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STATE OF MICHIGAN

IN THE SUPREME COURT

LOUIS JACKSON, MICHAEL C. BIRAC, LEE CRAFT, GAYLYNN CRAFT, RONALD HAYES, SMFJ, LLC, EVERETT HODGE, DONALD SWINNEY, STEPHANIE BOYD, and LISA SMITH,

Plaintiffs/Appellees,

v.

Supreme Court Docket No.
COA Case No. 344058
L.C. No. 2018-162877-NZ

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

Defendant/Appellant,

APPLICATION FOR LEAVE TO APPEAL BY OAKLAND COUNTY

ORAL ARGUMENT REQUESTED

SOUTHFIELD NEIGHBORHOOD REVITALIZATION INITIATIVE, LLC, FRED ZORN (PERSONALLY AND IN HIS OFFICIAL CAPACITY), E'TOILE LIBBETT, 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.

SCOTT F. SMITH (P28472)
Attorney for Plaintiffs
SMITH LAW GROUP, PLLC
30833 Northwestern Hwy., Suite 200
Farmington Hills, Michigan 48334
(248) 626-1962
smithsf.law@gmail.com

WILLIAM H. HORTON (P31567)
JOHN R. FLEMING (P79748)
Attorney for Appellant Oakland County Treasurer Andrew Meisner
GIARMARCO, MULLINS & HORTON, P.C.
101 West Big Beaver Road, Tenth Floor
Troy, Michigan 48084-5280
(248) 457-7000
bhorton@gmhlaw.com
jfleming@gmhlaw.com

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JOSEPH G. COUVREUR (P41836)
MATTHEW T. NICOLS (P78297)
Attorney for Defendants Southfield NRI, Southfield Non-Profit Housing Corp., and E'Toile Libbett
2915 Biddle Avenue, Suite 200
Wyandotte, Michigan 48192
(734) 281-7100
jcouvreur@pck-law.com

T. JOSEPH SEWARD (P35095)
Attorneys for Defendants City of Southfield, Zorn, Mandelbaum, Siver, Ward-Witkowski, and Witkowski
Seward Peck & Henderson PLLC
210 East 3rd Street, Suite 212
Royal Oak, Michigan 48067
(248) 733-3580
jseward@sph-pllc.com

APPLICATION FOR LEAVE TO APPEAL
BY APPELLANT OAKLAND COUNTY

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

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JUDGMENT APPEALED FROM

Appellant Oakland County appeals from the published Court of Appeals opinion dated September 21, 2023 (Appx Tab 1, pp 1-31). Appellant appeals pursuant to MCR 7.305(B)(5)(a)-(b), as the Court of Appeals' decision is clearly erroneous and will cause material injustice and it conflicts with a Supreme Court decision. This application is being timely filed pursuant to MCR 7.305(C)(2).

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in determining that Appellant violated the Takings Clause of the Michigan Constitution when this Court has already stated that no taking occurred under the facts of this case?

Appellant answers: Yes.
Appellees answer: No.

2. Should the Court of Appeals' decision be given prospective effect when it was unforeseen, created a new rule of law, and would disrupt the orderly administration of justice?

Appellant answers: Yes.
Appellees answer: No.

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SUMMARY OF THE ARGUMENT

In July 2020, this Court held that if a property was sold after tax foreclosure for more than was due and the County retained the surplus, a taking had occurred under the Michigan Constitution. *Rafaeli v Oakland County*, 505 Mich 429 (2020). However, in this case, the local municipality claimed the property by paying the County what was owed in back taxes so there was no auction sale and no surplus. In a published opinion (Appx Tab 1, pg 1-31), the Court of Appeals held a taking occurred under the Michigan Constitution and that its decision had full retroactive effect.

The panel erred and should be reversed for two reasons.

First, this Court held that a takings claim under the Michigan Constitution exists "if and only if" a tax foreclosure auction produces a surplus because there is no authority "affirming a vested property right to equity held in property generally." Here, the facts are uncontested that Oakland County only received that which it was owed.

Second, the Court of Appeals erred in holding that its decision is to be applied retroactively. The rule throughout Michigan and around the country is that tax decisions are given prospective application especially where, like here, administering the change in the law would be very difficult. A related question of prospective vs retroactive application of *Rafaeli* is pending before this Court, where it has granted leave on the issue. *Schafer v Kent Cnty*, 990 NW2d 876 (2023).

The Court should grant leave. Unlike *Rafaeli*, there was no public auction and no market test to determine if a property was worth more than the tax delinquency. A fact-specific inquiry is required for each property to determine if, at the time of foreclosure, it was worth more than the taxes owed. The administration of justice concerns weigh heavily in favor of prospective application.

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FACTS

I. Michigan's tax-foreclosure process.

Under the prior version of Michigan's General Property Tax Act (GPTA), the county treasurer acted as the collection agent for the municipality where the property was located when taxpayers became delinquent on their property taxes. After approximately three years of delinquency, multiple notices, and various hearings, a judgment of foreclosure could be entered in favor of the county and title transferred to the county treasurer. MCL 211.78 (2010), *et seq.*[1]

If the tax-delinquent property was not redeemed by March 31, title vested in the county treasurer, and (1) the state or local municipality had the right to claim the property in exchange for the payment to the county of unpaid taxes, interest, and other costs (the "minimum bid"), or (2) if the state or municipality did not exercise their right of first refusal, the property was put up for sale at a public auction in July and, if not sold, again in October. MCL 211.78m (2019).

