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STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs/Appellees,

v.

STATE OF MICHIGAN,

Defendant/Appellant.

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

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BRIEF AMICUS CURIAE OF ERICA PEREZ, PACIFIC LEGAL FOUNDATION, AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PLAINTIFFS/APPELLEES

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INTEREST OF AMICI CURIAE

Erica Perez is the former owner of real improved property that Wayne County foreclosed upon to collect a small debt. She rents a small apartment in New Jersey, but hopes eventually to move to Michigan to be closer to her relatives. To that end, in 2012, she and her father purchased two parcels of land with a four-unit apartment and a separate house in Detroit. Along with her father, she spent many months and tens of thousands of dollars improving the property in order to rent it to residential tenants and earn enough profit to finance a permanent move to Michigan. Ms. Perez paid her property taxes in full every year except for 2014, in which she unknowingly underpaid her taxes by $144.49. To collect this debt, Wayne County foreclosed her property, sold it to a third party for $108,000, and kept every penny. Ms. Perez is currently represented by Amici Pacific Legal Foundation and The Mackinac Center for Public Policy in ongoing litigation in Wayne County. *Perez v. Wayne County*, No. 19-009286-CZ. Like the class Plaintiffs at issue here, she commenced her takings claim prior to this Court's decision in *Rafaeli v. Oakland County*, 505 Mich. 429 (2020).

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Wilkins v. United States*, 598 U.S. 152 (2023); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF attorneys have extensive experience with the questions at issue in this case and have represented plaintiffs in takings claims involving tax

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foreclosure in state and federal courts, including cases arising in the State of Michigan. *See, e.g.*, *Tyler v. Hennepin County*, 598 U.S. 631 (2023); *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022); *Rafaeli*, 505 Mich. 429. It also represents Amicus Erica Perez in her ongoing litigation.

The Mackinac Center for Public Policy is a Michigan-based, non-partisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. The Mackinac Center for Public Policy has advocated against the retention of equity in excess of the tax debts owed in foreclosure matters, and against the imposition of excessive fines and penalties. Mackinac has joined the Pacific Legal Foundation in representing Amicus Erica Perez as local counsel.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Between 2014 and 2021, more than $780 million has been unlawfully confiscated from taxpayers in the United States through predatory foreclosure actions. Pacific Legal Foundation, Size & Scope, HomeEquityTheft.org, https://homeequitytheft.org/size-and-scope. The true figure is likely significantly larger, as that data comes from a report which only reviewed a fraction of the jurisdictions where such foreclosures are practiced. *Id.* On average, affected taxpayers lost 86% of the value of their property, the equivalent of 26 years' worth of payments on a 30-year mortgage. *Id.*

Before 2020, the State of Michigan was among the worst offenders. Amicus Erica Perez, for example, lost her home after she accidentally underpaid one year's tax assessment by $144.49. First Amended Complaint ¶ 13, *Perez v. Wayne County*, No. 19-009286-CZ. Wayne County

[1] Pursuant to MCR 7.312(H), Amici inform the Court that no counsel for any party to the case authored this brief in any part, and no such counsel or party has made a monetary contribution to fund its preparation. Aside from the Amici, no person has made any such monetary contribution.

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foreclosed on her home and sold it for $108,000, keeping every penny. *Id.* ¶ 16. Equally stark is the case of Uri Rafaeli, whose entire home was taken to recover a debt of $8.41. *Rafaeli*, 505 Mich. at 437. These cases present shocking injustice.[2]

Mr. Rafaeli's case appeared to promise a swift end to these injustices in Michigan. This Court held unequivocally that retaining the surplus proceeds following the sale of tax-foreclosed property violates the Takings Clause of the Michigan Constitution. *Id.* at 485. This decision, however, necessarily left legislative gaps. The unlawful confiscation of equity had been done pursuant to the General Property Tax Act (GPTA), and the authority to provide for real property taxation is vested in the state legislature. Mich. Const. art. IX, § 3. Thus, the legislature set to work on amending the GPTA to eliminate unconstitutional provisions and revise tax collection procedures to avoid unlawful takings.

