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IN THE SUPREME COURT
STATE OF MICHIGAN

MATTHEW SCHAFER,
HARRY HUCKLEBURY, and
LILLY HUCKLEBURY,
Plaintiffs-Appellees,

v.

KENT COUNTY,
Defendants-Appellants,

and

KENT COUNTY TREASURER,
Defendant.
_____/

Supreme Court No. 164975

COA Docket No. 356908
Trial Court No. 20-09502-CZ

Hon. Paul J. Denenfeld

APPELLEES MATTHEW SCHAFER and LILLY HUCKELBURY'S BRIEF ON APPEAL

Oral Argument Requested

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RECEIVED by MSC 11/13/2023 2:40:23 PM

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

COUNTER STATEMENT OF JURISDICTION 1

QUESTION PRESENTED 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

COUNTER STATEMENT OF FACTS AND PROCEEDINGS 4

1. Kent County takes Matthew Schafer and Lilly Hucklebury's homes, sells them for more than what they owed, and pockets a windfall 4
2. The trial court and Michigan Court of Appeals recognize that *Rafaeli* must be given full retroactive effect 4

STANDARD OF REVIEW 6

ARGUMENT 7

I. THE JUST COMPENSATION CLAUSE EXPLICITLY REQUIRES THE COUNTY TO PAY FOR THE TAKING OF MR. SCHAFER AND MRS. HUCKLEBURY'S PRIVATE PROPERTY AND SHOULD NOT BE SUBJECT TO RETROACTIVITY ANALYSIS 7

A. Michigan's robust Just Compensation Clause mandates compensation when government takes more than what is owed 7

B. Federal precedent requires courts to give full retroactive effect to *Tyler*, making this case moot 11

C. The Michigan Just Compensation Clause also mandates retroactive application of *Rafaeli* 12

D. This Court's retroactivity cases uphold constitutional rights and thus full retroactivity must be appropriate in a case seeking just compensation 14

II. *RAFAELI* AFFIRMED AN OLD RULE, LONG RECOGNIZED IN THE UNITED STATES AND IN MICHIGAN, AND THUS REQUIRES FULL RETROACTIVITY 16

A. *Rafaeli* affirmed a longstanding property right recognized at the U.S. Founding and by this Court in 1978 17

B. *Rafaeli* was foreshadowed by decisions in Michigan and elsewhere 19

III. FAIRNESS AND JUSTICE REQUIRE THAT THE COUNTY PAY JUST COMPENSATION FOR TAKINGS 21

A. The purpose of *Rafaeli* is to enforce justice itself and a longstanding constitutional right to just compensation 21

B. Only government relied on the old rule and that reliance was unjustifiable 22

C. Justice requires full retroactive application to allow Mr. Schafer and Mrs. Hucklebury to obtain just compensation 24

1. *Rafaeli* and *Tyler* held it was unjust to allow the government to take and keep a windfall 24

2. The County's budgetary complaints cannot absolve it of its constitutional duty to pay just compensation.....25

3. Denying full retroactivity would be illogical and violate traditional judicial principles.....28

CONCLUSION AND RELIEF SOUGHT 30

CERTIFICATE OF COMPLIANCE.....31

RECEIVED by MSC 11/13/2023 2:40:23 PM

RECEIVED by MSC 11/13/2023 2:40:23 PM

TABLE OF AUTHORITIES

Page(s)

Cases

AFT Michigan v. State of Michigan,
497 Mich 197 (2015) 8

Arkansas Game & Fish Comm'n v. United States,
568 US 23 (2012)....28

Armstrong v. United States,
364 US 40 (1960)....24

Bank of America, NA v. First American Title Ins. Co.,
499 Mich 74 (2016) 19

Bezeau v. Palace Sports & Ent., Inc.,
487 Mich 455 (2010) 16

Bogie v. Town of Barnet,
129 Vt 46 (1970)....20, 25

Bowles v. Sabree,
No. 20-cv-12838, 2022 WL 17582005 (ED Mich, Sept 6, 2022) 27

Burnquist v. Flach,
6 NW2d 805 (Minn 1942)....25

Carolina Chloride, Inc. v. S.C. Dep't of Transp.,
391 SC 429 (2011)....14

Cedar Point Nursery v. Hassid,
141 S Ct 2063 (2021)....16, 22

Cherokee Equities, L.L.C. v. Garaventa,
382 NJ Super 201 (Ch Div 2005) 27

City of Anchorage v. Thomas,
624 P2d 271 (Alaska 1981)....20

Coleman through Bunn v. D.C.,
70 F Supp 3d 58 (DDC 2014)....20

Coleman through Bunn v. D.C.,
No. 13-1456, 2016 WL 10721865 (DDC June 11, 2016)....20