II. Appellees' tax-delinquent properties.

All of Appellees' former properties were foreclosed by the Oakland County Treasurer for nonpayment of taxes. In each instance, the City of Southfield exercised its right to purchase for the amount of back taxes, interest, and other fees (the "minimum bid"). Second Amended Complaint, ¶¶ 3-5, 72-80 (Appx Tab 2, pp 33-59). Specifically:

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[1] After *Rafaeli*, the Michigan Legislature amended the GPTA to allow the state or municipalities to purchase tax-foreclosed properties "at the greater of the minimum bid or its fair market value[.]" MCL 211.78m(1) (2021).

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> Plaintiff Louis Jackson had a Tax Delinquency of $34,161. On July 31, 2017, Oakland transferred the property to Southfield, which paid the minimum amount due under MCL § 211.78m.

All of the other Appellees made similar allegations. Second Amended Complaint, ¶¶73-80 (Appx Tab 2, pp 46-47).

Appellees claim that Southfield then conveyed the properties to a related organization, Southfield Neighborhood Revitalization Initiative (SNRI), which invested time and money into the properties and later sold them for more than the minimum bid. But those later activities have nothing to do with Oakland County. The only claims that Appellees asserted against the County are violation of the Takings Clause of the Fifth Amendment (Count 1) and the Michigan Constitution (Count 2). (Appellees also pled a procedural due process claim against the County (Count 3) but abandoned that claim on appeal). Appellees also make different claims—inverse condemnation, unjust enrichment, and civil conspiracy—against the City of Southfield and SNRI. These claims do not involve the County.

III. Proceedings.

This case was initially dismissed and the Court of Appeals affirmed. This Court later vacated the judgment of the Court of Appeals and remanded to the trial court for reconsideration of Appellant's dispositive motion in light of *Rafaeli*. 507 Mich 866. On remand, the trial court held that Appellees failed to state a claim against Oakland County because there were no surplus proceeds

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produced at a tax foreclosure auction and, in any case, *Rafaeli* should only be applied prospectively. Opinion and Order dated February 2, 2022 (Appx Tab 3, pp 61-62). For similar reasons, the trial court held that Oakland County did not violate the federal constitution because the County did not take Appellees' equity without just compensation. *Id*. The trial court then denied Appellees' reconsideration motion. Opinion and Order dated April 25, 2022 (Appx Tab 4, p 64).

While the appeal was pending, two decisions were released that impacted the Court of Appeals ultimate decision in this case. First, the Sixth Circuit issued its decision in *Hall v Meisner*, 51 F4th 185 (6th Cir 2022). It held that every Michigan property owner has a legally protectable interest in a property's equity at the time of foreclosure, and a foreclosing governmental unit's failure to pay the property owner that equity constitutes a taking under the federal Takings Clause.

On remand, the Sixth Circuit instructed the District Court to abstain from the Michigan Constitutional claims: "Whether the facts alleged here violate the Michigan Constitution's Takings Clause is an issue for the Michigan courts to decide." *Hall, supra* at 196–97.

Second, the Court of Appeals issued decisions in *Proctor v Saginaw County*, 340 Mich App 1 (2022) and *Schafer v Kent Cnty*, ____ Mich App ____(2022) (Docket No. 356908). Both of those cases involved *Rafaeli*-like facts (i.e., properties that went to auction and produced a surplus). Collectively, those decisions held that *Rafaeli* is to be given retroactive effect. This Court has

granted leave in *Schafer* to resolve the question. 990 NW2d 876 (2023). An application for leave to appeal in *Proctor* is still pending. MSC Docket No. 164266.

In this case, in a published opinion and in reliance on *Hall* and *Proctor/Schaefer*, the Court of Appeals reversed the trial court on the Michigan Takings Claim and rejected Oakland County's argument that prospective application was appropriate.

As to the takings claim under the Michigan Constitution, the Court of Appeals held that this Court's clear directive that a takings claim exists "if and only if" an auction sale produces a surplus was *obiter dicta* and the panel was not bound to follow it. Opinion at 21 (Appx Tab 1, p 22). The panel concluded a takings claim is viable under these facts. ("Thus, we hold *Rafaeli* applies to the present case and does not preclude plaintiffs' unjust-takings claims under the Michigan Constitution.") Opinion at 22 (Appx Tab 1, p 23).

As to the question of retroactivity, the panel failed to distinguish between the facts in *Rafaeli/Proctor/Schafer* (where there was a public auction and market test) and this case (no public auction and no market test) and held it was bound by the panel's decision in *Proctor*. Opinion at 24 ("Under the doctrine of stare decisis, of course, the *Proctor* Court's decision is binding on us.") (Appx Tab 1, p 25). The panel declined to hold otherwise and convene a special conflict panel under MCR 7.215(J)(3).

