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STATE OF MICHIGAN
IN THE SUPREME COURT

LOUIS JACKSON, MICHAEL C. BIRAC, LEE CRAFT and GAYLYNN CRAFT, RONALD HAYES, SMFJ, LLC, EVERETT HODGE, DONALD SWINNEY, STEFANIE and KIRK BOYD, and LISA SMITH for themselves and all those similarly situated,

Plaintiffs/Appellees,

vs.

OAKLAND COUNTY TREASURER ANDREW MEISNER (PERSONALLY AND IN HIS OFFICIAL CAPACITY),

Defendants/Appellants,

vs.

SOUTHFIELD NEIGHBORHOOD REVITALIZATION INITIATIVE, LLC, FRED ZORN (PERSONALLY AND IN ORAL ARGUMENT HIS OFFICIAL CAPACITY), E'TOILE LIBBETT, REQUESTED MICHAEL A. MANDELBAUM, (PERSONALLY AND IN HIS OFFICIAL CAPACITY), CITY OF SOUTHFIELD, ACTING THROUGH KEN SIVER, KEN SIVER (PERSONALLY AND IN HIS OFFICIAL CAPACITY), SOUTHFIELD NON-PROFIT HOUSING CORPORATION, SUSAN WARD-WITKOWSKI (PERSONALLY AND IN HER OFFICIAL CAPACITY), and GERALD WITKOWSKI, (SPECIAL PROJECTS MANAGER-NRI),

Defendants.

Supreme Court Case No. 166320
COA Case No. 361397
LC Case No. 2018-162877-NZ

APPELLEES' ANSWER TO APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT IDENTIFYING THE ORDER APPEALED FROM

Appellant Oakland County seeks leave to appeal an Opinion and Order of the Court of the Appeals dated September 21, 2023 (Case No. 361397).

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals clearly erred when it held that former owners of foreclosed real properties must be compensated for their equity under the Michigan Constitution given that (1) the United States Supreme Court and Sixth Circuit Court of Appeals have held that equity is a protected property right under the Federal Constitution and (2) the Michigan Constitution must, at the very least, provide the same constitutional protections as the Federal Constitution.

Appellant's Answer: Yes.

Appellees' Answer: No.

2. Whether the Court of Appeals clearly erred when it applied *Rafaeli v Oakland County*, 505 Mich 429 (2020) retroactively given that (1) judicial decisions are only given prospective application in extreme and exigent circumstances and (2) the right to equity has been recognized as a property right dating as far back as the Magna Carta (1215).

Appellant's Answer: Yes.

Appellees' Answer: No.

3. Whether the Court of Appeals decision will cause material injustice given that former owners of foreclosed real properties will be compensated for their unlawfully taken equity in violation of the Federal and Michigan Constitution.

Appellant's Answer: Yes.

Appellees' Answer: No.

4. Whether the Court of Appeals' decision conflicts with a Michigan Supreme Court decision given that *Rafaeli v Oakland County*, 505 Mich 429 (2020) involved properties purchased via public auction, while this matter involves foreclosed properties transferred by a municipality's right of first refusal.

Appellant's Answer: Yes.

Appellees' Answer: No.

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SUMMARY OF THE ARGUMENT

Appellant's Application for Leave to Appeal should be denied because it fails to establish that the Court of Appeals' decision is (1) clearly erroneous and will cause material injustice or (2) is in conflict with a Supreme Court or different Court of Appeals' decision.

The Court of Appeals did not err in any manner when it held that equity is a protected property right under the Michigan Constitution given that the Michigan Constitution must, at the very least, provide the same amount of protection as the Federal Constitution. *See AFT Michigan v. State of Michigan, 497 Mich. 197, 217, 866 N.W.2d 782, 793 (2015); Rafaeli, LLC., 505 Mich. 429, 477, 952 N.W.2d 434, 462 (2020); Yu v. City of Ann Arbor*, No. 331501, 2017 WL 1927846, at *3 (Mich. Ct. App. May 9, 2017), (Appx Tab 10, pg. 229); *Tolksdorf v. Griffith*, 464 Mich. 1, 2; 626 N.W.2d 163 (2001). The United States Supreme Court and the Sixth Circuit of Appeals have both held that equity is a protected property right under the Federal Constitution. *See Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631, 638, 143 S. Ct. 1369, 1375, 215 L. Ed. 2d 564 (2023); *Hall v. Meisner*, 51 F.4th 185, 196 (6th Cir. 2022), *reh'g denied*, No. 21-1700, 2023 WL 370649 (6th Cir. Jan. 4, 2023) (Appx Tab 8, pg. 221), and *cert. denied sub nom. Meisner v. Tawanda Hall*, 143 S. Ct. 2639 (2023). Similar to its federal counterpart, the Michigan Constitution must also provide protection for a former owner of a foreclosed property's right to equity. Therefore, the Court of Appeals' decision is not clearly erroneous.