The result of these efforts—represented by PA 256—is a failure. Rather than creating a simple, user-friendly method by which foreclosing governmental units (FGUs) must return the surplus proceeds from a post-foreclosure sale to the original owner, the legislature has designed an elaborate labyrinth of concatenated deadlines and onerous hurdles. It seeks to lock people into this maze by providing that it was the exclusive procedure for claiming surplus proceeds. It makes no provision for the payment of interest on the surplus proceeds, despite a century of caselaw establishing interest as a required component of just compensation. *See Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923). Of special relevance here, it also purports to effectually deny recovery to every taxpayer whose property was foreclosed prior to this Court's decision in

[2] *See Tyler*, 598 U.S. at 647, Docket at http://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-166.html (linking to 33 amicus briefs from diverse viewpoints expressing outrage and often surprise at such confiscations, including AARP; the National Taxpayers Union Foundation; the National Association of Realtors; the Chamber of Commerce of the United States of America; Public Citizen; the Cato Institute; and the ACLU).

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Rafaeli. By conditioning recovery for these individuals on this Court's determination that *Rafaeli* applies retroactively, and by imposing a complicated claim procedure that plaintiffs like Ms. Perez *cannot* satisfy, as well as a two-year limitations period in which to bring a claim, the legislature left such taxpayers without recourse.

That is the trap in which the class Plaintiffs find themselves. The named Plaintiffs suffered foreclosure in February 2018. (Application 4). They filed their claims less than a year later, in January 2019, well within the six-year statute of limitations for takings claims in Michigan, *see Hart v. City of Detroit*, 416 Mich. 488, 503 (1982), and even within the narrower limitations period provided in the Court of Claims Act. *See* MCL 600.6431. The court—even without the benefit of the *Rafaeli* decision—vindicated their claims. It held that the State, which had acted as the FGU, had violated the Takings Clause of the Michigan Constitution.

In the normal course of things, such a determination would entitle the Plaintiffs to compensation in the form of their surplus proceeds, plus interest from the time of the foreclosure. *Seaboard Air Line*, 261 U.S. at 306; *see Hall*, 51 F.4th at 196 (identifying the government's "taking of absolute title" as the point at which a taking occurs) (internal quotations omitted). And, because the Plaintiffs filed an equally meritorious federal claim under 42 U.S.C. § 1983, they were all but assured to receive attorney fees as well. *See* 42 U.S.C. § 1988(b); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (prevailing plaintiff in a civil rights case "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust") (internal quotation and citation omitted); *see also Tyler*, 598 U.S. at 647 (holding that a *Rafaeli*-style taking violates the federal Constitution). According to the State, however, Plaintiffs should get nothing. The State argues that PA 256—adopted only *after* the Plaintiffs had already succeeded on the merits at the Court of Claims—retroactively divests the courts of jurisdiction over this case. In the State's view,

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"[i]n this area of the law, [the GPTA, as amended by PA 256,] is it." Appellant's Brief on Appeal (App. Br.) at 9.

That view is patently false. In this area of the law, the Constitution—not PA 256—reigns supreme. The Takings Clause is "self-executing" with respect to the requirement to pay just compensation. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty*., 482 U.S. 304, 315–16 (1987); *Rafaeli*, 505 Mich. at 454 n.54. As the U.S. Supreme Court recently affirmed, the "right to full compensation arises at the time of the taking, regardless of post-takings remedies that may be available[.]" *Knick*, 139 S. Ct. at 2170. The right to receive compensation for property taken "obvious[ly]" does not depend on any statutory provision. *Seaboard Air Line*, 261 U.S. at 306; *see League of Women Voters of Mich. v. Sec'y of State*, 339 Mich. App. 257, 275 (2021), *aff'd*, 508 Mich. 520, 536 (2022), (self-executing constitutional provisions cannot "be burdened or curtailed by supplementary legislation") (citing *Hamilton v. Sec'y of State*, 227 Mich. 111, 125 (1924) (Opinion of Bird, J.)). Moreover, just compensation must be "full" compensation; where the remedy is not made contemporaneously with the taking, it must include interest to account for the time-value of money. *See Jacobs v. United States*, 290 U.S. 13, 17 (1933); *see also Perry Drug Stores, Inc. v. Dep't of Treasury*, 229 Mich. App. 453, 458 n.4 (1998) ("The term 'time value of money' . . . refers to the concept that a dollar received today is worth more than a dollar to be received in the future.").