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STANDARD OF REVIEW

The trial court granted summary disposition under MCR 2.116(C)(8). Review of an order of summary disposition is *de novo*. *Bernardoni v Saginaw*, 499 Mich 470, 472 (2016). A motion under MCR 2.116(C)(8) considers only the pleadings. *Bailey v Schaaf*, 494 Mich 595, 603 (2013).

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ARGUMENT

I. APPELLEES FAIL TO STATE A CLAIM

This Court in *Rafaeli* made clear that the taking is the retention of surplus proceeds following an auction or other sale, *not* the foreclosure itself:

> As the foreclosing governmental unit under the GPTA, *defendants were entitled to seize plaintiffs' properties* to satisfy the unpaid delinquent real-property taxes as well as any interest, penalties, and fees associated with the foreclosure and sale of plaintiffs' properties.

Rafaeli v Oakland County, 505 Mich 429, 473 (2020) (emphasis added).

There is *no* government taking absent a surplus: "[A] former property owner has a compensable takings claim *if and only if the tax-foreclosure sale produces a surplus*." 505 Mich at 447 (emphasis added). And this Court clarified that former owners of tax-foreclosed properties are not entitled to compensation "*until* their properties [sell] for an amount in excess of their tax debts." *Id.* at 476 (emphasis added).

"Seizing plaintiffs properties to satisfy the unpaid debts" is all that occurred in this case. Appellees so acknowledge. No surplus proceeds were generated. Second Amended Complaint, ¶ 56 (Appx Tab 2, p 43). Appellees agree that Oakland County only received the "minimum amount due [under the GPTA]", which is what Appellees owed in taxes, interest, and fees. Second Amended Complaint, ¶¶72-80 (Appx Tab 2, pp 46-48).

The fundamental premise of *Rafaeli* is that the foreclosing governmental unit cannot obtain more than it is owed:

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> Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing government 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 483-84.

There is no taking unless the "tax-foreclosure sale produces a surplus." Oakland County obtained exactly what was due to it, "no more, no less." Since Oakland County obtained only what it was owed, Appellees have failed to state a claim against it.

A review of *Rafaeli* shows this Court considered the arguments set forth by Appellees and adopted by the Court of Appeals. In his lone concurrence, Justice Viviano argued for "equity" as the appropriate measure of damages on this premise:

> Consequently, the majority's view of the case would seemingly be that if the property does not sell at auction and is simply transferred to a governmental unit, the taxpayer is out of luck: no proceeds, let alone a surplus, have been produced or retained by the government.

Id. at 518.

The other six justices of this Court rejected his rationale. "*We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties* so as to be put in as good of position had their properties not been taken at all." *Id.* at 483 (emphasis added). This Court addressed the claims raised in this case and rejected the holding of the Court of Appeals:

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"Further, we are unaware of any authority affirming a vested property right to equity held in property generally." *Id*. at 484, fn 134.

Appellees have failed to state a claim under the Michigan Constitution. The Court of Appeals should be reversed.

II. THE COURT OF APPEALS DECISION SHOULD BE PROSPECTIVE

If the Court holds that a taxpayer suffered a taking under the facts of this case, it should hold that this case is to be applied prospectively.

While judicial decisions are typically given retroactive effect, "[p]rospective application of a holding is appropriate when the holding overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed." *Lindsey v Harper Hospital*, 455 Mich 56, 67 (1997); *Pohutski v City of Allen Park*, 465 Mich 675, 697 (2002). When such a ruling occurs, as in this case, the additional factors to be considered are (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Pohutski* at 696-97.

Examples abound. In *Pohutski*, this Court overruled a prior case and held cities were immune from tort liability related to sewage system failures. Because it overruled prior cases and there had been "extensive reliance" on the former rule, the Court applied its holding prospectively. Likewise, in *LCI Telecommunications v Department of Commerce*, 227 Mich App 196, 207-08 (1997), the Court of Appeals held its ruling applied prospectively because the parties had relied on the interpretation of the tax statute "for over twenty years…." And again, in *Bolt v City of Lansing,* 238 Mich App 37 (1999), the

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Court of Appeals held that that this Court's ruling that a tax ordinance was unconstitutional was "a significant issue of first impression" and prospective application was "appropriate." *Id*. at 48.

Here, *Rafaeli* and this case both decided issues of first impression that Oakland County could not have foreseen. As shown below, there was no suggestion in *any* case that the GPTA's tax foreclosure regime was unconstitutional. Oakland County – and every other Michigan county – appropriately relied on the GPTA's plain language and a multitude of cases from around the country which hold similar statutes do not constitute a taking. The issue in this case is different than *Schafer*, especially because the administration of justice is significantly different under these facts.

A. Administration of justice concerns.

"Courts have acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley et al v Detroit Board of Education*, 431 Mich 632, 643 (1988).

Applying the *Rafaeli* rule retroactively in this case would force trial courts to value what a given property would sell for at a hypothetical auction dating back years. Courts would be forced to hear testimony and take proofs and make individual, retrospective conclusions. There is no uniformity or commonality in the claims, so individual trials or hearings will be required for each parcel. Certainly, expert testimony would be required. It may be determined that some properties would not cover the outstanding taxes. Judges would be transformed into retroactive real estate appraisers attempting to ascertain the motivations of

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a hypothetical buyer going back years and before numerous improvements to the property had been made.

