestion that it can do any such thing retroactively. If it succeeds in doing so, it will deal a decisive blow against the class action device. The State will have established a template for unscrupulous governments and powerful interests to terminate meritorious class actions they cannot defeat in court.

RECEIVED by MSC 10/18/2023 9:08:17 PM

The State does not have a compelling response to the Class's clear showing that PA 256 is unconstitutional. Throughout the briefing, it has denied that PA 256 impairs vested rights. But a statute that purports to extinguish vested, pending takings claims obviously impairs a vested right. The fact of such extinguishment puts the lie to the State's claim that the statute is merely "procedural" or "remedial." And the State's defense of PA 256's five percent fee fails. It claims that the fee is consistent with *Rafaeli* because it is needed to pay the cost of the new PA 256 process. But the State (with the held of the Treasurers Association) cannot establish an unreasonably complex process and then charge its victims for the cost of administering it.

Ultimately, the only sense in which PA 256 could be constitutional is as an optional process. The State cannot mandate its use. *Knick v Twp of Scott, Penn*, 139 S Ct 2162, 2170 (2019).

Thus, the Court of Claims did not abuse its discretion in certifying this case as a class action. All of the Class Members suffered the same injury from the State's single course of conduct. And without certification, almost all of the State's victims will see nothing after being trapped by the legal tripwires of PA 256 and the State will keep almost all of its ill-gotten funds. If class certification is improper here, it is difficult to see when the State would ever concede that it could be possible.

The State's primary response is that certification is improper because of the potential presence of liens on the Class Members' properties. But the liens have been extinguished. MCL 211.78k(5)(c). Even were they not, the Court of Claims was correct that they are no impediment to certification, and the Court of Appeals was correct to uphold this decision. Ultimately, the State assumes – without analysis or argument – that this case involves the allocation of a fixed pot of funds for each property. It does not. Rather, it is a damage claim by the State's victims for the injury it has inflicted.

RECEIVED by MSC 10/18/2023 9:08:17 PM

The statute of limitations for such claims should be six years. While the Class did not appeal the Court of Appeals' application of the Court-of-Claims specific limitations periods, it nonetheless continues to assert that the six-year catch-all applicable to state-law takings claims applies. MCL 600.5813. In any event, the State is incorrect that PA 256's two-year limitation period applies. Nor can the State argue that the period is a statute of repose, given that it has neither preserved this argument nor showed that the period meets the test for constituting such a limitation.

Finally, PA 256 cannot be salvaged by equitably tolling pre-*Rafaeli* claimants' statutory claims. Even with such tolling, the statute is still insufficient and unconstitutional as explained throughout. And the State's equitable tolling analysis simply illustrates PA 256's unconstitutionality. The State effectively asks the Court to rewrite the statute in order to salvage the State's ability to escape this class action and keep almost all of the money it illegally took. The Court should decline this request.

ARGUMENT

I. PA 256 cannot be the exclusive method of adjudicating the Class's claims; and, therefore, it cannot interfere with this case or its certification as a class action.

A. This Court and the United State Supreme Court have affirmed that the State committed a taking.

It is undisputable that the State engaged in a taking. This Court unanimously found so. *Rafaeli*, 505 Mich at 484-485. Under state law, this Court identified the taking as occurring when the FGU sells the foreclosed property and retains the surplus proceeds. *Id*. This Court affirmed that "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 483-484.

RECEIVED by MSC 10/18/2023 9:08:17 PM

The Sixth Circuit likewise found a federal taking. *Hall v Meisner*, 51 F4th 185, 196 (CA 6, 2022). It placed it earlier in the process than this Court found, upon the FGU's acquisition of outright property title. *Id*.

Later, the United States Supreme Court unanimously confirmed that the practices at issue here were a federal taking. *Tyler v Hennepin Cnty, Minn*, 598 US 631, 647 (2023) (a "taxpayer must render unto Caesar what is Caesar's, but no more.").

B. PA 256 does not yet apply to pre-*Rafaeli* class members.

As the Class explained in its Response to the State's Application, the PA 256 process is illusory for equity takings victims whose foreclosures took place before the *Rafaeli* decision. Response at 7-9. Thus, the Court of Appeals was correct to find that the statute was irrelevant to these Class Members: its operation was not yet triggered.

C. Section 78t is unconstitutional.

1. Any application of Section 78t to pre-*Rafaeli* claimants would be unconstitutional.

PA 256 purports to retroactively establish a new limitations period on the Class Members' claims: under *Rafaeli*, they had takings claims with a six-year limitations period, but PA 256 purports to impose a two-year limitation period. Response at 9-10. But as the Class previously explained, the State cannot extinguish vested claims against it by amending the applicable limitations period. Response at 10-12.

The State concedes this. It admits that "a new and retroactive law that abrogates a prior cause of action and in the process eliminates every manner of claiming a vested right (i.e., leaves no other method of recovery) is impermissible retroactive legislation" and that "[a] new law cannot eliminate all access to a remedy the prior law would have afforded." Appellant's Brief at 22. See also Appellant's Brief at 24, 28 (citing *Minty v State*, 336 Mich 370 (1953)).

RECEIVED by MSC 10/18/2023 9:08:17 PM

At the very least, the State cannot extinguish the Class Members' vested, pending federal takings claims. Federal takings claims ripen immediately, Response at 20: "[A]s soon as the government takes [the] property without paying for it." *Knick*, 139 at 2170. "[B]ecause a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time." *Id.* at 2172. There is no "exhaustion requirement for § 1983 takings claims," and no longer any rule that "a property owner must pursue state procedures for obtaining compensation before bringing a federal suit." *Id.* at 2173.[3] And as the Class also explained in its Response, the Supremacy Clause bars the State from extinguishing federal rights such as the Fifth Amendment right against insufficiently compensated takings. Response at 19.

Particularly salient, the State cannot extinguish vested, pending claims for constitutional violations. Under 42 USC § 1983, a litigant may bring a claim in State court. *Maine v Thiboutot*, 448 US 1, 3 n 1; *Haywood v Drown*, 556 US 729, 731 (2009). Thus, Michigan courts recognize Section 1983 claims in Michigan courts. *Johnson v VanderKooi*, 502 Mich 751 (2018) (adjudicating § 1983 claims). Even if, *arguendo*, sovereign immunity applies to Section 1983 claims against the State itself or its officers, *Smith v Dep't of Pub Health*, 428 Mich 540, 544 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58 (1989), Michigan law recognizes an analogous cause of action against the State for constitutional violations. *Mays v Gov't of Michigan*, 506 Mich 157, 190-192 (2020) (collecting cases). See also *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 705-706 (2022) (damage claims against the State for

[3] Prior to *Knick*, a takings plaintiff needed to establish an exhaustion of state law remedies prior to bringing a federal claim. *Knick*, 139 S Ct at 2173. See *Williamson Cnty Reg'l Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172 (1985). But *Knick* explicitly overruled *Williamson Cnty*. See *Knick*, 139 S Ct at 2167.

RECEIVED by MSC 10/18/2023 9:08:17 PM

state constitutional violations are generally available). Indeed, damage claims against the State for constitutional violations generally extend at least to the extent of equivalent Section 1983 claims. *Mays*, 506 Mich at 189-190 (citing *Smith*, 428 Mich 540, 640-643 (1987) (BOYLE, J., concurring in part and dissenting in part)). This Court has expressly recognized such claims in this takings context. *Id.* at 173-174.[4]

The claims here were vested and pending. And they were meritorious: under *Tyler*, *Hall*, and *Freed*, *supra*, there is no question that the State's victims had and have federal takings claims. The victims may thus pursue these claims through Section 1983 or, here, the equivalent cause of action against the State. *Fox v Saginaw Cnty*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 13, 2021 (Case No. 1:19-cv-1187) (Appellee's 3/3/23 App to Ans pp 121-134) (recognizing Section 1983 claims for identical conduct); *Grainger v Ottawa Cnty*, unpublished opinion of the United States District Court for the Western District of Michigan, issued March 2, 2021 (Case No. 1:19-cv-00501) (Appellee's 3/3/23 App to Ans pp 140-153) (same); *Mays*, *supra* (recognizing state-law equivalent for takings claim against state official).

A state cannot extinguish a pending constitutional damages case through legislation and say that it is merely changing the form of the claim that the litigant must bring – especially not where the new "form" entails recovery limits and procedural impediments, such as the preclusion of class litigation as discussed *infra*. Given the supremacy cause, any such effort would be unconstitutional as directed to pending Section 1983 claims. *Perez v Campbell*, 402 US 637, 652 (1971) ("[A]ny state legislation which frustrates the full effectiveness of federal law is rendered

[4] Given the Supremacy Clause, discussed above, the State cannot purport to immunize itself from federal takings law. Such immunity would eviscerate the Fifth Amendment by permitting states to commit takings with impunity.