The Court of Appeals also did not err in any manner when holding *Rafaeli* is retroactive because, amongst other things, *Rafaeli* did not create a new principle of law, but instead, *Rafaeli, Tyler,* and *Hall* vindicated a property right that dates as far back as the Magna Carta (1215).

The Court of Appeals' decision will not cause any material injustice, but instead will protect and compensate the former owners of foreclosed properties for their unlawfully taken

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property in violation of the Federal and Michigan Constitution. As such, Appellant cannot establish that any injustice, let alone manifest injustice, will occur.

The Court of Appeals' decision is not in conflict with *Rafaeli* given that this matter involves properties transferred via a municipality's right of first refusal under the Michigan General Property Tax Act, and not properties transferred by a public auction. The Court of Appeals' decision is also not in conflict with a different Court of Appeals' decision given that it properly abided by the doctrine of stare decisis when adopting the retroactivity holdings in *Schafer v. Kent Cnty.*, No. 356908, 2022 WL 4389922, at *1 (Mich. Ct. App. Sept. 22, 2022) (Appx Tab 9, pg. 224), and *Proctor v. Saginaw Cnty. Bd. of Commissioners*, 340 Mich. App. 1, 985 N.W.2d 193 (2022).

COUNTER-STATEMENT OF FACTS

Appellees and the putative Class Members all fell behind in paying their property taxes. Their properties were all forfeited and then foreclosed. Appellees are not challenging forfeiture and foreclosure; they are challenging what happened after. Following the foreclosure of their homes, rather than pay them the surplus equity beyond the unpaid taxes, or placing the property for public auction to generate surplus proceeds, Appellant transferred the foreclosed and unencumbered properties to the City of Southfield, which in turn transferred them to private entities for $1.00, thus depriving Appellees of their equity and eliminating any chance of generating surplus proceeds at auction. To date, Appellant still refuses to compensate Appellees for their unlawfully taken equity in violation of the Federal and Michigan Constitution.

PROCEDURAL HISTORY

This is the second time this case has attempted to make its way to the Court. Indeed, the Michigan Supreme Court remanded it to the trial court with instructions to reconsider in light of

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Rafaeli, LLC. See Jackson v. Southfield Neighborhood Revitalization Initiative, 953 N.W.2d 402, 403 (Mich. 2021), (Appx Tab 6, pg. 188). Instead, in one of her last actions before retiring, the Honorable Denise Langford Morris decided in a brief opinion lacking detailed analysis that *Rafaeli* did not apply to this case, in direct contradiction of the Court's instructions. A visiting judge denied a motion for reconsideration, thereby necessitating Plaintiffs' appeal to the Court of Appeals.

This case began on January 3, 2018, when Plaintiffs filed their Complaint against Defendants. Six days later, Plaintiffs filed their First Amended Complaint. Defendants responded by filing Motions for Summary Disposition of Plaintiffs' First Amended Complaint. On May 10, 2018, the trial court granted Defendants' Motions for Summary Disposition, thereby dismissing all of Plaintiffs' claims pled in their First Amended Complaint. Plaintiffs timely filed their appeal related to the trial court's May 10, 2018 Order on June 8, 2018.

On December 19, 2019, this Court in *Jackson v. Southfield Neighborhood Revitalization Initiative*, No. 344058, 2019 WL 6977831, at *1 (Mich. Ct. App. Dec. 19, 2019), *judgment vacated in part, appeal denied in part,* 953 N.W.2d 402 (Mich. 2021) affirmed the trial court's May 10, 2018 holdings. On February 27, 2020, Plaintiffs filed their Application for Leave to Appeal to the Court.