Contrast these facts with those presented in *Rafaeli*. The surplus generated in the *Rafaeli* class is easily identifiable. The administration of justice concerns in *Rafaeli* are minimal. In this case, the individual issues swallow the rule:

- As a threshold matter, would a hypothetical auction in the year of foreclosure produce a surplus on a given property?

- What were the market conditions in the year of foreclosure and how would they influence potential bids? What was the condition of the real estate market in a given community? What were interest rate trends and other factors determinative of value?

- What was the state of disrepair on a given property and how does that influence its value? Can one make a rationale determination based on evidence lost to the passage of time?

- Can one extrapolate data from auction sales for properties in municipalities that did not claim real estate under the right of first refusal in the determination of value? How does the quality of life in one community impact the value of real estate within its borders? Do external factors such as crime, the quality of the local educational system, and local economic conditions influence value?

The Sixth Circuit has held that individual issues overwhelm common issues. In *Tarrify Properties, LLC v Cuyahoga County, Ohio*, 37 F 4th 1101 (6th Cir 2022), the Sixth Circuit affirmed denial of class certification in a case identical to this case. There, Cuyahoga County, Ohio foreclosed on plaintiff's

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property, plaintiff did not redeem it and the County subsequently transferred the property to the Cuyahoga County Land Reutilization Corporation. *Id*. at 1105. Plaintiff sued on its own behalf and on behalf of former owners of "tax-foreclosed properties in which 'the total value of that property exceeded the amount of the impositions on that property at the time the transfer occurred.'" *Id*. The district court denied class certification.

The Sixth Circuit affirmed, stating:

- "The key impediment in this case is that the court must ask whether a given property's fair market value exceeds the taxes owed at the time of the transfer to determine who is in the class." *Id. at* 1106.

- "Determining fair market value requires an independent and individualized assessment of each absent class member's property." *Id*.

- "[T]he valuation of real property depends on many circumstances, including the size, location, use and condition of the property and the relevant market conditions at the time of the transfer." *Id*.

Plaintiffs in other cases were undaunted by *Tarrify* but the Sixth Circuit has been consistent. In reversing class certification in a Michigan foreclosure:

> [Where a] landowner may seek the difference between the fair market value of their homes and the taxes they owe… this damages method necessitates fact-specific evidence about the worth of each class member's property on a property-by-property basis. It thus could 'overwhelm' any common issues."

Fox v Saginaw County, Michigan, 67 F 4th 284, 301 (6th Cir 2023).

The Sixth Circuit was required to repeat itself again in *In re Sabree*, 22-0111 (March 15, 2023) (Appx 5, pp 65-69). In that case, Wayne County appealed a class certification order which included "relief on behalf of property owners whose property 'was worth more … than the total tax delinquency and

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w[ere] not refunded the excess/surplus equity.'" *Id*. at 3. The Sixth Circuit briefly reviewed its prior holdings and stated:

> Here, Plaintiff's class allegations are no different than those in *Tarrify*, *Fox,* and *Sabree*. In order to determine whether there are any common issues, who is in the class and who is not, whether individual issues predominate, and whether there are individual defenses will require individual "mini-trials" as to the fair market value of each property to see if it exceeds the Minimum Bid.

Id.

The mini-trial problem is unavoidable and would impose an onerous and significant burden on the foreclosing county and trial courts. Contrast with *Rafaeli*, where a class could be certified because it is easy to determine who has suffered a taking (the auction sale produced a surplus) and who did not (the property did not sell at auction or sold for less than the tax delinquency) and it was easy to determine the damage sustained by each class member (i.e., the surplus amount). Ascertaining the answers to both of those questions here imposes fact-intensive discovery as to each plaintiff and defendant. Expert discovery will be conducted as to each property. Challenges to expert qualifications, methodology, and conclusions would be commonplace. Appeals are certain to occur. Litigation would ensue for years to come.

Spread throughout the state, retroactivity would force the expenditure of an untold amount of judicial resources and strain the otherwise orderly administration of justice.

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B. The decision in this case established a new rule.

The GPTA is not a creation of Oakland County. Rather, it is a tax statute imposed by the State on Oakland County and the other 82 counties in Michigan. During the 21 years since its revision, there is no case that would suggest the GPTA was unconstitutional. In fact, the opposite is true. The starting point is the presumption that all statutes are constitutional. "Statutes are presumed to be constitutional…." *In re Sanders*, 495 Mich 394,404 (2014).

Local governments are required to conduct operations on the tax revenue they generate. They do not have the luxury of waiting for a court's vindication that the statutes that authorize their collection efforts pass constitutional scrutiny. Thus, the presumption of constitutionality is heightened when a tax statute is in play: "If tax legislation is at issue, then the presumption is especially strong. Until a taxing statute has been shown to 'clearly and palpably violate the fundamental law,' it will not be declared unconstitutional." *Dana Corporation v Department of Treasury*, 267 Mich App 690, 694 (2005) (cleaned up).