RECEIVED by MSC 10/18/2023 9:08:17 PM

invalid by the Supremacy Clause."). And under Michigan law, such causes of action are inherent, except when, unlike here, the Constitution defers enforcement of a constitutional protection to the non-judicial branches or when another branch has provided its own adequate remedy. *Bauserman*, 509 Mich at 705-706. As discussed throughout, PA 256 is inadequate. This Court cannot require its use without overturning *Bauserman*.

More generally, if the Legislature can extinguish pending constitutional damage claims, then the rights that this Court recognized in *Mays*, *Bauserman*, and *Smith* would be grievously undermined. This would also undermine the entire purpose of Section 1983 which, even if it does not provide the mechanism for claims such as here, provides their template. *Mays*, 506 Mich at 189-190. Enacted as part of the Civil Rights Act of 1871, the statute was a cornerstone of the Reconstruction Congress's efforts to protect human rights in what had been the Confederacy from the depredations of government officials who remained in defiance of the Union and its Constitution. Alan W. Clarke, The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct, 7 Scholar: St. Mary's L. Rev. Minority Issues 151, 154-57 (2005) (surveying the history of the statute's passage). While the Class in no way means to equate the moral significance of the issues at stake here, this context is important for understanding the statute's operation and its interaction with legislation. If legislatures could simply extinguish such claims, then constitutional protections would be dead letter, which is exactly what the Reconstruction Congress – and this Court in *Mays* and *Bauserman* – were trying to avoid.

This issue is particularly important when, as here, the defendant is the State itself. The Eleventh Amendment bars Section 1983 claims against a state in federal court. *Edelman v Jordan*, 415 US 651, 662-663 (1974). Thus, the only opportunity to pursue relief for constitutional

RECEIVED by MSC 10/18/2023 9:08:17 PM

violations against a state is in that state's courts. See *Bauserman*, 509 Mich at 710. The State's argument – that it can force the dismissal of a pending constitutional damages case against itself – would eviscerate this right.[5]

2. Section 78t is unconstitutional as to everyone, including post-*Rafaeli* claimants.

As the Class explained in its Response to the State's Application, PA 256 is also unconstitutional as to post-*Rafaeli* claimants. Response at 17.

a. The State cannot legislatively extinguish a federal takings claim.

Again, because the State cannot extinguish a federal right, it cannot force claimants to *exclusively* use PA 256. "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." *Knick*, 139 S Ct at 2171.

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

As the Class explained in its Response to the State's Application, PA 256 purports to deprive claimants of the compensation that this Court directed in *Rafaeli*. Response at 18-19.

As to the federal claims, the proper measure of damages has been widely scrutinized. See, e.g., *Fox v Saginaw Cnty*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 16, 2020 (Case No. 19-cv-11887) ("This Court has yet to

[5] Despite *Tyler* and *Rafaeli*'s conclusions that the conduct at issue constituted a taking, the State suggests that this Court and the United States Supreme Court got it wrong, and that "[t]his is not an eminent domain or a condemnation or even a regulatory taking" but "rather … a collection action that, but for the failure to provide access to remaining proceeds, would have nothing to do with takings law." Appellant's Brief at 30. And in order to avoid committing further takings, the State must comply with *Rafaeli*.

RECEIVED by MSC 10/18/2023 9:08:17 PM

decide the proper measure of damages.") at p 6 (Appellee's 3/3/23 App to Ans p 116); *Hall*, 51 F4th at 196. Admittedly, since the most recent briefing, the Sixth Circuit has cast serious doubt on any fair-market-value-based damage theory. *Freed v Thomas*, 81 F4th 655 (CA 6, 2023). But, if nothing else, as explained in the Response to the Application, the Class is entitled to interest and attorney fees under 42 USC § 1983. *Proctor v Saginaw Cnty Bd of Comm'rs*, 340 Mich App 1, 30 (2022) (app pending).

c. The Legislature cannot abrogate the Michigan Court Rules.

As the Class explained in its Response to the State's Application, PA 256 purports to improperly abrogate the Michigan Court Rules, which is the judiciary's province, not the Legislature's. Response at 42-43.

d. The PA 256 notice-and-claims process unconstitutionally impedes victims' rights.

i. The process is unconstitutionally burdensome.

PA 256 purports to replace a straightforward takings claim with a multi-step process that begins before the property auction and ends months – or even years – later, with multiple intervening deadlines that the claimant must meet. In *Rafaeli*, this Court said that FGUs must give the surplus proceeds back to the foreclosed taxpayers. But instead of following that simple direction, as detailed above, PA 256 requires a foreclosure victim to submit a notice to the FGU after the foreclosure but before the auction. Then, the foreclosed taxpayer must wait for a notice from the FGU. Only then can the foreclosed owner file a motion seeking to get the refund that *Rafaeli* requires.

The due process clause bars governments from impairing property rights through such onerous procedures. *Mathews v Eldridge*, 424 US 319 (1976). Under *Matthews*, a process is evaluated based on (1) "the degree of potential deprivation that may be created by a particular

RECEIVED by MSC 10/18/2023 9:08:17 PM

decision," (2) the "fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards," and (3) the public interest. *Id.* at 341, 343, 347 (discussed in *Ingram v Wayne Cnty, Michigan*, 81 F4th 603 (CA 6, 2023)).[6]

PA 256 fails this test. The "degree of potential deprivation" is total – under the State's theory, claimants who do not use their process lose the entirety of their interest. And the claimants are not merely losing the opportunity to bring a claim: under *Rafaeli*, the surplus proceeds are the former property owners' property. *Rafaeli*, 505 Mich at 484-485.

Moreover, the current process – a straightforward takings claim, with the added efficiency of a class action – means that "additional procedural safeguards" are not just unnecessary; they are clearly designed to frustrate would-be claimants. And the public interest is hardly served by allowing the government to retain substantial illegally taken amounts by subjecting claimants to a designed-to-fail process.

In a recent case, the Sixth Circuit considered a similar Rube Goldberg process: Wayne County's vehicle foreclosure redemption procedure. *Ingram*, 81 F4th at 606-607. It found the ordeal to be like PA 256 here, replete with designed-to-fail inefficiencies. *Id.* at 610. It "h[e]ld two weeks from the date of the vehicle's seizure to be an appropriate time frame to provide the vehicle owner an opportunity to be heard to contest the holding of a vehicle vital to the owner's transportation and livelihood." *Id.* at 621. The concurrence would have gone even further, rejecting application of the *Matthews* balancing test; reasoning that "when the government arrests someone, depriving them of liberty, Supreme Court precedent requires a preliminary hearing within 48

[6] The procedural due process guarantee of the Michigan Constitution is co-extensive with the federal guarantee. *Mays v Snyder*, 323 Mich App 1, 58 (2018), aff'd sub nom *Mays v Gov't of Michigan*, 506 Mich 157 (2020) (citation omitted).

RECEIVED by MSC 10/18/2023 9:08:17 PM

hours"; and proposing application of "the same rule to Wayne County's seizure of the plaintiffs' property." *Id.* at 622-23 (THAPAR, J., concurring).

In any event, here, the claimants will not receive their money back for months, if then. This is inconsistent with *Ingram*, and more broadly at odds with its recognition that the government cannot allow itself to illegally seize property by requiring owners to jump though complex hoops to get it back.

ii. The process impairs claimants' state rights.

PA 256's notice requirement improperly purports to impair claimants' state-law takings claim. It does so by requiring claimants to provide notice of their claim before their *Rafaeli*-recognized property interest even exists and certainly before the government takes it: the notice is due in July, but the auction is not until August or September.

This turns takings law on its head. See *Cedar Point Nursery v Hassid*, 141 S Ct 2063, 2066 (2021) (applying a simple "*per se* rule: The government must pay for what it takes," citation omitted). There is no requirement that property owners register with the government as potential takings claimants before the owners acquire the property; otherwise, governments could grant themselves sweeping immunity by requiring property owners to pre-register any potential takings claims. See *In the Matter of the Petition of the Berrien County Treasurer for the Foreclosure of Certain Parcels*, Order and Opinion of Berrien County Trial Court, issued May 24, 2023 (Docket No. 2020-0105-CH)) (App 2 pp 258-262) ("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. 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

RECEIVED by MSC 10/18/2023 9:08:17 PM

deadline. One does not have a vested right to proceeds that do not exist.") (*Rafaeli* citation omitted).

iii. The process impairs claimants' federal rights.