County of Wayne v. Hathcock,
471 Mich 445 (2004) 15, 17

Crown, Cork & Seal Co. v. Parker,
462 US 345 (1983)....5

Dahlen v. Shelter House,
598 F3d 1007 (CA 8, 2010) 16

Dean v. Dep't of Nat. Res.,
399 Mich 84 (1976) ..... *passim*

Devillers v. Auto Club Ins. Ass'n,
473 Mich 562 (2005) 3, 17

El-Khalil v. Oakwood Healthcare, Inc,
504 Mich 152 (2019) 6

First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.,
482 US 304 (1987) 3, 8, 25

Fox v. Saginaw Cnty., Michigan,
67 F4th 284 (CA 6, 2023) 10

Freed v. Thomas,
81 F4th 655 (CA 6, 2023) 10, 24

Freed v. Thomas,
No. 17-CV-13519, 2021 WL 942077 (ED Mich Feb 26, 2021) 10

Gildemeister v. Lindsay,
212 Mich 299 (1920) 2, 12

Grainger, Jr. v. Cnty. of Ottawa,
No. 1:19-CV-501, 2021 WL 790771 (WD Mich Mar 2, 2021) 5–6

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38 Miss 424 (Miss Err & App 1860) 20

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51 F4th 185 (CA 6, 2022), *reh'g denied*, No. 21-1700, 2023 WL 370649 (CA 6, Jan 4, 2023), *and cert. denied*, No. 22-874, 2023 WL 4065633 (US June 20, 2023) ..... *passim*

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509 US 86 (1993) 2, 11, 15

Hart v. City of Detroit,
416 Mich 488 (1982) 16

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467 US 229 (1984) 16

Jackson v. Southfield Neighborhood Revitalization Initiative,
507 Mich 866 (2021) 10

Jackson v. Southfield Neighborhood Revitalization Initiative,
No. 361397, __NW2d__, 2023 WL 6164992 (2023) 10, 12

James B. Beam Distilling Co. v. Georgia,
501 US 529 (1991) 15, 29

Johnson v. Hale,
No. 349594, 2020 WL 5495273 (Mich App, Sept 10, 2020) 19

RECEIVED by MSC 11/13/2023 2:40:23 PM

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130 F 564 (CCD W Va 1900) 20

Kirby Forest Indus. v. United States,
467 US 1 (1984) 8

Knick v. Twp. of Scott,
139 S Ct 2162 (2019) 8, 13, 16

Lake Cnty. Auditor v. Burks,
802 NE2d 896 (Ind 2004) 20

League of Women Voters of Michigan v. Secretary of State,
508 Mich 520 (2022) 14

Lindsey v. Harper Hosp.,
455 Mich 56 (1997) 13

Lynch v. Household Fin. Corp.,
405 US 538 (1972) 22

Martin v. Snowden,
59 Va 100 (1868) 20

Mays v. Snyder,
323 Mich App 1 (2018) 13

Monongahela Nav. Co. v. United States,
148 US 312 (1893) 3

Montgomery v. Louisiana,
577 US 190 (2016), *as revised* (Jan 27, 2016) 11

Nathan v. Rowan,
651 F2d 1223 (CA 6, 1981) 29

Palazzolo v. Rhode Island,
533 US 606 (2001) 3, 8, 21

Paul v. Detroit,
32 Mich 108 (1875) 13

Penn Mutual Life Insurance v. Department of Licensing & Regulation,
162 Mich App 123 (1987) 14

People v. Maxson,
482 Mich 385 (2008) 7

People v. Stovall,
510 Mich 301 (2022) 11

Peterman v. State Dep't of Nat. Res.,
446 Mich 177 (1994) 13

Pohutski v. City of Allen Park,
465 Mich 675 (2002) 3, 17, 21–22

RECEIVED by MSC 11/13/2023 2:40:23 PM

Rafaeli v. Oakland County,
505 Mich 429 (2020) ..... *passim*

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No. 14-13958, 2015 WL 3522546 (ED Mich, June 4, 2015) ..... *passim*