Yet the GPTA, as amended by PA 256, purports to limit recovery below the constitutional minimum, and in the case of the class Plaintiffs, to withhold recovery altogether. The Constitution does not permit these limitations. This Court should reject the State's application and permit the claims to proceed.

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ARGUMENT

I. THE CONSTITUTION, NOT THE GPTA, CONTROLS

In this area of the law, the Constitution is supreme. The Fifth Amendment to the U.S. Constitution provides that private property shall not be taken without just compensation. U.S. Const. amend. V. The Constitution of Michigan provides much the same, though it goes even further, offering greater property rights protections than its federal counterpart. Mich. Const. art. X, § 2; *Rafaeli*, 505 Mich. at 449–50. These clauses are self-executing in nature, meaning that the Constitution—independently and of its own force—requires government to pay just compensation for property taken, even in the absence of some statutory cause of action. *See First English*, 482 U.S. at 315–16; *Rafaeli*, 505 Mich. At 454, n.54.

This "self-executing character" of the Takings Clause gives rise to a property owner's right to maintain a judicial action challenging an uncompensated taking. *Rafaeli*, 505 Mich. at 454 n.54 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)). It is therefore well-established that "claims for just compensation are grounded in the Constitution itself." *First English*, 482 U.S. at 315 (citing *Jacobs*, 290 U.S. at 16). And for the same reason, it is "obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions." *Seaboard Air Line*, 261 U.S. at 306. In short, as the Supreme Court more recently affirmed, the "Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available[.]" *Knick*, 139 S. Ct. at 2170.

The State of Michigan asserts an erroneous framing from the outset by insisting that "[i]n this area of the law, [PA 256] is it." App. Br. 9. In arguing that PA 256 retroactively divests the courts of jurisdiction over the *Hathon*'s takings claim, the State fails to cite any takings precedents. That is a crucial error, because due to the uniquely self-executing nature of the Takings Clause,

takings are "in a class by themselves[.]" *Wisconsin Cent. Ltd. v. Public Service Comm'n of Wisconsin*, 95 F.3d 1359, 1368 (7th Cir. 1996).

For example, the State cites *Bank Markazi v. Peterson* for the proposition that the legislature may "direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." App. Br. 19 (quoting *Bank Markazi*, 578 U.S. 212, 229 (2016)). Yet the immediately preceding sentence from that decision notes explicitly that this general rule does not apply in the context of the Takings Clause. *Bank Markazi*, 578 U.S. at 229 (the rule only applies "'[a]bsent a violation of'" a handful of Constitutional directives, including the Takings Clause) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 267 (1994)).

II. THE GPTA CANNOT DEPRIVE PLAINTIFFS OF THEIR RIGHT TO JUST COMPENSATION

The State seeks to ensnare the Hathon Plaintiffs—and all Plaintiffs whose takings claims arose pre-*Rafaeli*—into a trap. It argues that MCL 211.78t is the exclusive statutory procedure; that no pre-*Rafaeli* claimants can get relief unless and until this Court issues authority that *Rafaeli* has full retroactive application; and that all claims must be made within two years from the judgment of foreclosure. Yet as the Plaintiffs correctly observe, because *Rafaeli* was decided more than two years ago, these arguments together would totally preclude any actions that arose from foreclosures effected before *Rafaeli*. Answer to App. 9.

From a constitutional standpoint, this is nonsense; "'property rights cannot be so easily manipulated.'" *Tyler*, 598 U.S. at 645 (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021)). As the United States Supreme Court held one hundred years ago, "[i]t is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions." *Seaboard Air Line*, 261 U.S. at 306. Michigan's Takings Clause, which in some cases provides even stronger protection than its federal counterpart, is similarly independent. *Rafaeli*,

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505 Mich. at 454 n.54 (explaining that the right to bring a takings claim derives from the "self-executing character" of the Constitution itself) (citing *Clarke*, 445 U.S. at 257).