As discussed above, property owners have a constitutionally protected property interest in their equity, and the seizure of title constitutes a taking of it. *Hall*, 51 F4th at 194. Moreover, the property owner has a vested takings claim as soon as this equity taking took place. *Knick*, *supra*. Thus, as soon as the FGU takes complete title upon foreclosure, a taking has happened under *Hall*, and *Knick* gives the taxpayer a vested right to bring an immediate federal takings claim. But PA 256 purports to require claimants to submit a notice by the July 1 after the foreclosure. MCL 211.78t(2). This is an unconstitutional effort to destroy a vested federal takings claim. See, e.g., *Block v N Dakota ex rel Bd of Univ & Sch Lands*, 461 US 273, 286 n 23 (1983). Indeed, *Hall* was explicit that a state statute cannot abrogate the property right it recognized. *Hall*, 51 F4th at 194.

e. PA 256 purports to improperly resurrect extinguished liens.

PA 256 purports to resurrect liens against the victims' properties. See MCL 211.78t(9). But Michigan's foreclosure statute extinguishes such liens—MCL 211.78k(5)(c). This provision survived PA 256. *Breiner*, slip op at 11-12 (Appellee's 3/3/23 App to Ans p 390).

Multiple courts have recognized such extinguishment. See, e.g., *Fox v Cnty of Saginaw*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 16, 2020 (Case No. 19-cv-11887), p 7 (quoting Court of Claims June 7, 2019 Opinion Certifying the Class p 8) (Appellee's 3/3/23 App to Ans p 117). And the United States Supreme Court has recognized that such lien extinguishment statutes leave plaintiffs such as here with a right to their equity. *Tyler*, 598 US at 637. Any effort to resurrect such liens as a claim against the fee owner – or in competition with the fee owners – without compensation is another

RECEIVED by MSC 10/18/2023 9:08:17 PM

unconstitutional taking against the fee owner. It also constitutes another improper effort to impair the claimant's entitlement to the full Fifth Amendment compensation owed. See *Knick*, *supra.* 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. See also *In re Advisory Opinion on Constitutionality of Act No. 346 of Pub. Acts of 1966*, 380 Mich 554, 589 (1968).

The purported reimposition of extinguished liens is critical to PA 256's design. Why not simply let owners go to the FGU after the auction and get their refund? The only justification for eschewing such a straightforward approach in favor of a drawn-out morass – other than discouraging claimants or burying them in red tape – is the need to account for lienholders. But there is no such need and, in fact, the State cannot constitutionally afford the *former* lienholders any rights to the owners' proceeds. The fact that the process's complexity depends upon this improper purpose is another reason that the process is unconstitutional.

D. PA 256 cannot order a class decertified by legislative fiat.

PA 256 purports to extinguish the Class's ability to continue with this case as a class action. The State says that "its operation precludes class actions." Appellant's Brief at 37.

Once again, this reflects the Legislature's improper imposition on the judiciary's prerogative to establish its own procedural rules. It would also impair the Class Members' vested rights.

A key purpose of class actions is to aggregate claims that individuals would not or could not bring on their own. *Cowles v Bank West*, 263 Mich App 213, 227 (2004), vacated in part on other grounds 476 Mich 1 (2006) ("The resulting multiplicity of actions would negate the efficiency for which class action litigation is designed."). A bar on class actions as to a particular

RECEIVED by MSC 10/18/2023 9:08:17 PM

issue – here, tax equity – means that most victims will never secure recovery. The State concedes that, in the years before this litigation, few if any of its victims sought individual relief. See Appellant's Brief at 6 ("Before *Rafaeli* … very few claims of this type were filed"). This is hardly a surprise. By definition, the victims are suffering from severe distress to begin with – otherwise they would have been able to keep up with their taxes. Almost all of them have faced economic dislocation. Many have dealt with serious health issues, and a significant number have passed away. Pervasively, they are ill-positioned for individual litigation.

This is one reason that PA 256 is an inadequate alternative to the class action. The Court can and should take judicial notice of the fact that only a relative handful of victims have pursued PA 256 relief from the counties that act as FGUs. Nushrat Rahman, *Michiganders who lost property to tax foreclosure need to watch these legal cases*, DETROIT FREE PRESS, (August 29, 2023), available at https://www.freep.com/story/news/local/michigan/2023/08/29/lost-property-tax-foreclosure-michigan-legal-cases/70649467007. And with good reason: as discussed above, PA 256 requires adherence to a convoluted process that requires claimants to begin the process before they even have a state-law claim. Opponents of class actions frequently try to force claimants into class action alternatives that face criticism. Gary Born and Claudio Salas, *United States Supreme Court and Class Arbitration: A Tragedy of Errors, The Symposium*, 2012 J Disp Resol (2012), available at: https://scholarship.law.missouri.edu/jdr/ vol2012/iss1/3. These general efforts raise a host of issues, and different alternatives have different merits and shortcomings. But this situation reflects a worst-case scenario: a state facing a meritorious garden-variety class action tries to force its victims into a convoluted individualized alternative laden with tripwires designed to ensure that the process fails.

RECEIVED by MSC 10/18/2023 9:08:17 PM

Moreover, the victims here are already litigants, who would have their claims dismissed out from under them without them even knowing. This is not like the State's benign hypothetical, in which a party's cause of action goes from one designation to another, presumably accompanied by orderly motion practice. Here, the absent class members would never even know what happened to them. They would simply lose their claims and remedies. If this is indeed constitutional as the State suggests, then the implications are shocking. The State could enact a brazenly unconstitutional law – say, a ban on a criticism of a particular political figure, or a prohibition on silent prayer in public places. And a recalcitrant Legislature could protect the state from the ensuing class actions, barring victims from seeking ordinary compensation for constitutional violations and instead requiring them to go through a prohibitively complex claims process without a chance for classwide litigation. Or the Legislature could immunize private defendants from class action liability. For example, if a major polluter faced meritorious class claims, the Legislature could kill the class action by forcing victims to go through a PA 256-style process instead. Again, nothing in the State's authorities suggest that the Legislature can kill pending class actions in this manner. Class actions are frequently the only way for the victims of widespread wrongdoing to secure relief, and they are often the only way to hold large-scale offenders to account. These goals would be fatally undermined if this Court were to adopt a new rule from whole cloth permitting the Legislature to extinguish them even after they are underway.[7]

[7] The State boasts of PA 256 – presumably as judicially amended – that it provides "one process whether a tax foreclosure occurred in Gogebic County or in Lapeer County" and that "the same requirements apply whether the Saginaw County Treasurer or the State Treasurer was the FGU." Appellant's Brief at 19. But what could be more comprehensive than the constitution itself, under which the Class has brought its claims? Perhaps recognizing this, the State claims that the PA 256 "process does not borrow from other areas of law that are not exactly like in rem tax debt collection" but instead "addresses the needs and requirements of this process, adjudicating claims in the same circuit court already familiar with the property, parties, and processes." *Id.* But PA 256 is not a seamless extension of the foreclosure process that is "exactly like" the rest of it. Rather, it

RECEIVED by MSC 10/18/2023 9:08:17 PM

Again, the class action here reflects the only real opportunity for most of the class members to secure any recovery; the class members are themselves litigants by virtue of the class's certification; therefore, legislated decertification would compel their *de facto* dismissal; and the State's ability to compel decertification by legislative writ would eviscerate the class action device. Although "[n]onnamed class members … may be parties for some purposes and not for others," as "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context," *Devlin v Scardelletti*, 536 US 1, 2, 9–10 (2002), absent class members "are parties … in the sense of being bound by [a class] settlement … or judgment[.]" Thus, they are litigants protected from the extinguishment of their case by legislative fiat and, like the named plaintiffs, have vested rights. An absent "class-action plaintiff is not required to fend for himself. The court and named plaintiffs protect his interests." *Phillips Petroleum Co v Shutts*, 472 US 797, 809 (1985) (citation omitted). Indeed, "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Id.* at 810. The idea that a defendant State can simply order a class decertified for no reason other than its own self-protection makes a mockery of the "safeguards" that the United States Supreme Court recognized.

The State also argues that MCR 3.501's "application cannot be considered any vested right here when such application will allow some litigants to prejudice (or even eradicate) the rights of

---

is a complex process that is entirely distinct from the foreclosure itself. And, indeed, multiple courts have found that the issues in this case – and which would be addressed by PA 256 – are distinct from the underlying tax process. *Freed v Thomas*, 976 F3d 729, 735 (CA 6, 2020) (Because Plaintiff's claims stem from the State's "*post-collection* actions, specifically Michigan's refusal to refund the excess proceeds," the Tax Injunction Act did not apply) (emphasis in original). *Harrison v Montgomery Cnty, Ohio*, 997 F3d 643, 651 (CA 6, 2021).