No argument has been made that Oakland County strayed from what the GPTA authorizes or that the statute is anything but clear and unambiguous. Prior to *Rafaeli,* where a claim challenging the constitutionality of the tax foreclosure system had been asserted, it had uniformly been rejected. Indeed, as Judge Shapiro stated in his concurrence in *Rafaeli* in the Court of Appeals, any unfairness in the GPTA was a matter for the Michigan Legislature:

> In light of the United States Supreme Court's decision in *Nelson [v City of New York*, 352 US 103 (1956)], I conclude we must reject Appellants'

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> claim despite what appears to be an obvious injustice that requires remedial action. However, until such time as the United States Supreme Court revisits the issue, it is the Legislature, and not this Court, that must take such action.

Rafaeli, LLC v Oakland County, No 330696, 2017 WL 4803570, at *6 (Mich Ct App, Oct 24, 2017 (Shapiro, J, concurring).

The decision in this case runs contrary to even the groundbreaking decision in *Rafaeli*. The decision does not represent a clarification of disputed law or a redirection of its application which may occur from time-to-time. Rather, the decision represents a complete and unexpected new rule in an area of law – taxation and real estate – where the presumption of constitutionality and stability is the strongest.

Appellees will argue that the decision's focus on historical context establishes the alleged rights it vindicates were foreshadowed. First, such 20/20 hindsight is improper and unfair to government officials who must apply state tax statutes as they are written. *Allstate v McCarn*, 471 Mich 283, 293 (2004) ("we believe such hindsight reasoning is an improper mode of analysis"); *May v Goulding*, 365 Mich 143, 155 (1961) ("But the legal problem in this case, it may be well to remind ourselves once more, involves not hindsight but foresight….").

When the outcome is known, it is easy – and false – to say it was obvious. In rejecting such reasoning, the U.S. Supreme Court has emphasized: "Reconstruction by hindsight, making obvious something that was not at all obvious to superior minds until someone pointed it out, – this is too often a

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tempting exercise for astute minds." *Marconi Wireless v US*, 320 US 1, 62 (1943). Accord *San Francisco v Sheehan*, 575 US 600 (2015) ("Courts must not judge officers with the 20/20 vision of hindsight."); *Sanabria v US*, 437 US 54, 64 (1978) ("Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight.")

Second, a ruling is "foreshadowed" if there are indications that the rule of law as applied in the specific circumstance is questioned, eroded, or if exceptions are added. *E.g., Hill v Lansing*, 224 Mich 388, 389 (1923) ("The instant case was foreshadowed in [*Matthews v Kalamazoo*, 127 Mich 530 (1901)]"); *Mack v Detroit*, 467 Mich 1211 (2002) (Corrigan, J, concurring) ("the *Mack* decision was foreshadowed in several recent cases….").

Here, Appellees failed to cite a single case that suggested the GPTA was unconstitutional. Rather, the only "foreshadowing" of an outcome was that Appellees failed to state a claim because a tax foreclosure auction did not produce a surplus. Predicting the outcome of the application of general constitutional provisions to specific circumstances is fraught with uncertainty at best. As the Supreme Court of Texas stated in holding a tax statute unconstitutional but applying its ruling prospectively: there is "a dearth of caselaw interpreting the constitutional provisions in issue, and none of those cases involve circumstances like those presented in this case." *Carrollton-Farmers Branch Independent School Dist v Edgewood Independent School Dist*, 826 SW2d 489, 520 (Tex, 1992).

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C. Oakland County's reliance was reasonable.

The body of law which supported the GPTA as written is extensive and was developed over the course of decades. Numerous cases from other states have also addressed this issue – both before and after the revision of the GPTA in 1999 – and held that taking strict title in tax foreclosures was constitutional. Oakland Count's reliance on the GPTA was reasonable because of the numerous ways the statutory regime had been challenged and those challenges were rejected. County treasurers are bound to follow the law and cannot pick and choose which portion of the statute should be enforced.

An example of a similar situation is *Bolt v City of Lansing*, 459 Mich 152 (1998). There, this Court held that a city ordinance was not a fee but an unconstitutional tax that violated the Headlee Amendment. On remand, the Court of Appeals held that the ruling applied only prospectively because the prior caselaw pointed in the other direction and "Michigan municipalities could have reasonably concluded" the charges were not subject to the requirements of the Headlee Amendment. *Bolt v City of Lansing (on remand)*, 238 Mich App 37, 45-47 (1999). The Court of Appeals concluded that this Court's decision created a "different analytical framework" and that resolution of the dispute was not clearly foreshadowed. *Id*. at 47. The *Bolt* Court went on to note that "Michigan's approach to this issue was not unique in American jurisprudence. There was no foretoken that Michigan law on this issue would be deemed anachronistic or out of sync with the prevailing law in other jurisdictions." *Id*. *Apropos* this case, the Court of Appeals stated:

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> Here, the Supreme Court's decision announced a new and unanticipated rule of law concerning a significant public issue of first impression, i.e., whether a charge assessed to property owners to fund a federally mandated project is a user fee, or a tax subject to the Headlee Amendment requirements. The Supreme Court's resolution of this issue differs from case law addressing the user fee/tax inquiry in other contexts.