Schafer v. Kent Cnty.,
990 NW2d 876 (Mich 2023) 6

Shattuck v. Smith,
6 ND 56 (1896) 20

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334 US 1 (1948) 22

Sidun v. Wayne Cnty. Treasurer,
481 Mich 503 (2008) 24

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400 Mich 135 (1977) 17

Storey v. Meijer, Inc.,
431 Mich 368 (1988) 29

Syntax, Inc. v. Hall,
899 SW2d 189 (Tex 1995) 20

T.M. v. M.Z.,
501 Mich 312 (2018) 12

Tallage Lincoln, LLC v. Williams,
485 Mass 449 (2020) 28

Thomas Tool Services, Inc. v. Town of Croydon,
145 NH 218 (2000) 19

Tyler v. Hennepin County,
598 US 631 (2023) ..... *passim*

United States v. Clarke,
445 US 253 (1980) 13

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110 US 146 (1884) 19

United States v. Miller,
317 US 369 (1943) 8

United States v. Taylor,
104 US 216 (1881) 18

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401 US 715 (1971) 11

W. A. Foote Mem'l Hosp. v. Michigan Assigned Claims Plan,
504 Mich 985 (2019) 17

RECEIVED by MSC 11/13/2023 2:40:23 PM

RECEIVED by MSC 11/13/2023 2:40:23 PM

Wade v. Dep't of Corrections,
439 Mich 158 (1992) 7

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378 Ill 453 (1941) 8

Washtenaw County v. State Tax Commission,
422 Mich 346 (1985) 14

Wayne Cnty. Rd. Comm'rs v. GLS LeasCo,
394 Mich 126 (1975) 25

Wayside Church v. Van Buren Cnty.,
847 F3d 812 (CA 6, 2017) 23

Wayside Church v. Van Buren County,
No. 1:14-cv-1274 (WD Mich) 5–6, 27

West v. State,
150 SW2d 363 (Tex Civ App 1941) 25

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95 F3d 1359 (CA 7, 1996) 13

Constitutions

Const 1963, art 10, § 2 ..... *passim*

US Const 8, 10–12

US Const Am V 1, 8, 17

US Const Am XIV 1, 8, 11, 18

Statutes

42 USC 1983 5

MCL 211.87b(1) 27

MCL 213.2 15

MCL 213.57 15

MCL 324.8905c 19

MCL 600.6044 19

Rules

MCR 2.116(C)(4) 5

MCR 2.116(C)(8) 5–6

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/search.aspx?filename=/docket/docketfiles/html/public/22-166.htm 22

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RECEIVED by MSC 11/13/2023 2:40:23 PM

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COUNTER-STATEMENT OF JURISDICTION

Plaintiffs-Appellees concur in Defendants-Appellants statement of the basis for this Court's jurisdiction.

QUESTION PRESENTED

Whether Matthew Schafer and Lilly Hucklebury may be denied the just compensation required by the Michigan Takings Clause because (although timely) they filed their lawsuit after this Court decided *Rafaeli v. Oakland County*, 505 Mich 429 (2020).

Plaintiffs-Appellees: No

Defendants-Appellants: Yes

Court of Appeals: No

Trial Court: No

INTRODUCTION AND SUMMARY OF ARGUMENT

Kent County foreclosed and sold Matthew Schafer and Lilly Hucklebury's homes, received more than what each owed in property taxes, interest, and fees, and kept the surplus proceeds as a windfall. But in *Rafaeli v. Oakland County*, 505 Mich 429 (2020), this Court recognized that the Michigan Constitution's Just Compensation Clause forbids the government from keeping any surplus proceeds from such a sale and requires it to return the proceeds to the former owner. And in *Tyler v. Hennepin County*, 598 US 631 (2023), the unanimous U.S. Supreme Court similarly found that the government violates the U.S. Constitution's Fifth and Fourteenth Amendments when it keeps more than what is owed. "[A] taxpayer must render unto Caesar what is Caesar's but no more." *Id*. at 647.

Kent County, however, argues that it need not abide by these limitations here, and this Court should allow it to keep Mr. Schafer's and Mrs. Hucklebury's surplus, in violation of *Tyler*,

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Rafaeli, and the Michigan Constitution because although their claims were within the statute of limitations, they were filed after this Court decided *Rafaeli*. County Br. 26–27. The County asks this Court to warp its retroactivity doctrine to bar the constitutionally mandated remedy. Consistent with centuries of Anglo-American law, *Rafaeli* upheld longstanding rights in Michigan and across the United States, yet the County would treat it as a "new" rule for the sole purpose of depriving the former homeowners of the relief mandated by the Constitution. The County seeks to justify this unconstitutional confiscation because it complied with a state statute, and counties wish to avoid the cost of disgorging the windfalls they wrongly confiscated from the former owners of homes, farms, and other real estate. County Br. 27.

These arguments cannot prevail in light of the Supreme Court's decision in *Tyler*, to which *all* courts must give full retroactivity. *Harper v. Va. Dep't of Taxation*, 509 US 86, 100–01, 132 (1993) (state courts must give full retroactivity to Supreme Court decisions applied to the parties). Because Mr. Schafer's and Mrs. Hucklebury's federal takings claims moot the question of *Rafaeli*'s retroactivity, *Gildemeister v. Lindsay*, 212 Mich 299, 302 (1920) (moot case presents "nothing but abstract questions of law"), this Court may dismiss this appeal as improvidently granted.