RECEIVED by MSC 10/18/2023 9:08:17 PM

other claimants." Appellant's Brief at 29. This is an apparent reference to the fact that lienholders are not included in the class. As discussed above and further discussed below, their exclusion was and remains entirely appropriate. Any "rights" of theirs were "eradicate[d]" by the statute's operation, not by this case. In any event, the fact that the State does not agree with how a court defined a class does not permit the Legislature to order it decertified by legislative fiat.

Finally, the State claims that "[i]f a cause of action is not vested, which case law appears to show it is not here, then a particular way of proceeding in an original action under a discretionary court rule cannot be vested either." *Id.* But as discussed below, the "cause of action" formulation is a red herring. PA 256 could have changed the form of the cause of action without extinguishing claims, compelling a byzantine process outside the court rules, or purportedly decertifying the certified class.

E. The State's arguments for Section 78t's constitutionality fail.

1. The Legislature's intentions as to retroactivity cannot justify an unconstitutional provision.

As the Class explained in its Response to the State's Application, neither the Legislature's intention that PA 256 apply retroactively, nor any other general canon of statutory construction, can justify its unconstitutional operation. Response at 10.

2. PA 256 is inconsistent with *Rafaeli*.

The State argues in multiple places that PA 256 is consistent with *Rafaeli*. These arguments amount to an assertion that *Rafaeli* did not recognize the right it clearly recognized. For example, the State argues incorrectly that "the idea that Public Act 256 divests a right misconstrues the 'right' at issue." Appellant's Brief at 22. But the statute extinguishes vested property rights and takings claims. Even as to those victims it affords a claim, it extinguishes the right to fair compensation by providing claimants with less than required in *Rafaeli* as well as less than what

RECEIVED by MSC 10/18/2023 9:08:17 PM

the Fifth Amendment mandates. The State further claims that "[t]he only vested right at issue here is that identified in *Rafaeli*: the right to make a claim for remaining proceeds, after netting out the taxes, interest, costs, and fees," and that "Public Act 256 does not destroy any such vested right" but "rather … it codifies that right and creates a unified claim-making process that respects the competing interests of all potential claims." Appellant's Brief at 22. This argument ignores the fact that the United States Supreme Court joined this Court in finding that the conduct at issue constituted a taking; even if the right that this Court recognized in *Rafaeli* is as circumscribed as the State claims, it is no longer the "only" right at issue. And the *Rafaeli*-recognized right is not so circumscribed. The right is not merely to "make a claim" – it is to receive "no less" than the net surplus proceeds. Indeed, as discussed above, the owners' right to the surplus is itself a property right. See Appellant's Brief at 21 (conceding property right in proceeds). PA 256 does indeed "destroy [this] vested right" by entirely extinguishing some victims' vested claims, by impairing others' ability to get a refund; and by precluding anyone from receiving the full amount due.

3. The State's "final order" argument fails.

Having conceded that it cannot extinguish the claims against itself through legislation, the State turns around and argues that, actually, it can, so long as the Class has not secured a final order. The State claims that "[c]ourts have long held that new laws may apply to pending disputes, so long as there is no final court order, if the new law is intended for retroactive application." Appellant's Brief at 19 (citing *Bank Markazi v Peterson*, 578 US 212, 229 (2016) as reaffirming that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases.").[8] But *Bank Markazi* explicitly recognized Constitutional restrictions to

[8] Likewise, the State argues that "[t]he real dividing line… is between claims subject to a final court order and pending proceedings without such an order," because "'legislation … may abate actions pending, but when those actions have passed into judgment the power of the

RECEIVED by MSC 10/18/2023 9:08:17 PM

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.'" *Bank Markazi*, 578 US at 228-229, quoting *Landgraf v USI Film Prod*, 511 US 244, 266 (1994).

4. PA 256 is not merely "procedural and remedial".

As the Class explained in its Response to the State's Application, the State cannot salvage PA 256 as merely "procedural" or "remedial." Response at 14-17. PA 256 purports to extinguish pre-*Rafaeli* claimant's rights, and substantially impair the rights of post-*Rafaeli* claimants.

The State nonetheless cites *Antoni* for the proposition that "it is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired." Appellant's Brief at 26 (quoting *Antoni v Greenshow*, 107 US 769, 775 (1883). But as the quoted language makes clear, the issue there was enforcement of a contract, not a constitutional right. *Id.* at 774-775.[9] And even if the same test applies, PA 256 fails it. The statute does not merely "impair[]" claimants' rights; it purports to extinguish them. Even as to those claimants who can use the PA 256 process, it would still fail the *Antoni* test. As the State concedes, "[w]hen reviewing such a 'change of remedies,'

---

legislature to disturb the rights created thereby ceases.'" Appellant's Brief at 27 (citing *McCullough v Com of Virginia*, 172 US 102, 123-124 (1898)). But as the State concedes, *McCullough* proceeded to explain that "when a new law's 'remedy [is] adequate and efficacious, the taking away of the old right' while replacing it with a new method of recovery, does not violate any vested right." *Id*. (quoting *McCullough*, 172 US at 124). Here, though, PA 256 outright extinguishes vested rights, and the new "remedy" is hardly "adequate and efficacious." *Id.*

[9] The State does note that "[i]n *Rafaeli*, this Court noted that historically 'whenever the government seized property for delinquent taxes, it did so subject to 'an implied contract in law' to either return the property if the tax debt was paid or 'to render back the overplus' if the property was sold to satisfy the delinquent taxes.'" Appellant's Brief at 27 (quoting *Rafaeli*, 505 Mich at 464). But this does not transform the taking that *Rafaeli* recognized into an ordinary breach of contract claim amenable to legislative adjustment.

RECEIVED by MSC 10/18/2023 9:08:17 PM

Antoni held ‘‘the rule seems to be that in modes of proceeding and of forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or *so embarrass it with restrictions and conditions, as seriously to impair the value of the right*.’’” Appellant’s Brief at 27 (quoting *Antoni*, 107 US at 800, which quoted *Walker v Whitehead*, 83 US 314, 318 (1872) (emphasis added)). PA 256’s designed-to-fail procedural tripwires – and the five percent fee charged, discussed below – seem designed precisely to “embarrass [the claimants’ claims] with restrictions and conditions” that “seriously … impair the value of the right.” *Id.* Indeed, in another case that the State cites, the United States Supreme Court described a permissible amendment as one that “did not destroy the efficiency of the remedy.” *Poindexter v Greenhow*, 114 US 270, 299 (1885) (quoted at Appellant’s Brief at 27). The PA 256 process is the opposite of “efficient.”

Ultimately, the State retreats to the suggestion that the claimants’ rights are so ill-defined that they effectively lack protection. It quotes the United States Supreme Court’s 1866 comment that “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,’” and that “‘[e]very case must be determined upon its own circumstances.’” Appellant’s Brief at 27 (*Von Hoffman v City of Quincy*, 71 US 535 (1866)). But the caselaw cited throughout the briefing shows that in the subsequent fifteen decades, courts – including this Court in its application of Michigan law – have more clearly defined the distinction between permissible and impermissible amendments, and, as shown throughout, PA 256 falls on the impermissible side of the line. And even if, *arguendo*, this case must be evaluated solely “upon its own circumstances,” those circumstances show that PA 256 improperly “impair[s] substantial rights … under the form of modifying the remedy” for all the reasons discussed throughout. *Id.*

RECEIVED by MSC 10/18/2023 9:08:17 PM

The vested rights at issue are property rights and constitutional claims; PA 256 either extinguishes the claims or impairs them by forcing claimants to jump through needless hoops to secure an insufficient amount; it denies the certified Class the opportunity for classwide litigation, which presents the only real opportunity for most victims to secure compensation; and it reflects an effort by the State to immunize itself against established liability and permit the retention of illegally-taken property.

5. Section 78t purports to divest takings victims of vested rights.

Similar to its "procedural and remedial" argument, the State argues in multiple places that PA 256 could permissibly displace this class action because the Legislature may always alter the form of a claim – even a pending claim – so long as it preserves its substance.

This argument fails for all of the same reasons as discussed throughout: the Legislature cannot re-write the Court rules; the State cannot require claimants to seek less than the amount to which they are entitled; and the State cannot extinguish a class action against itself. The State provides no authority extending the anodyne principle that the Legislature may change the form of a cause of action to the notion that it can prohibit class actions, let alone a prohibition that would operate to decertify a pending class action, let alone one against the State itself. It merely claims that "the 'right' here is the property right in proceeds not a particular cause of action." Appellant's Brief at 21. But the problem is not that the State changed the cause of action; that would be as if, for example, the Uniform Condemnation Procedures Act, MCL 213.1 *et seq.* were replaced with a substantively similar "Revised Property Protection Act" that afforded takings victims the same protections. The problem is that the State has enacted a byzantine new process that purports to extinguish vested takings claims and that deprives victims of the full compensation to which they are entitled.