Id. at 45.[2]

Oakland County was entitled to rely on the long-standing law that tax foreclosure proceedings are *in rem,* resulting in title to the property being transferred to the foreclosing governmental unit. All prior interests are extinguished. *International Typographical Union v Macomb County*, 306 Mich 562, 575 (1943) ("The courts have, we find, uniformly held that actions to impress liens upon property and to enforce a tax lien against real estate are proceedings *in rem*."). "A proceeding *in rem* is a proceeding against the thing. Tax laws seek to make the land answer for public dues." *Id*. at 653. Accordingly, an *in rem* action "determin[es] the title to property and the rights of the parties…." *Chevalier v Estate of Barnhart*, 803 F3d 789, 802 (6th Cir 2015). "It is the settled law of this State that as between the State and the original owner, the title to the land sold for nonpayment of taxes becomes absolute in the State…." *Jacobsen v Nieboer*, 299 Mich 116, 127 (1941).

[2] This Court subsequently granted leave, 462 Mich 9, but later vacated that order, 464 Mich 854, because "we are no longer persuaded the questions presented should be reviewed by this Court."

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Oakland County was also entitled to rely on the established principle that a forfeiture is not a taking. The seminal case on this issue is the decision of the Supreme Court of the United States affirming the Michigan Supreme Court. In *Michigan ex rel. Wayne Cnty Prosecutor v Bennis*, 447 Mich 719 (1994), this Court held that the innocent owner of a car which was forfeit because of its use in a criminal act did not have a taking claim. This Court, after reviewing decisions of the Supreme Court of the United States where property was forfeit by innocent owners, stated: "Applying the principles of *Van Oster* and *Calero*, it is evident that Mrs. Bennis' claim is without constitutional consequence." *Id.* at 741.[3]

The Supreme Court of the United States affirmed. In *Bennis v Michigan*, 516 US 442 (1996), the Supreme Court directly addressed the taking issue:

> *We granted certiorari in order to determine whether Michigan's abatement scheme* has deprived petitioner of her interest in the forfeited car without due process, in violation of the Fourteenth Amendment, or *has taken her interest for public use without compensation*, in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment. *We affirm*.

Id. at 446 (emphasis added).

The Supreme Court of the United States explained:

> Petitioner also claims that the forfeiture in this case was a taking of private property for public use in

[3] As this Court noted, *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663, 689 (1974), stated that it did not matter if the yacht owner "proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."

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> violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. *The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain*.

Id. at 452 (emphasis added).

This reasoning is directly applicable here. As in *Bennis*, under the GPTA, the property in a foreclosure "was transferred by virtue of that proceeding from petitioner to the State." According to the Supreme Court of the United States, "the government may not be required to compensate an owner for property which it has already lawfully acquired." Civil asset forfeiture applied to both innocent Mrs. Bennis and innocent Pearson Yacht in the *Calero-Toledo* case. As the Supreme Court of the United States stated in *Calero*: "Despite this proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." 416 US at 682.

In addition to *Bennis*, it is well established that persons can be deprived of their property if they are provided due process. The Fifth Amendment to the United States Constitution states: "No person shall be … deprived of life, liberty or property without due process of law." The Michigan Constitution is identical. Const. 1963, art 1 §17. The inverse is true: a person can be deprived of

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property if they are afforded due process. See *In re Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 9 (2007).

The law was established that providing due process – notice, an opportunity to be heard, and a hearing before a judge – allows the government to take someone's property without compensation for a delinquency or forfeiture. Indeed, this issue was addressed in the tax foreclosure case of *Nelson v New York*, 352 US 103 (1956). There, the Supreme Court of the United States held that where due process is provided, a municipality can foreclose upon, sell, and retain the surplus proceeds of a delinquent taxpayer's property without offending the Takings Clause of the Fifth Amendment:

> What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. *We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.*

Id. at 110-11 (emphasis added).

Oakland County's reliance on the constitutionality of the GPTA was bolstered by the fact that courts across the country have held that tax foreclosure is not a taking:

New York: "There is no unfairness, much less a deprivation of due process, in the county's retention of any surplus… There is no constitutional prohibition against such a full forfeiture." *Sheehan v County of Suffolk*, 499 NYS2d 656, 659 (NY, 1986).

Wisconsin: "[W]hen a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may

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constitutionally retain them as long as notice of the action meets due process requirements." *Ritter v Ross*, 558 NW2d 909, 912 (Wis App 1996) (citations omitted).

Illinois: "The Illinois legislation is constitutional since delinquent landowners, including the Appellants, are adequately notified of their tax deficiencies and of a tax sale or foreclosure." *Balthazar v Mari, Ltd*, 301 F Supp 103, 106 (ND Ill 1969). The Supreme Court of the United States affirmed. 396 US 114 (1969).

Maine: "[A] municipality's title to property acquired under the tax-lien-mortgage-foreclosure statute is absolute, and the city or town has no power to part with, nor duty to account for, any surplus value on any theory of 'equity and good conscience.'" *City of Auburn v Mandarelli*, 320 A2d 22, 32 (ME, 1974).