On July 17, 2020, the Court issued its opinion in *Rafaeli*, 505 Mich. 429, 952 N.W.2d 434 (2020), which found that the government's retention of surplus proceeds generated from a tax foreclosure sale amount to an unconstitutional taking without just compensation under the Michigan Constitution. On February 2, 2021, pursuant to MCR 7.305(H)(1), in lieu of granting Plaintiffs' February 27, 2020 Application for Leave to Appeal, the Court vacated this Court's December 18, 2019 judgment and remanded this case to the trial court "for reconsideration of the

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defendants' motions for summary disposition in light of *Rafaeli*" *Jackson*, 953 N.W.2d 402, 403 (Mich. 2021).

Upon remand, Plaintiffs received leave to file their Second Amended Class Action Complaint on October 13, 2021, alleging: (1) improper taking without just compensation in violation of Fifth and Fourteenth Amendments 42 USC §§ 1983 and 1988 (against Oakland County); (2) inverse condemnation violation of the Michigan Constitution, Article X, Section 2 (against Oakland County); (3) violation of procedural due process 42 USC §§ 1983 and 1988 (against Oakland County); (4) unjust enrichment (against SNRI); (5) civil conspiracy 42 USC § 1983 (against City of Southfield, SNPHC, SNRI, Zorn, and Siver); and (6) declaratory relief (against all Defendants). In lieu of answers, Defendants each filed their own Motions for Summary Disposition. (Appx Tab 2, pg. 11; Appx Tab 3, pg. 52; Appx Tab 4, pg. 90). On February 2, 2022, without providing any meaningful substantive analysis of Plaintiffs' claims, the Circuit Court granted Defendants' Motion for Summary Disposition. Five days later, Plaintiffs filed their Motion for Reconsideration related to the Circuit Court's February 2, 2022 Order, which the Circuit Court ultimately denied on April 25, 2022. (Appx Tab 5, pg. 130).

On September 21, 2023, the Court of Appeals held, amongst other things, that *Rafaeli* was retroactive, and that Appellant unlawfully took Appellees' property by failing to compensate them for their equity in violation of the Michigan Constitution. *See Jackson v. Southfield Neighborhood Revitalization Initiative*, No. 361397, 2023 WL 6164992 (Mich. Ct. App. Sept. 21, 2023). (Appx Tab 7, pg. 188). Primarily, the Court of Appeals held that *Rafaeli* was retroactive because the case did not announce a new principle of law. Instead, the Court of Appeals embraced and adopted *Hall*'s historical analysis of a person's right to equity, which dates back as far as the Magna Carta (1215). *See Jackson Southfield Neighborhood Revitalization Initiative*, No. 361397, 2023 WL

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6164992, at *9 – 10, 12 (Mich. Ct. App. Sept. 21, 2023); *see also Hall v. Meisner*, 51 F.4th 185, 192 (6th Cir. 2022), *reh'g denied*, No. 21-1700, 2023 WL 370649 (6th Cir. Jan. 4, 2023), and *cert. denied sub nom. Meisner v. Tawanda Hall*, 143 S. Ct. 2639 (2023). Based on this deep-rooted right to equity in English and American common law, the Court of Appeals held that *Rafaeli* did not introduce a new rule of law and, therefore was retroactive. *See Jackson*, No. 361397, 2023 WL 6164992, at *7 (Mich. Ct. App. Sept. 21, 2023).

The Court of Appeals also held that Appellees had properly pled a takings claim under the Michigan Constitution based on the fundamental principle that the Michigan Constitution provides at least the same amount of protection as the Federal Constitution. *See Jackson*, No. 361397, 2023 WL 6164992, at *16 (Mich. Ct. App. Sept. 21, 2023). Given that *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564 (2023) and *Hall* held that a county commits a taking under the Federal Constitution when it fails to compensate a foreclosed property owner for his or her equity, the Court of Appeals correctly found that a taking had also occurred under the Michigan Constitution.

STANDARD OF REVIEW

The Court reviews a Court of Appeals' order pursuant to MCR 7.305(B). Appellants assert that it is entitled to relief pursuant to MCR 7.305(B)(4)(a) and (b), which state:

> (5) in an appeal of a decision of the Court of Appeals,
> (a) the decision is clearly erroneous and will cause material injustice, or
> (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals

A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-movant. *See Wade v Dep't of Corrections*, 439 Mich 158, 162-63 (1992). A motion under

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MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *See Wade*, 439 Mich at 163. "When deciding a motion brought under this section, a court considers *only the pleadings*." *See Maiden v Rozwood*, 461 Mich 109, 119-20 (1999) (citing MCR 2.116(G)(5)) (emphasis added).