RECEIVED by MSC 10/18/2023 9:08:17 PM

6. The State's defense of the five percent fee fails.

The concurrence to the order directing oral argument suggests that the parties address "whether the 5% sales commission under MCL 211.78t(9) is constitutional." *Hathon v State of Michigan*, 990 NW2d 876, 877 (Mich 2023) (ZAHRA, J., concurring).

As the Class has consistently argued, the fee is unconstitutional. See Response to Application at 18-19. It results in compensation less than this Court's "no more, no less" constitutional mandate in *Rafaeli*. It is also an insufficient recovery under federal law. Response to Application at 19-20. *See also Tyler*, *supra* at 647 ("The taxpayer must render unto Caesar what is Caesar's, but no more.").

The State's defense of the fee is unconvincing. It claims that it is that "[t]his modest fee serves at least two functions: (1) it is a fee for the additional FGU duties, services, and costs incurred in the newly lengthened tax collection process, which no longer ends at public sale. And (2) it serves as a modest deterrent consistent with the law's *pay your own way* requirements." Appellant's Brief at 30 (emphasis in original).

As to the first purported function, "additional … duties, services, and costs" are the byzantine procedures imposed by the statute itself. The State cannot establish a convoluted process, and then complain that its complexities make it too expensive to operate without fees that go beyond *Rafaeli*'s dictates.

The State further argues that "[l]ike any debt collection action, debtors are responsible for the added expenses they create under this collection law, through its conclusion, which now includes post-foreclosure processes," Appellant's Brief at 30, as if this were a self-evident legal principle. See also Appellant's Brief at 31 ("Summed up: when a debtor forces a creditor to use foreclosure to collect, the debtor bears the risk and the costs of that decision."). But the State does

RECEIVED by MSC 10/18/2023 9:08:17 PM

not offer any authority for this general proposition, and "[a] party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position," let alone for its extension to this constitutional-claim context. *Seifeddine v Jaber*, 327 Mich App 514, 519 (2019).

The closest the State comes to justifying its proposed "pay your own way" rule is by reference to *Rafaeli*'s specification that this Court's specified compensation was due to victims, "no more, no less." Appellant's Brief at 31-32 (quoting *Rafaeli*, 505 Mich at 484). But this Court's concrete delineation of the compensation due did not establish a generalized "pay your own way" rule; it reflected the FGUs' obligation to return illegally taken funds while allowing for reasonable fees. Again, the State cannot establish a self-serving thicket of "post-foreclosure processes" in a grudging effort to purportedly satisfy *Rafaeli* and then charge claimants for the obstacle course.

This argument also fails because the costs of the new process are incurred after the point in time when *Rafaeli* permits deductions. The State claims that, under *Rafaeli*, "[t]he FGU was entitled to the "amount owed in unpaid taxes, interest, penalties, *and fees related to the forfeiture, foreclosure, and sale of their properties*," which tax collection process now continues after public sale." Appellant's Brief at 33 (quoting *Rafaeli*, 505 Mich at 475) (emphasis the State's). But the quoted language undermines the State's argument:

> 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

RECEIVED by MSC 10/18/2023 9:08:17 PM

> in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties.

Rafaeli, 505 Mich at 474-475 (all emphasis added). Clearly, the only "fees" that an FGU could constitutionally deduct from the amount due to the foreclosed taxpayer are the fees already incurred at the time of the FGU's proceeds distribution – not fees for costs incurred afterwards in administering a claims process.

Moreover, only "reasonable" fees can be deducted. As this Court's operative holding says, "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 (emphasis added). The State's quotation from *Rafaeli* conveniently omits the word "reasonably." Again, the fees at issue are "unreasonable" because the Rube Goldberg claims process is unreasonable.[10]

As to (2), absolutely nothing in *Rafaeli*'s "no more, no less" compensation rule allows for a "deterrent," no matter how "modest." Penalties are inherently non-compensatory. The State's

[10] The State's presumed response would be its argument that "while [the fee] may serve some deterrent purpose it is not punitive" but rather "a fee for services that prohibits a tax debtor from securing public services without paying." Appellant's Brief at 34. Again, though, the State cannot mandate a thicket of pointless "public services" and charge claimants for them. And the State concedes that "the fee is not applied prior to foreclosure (to all parcels like a tax) but only as a part of the new claim-making process," *id.*, whereas *Rafaeli* only permitted fees incurred prior to the FGU-level distribution of the auction proceeds, as discussed above. It is irrelevant whether "realtors, title companies, closing agents, auctioneers, and other real estate professionals routinely charge such fees in private transactions." *Id.* They are not subject to the Fifth or Eighth Amendments or their state constitutional equivalents. And the Class is not asking "[t]his Court [to] allow Plaintiffs to avail themselves of the new process without paying their own way," *id.* at 34-35; they are saying that it is unconstitutional to force the Class Members to use the new process.

RECEIVED by MSC 10/18/2023 9:08:17 PM

"modest deterrent" argument amounts to a concession that the five percent fee falls outside of *Rafaeli* and is *per se* unconstitutional.[11,12]

F. PA 256 is only viable as an optional claims process.

The State says that "[i]t is unclear how any one of these alleged infirmities would render the entire law unconstitutional for every application given the requirement that unconstitutional statutory provisions be severed, and the remainder of the law otherwise left in place, if possible." Appellant's Brief at 30 (citing MCL 8.5). But despite raising this issue, the State never provides any insight into how it thinks any provisions should or should not be severed. In fact, the answer is simple. The "exclusive remedy" provision is unconstitutional and can be severed from the rest of the statute. If claimants want to use PA 256, with its byzantine process and inadequate recovery, they would have the option to do so. But they would also have the option of bringing an action under the ordinary court rules for a taking as this Court recognized in *Rafaeli*.[13]

---

[11] Having claimed that the fee is justifiable as a "mild deterrent," the State backtracks, claiming that it is not "an excessive fine even if it serves the additional purpose of a mild deterrent" because "[g]iven the new processes and expenses, it is clearly not a pure fine for behavior." Appellant's Brief at 33. But as discussed throughout, the new "processes and expenses" cannot justify the fee. And *Rafaeli*'s "no more, no less" formulation leaves no room for a "mild deterrent" fine. Thus, to the extent that the five percent fee is, in fact, intended to function as a deterrent, it is indeed "an excessive fine." *Id.*

[12] The State nonetheless claims that "the remedy [in PA 256] remains the same [as in *Rafaeli*]: the ability to bring and prove a claim for remaining proceeds net of the costs associated with collection, as determined by the Legislature," and that "[t]he 5% fee divests nothing because Plaintiffs were never entitled to such services without paying for them." Appellant's Brief at 24. But the Legislature cannot define the properly withheld costs by fiat. Indeed, the State never even provides any support or argument for why its estimate should be afforded any deference at all. *People v Cameron*, 319 Mich App 215, 232 (2017) (Court is not required to unravel and elaborate on defendant's arguments). Even if, *arguendo*, the Legislature's estimate of the costs is entitled to some deference, it lacks any reasonable basis as discussed above – the FGU has already collected compensable costs. And, again, the idea that claimants should have to pay for the expenses imposed by PA 256's byzantine procedural tripwires turns *Rafaeli* on its head.

[13] The issue is particularly salient for victims such as the Class Members whose claims are against the State. Victims of the counties that served as FGU can sue in federal court regardless of PA 256, because *Knick* affords takings victims immediate access to federal court without the need

RECEIVED by MSC 10/18/2023 9:08:17 PM

G. The Court of Claims has jurisdiction over this case.

The Court of Claims has jurisdiction. Under MCL 600.6419(1)(a), the Court of Claims has jurisdiction over "any claim … against the state or any of its departments or officers." This includes constitutional claims such as here. *Rusha v Dep't of Corrections*, 307 Mich App 300, 305 (2014) (citing MCL 600.6419(1)(a)).

The State responds that it has divested the Court of Claims' jurisdiction through PA 256. But for all the reasons discussed above, PA 256 – or at least its exclusive remedy provision – is unconstitutional. If nothing else, the Legislature cannot specify a particular judicial procedure in derogation of the Court Rules.[14]

II. The Court of Claims did not abuse its discretion in certifying a class.

A. The class satisfies the court rule and its purpose.

1. The Class satisfies the purpose of MCR 3.501.

This case is a straightforward class action: all of the class members suffered the same injury from the same defendant's single course of conduct. If this case cannot be certified as a class action, it is difficult to see when a class action would be possible. The State's argument is a frontal assault on the class action device, and the Court should reject the State's invitation to eviscerate class actions in this state.