New Hampshire: "We conclude that the town is under no legal obligation to account to the plaintiff for the surplus proceeds realized upon resale. The collector's deed terminated the plaintiff's right of redemption, and the proceeds on resale were the property of the town." *Spurgias v Morrissette*, 109 NH 275, 278 (1969).

Oregon: "Courts construing state tax laws have generally found no constitutional violation in the excess proceeds provisions… the appropriate forum to raise these concerns is the state legislature." *Reinmiller v Marion County Oregon*, Case No. 05-1926-PK at 3 (D Ore 2006).

Arizona: "Overall, cases considering constitutional challenges to state tax foreclosure sales conclude that 'a taxpayer has a recognizable interest in the excess proceeds from such a sale only if the state constitution or tax statutes create such an interest.'" As discussed above, Arizona law does not provide for the recovery of any funds by a previous owner after a tax sale." *Automatic Art, LLC v Maricopa County,* Case No. CV-08-1484-PHX-SRB at 5 (D Ariz 2010) (citations omitted.)

D. The purpose of the new rule was to declare a tax statute unconstitutional.

The purpose of the new rule is straight-forward: it was to declare a clear and unambiguous statute unconstitutional. The Michigan Tax Tribunal has addressed this issue in exactly that situation involving the GPTA. In *Toll Northville LTD v Township of Northville*, 480 Mich 6 (2008), this Court struck down a section of the GPTA under the Headlee Amendment that increased the taxable

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value of real property because of the installation of public service improvements. Two years later, the Michigan Tax Tribunal held the decision applied prospectively. As to the purpose of the new rule, the Tax Tribunal stated simply that its purpose was "to declare MCL 211.34d(1)(b)(viii) unconstitutional." *Toll Northville, LLC v Township of Northville*, Michigan Tax Tribunal Docket No. 284952 (Jan 28, 2010) at 33.

Here, the purpose of the new rule is intended to do just that: "to declare [a portion of the GPTA] unconstitutional." In December 2020, the Legislature responded to *Rafaeli* and enacted Public Acts 255 and 256. These statutes revise the GPTA, providing an orderly process for former property owners to make a claim for surplus proceeds and for right of first refusal claimants to be compensated. The exact same can be said of the decision in this case.

In an area of the law where stability is crucial, the purpose of a new rule should not be to punish those who relied on "the language of the statute." *In re Brown's Estate*, 362 Mich 47, 52 (1960). Indeed, real estate law is an area where "stability of record title" is particularly important and "uncertainty of titles" is to be avoided. *Daniels v Daniel*, 362 Mich 176, 191 (1961). The purpose of the new rule is to speak to future application, not to sanction those who relied on an unambiguous statute.

E. Tax decisions are applied prospectively.

The rule in Michigan and throughout the United States is clear: when a tax statute is held to be constitutionally infirm, the decision is applied prospectively. E.g., *Bolt,* 238 Mich App at 44 ("A decision should be applied

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prospectively if the decision overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed"); *LCI Telecommunication,* 227 Mich App at 207-08 ("Prospective application is preferred when overruling an established precedent or when deciding an issue of first impression whose resolution was not clearly foreshadowed"); *Toll Northville, supra* at p 33 ("[T]he Court's decision in *Toll Northville Ltd v Townshp of Northville*, 480 Mich 6 (2008) announced a new and unanticipated rule of law concerning a significant public issue of first impression."). Appellees have cited no tax case to the contrary.

Indeed, because of the unanticipated impact on tax collections, prospective application of a holding invalidating a tax statute is the rule throughout the country. In *Salorio v Glaser*, 93 NJ 447; 461 A2d 1100 (1983), the New Jersey Supreme Court invalidated a state tax on the basis that it violated the Privileges and Immunities Clause of the United States Constitution. The Court held the ruling was to apply prospectively because, among other reasons, "reliance interests weigh heavily in the shaping of an appropriate equitable remedy. This is particularly so in this case where invalidation of the ETT tax blocks a source of revenue heretofore available to the state." *Id*. at 464. The Court continued:

> Foremost among the factors to be considered is the State of New Jersey's justifiable reliance upon the availability of the ETT funds. *We have consistently and frequently advised that a duly enacted statute is presumptively valid. The officials, legislative and executive, were entitled to rely on that presumption*.

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> *** Furthermore, no one challenged the ETT until June 1977, fifteen years after the ETT was enacted.

Id. at 465-66 (emphasis added).

The rule is the same in jurisdiction after jurisdiction. Consider:

United States: "A careful consideration of the equities persuades us that *Scheiner* should not apply retroactively. *** [S]tate tax collection authorities would have been justified in relying on state enactments valid under then-current precedents…." *American Trucking v Smith*, 496 US 167, 182 (1990).

Pennsylvania: "With respect to tax statutes, then, we reaffirm *McNulty* in holding that a decision of this Court invalidating a tax statute takes effect as of the date of the decision and is not to be applied retroactively." *Oz Gas. Ltd v Warren Area Schools*, 595 Pa 128, 146; 938 A2d 274 (2007).