To establish that they are entitled to summary disposition pursuant to MCR 2.116(C)(10), Defendants must demonstrate that no factual issue exists upon which reasonable minds could differ. *See Benton v Dart Properties Inc*, 270 Mich App 437, 444-45 (2006). All well pleaded factual allegations are accepted as true and construed in a light most favorable to the non-movant. *See Maiden*, 461 Mich at 119–20. A (C)(10) motion is generally premature if discovery has not been completed, unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position. *See Liparoto Const v Gen Shale Brick*, 284 Mich App 25, 33–34 (2009).

ARGUMENT

I. The Court of Appeals did not clearly err when it held that Appellant committed a taking in violation of the Michigan Constitution.

A. The Michigan Constitution must, at the very least, provide the same amount of protection as the Federal Constitution.

The Court of Appeals correctly held that Appellant violated the Michigan Constitution when it failed to compensate Appellees for their equity. Both *Tyler* and *Hall* held that counties cannot take more than what they are owed when foreclosing on real property and that former owners of foreclosed real property are entitled to just compensation under the Federal Constitution for their surplus proceeds and equity. *See Tyler*, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564 (2023); *Hall*, 51 F.4th 185, 196 (6th Cir. 2022).

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Similar to the Federal Takings Clause, Michigan's Takings Clause states, "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." *See* Const. 1963, art 10, § 2. Michigan's Takings Clause generally "offers the same level of protection as the United States Constitution." *See Yu v. City of Ann Arbor*, No. 331501, 2017 WL 1927846, at *3 (Mich. Ct. App. May 9, 2017) (Appx Tab 10); *Tolksdorf v. Griffith*, 464 Mich. 1, 2; 626 N.W.2d 163 (2001) ("The Taking Clause of the state constitution is substantially similar to that of the federal constitution."). In fact, the Michigan Supreme Court has noted that the Michigan's Takings Clause provides broader protection than its federal counterpart. *See AFT Michigan v. State of Michigan*, 497 Mich. 197, 217, 866 N.W.2d 782, 793 (2015); *see also Rafaeli, LLC.*, 505 Mich. 429, 477, 952 N.W.2d 434, 462 (2020). Given that Michigan's Takings Clause provides broader protection than the Federal Constitution's Takings Clause, the Court of Appeals correctly held that Appellant violated the Michigan Constitution when it failed to compensate Appellees for their unlawfully taken equity.

B. Rafaeli does not bar Appellees' taking claim.

Appellant argues that Appellees are unable to plead a violation of the Michigan Constitution due to *Rafaeli* holding that an owner of a foreclosed property is only entitled to surplus proceeds; "no more, no less." Appellant Brief at p. 6 – 7. *See Rafaeli*, 505 Mich. 429, 484, 952 N.W.2d 434, 466 (2020). First, *Rafaeli* is distinguishable from this matter because that case involved properties transferred from Appellant to third parties through a public auction. In most instances, the public auctions generated excess/surplus proceeds[1], which according to *Rafaeli*, rightfully belong to the owners of the foreclosed properties. Unlike *Rafaeli*, however, this matter

[1] Excess/surplus proceeds mean any funds above and beyond the tax delinquency amount and costs associated with the foreclosure.

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involves properties transferred from Appellant to municipalities via the municipalities' right of first refusal under Michigan's General Property Tax Act ("GPTA"). Notably, these transfers could not generate any excess proceeds because the municipalities only had to pay the "minimum bid," which was merely the tax delinquency amount plus costs associated with the foreclosure. Therefore, when a property was transferred via a municipality's right of first refusal, no surplus proceeds were ever generated. Given that *Rafaeli* is not a right of first refusal case, *Rafaeli* does not bar Appellants' claim.