---

to use a state-level procedure. *Knick*, 139 S Ct at 2172-2173. But the Eleventh Amendment generally bars federal claims against the State. Compare *Bauserman*, 509 Mich at 710, with *Fox v Saginaw Cnty*, unpublished opinion of the Sixth Circuit Court of Appeals, issued February 22, 2022 (Docket No. 21-1108), pp 5-6 (App pp 266-267) (rejecting county FGUs' eleventh amendment defense).

[14] The issue of whether the Legislature could simply transfer jurisdiction of this case from the Court of Claims to a different court while retaining its procedural and substantive nature poses an interesting hypothetical. But that is not the issue here. The purported divestiture of the Court of Claims' jurisdiction is inextricably bound with the imposition of the non-Court Rules PA 256 claim process and the substantive evisceration of the Class Members' claims.

RECEIVED by MSC 10/18/2023 9:08:17 PM

Indeed, the State's argument that this case is at odds with the purpose of MCR 3.501 exposes its *de facto* argument for the rule's effective elimination. As discussed above, a key purpose of class actions is to aggregate claims that individuals would not or could not bring on their own. Frequently, a class action will be the only way to hold a wayward government or private wrongdoer to account – and it will frequently be the only way for the victims to secure any redress as a practical matter. Again, that is just the case here.

2. The Class meets the MCR 3.501 requirements.

a) Numerosity.

As the Class explained in its Response to the State's Application, the Court of Claims was correct that the Class is sufficiently numerous. Response at 36-37.

b) Commonality.

As the Class explained in its Response to the State's Application, the Court of Claims was correct that the Class faces common issues. Response at 37-39.[15]

c) Typicality.

As the Class explained in its Response to the State's Application, the Court of Claims was correct that the named plaintiffs' claims are typical. Response at 39-40.

d) Adequacy.

[15] The State claims that, with *Rafaeli* decided, "there can be no common proof because each sum of money from each sold parcel will turn on each claimant's rights *before* foreclosure based on deeds, liens, contracts, etc., property by property, claimant by claimant." Appellant's Brief at 39 (citing MCL 211.78t(9)) (emphasis in the original). But as discussed in response to the State's Application, the fact that a common issue has been resolved against a Defendant does not undermine a finding of commonality. Response at 38-39. And as discussed throughout, liens are extinguished and otherwise irrelevant. "Deeds" seems to be a reference to whether or not someone is an owner, which is an issue of class definition and membership, not liability. It is entirely unclear what issue the State anticipates with respect to "contracts." At most, these issues seem to be ones that might impact Member-specific damages, and difference in damage amounts is not a bar to certification. See *Breiner*, *supra*.

RECEIVED by MSC 10/18/2023 9:08:17 PM

As the Class explained in its Response to the State's Application, the Court of Claims was correct that the named plaintiffs and their counsel are adequate. Response at 40.

e) Superiority.

As the Class explained in its Response to the State's Application, the Court of Claims was correct that class adjudication is the superior method of resolving this dispute. Response at 40-42. The State's argument that "class litigation here with the attendant right to opt out does not work" because "two courts or actions cannot decide the same set of facts or claims or distribute finite funds from a sold property," Appellant's Brief at 38-39, fails for the same reason. The Class Members – like any takings victims – have damage claims against the government that illegally seized their property. *First English Evangelical Lutheran Church v Cnty of Los Angeles*, 482 US 304, 316 n 9 (1987). The State cannot get out of paying the just compensation owed by pretending that the properties' surplus proceeds reflect "finite sums" subject to division in the manner of an estate. Indeed, as discussed above, *Rafaeli* detailed the amount due – without any provision for deductions to pay lienholders. The State's assumption that it can withhold such deductions puts PA 256 firmly on the "no less" side of this Court's compensation formula.

3. The Court of Claims did not abuse its discretion in defining the class.

The State argues that "[a]s an initial point, although the class definition presently includes sales occurring after the new law was enacted, that definition is legally erroneous as the new statute is the only way to make these claims." Appellant's Brief at 32 (citing MCL 211.78l and MCL 211.78t(11)). But this simply assumes that PA 256's exclusive remedy provision is constitutional, that the Court of Claims erred in certifying the class, and that the Court of Appeals erred in upholding the Court of Claims. Such an assumption is unwarranted. Litigants may not simply announce a legal position and leave it to the Court to find a basis for the assertion. *Schellenberg v*

RECEIVED by MSC 10/18/2023 9:08:17 PM

Rochester Elks, 228 Mich App 20, 49. Even if the State pursued this argument, it would fail: for the reasons set forth throughout, PA 256's exclusive remedy provision is unconstitutional.

The State then argues that after "removing such 'future' class members, the remaining pre-PA 256 litigants lack standing to challenge post-PA 256 fees." Appellant's Brief at 32 (citing *Andary v USAA Casualty Ins Co*, --- Mich ---; 978 NW2d 875 (2023)). But as discussed above, the 'future' class members should not be removed. And the State's argument is inconsistent with its argument elsewhere that the "pre-PA 256 litigants" should be forced to use the PA 256 process based on a judicially rewritten version of the statute, presumably with its fees intact. For good measure, the State's standing argument fails, as standing under Michigan law is a flexible concept recognizing the broad jurisdiction of the state's courts. *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372 (2010) ("Michigan standing jurisprudence should be … a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing.").

Finally, the State complains that "the class definition currently excludes all lienholders, a group with equally vested and senior rights to those of 'owners[,]'" and that "correcting that error to include lienholders while maintaining the class action posture makes resolution less manageable and introduces adversity as between class members." Appellant's Brief at 1-2. But there is no "error" to correct: as discussed below, lienholders are irrelevant to class certification.

B. Classwide litigation is the superior method for litigating this dispute.

As discussed above, the class members all suffered the same injury from the single defendant's single course of conduct. This makes the quintessential class action in which the overwhelmingly common issues are resolved efficiently at the same time. By contrast, individual actions are always less efficient – and particularly individual PA 256 actions, with their byzantine

RECEIVED by MSC 10/18/2023 9:08:17 PM

procedural tripwires. Perhaps most important, as discussed above, classwide litigation is the only way that nearly any of the class members will secure relief. It is difficult to avoid the conclusion that the State finds individual cases superior because it does not want to give back the illegally taken money.

Appellant's primary response is that the Court of Claims improperly failed to address the prior holders of liens on the Class Members' properties. As the Class explained in its Response to the State's Application, the Court of Claims was correct to reject the State's lienholder arguments. Response at 43-44. Indeed, no less an authority than the United States Supreme Court has rejected the arguments that the presence of former lienholders, whose liens were extinguished by statute in the foreclosure, impede the owner's takings claims. *Tyler*, 598 US at 637.[16]

The State's lienholder-related arguments often seemed premised on the misapprehension that this is an *in rem* proceeding to allocate property proceeds, when in fact it is a class action damage claim for injuries. The State repeatedly assumes, without argument, that the Court should treat this class-action damage claim as a process to allocate the fixed set of funds derived from each property. For example, the State claims that "the fact that litigants may 'opt out' of class

[16] The State discusses *Tarrify Properties* at length. Appellant's Brief at 40-41 (discussing *Tarrify Properties, LLC v Cuyahoga County, Ohio*, 37 F4th 1101 (CA 6, 2023)). In *Tarrify*, the Sixth Circuit upheld a District Court's exercise of discretion in denying certification to a class seeking fair-market-value based damages because, it found, such a proposed class lacked a classwide damages model, with damages instead based on property-specific valuation disputes. *Id.* at 1106-1109. But the State then concedes that *Rafaeli* provides for surplus-proceeds-based damages, which provides for an easily-administered classwide damage model. Appellant's Brief at 41. The State suggests that individual issues might nonetheless emerge. But "mini-trials" are just the "inefficienc[y]" that PA 256 courts. *Id.* The State cannot argue strenuously for an individualized Rube Goldberg claims process that purports to unconstitutionally resurrect extinguished liens and thereby multiply the litigants, and then claim that the Court of Claims abused its discretion because, the State thinks, the class action might end up facing some inefficiencies. The pot is calling the kettle black.

RECEIVED by MSC 10/18/2023 9:08:17 PM

litigation makes [it] unworkable[,]" because "the proceeds from Green Acre are finite and may only be decided by one court in one action." Appellant's Brief 2.

Again, though, the State cannot simply assume that this is an *in rem* proceeding, because "[a] party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position." *Seifeddine*, 327 Mich App at 519. In any event, takings claims are damage claims. *First English*, 482 US at 315-316. Thus, they are not bankruptcy-style allocation cases or *in rem* proceedings to allocate interests in a property. As just one example for why this "finite funds" theory fails, consider claims under 42 USC § 1983. As discussed *infra*, plaintiffs prevailing on such claims are entitled to interest on the amount taken, which is entirely inconsistent with the idea that takings damages reflect the allocation of finite sums.