Utah: "We believe the circumstances of this case require that the rules adopted in this decision be applied prospectively with a delayed effective date. *** Without warning it would be inequitable to correct an interpretation of law that has been relied upon for so many years." *Loyal Order of Moose v County Bd of Equalization*, 657 P2d 257, 265 (Utah, 1982).

North Dakota: "Having weighed the equities in this case, we conclude that the district court properly gave its ruling pure prospective application, thereby effectively denying the Appellants' claims for refunds." *Metropolitan Life Ins v Commissioner of Insurance*, 373 NW2d 399, 412 (ND, 1985).

Arizona: "[I]n tax matters, when a previous decision is overruled, the new decision is given prospective effect only." *City of Tempe v Del E. Webb Corp*, 12 Ariz App 228, 229 (1971).

Florida: Ruling would apply prospectively because the School Board "acted in good faith in reliance on a presumptively valid statute." *Gulesian v Dade County School Board*, 281 So 2d 325 (Fla 1973).

Georgia: "We hold that the *Mangelly* decision is prospective from March 31, 1979 at 12:00 midnight, when the order of this court was made the judgment of the trial court." *Strickland v Newton County*, 244 Ga 54, 55 (1979).

Wisconsin: "We therefore make our mandate of unconstitutionality prospective only…." *Gottlieb v City of Milwaukee*, 33 Wis 2d 408, 432 (1967).

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Kentucky: "[W]e are persuaded to apply our ruling on this [tax] issue prospectively." *Jacobs v Lexington-Fayette Urban County Government*, 560 SW2d 10, 14 (Ky 1977).

Texas: "[T]oday's decision involves issues of first impression whose determination was not clearly foreshadowed. *Carrollton-Farmers Branch Independent School Dist*, *supra* at 520 (Tex, 1992).

New York: "[O]ur decision does not permit recovery of taxes previously paid pursuant to the legislation for the 1984-85 tax year now invalidated." *Foss v City of Rochester*, 65 NY2d 247, 260; 480 NE2d 717 (NY Ct App,1985).

Here, the Court of Appeals concluded that *Schafer* and *Proctor* are dispositive of the question because it was required to do so since they are published. Opinion at 22-24 (Appx Tab 1, pp 23-25). But it would be inconsistent with legions of Michigan and non-Michigan caselaw to apply the decision retroactively to claw back money from a statutorily proper tax foreclosure proceeding.

Indeed, doing so would contravene the plain language of *Rafaeli* itself, which bases its holding on the funds the foreclosing governmental unit receives, not the value of the property:

> Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing government 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 483-84.

At the time Oakland County was acting, it was not even foreseeable that the change in law rendered by *Rafaeli* would occur, much less that the Court of Appeals would create a property right rejected by this Court in *Rafaeli*.

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panel in this case and the Sixth Circuit would redefine a property right established by this Court and hold that a property right exists where no public auction occurred and no surplus was produced and the County only received what it was owed.

RELIEF REQUESTED

Appellant requests this Court to:

1. Grant the application for leave to appeal; or,

2. In the unlikely event that this Court holds that *Rafaeli* is retroactive, it should hold the Court of Appeals' decision in this case is prospective only.

GIARMARCO, MULLINS & HORTON, P.C.

By: /s/ William H. Horton
WILLIAM H. HORTON (P31567)
JOHN R. FLEMING (P79748)
Attorneys for Defendant/Appellee Oakland County Treasurer Andrew Meisner
101 West Big Beaver Road, Tenth Floor
Troy, Michigan 48084-5280
(248) 457-7000
bhorton@gmhlaw.com
jfleming@gmhlaw.com

Date: November 1, 2023

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CERTIFICATION OF WORD COUNT

Appellant certifies that Appellant's Application for Leave to appeal contains 6,941words double-spaced; at least 1.5 inch margins on the sides; consecutive page numbering; and type size of all text and footnotes that is 12 point (for proportional fonts). I also certify that it is the appropriate length.

GIARMARCO, MULLINS & HORTON, P.C.

By: /s/ William H. Horton
WILLIAM H. HORTON (P31567)
JOHN R. FLEMING (P79748)
Attorneys for Defendant/Appellee Oakland County Treasurer Andrew Meisner
101 West Big Beaver Road, Tenth Floor
Troy, Michigan 48084-5280
(248) 457-7000
bhorton@gmhlaw.com
jfleming@gmhlaw.com

Date: November 1, 2023

SERVICE OF NOTICE OF FILING

I certify that I filed a Notice of Filing Application for Leave to Appeal with the Oakland County Circuit Court and with the Michigan Court of Appeals on November 1, 2023.

GIARMARCO, MULLINS & HORTON, P.C.

By: /s/ William H. Horton
WILLIAM H. HORTON (P31567)
JOHN R. FLEMING (P79748)
Attorneys for Defendant/Appellee Oakland County Treasurer Andrew Meisner
101 West Big Beaver Road, Tenth Floor
Troy, Michigan 48084-5280
(248) 457-7000
bhorton@gmhlaw.com
jfleming@gmhlaw.com

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CERTIFICATE OF SERVICE

On November 1, 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.

/s/ William H. Horton
William H. Horton (P31567)
Attorney for Appellant
bhorton@gmhlaw.com