The constitutional mandate of just compensation is a "self-executing" remedy which is "required by the Constitution" when government action has effected a taking. *First English*, 482 U.S. at 315–16; *see Hart v. City of Detroit*, 416 Mich. 488, 494 (1982) ("victim of [] a taking is *entitled* to just compensation") (emphasis added). By definition, self-executing constitutional provisions cannot "be burdened or curtailed by supplementary legislation." *League of Women Voters*, 339 Mich. App. at 275 (citing *Hamilton*, 227 Mich. at 125 (Opinion of Bird, J.)); *see Knick*, 139 S. Ct. at 2170 (The "right to full compensation arises at the time of the taking, regardless of post-taking remedies that may [or may not] be available to the property owner."). And in any case, statutory procedural requirements which "completely divest[] a claimant of his or her right to pursue a constitutional claim" are themselves "unconstitutional." *Mays v. Snyder*, 323 Mich. App. 1, 33 (2018).

Moreover, although PA 256 purports to create the exclusive procedure for the owners of foreclosed property to make a claim for just compensation, it cannot prevent a plaintiff from filing a federal takings claim under 42 U.S.C. § 1983 in federal court. *See Knick*, 139 S. Ct. at 2172–73 ("plaintiffs may bring constitutional claims under [42 USC] § 1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.") (internal quotations and citations omitted). The State's position would lead to the counterintuitive result that a plaintiff may recover attorneys' fees and interest under 42 U.S.C. § 1988(b) in federal court but cannot hope to do the same in state court.[3] By incentivizing Plaintiffs to file in federal

[3] Although federal suits against the State itself may be barred by the Eleventh Amendment, the same does not apply where the FGU is an officer or political subdivision rather than the State itself. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of

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rather than state court, PA 256 defeats its own apparent purpose of creating a unified procedure. (*See* Application 9–10).

Also nonsensical is the legislature's choice to make pre-*Rafaeli* claims contingent on this Court's pronouncement of whether *Rafaeli* applies retroactively is meaningless. *Rafaeli* necessarily applied retroactively the moment it was decided because it was a decision grounded in the Takings Clause. Such decisions are categorically immune from limitation of retroactive application. This would be so even if this Court had not been rather explicit in its determination that *Rafaeli* did not announce a new rule of law, but merely recognized principles that would have been commonly understood by the ratifiers of the Michigan Constitution. *See Rafaeli*, 505 Mich. at 472; *People v. Phillips*, 416 Mich. 63, 68 (1982) (retroactivity cannot be limited unless the decision in question announced a new rule of law).

Again, the just compensation mandate is a "self-executing" remedy. The policy considerations underlying the judge-made doctrine that the application of certain judicial decisions should be temporally limited simply do not apply to a self-executing constitutional mandate. *See Lindsey v. Harper Hosp.*, 455 Mich. 56, 68 (1997) (explaining that the "flexible approach" to retroactivity is a policy choice intended to serve the interests of justice). Rather, because of the self-executing nature of the Takings Clause, "a property owner has a constitutional claim for just compensation at the time of the taking." *Knick*, 139 S. Ct. at 2171. No authority suggests that this constitutional entitlement may be abrogated by later-decided case law which affirms the very right in question, merely because that case was not explicit about its temporal effect.

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the Eleventh Amendment to suit in federal courts . . . does not extend to counties and similar municipal corporations."); *see also* MCL 211.78(8)(a) (defining "[f]oreclosing governmental unit").

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III. THE GPTA WOULD PROVIDE LESS THAN JUST COMPENSATION TO THE PLAINTIFFS HERE, EVEN IF THEY COULD STILL STAKE A CLAIM UNDER ITS PROCEDURES

The constitutional mandate to pay just compensation "is comprehensive." *Seaboard Air Line*, 261 U.S. at 306; *Jacobs*, 290 U.S. at 16–18. Compensation is "not limited to the value of the property at the time of the taking[.]" *Seaboard Air Line*, 261 U.S. at 306. Rather, it includes "such addition as will produce the full equivalent of that value paid contemporaneously with the taking." *Id.* In other words, where compensation is not made contemporaneously with the taking, the property owner is constitutionally entitled to pre-judgment interest sufficient to place him "in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation."[4] *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10–11 (1984). Such entitlement derives from the Constitution itself, and "cannot be made to depend upon state statutory provisions." *Seaboard Air Line*, 261 U.S. at 306.