Second, *Rafaeli* also does not bar Appellees' Michigan Takings claim because *Rafaeli's* references regarding former property owners only having an interest in surplus proceeds from a public tax-foreclosure sale are obiter dicta. *See Secura Ins Co v Stamp*, 341 Mich App 574, 585 n 9, 991 N.W.2d 244 (2022) ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication.") In fact, *Hall* held that the federal district court's reliance on dicta in *Rafaeli* was misplaced:

> The district court, for its part, disagreed in a carefully reasoned opinion. Specifically, the court held that, in the event of foreclosure, the former property owner has a property right only to any surplus proceeds (meaning proceeds in excess of the tax delinquency) obtained by the "foreclosing governmental unit" after a foreclosure sale—if in fact there was one. **For that proposition the court relied upon the Michigan Supreme Court's opinion in *Rafaeli*, which arguably said as much, albeit in dictum.** *See* 505 Mich. at 462, 952 N.W.2d 434. And here the foreclosing governmental unit—the County—had not obtained any surplus at all from its disposition of the plaintiffs' homes, because it conveyed them (to the City of Southfield) for merely the amounts of their tax delinquencies.

See Hall, 51 F.4th 185, 189 (6th Cir. 2022) (emphasis added). Analogous to the Sixth Circuit, the Court of Appeals also correctly held that *Rafaeli's* specific language that the owner of foreclosed properties is only entitled to excess proceeds is mere dicta and does not preclude Appellees from successfully pleading a Michigan Constitution violation.

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II. The Court of Appeals did not clearly err when it held that *Rafaeli* is retroactive.

A. The Court does not need to find Rafaeli retroactive in order to find a taking under the Michigan Constitution.

As explained above, the Michigan Constitution must provide the same amount of protection as the Federal Constitution. Therefore, the Court does not need to specifically hold that *Rafaeli* is retroactive in order to find that Appellant violated the Michigan Constitution. Instead, the Court can simply hold that there was a violation of the Michigan Constitution due to the United States Supreme Court and Sixth Circuit holding that a taking has occurred under the Federal Constitution and given that the Michigan Constitution must provide the same amount of protection as its federal counterpart.

B. Alternatively, if the Court determines that it is necessary to determine whether Rafaeli is retroactive, Appellant is unable to establish any of the elements necessary for its extreme remedy of prospective application.

"The general rule is that judicial decisions are to be given complete retroactive effect." *See Michigan Educ Employees Mut Ins Co v Morris*, 460 Mich. 180, 189, 596 N.W.2d 142 (1999) (quotation marks, citation, and alterations omitted). "Only where a decision is unexpected or indefensible in light of the law existing at the time that the underlying facts developed is there a question about whether to afford the decision complete retroactivity." *See Curtis v. City of Flint*, 253 Mich. App. 555, 564, 655 N.W.2d 791, 796 (2002) (internal quotes omitted). Prospective application is an "extreme measure," "a departure from the usual rule," and "appropriate only in exigent circumstances." *See Gladych v. New Fam. Homes, Inc.*, 468 Mich. 594, 606, 664 N.W.2d 705, n.6 (2003); *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562, 586, 702 N.W.2d 539, 554 (2005).

The threshold question in determining whether a judicial decision should be applied prospectively is whether the "decision clearly established a new principle of law." *See Pohutski v.*

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City of Allen Park, 465 Mich. 675, 696, 641 N.W.2d 219, 233 (2002). If the threshold question is answered in the affirmative, a court must then consider the following factors: "1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id.*

i. *The decisions did not clearly establish a new principle of law.*

Neither *Hall* nor *Rafaeli* introduced a new principle of law. Instead, both decisions provided a detailed historical analysis explaining the fundamental principle that a debtor's land could only be taken to the extent necessary to satisfy the debt and that equity was a historically protected property right.

a. The right to surplus equity dates as far back as the Magna Carta (1215).

Hall did not establish a new rule but validated a long-established principle and property right. *Hall* explained that it has been well established since the origination of the Magna Carta (1215), that "a debtor's lands could be taken only to the extent necessary to satisfy the debt" and a creditor is not entitled to recover more than the amount owed. *See Hall*, 51 F.4th 185, 192–93 (6th Cir. 2022). *Hall* further explained that English and American courts have recognized a debtor's right to equity dating as far back as the 1600s and 1827 respectively. *See Hall*, 51 F.4th 185, 192 (6th Cir. 2022). Specifically, in 1827, New York's highest court in *Lansing v. Goelet*, 9 Cow. 346, 355, 1827 WL 2536 (N.Y. 1827) (Appx Tab 11, pg. 235) held that in cases where "the mortgaged premises exceed the amount of the debt in value," strict foreclosure, a process by which a borrower's entire interest in his property was forfeited, regardless of the amount of equity, was "unconscionable." *See Hall*, 51 F.4th 185, 192 (6th Cir. 2022). In 1888, the Michigan Supreme Court also similarly held that strict foreclosures had been disfavored for years and should only occur in rare circumstances. *See Meigs v. McFarlan*, 72 Mich. 194, 201, 40 N.W. 246 (1888); *see*

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also Hall, 51 F.4th 185, 193 (6th Cir. 2022). Based on these long-established principles, *Hall* held that equity has historically been recognized as a property right in English and American law.