III. The six-year statute of limitations for takings claims applies to claims for taken property.

A. The proper limitation period is six years.

1. The six-year period applies.

The concurrence to the order directing oral argument suggests that the parties address "whether the time to make a claim for remaining proceeds under MCL 211.78t is subject to the limitations periods set forth in MCL 211.78l, MCL 600.5813, or MCL 600.6452(1)." *Hathon*, 990 NW2d at 877 (ZAHRA, J., concurring).

The post-PA 256 limitations periods set forth in MCL 211.78l is the two-year limit discussed throughout. The Class does not dispute that the State may establish a two-year deadline for the use of the PA 256 process. But, as discussed throughout, the Class vigorously dispute the State's contention that it may mandate use of this process.

RECEIVED by MSC 10/18/2023 9:08:17 PM

Moreover, prior to PA 256, the operating language at MCL 211.78l read, "[a]n action to recover monetary damages *under this section* shall not be brought more than 2 years after a judgment for foreclosure is entered under section 78k." MCL 211.78l (prior to amendment by Public Act 256) (emphasis added). As the State concedes, this concerned claims for lack of notice the during the foreclosure process. Appellant's Br at 11.

The Class here is not bringing claims "under [that] section." Indeed, the Class's claims do not challenge the underlying foreclosures; rather, they seek damages for the post-foreclosure disposition of property. See, e.g., *Freed v Thomas*, 976 F3d 729, 737 (CA 6, 2020) (analogous claims did not involve taxation but rather post-taxation property claims).

This leaves MCL 600.5813, which is the catch-all six-year limitation period, and MCL 600.6452(1), which sets forth a three-year period for claims against the State in the Court of Claims.

There is little question that MCL 600.5813 applies to state-law takings claims against FGUs other than the State. *Hart v City of Detroit*, 416 Mich 488, 505 (1982). At the Court of Claims, the Class argued that this limitation period applies here, too. The Court of Claims disagreed, applying instead MCL 600.6431 and its one-year notice provision.[17] The Class cross-appealed, arguing "that the statute of limitations for inverse condemnation claims is the general six-year limitations period found in MCL 600.5813[.]" *Breiner*, slip op at 13 (Appellee's 3/3/23 App to Ans p 391). The Court of Appeals rejected this argument. *Id.* The Class did not appeal this decision, electing instead to ask this Court to uphold the Court of Appeals decision in its entirety and leaving any further challenge to after final judgment enters.

[17] This issue is the subject of the appeal being made in *Breiner*.

RECEIVED by MSC 10/18/2023 9:08:17 PM

For the Class, the issue of MCL 600.6452(1) is academic, because, under the Court of Appeals' decision, the *de facto* limitation period is one year under MCL 600.6431. However, in order to fully address the Court's direction, the Class welcomes the opportunity to explain why MCL 600.5813, and neither MCL 600.6451(1) nor MCL 600.6431, applies.

"[T]his Court has never held that constitutional claims against the state … should be treated like the personal-injury claims[.] *Mays*, 506 Mich at 204 (BERNSTEIN, J., concurring) (cleaned up). This opinion proceeded to discuss Chief Justice McCormick's concurrence in *Bauserman*, 503 Mich at 194. See *Bauserman*, 503 Mich at 195 (MCCORMACK, CJ, concurring). This explained 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." *Id.* 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 permit the Legislature to burden or curtail constitutional rights." *Id.* at 195-196. See also *Felder v Casey*, 487 US 131, 151 (1988) (state statute's notice rules could not apply to federal action under 42 USC 1983).

Similarly, here, the Court of Claims' application of MCL 600.6431(3) deprived, and any application of MCL 600.6452(1) would deprive, would-be class members of their ability to secure redress for the violation of their constitutional rights.

This was and is unduly harsh. In *Mays*, this Court further agreed with *Rusha*'s characterization of the harsh-and-unreasonable-consequences exception, and clarified that "*Rusha*

RECEIVED by MSC 10/18/2023 9:08:17 PM

should not be read as advocating for the creation of a judicial saving construction to supplement an otherwise valid statute." *Snyder*, 323 Mich App at 32. "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) (emphasis in original). Here, allowing the State to retain the value of the destroyed and taken equity is manifestly unjust.

2. The State's argument for a two-year statute of repose fails.

The State claims that "[s]ince 1999, the law always had a statute of repose for post-tax foreclosure claims. Originally, the Legislature only envisaged a due process claim for lack of notice, which it identified in MCL 211.78l," and that, because "[t]hat claim is based on a constitutional violation, just like the claim asserted here … in PA 256 the two-year limitation remains." Appellant's Brief at 11. This argument fails.[18]

Rafaeli recognized – and the Class here has pled – a takings claim. *Rafaeli*, 505 Mich at 483-484. This Court did not find that Mr. Rafaeli had stated "a due process claim for lack of notice" to which the two-year limitation period would apply. The State cannot apply the limitation period for an inapplicable claim to the claims that are actually at issue and that have their own specified limitation period.

Nor can the State argue that the limitation period in the old version of the GPTA was a sweeping "statute of repose" that applied to any potential claims related to the statute, as opposed

[18] The State's defense of the statute is not internally consistent. For example, it argues that "Public Act 256 clarified the statute of limitations." Appellant's Brief at 7 (citing MCL 211.78l). But elsewhere, it insists that MCL 211.78l is a statute of *repose*. Regardless, the State would have it operate to extinguish pending claims.

RECEIVED by MSC 10/18/2023 9:08:17 PM

to just the enumerated statutory claims, or that it is a statute of repose at all.[19] The State has not preserved the argument that this period is a statute of repose. For a party to preserve an argument for appeal, it must assert the argument at the trial court and at any intermediary appellate court. *Redmond v Heller*, 332 Mich App 415, 430 (2020) ("Generally, to preserve a claim of error for appellate review, the party claiming the error must raise the issue in the trial court."). Here, the State raises this argument for the first time at this Court, and in supplementary briefing at that.

Indeed, PA 256's limitations period is not a statute of repose. Under Michigan law, a period is a statute of repose if it "bar[s] any suit that is brought after a specified time *since the defendant acted*[.]" *Frank v Linkner*, 500 Mich 133, 142 (2017) (citing *Black's Law Dictionary* (10th ed)) (emphasis in original). Here, the foreclosure itself is the event in question, which is a judicial act as opposed to the FGU's.

Again, if the State wants to set a two-year deadline for an optional process, it can do so. But it cannot operate as a preclusive "statute of repose" that bars otherwise lawful claims such as the Class Members.

B. The State's equitable tolling argument fails.

The concurrence to the order directing oral argument also suggests that the parties address "whether the applicable limitations period is subject to equitable tolling until this Court decides whether *Rafaeli* [] applies retroactively[.]" *Hathon*, 990 NW2d at 877 (ZAHRA, J., concurring).

[19] Again, the Class notes that the issue is beyond the scope of this case. Because of the one year notice period under the Court of Claims Act, the Class Members here, by definition, had their claims accrue in the year before the complaint's filing. The foreclosures were presumably within the preceding few months and, at the very least, despite controlling the relevant documents, the State has not shown that any of the Class Members suffered their foreclosures more than two years before the filing.

RECEIVED by MSC 10/18/2023 9:08:17 PM

The better answer is to find that the convoluted PA 256 procedure is optional, and that no claimants – and particularly not pre-*Rafaeli* claimants – are required to use it.

The State, by contrast, seeks the application of equitable tolling in an effort to effectively rewrite the statute. Apparently recognizing the statute's unconstitutionality, it seems to bargain with this Court to allow it to destroy this class action against it. The Court should reject this effort.

The State summarizes its proposed rewrite on Page 2 of its Supplemental Brief, writing that, "[i]f this Court holds that *Rafaeli* applies retroactively, it should also hold that claimants from 2019 circuit court foreclosure orders (effective April 1, 2019) and subsequent sales may file claims under MCL 211.78t(6), so long as their claims have not already been adjudicated by another court or action."[20] It continues that "[t]his should not toll any claims based on foreclosures that were effective after the new law was enacted and that required no ruling from this Court to proceed; those claimants' time to bring claims has expired." *Id.*[21] It argues that tolling should also apply to non-litigating lienholders adverse to the Class Members, because, it says, such "equitable tolling puts all potential claimants, including those seeking the funds in this case, on equal footing by giving lienholders the same protections as 'owners.'"[22]

---

[20] Elsewhere, the State argues that "[i]n application and voice, PA 256 is not an outlier or afterthought," insisting that "[i]t is not a set of orphaned provisions awkwardly appended to an existing statute" but rather "an integrated part of the existing timeline and process." Appellant's Brief at 9. This raises the question of why the State asks this Court to rewrite the statute.