MCL 211.78t provides less than the constitutional minimum. Under that statute, the former owners of foreclosed properties may only make a claim on the "remaining proceeds" from a subsequent sale. MCL 211.78t(9). The "remaining proceeds" are calculated by adding together the "minimum bid" under § 211.78m, all other fees and expenses incurred by the FGU pursuant to § 211.78m, and a sale commission equal to 5% of the subsequent sale price; and subtracting this sum from the subsequent sale price. The "minimum bid" under § 211.78m is the total of all "delinquent taxes, interest, penalties and fees due on the property, and may include any additional expenses incurred by the [FGU] in connection with the" property. MCL 211.78m(16)(c). This

[4] *Rafaeli* is not to the contrary. This Court did reject the argument that plaintiffs must be "put in as good of [a] position [as if] their properties had not been taken at all." 505 Mich. at 482. But that is a categorically different notion than the principle that plaintiffs must be put in as good a position as if compensation was made contemporaneously with the taking. The former relates to substantive measure of compensation; the latter relates to its time-value.

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calculation plainly makes no provision for the payment of interest on the remaining proceeds. Yet as described above, interest is constitutionally required where the payment of compensation is not made contemporaneously with the taking.

Here, the State confiscated the properties from the named Plaintiffs in February 2018 and kept the surplus proceeds from the subsequent sales later that year. (Application 4). The State has had the benefit of those proceeds—unjust gains—at the expense of the Plaintiffs for more than five years already. The Takings Clause requires that the government pay interest since 2018. Amicus curiae Erica Perez has been deprived of her just compensation for more than six years. Wayne County confiscated her rental property and future home in 2017. Wayne County informed her tenants of the confiscation after foreclosure and before the auction, depriving her of important rental income. Wayne County then sold it for more than $107,000 more than she owed. The County kept that money instead of returning it to her. She could have used that money—her property—to reinvest in a home or rental property for her family and their future. Instead, she's been deprived of the ability to reinvest in a way that builds a future for her family.

Moreover, the statute as presently written still poses constitutional problems for parties whose properties are taken today. First, the government waits roughly seven months before selling the property at auction.[5] While this may not meaningfully harm individuals who are allowed to reside or use the property until it is sold, it certainly harms individuals who are not allowed to use

[5] Under the GPTA, foreclosure hearings must be scheduled in February. MCL 211.78h(5). Judgment of foreclosure must be entered by March 30 and become effective March 31. MCL 211.78k(5). In most cases, the judgment's effect also serves as the close of redemption and triggers the vesting of fee simple title with the FGU. MCL 211.78k(5), (6). Thus, March 31 is also the date on which the taking occurs. *Knick*, 139 S. Ct. at 2170 (takings claim arises "as soon as a government takes [] property for public use without paying for it"). The auction will typically take place in August or September and, potentially, will not be concluded until the first Tuesday in November. MCL 211.78m(2); *see* Class Plfs.' Sup. Br. 18.

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the property and desperately need the income for their families. Following the auction, an additional seven to eight months pass between the date of the auction and the date of the judgment ordering the return of surplus proceeds.[6]

All told, for property owners who manage to navigate this complex claim procedure, approximately 15 months will pass between the foreclosure and the date that compensation is ordered. That is, the taking will occur on March 31, and compensation may not be ordered until late June of the following year. The claimant has a constitutional entitlement to interest for these 15 months, yet the statute makes no provision for it. *See Hall*, 51 F.4th at 196 (identifying the government's taking of absolute title as the point at which a taking occurs). The government cannot force a takings claimant into a lengthy statutory procedure that diminishes the value of an eventual monetary remedy; the result is necessarily less than the just compensation mandated by the Constitution.

CONCLUSION

The trap set here by the State must fail. Plaintiffs' right to compensation derives not from PA 256, nor even from this Court's decision in *Rafaeli*, but from the Constitutions of the State of Michigan and the United States. This Court should reject the State's Application and permit the claims to proceed.

[6] The treasurer need not provide notice of the "remaining proceeds" until January 31. MCL 211.78t(3). The claimant may then file a motion for the "remaining proceeds" between February 1 and May 15. MCL 211.78t(4). At the end of this period, the FGU "shall file" a response to the claimant's motion. MCL 211.78t(5). Following this response, the court must set a hearing date, giving at least 21 days of notice for the hearing. MCL 211.78t(9).

DATED: October 31, 2023.

Respectfully submitted,

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/s/ Derk A. Wilcox
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