Hall also explained that Michigan recognizes equity/equitable title[2] in other contexts. *See Hall*, 51 F.4th 185, 195 (6th Cir. 2022). The Michigan Supreme Court "has consistently held that under a land contract, although the vendor retains legal title until the contractual obligations have been fulfilled, the vendee is given *equitable title, and that equitable title is a present interest in realty* that may be sold, devised, or encumbered." *See Graves v. American Acceptance Mortg. Corp.*, 469 Mich. 608, 615, 677 N.W.2d 829 (2004) (emphasis added). Michigan law also recognizes equitable title in timber and mineral rights and marital assets. *See City of Marquette v. Michigan Iron & Land Co.*, 132 Mich. 130, 132, 92 N.W. 934, 934 (1903) (timber); *Kerzka v. Farr*, No. 310938, 2013 WL 4823507, at *5 (Mich. Ct. App. Sept. 10, 2013) (mineral rights)(citing *Stevens Mineral Co. v. Michigan*, 164 Mich.App. 692, 418 N.W.2d 130, 133 (1987) (Appx Tab 12, pg. 261); *Reeves v. Reeves*, 226 Mich. App. 490, 493, 575 N.W.2d 1, 2 (1997) (marital assets). As such, the right to equity existed long before *Rafaeli*.

b. The right to surplus proceeds also dates as far back as the Magna Carta (1215).

Analogous to *Hall*, *Rafaeli* also provided a detailed historical analysis establishing that surplus proceeds have been a historically protected property right. *See Rafaeli* at 456-473. *Rafaeli* relied on English common law and authorities, the Magna Carta, and United States and Michigan Supreme Court precedent to determine that surplus proceeds were a protected property right. *Id*. Specifically, *Rafaeli* explained:

[2] Pursuant to *Hall*, 51 F.4th 185 (6th Cir. 2022), equity and equitable title are indistinguishable. *Hall* explains that a debtor's equitable interest in his property is informally referred to by the public as "equity in real property", while "English and American courts for centuries have called it "equitable title." *Id.*

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> [w]e conclude that our state's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. **Having originated as far back as the Magna Carta**, **having ingratiated itself into English common law**, and **having been recognized both early in our state's jurisprudence** and **as late as our decision in *Dean* in 1976**, a property owner's right to collect the surplus proceeds from the tax-foreclosure sale of his or her property **has deep roots in Michigan common law**…Further, the prohibitions against collecting excess taxes, selling more land than needed to collect such taxes, and taking more property than necessary to serve the public all underlie a property owner's right to collect the surplus proceeds and **were well-established legal principles before 1963**. Therefore, we hold that the ratifiers would have commonly understood this common-law property right to be protected under Michigan's Takings Clause at the time of the ratification of the Michigan Constitution in 1963.

See Rafaeli, 505 Mich. 429, 470–72. According to *Rafaeli*, the right to surplus proceeds was a vested and recognized property right not just prior to Michigan's statehood and Constitution, but as far back as the Magna Carta (1215). As such, the Court of Appeals, while relying on *Hall*, *Schafer v. Kent Cnty.*, No. 356908, 2022 WL 4389922, at *1 (Mich. Ct. App. Sept. 22, 2022), and *Proctor v. Saginaw Cnty. Bd. of Commissioners*, 340 Mich. App. 1, 985 N.W.2d 193 (2022), did not clearly err when it held that *Rafaeli* did not announce a new rule of law and therefore, should be applied retroactively.

Appellant's failure to satisfy this threshold requirement is fatal to its "extreme" request for prospective application of *Rafaeli*.

c. *Hathcock* is dispositive regarding retroactivity.