[21] It is not even clear whether the State wants the Court to take up its *de facto* legislative proposal at this time. Discussing the purported "grace period," it says that "the new law includes a six-month window to file a notice of intention and subsequent circuit court motion seeking proceeds, if this Court holds those sales are eligible" but that "[t]hat is a matter for another appeal." Appellant's Brief at 11.

[22] The State argues in its "Statement of Questions Presented" that, "[i]f this Court holds that *Rafaeli* has some retroactive application covering sales before July 18, 2020," then this Court must decide whether "the law provide[s] that the notice of intent must be filed within 180 days of such ruling, starting the claim process[.]" Appellant's Brief at xiii. Actually, though, as the Court of Appeals correctly found, PA 256 was simply not triggered for the Class's claims because this Court had not issued the requisite *Rafaeli*-retroactivity opinion. Response at 7-9. And even if PA

RECEIVED by MSC 10/18/2023 9:08:17 PM

The State notes correctly that "[u]nder MCR 3.501(F)(1), 'the statute of limitations is tolled as to all persons within the class described in the complaint on the commencement of an action asserting a class action,'" but identifies as "the problem" the fact "that the class only encompasses 'owners'" and that "although lienholders are claimants under the new law their ability to make claims alongside 'owners' is in question." Appellant's Brief at 53. The State's apparent concern for the lienholders is puzzling. As discussed above, the statute extinguished the liens. In any event, the lienholders – presumably consisting largely of financial institutions – sat on their rights while the class – consisting of economically distressed taxpayers, many of whom have suffered severe medical issues, and the families of deceased homeowners – has vigorously litigated. If the State wishes to lend the financial institutions economic support, then the Legislature can appropriate relief funds; there is no need to cost the actual victims their opportunity to be made whole.

The State's request amounts to a bare request for this Court to legislate from the bench. And the request here does not involve judicial lawmaking in the pejorative sense in which the term is usually employed. For example, the State is not asking the Court to invalidate a statute on constitutional grounds, or recognize a disputed constitutional right. Rather, it is asking the Court to delve in and effectively rewrite the legislative text in order to produce the State's desired outcome: to replace the two-year limitations period with a one-time extension, and then to apply the extended limitations period to additional potential claimants absent from this case. Such detailed amendment is an issue for the Legislature and, indeed, its staff and committees. See, e.g., *League of Women Voters of Mich v Sec'y of State*, 508 Mich 520, 574-576 (2022) ("[T]his Court can nullify statutes to the extent that they are unconstitutional" [but] "cannot revise, amend,

256 is available to claimants such as the Class Members, its use cannot be mandatory for all of the reasons discussed throughout.

RECEIVED by MSC 10/18/2023 9:08:17 PM

deconstruct, or ignore the Legislature's product" [and] "does not have the authority to strike down statutes merely because it disagrees with [the Legislature's] wisdom or prudence.").

For example, the State argues that, "[i]f this Court holds for some retroactive application of *Rafaeli*, the two-year statute of repose should apply from this Court's *Rafaeli* decision backward two years, thus providing a 180-day window for claimants that were foreclosed under MCL 211.78k within two years prior to July 18, 2020, to proceed under the new law." Appellant's Brief at 11-12. But it never explains why the statute of repose should run backwards from *Rafaeli* – again, statutes of repose are hard bars running ***forward*** from the dates of specific events. What the State seems to be saying is that, if the Court applies *Rafaeli* retroactively, then it should find claims timely if the foreclosures were within the two years prior from *Rafaeli*. But this is at odds with the contention, elsewhere, that it is this case – as opposed to *Rafaeli* – that affords the necessary tolling. Indeed, it is unclear why *Rafaeli* should function as a *de facto* claims date.

Again, the State is trying to rewrite the statute's complexities and infirmities in order to try to establish a version that, unlike the actual statute, meets some bare minimum of constitutionality. The State's proposal should be hashed out in a legislative committee, not this lawsuit.

Moreover, if the two-year limit is indeed a statute of repose, then it is generally not subject to tolling. *Frank*, 500 Mich at 141 ("a statute of repose cannot be tolled pursuant to the fraudulent-concealment statute"); *California Public Employees' Retirement System v ANZ Securities, Inc*, 582 US 497 (2017) (federal class action tolling does not apply to statutes of repose). Thus, the State's strategy for salvaging the statute may not even work.[23]

[23] The State claims that "[h]ere…the bulk of the analysis need not turn on either equitable or judicial tolling; Michigan provides tolling under MCL 600.5856." Appellant's Brief at 52. This statute concerns the tolling of statute of limitations *or repose* upon the complaint's filing. MCL 600.5856(a). The unstated implication is that the State believes that MCR 3.501's tolling provision should be read in the context of this statute. If so, then this would explain how the State finds MCR

RECEIVED by MSC 10/18/2023 9:08:17 PM

Ominously, the State claims that, "[a]s to equitable tolling, should this Court hold *Rafaeli* is subject to retroactive application this Court should allow lienholders to file within 180 days alongside owners," but that, "[f]or 'owners' such equitable tolling is unnecessary because once the class is decertified, they can rely on principles of statutory and class-certification tolling." Appellant's Brief at 12. Yet as explained above, tolling is generally unavailable for statute of repose deadlines. Perhaps the State is setting a trap, planning to argue later that tolling was unavailable after all. Perhaps the State will later argue that its favored lienholders were tolled, but not the disfavored taxpayers. Or perhaps it simply failed to account for this issue in proffering its *de facto* statutory rewrite. In any event, the rewrite is unworkable. But the problem does not ultimately stem from the State's failure to blue pencil a salvageable statute. The problem is that PA 256 is beyond repair.

Indeed, the State's consistent retreats as to PA 256's constitutionality illustrate the statute's irredeemable nature. As discussed above, the State began by flatly arguing that it had immunized itself from claims by pre-*Rafaeli* victims. Then, at the Court of Appeals, it argued for the first time that, if this Court were to rule that *Rafaeli* should apply retroactively, then these claimants would have a grace period – but that it would be illusory, because the two-year limitation would have run before the "grace period" began. Now, for the first time, the State says that some sort of tolling can apply to extend some pre-*Rafaeli* claimants' deadline into the grace period, as long as there is equitable tolling for the holders of extinguished liens also. If the statute were actually constitutional, then the State's position would not be a moving target.

3.501 tolling to apply to the limitation period it calls a "statute of repose." Again, though, the State does not explain this explicitly. So the Court is left in the same place: the State has failed to explain how its *de facto* statutory rewrite works, and leaves it to the Court to craft a constitutional version of the statute. In reality, the "constitutional version" of PA 256 is the one that lacks the "exclusive remedy" provision.

RECEIVED by MSC 10/18/2023 9:08:17 PM

Ultimately, any effort to effectively rewrite PA 256 through an allowance for tolling – equitable or otherwise – would be futile. The extinguishment of vested claims is one of the statute's constitutional infirmities. But, as discussed throughout, it is not the only one. Despite the State's efforts, PA 256 cannot be salvaged.

CONCLUSION AND RELIEF REQUESTED

For all of the reasons set forth throughout the briefing, the Class respectfully requests that this Court uphold the Court of Appeals.

RESPECTFULLY SUBMITTED,

/s/ Matthew E. Gronda
MATTHEW E. GRONDA (P73693)
Co-Lead Counsel
PO Box 70
St. Charles, Michigan 48655
Phone: 989-249-0350
matt@matthewgronda.com

/s/ Philip L. Ellison
PHILIP L. ELLISON (P74117)
OUTSIDE LEGAL COUNSEL PLC
Co-Lead Counsel
PO Box 107
Hemlock, MI 48626
Phone: 989-642-0055
pellison@olcplc.com

/s/ E. Powell Miller
E. POWELL MILLER (P39487)
SHARON S. ALMONRODE (P33938)
CHRISTOPHER D. KAYE (P61918)
THE MILLER LAW FIRM PC
Co-Lead Counsel
950 West University Drive, #300
Rochester, MI 48307
Phone: 248-841-2200
epm@millerlawpc.com
ssa@millerlawpc.com
cdk@millerlawpc.com

Dated: October 18, 2023

RECEIVED by MSC 10/18/2023 9:08:17 PM

WORD COUNT STATEMENT

This document complies with the type-volume limitation of the Michigan Court Rules because, excluding the part of the document exempted, this **Supplemental Brief** contains no more than 16,000 words. This applicable portion of this document contains 15,860 words.