Hathcock involved the constitutionality of condemnation proceedings that overruled a Michigan Supreme Court decision that had been in effect and relied upon by Michigan counties for twenty-three years. *See Cnty. of Wayne v. Hathcock*, 471 Mich. 445, 483, 684 N.W.2d 765, 787 (2004). Although *Hathcock* overturned *Poletown Neighborhood Council v. City of Detroit*,

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410 Mich. 616, 304 N.W.2d 455 (1981), *overruled by Cnty. of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004), the Court applied its ruling retroactively and explained its justification for doing so as follows:

> **[i]n the twenty-three years** since our decision in *Poletown*, it is a certainty that state and local government actors have acted in reliance on its broad, but erroneous, interpretation of art. 10, § 2. **Indeed, Wayne County's course of conduct in the present case was no doubt shaped by *Poletown's* disregard for constitutional limits on the exercise of the power of eminent domain and the license that opinion appeared to grant to state and local authorities**.
>
> **Nevertheless, there is no reason to depart from the usual practice of applying our conclusions of law to the case at hand**. **Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963. Our decision simply applies fundamental constitutional principles** and enforces the "public use" requirement as that phrase was used at the time our 1963 Constitution was ratified.

See Hathcock, 471 Mich. 445, 484 (emphasis added).

In this matter, there is even less justification to apply *Rafaeli* prospectively because *Rafaeli* did not overturn Michigan Supreme Court precedent. Instead, similar to *Hatchcock*, *Rafaeli* simply applied "fundamental constitutional principles" that had been in place prior to the Michigan Constitution taking effect in 1963. Therefore, the Court of Appeals did not clearly err when it held that *Rafaeli* is retroactive.

ii. *The purpose of Rafaeli is to compensate the previous owners of foreclosed property for their unlawfully taken property right.*

The purpose of *Rafaeli* was not to merely find that the GPTA was unconstitutional, but instead was to compensate the owners of foreclosed property for their unlawfully taken surplus proceeds in violation of the Michigan Constitution. As explained above, *Rafaeli* vindicated the

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right to surplus proceeds, which originates well before Michigan's 1963 Constitution, by holding that an unlawful taking occurs when a county, such as Appellant, fails to compensate the former owner for his or her surplus proceeds. Appellant attempts to characterize this matter as a tax dispute, instead of a constitutional law issue, in order to "support" its bald assertion that the "rule in Michigan and throughout the United States" is to apply judicial decisions prospectively that find tax statutes unconstitutional. (Appellant App. at p. 22.) However, *Rafaeli* rejected this same attempt to characterize these types of unlawful taking as a tax issue. Specifically, *Rafaeli* stated:

> …the power of taxation should not be confused with the power of eminent domain ....[p]ut simply, defendants' argument that the taxing power justifies their retention of the surplus proceeds from tax-foreclosure sales over and above property owners' tax liabilities is an exceedingly poor attempt at disguising a physical taking of property requiring just compensation as an arbitrary and disproportionate tax.

See Rafaeli, 505 Mich. 429, 481, 952 N.W.2d 434, 464 (2020). Simply put, *Rafaeli* is a constitutional matter, not a tax issue, and the purpose of its holding was to compensate the owners of foreclosed properties for their surplus proceeds, which has been recognized as a property right for over eight-hundred years.

iii. *Appellant's reliance on the "old rule" is inconsequential.*

First and foremost, *Rafaeli* did not announce a new rule, but instead vindicated a property right that has been recognized since 1215. To support its reliance on the "old rule", Appellant directs the Court to a **minority of jurisdictions**, which have held that a taking does not occur when a foreclosing governmental unit fails to return surplus proceeds to the owner of the foreclosed property. *See* Appellant's Application at pg. 20. According to *Tyler* "[t]hirty-six States and the Federal Government require that the excess value be returned to the taxpayer." *See Tyler*, 598 U.S. 631, 642, 143 S. Ct. 1369, 1378, 215 L. Ed. 2d 564 (2023). *Rafaeli* also specifically mentioned

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that Vermont and New Hampshire "recognized the government's obligation to return any surplus proceeds to the former owner after a tax-foreclosure sale and that the failure to return those proceeds is a taking under their state constitutions." *See Rafaeli*, 505 Mich. 429, 478, 952 N.W.2d 434, 463 (2020). Given that the majority of jurisdictions consider Appellant's unlawful retention of surplus value as a taking, Appellant's reliance on jurisdictions outside of Michigan overwhelmingly supports retroactive application.

Second, pursuant to *Hathcock*, Appellant's reliance on the "old rule" is inconsequential. *Hathcock* applied its decision retroactively despite overruling Court precedent and noting that Michigan counties had relied on its previous precedent for twenty-three (23) years. *See Hathcock*, 471 Mich. 445, 484, 684 N.W.2d 765, 787 (2004). In fact, *Hathcock* applied its decision retroactively despite noting that the county's "course of conduct…was no doubt shaped" by the Court's prior decision. *Id.* As such, Appellant's reliance on the "old rule" is insignificant and unworthy of finding that this factor weighs in Appellant's favor.

iv. *Retroactivity will promote the administration of justice.*

Appellant's discussion of administration of justice is improper and should be ignored by the Court. Specifically, Appellant is improperly attempting to bait the Court to grant its Application in order to obtain a ruling containing favorable language regarding class certification. *See* Appellant's Application at pgs. 9 – 12. This is completely improper given that issues related to class certification are not properly before the Court, or any court, due to the fact that class certification has not yet been briefed. Most likely, Appellant is attempting to bait the Court in this manner because it has recently conceded class certification by admitting that damages can be readily determined on a class wide basis by simply multiplying state equalized value bv two (2).

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Appellant's admission eliminates any and all "mini-trial" concerns alleged by Appellant. As such, the Court should disregard any class certification concerns raised by Appellant.

Nonetheless, applying *Rafaeli* retroactively will promote the administration of justice. Unavailingly, Appellant attempts to portray itself as the victim in this manner. However, Appellees, not Appellant, had their constitutional right to equity unlawfully stripped from them in violation of the Federal and Michigan Constitution. Applying *Rafaeli* retroactively will undeniably promote the administration of justice by protecting and vindicating a historically protected property right that has been in existence before this country was even founded. Therefore, the administration of justice factor only weighs in Appellees favor and does not support the extreme remedy of prospective application.

III. There is no manifest injustice caused by the Court of Appeals holding that there was a Michigan Constitution violation and that *Rafaeli* is retroactive.

Notably, Appellant does not specifically address whether a manifest injustice will occur if its Application is denied. As such, Appellant has failed to properly brief this issue, which is necessary for the Court to consider Appellant's Application. Therefore, Appellant's Application should be denied.

Instead, in a roundabout manner, Appellant seems to suggest that a manifest injustice will occur because Appellant will be liable to Appellees and the putative class members for significant damages. However, Appellant's potential liability is not a sufficient reason to apply *Rafaeli* prospectively, especially when Appellant violated the Federal and Michigan Constitution.

IV. Appellant's Application should be denied because the Court of Appeals' decision does not conflict with a decision from the Court or another decision of the Court of Appeals.

The Court of Appeals' decision does not conflict with any case law. Appellant suggests that the Court of Appeals' decision conflicts with *Rafaeli*, but this is incorrect. *Rafaeli* involved

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foreclosed properties transferred by Appellant to third parties via a public auction, while this matter involves foreclosed properties transferred through a municipality's right of first refusal. As such, *Rafaeli* is not in conflict with the Court of Appeals' decision.

The Court of Appeals' decision is also not in conflict with a different Court of Appeals decision given that it properly abided by the doctrine of stare decisis by following the precedent set forth in *Schafer* and *Proctor*. Therefore, Appellant's Application should be denied for failing to satisfy MCR 7.305(B)(5)(b).

RELIEF REQUESTED

Based on the foregoing, Appellant's Application for Leave to Appeal should be denied and this matter should be remanded to the trial court in accordance with the Court of Appeals' decision. If granted, briefing should be expediated and oral argument should be consolidated with *Hathon v State of Michigan* (Docket No. 165219) and *Schafer v. Kent County* (Docket No. 164975).

Date: November 29, 2023

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CERTIFICATION OF WORD COUNT

I hereby certify that this document complies with the formatting requirements of MCR 7.212(B)(5). It is set in Times New Roman 12-point font, and except for topic headings, quotations and footnotes it is double-spaced. Furthermore, I hereby certify that, pursuant to MCR 7.212(B)(3), this document contains 7,000 countable words (utilizing the word count function from Microsoft Word).

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CERTIFICATE OF SERVICE

On November 29, 2023, I electronically filed this document through the Michigan Supreme Court MiFile TrueFiling System, which will send notice of electronic filing to the attorneys/parties of record.

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