If the Court reaches the question presented, it should reject the County's invitation to weaken this state's Constitution. The Michigan Constitution mandates compensation and is self-executing. *Rafaeli*, 505 Mich at 454, n.54. Moreover, Michigan's Just Compensation Clause is equal to or more protective than the federal Just Compensation Clause. *Id*. at 454. The County's proposed rule would render Michigan's Just Compensation Clause a mere shadow of its federal counterpart—unenforceable whenever this Court has not issued an opinion directly on point. Worse, a constitutional rule cannot stand or fall based on government's failure to budget for paying

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just compensation. The just compensation requirement is "self-executing" and does not turn on the government's consent. See, e.g., *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 US 304, 315–16 (1987) (self-executing); *Monongahela Nav. Co. v. United States*, 148 US 312, 325 (1893) (compensation is a judicial question and the legislature cannot limit it). As a constitutional rule this Court should hold that full retroactivity is required in Just Compensation Clause cases.

But even if this Court applies the retroactivity test, it overwhelmingly favors full retroactivity here. Courts may only take the "extreme measure" of departing from the rule that its decisions are fully retroactive in "exigent circumstances" when a decision creates a new and unforeseen rule and if full retroactivity would cause injustice. *Pohutski v. City of Allen Park*, 465 Mich 675, 696 (2002); *Devillers v. Auto Club Ins. Ass'n*, 473 Mich 562, 586 (2005). The rule in *Rafaeli, LLC v. Oakland County* was predicated on 800 years of Anglo-American law. 505 Mich at 456–73. It was not new or unforeseen. *Id.* The fact that the government violated the long-established rule that surpluses belong to property owners for an appallingly long time cannot transform a violation into an established, legitimate rule.

Moreover, justice—the core purpose of the Just Compensation Clause and *Rafaeli*—demands the payment of just compensation here. See *Rafaeli*, 505 Mich at 480–81; *Palazzolo v. Rhode Island*, 533 US 606, 617–18 (2001). *Rafaeli* expressly held that "confiscation of the sale proceeds in excess of what is actually owed requires delinquent taxpayers alone to bear public burdens which, in all *fairness and justice*, should be borne by the public as a whole." *Rafaeli*, 505 Mich at 480–81 (internal quote omitted and emphasis added). The County's request would prevent the justice *Rafaeli* requires, disproportionately harming Michigan's most vulnerable members—the elderly, sick, and poor. The County's arguments about its misbegotten reliance are similarly

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unpersuasive given the prior decisions by this Court, the U.S. Supreme Court, and numerous courts in other jurisdictions that should have put the County on notice that its reliance on Michigan's statutes was risky and inappropriate. Justice calls out for relief here and thus full retroactivity.

This Court should affirm the lower court's decision and hold that Mr. Schafer and Mrs. Hucklebury may proceed with their claims seeking just compensation.

COUNTER STATEMENT OF FACTS AND PROCEEDINGS

1. Kent County takes Matthew Schafer and Lilly Hucklebury's homes, sells them for more than what they owed, and pockets a windfall

In 2009, Matthew Schafer, a veteran and truck driver, purchased the home at 11414 Belding Road NE in Kent County. Appendix (App.) at 37. Beginning in 2014, he fell behind on his property taxes. See *id*. In 2017, Kent County foreclosed and took absolute title to Matthew Schafer's property worth $95,800 to collect $5,300 in delinquent property taxes. Appellees' Appendix (Schafer App.) at 5b. On September 7, 2017, the County sold the property at auction for $51,500 and kept all the proceeds. *Id.*; App. 27.

Similarly, Lilly and Harry Hucklebury, a married couple, purchased their home at 8470 17 Mile Rd, Cedar Springs, in 1996. See App. 39. In 2014, they fell behind on their property taxes. See *id*. Kent County foreclosed and took the Huckleburys' property worth at least $39,600, and sold it at auction on September 7, 2017, for $33,000. Even though the Huckleburys only owed $6,000 in taxes, interest, penalties, and fees, the County kept all the proceeds from the sale. Schafer App. 5b; App. 27. While this litigation was pending, Mr. Hucklebury passed away, leaving Mrs. Hucklebury, now 80 years old, to seek just compensation alone. Schafer App. 76b.

2. The trial court and Michigan Court of Appeals recognize that *Rafaeli* must be given full retroactive effect

On December 14, 2020, Mr. Schafer and the Huckleburys filed a putative class action against Kent County seeking the surplus value of their property taken or alternatively the surplus

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proceeds from the sale of their property. App. 23–24. The lawsuit alleged, *inter alia*, that the County violated the Michigan and U.S. constitutions by taking more property than was owed in taxes, penalties, interest, and fees. *Id*. On February 16, 2021, Kent County filed a motion for summary disposition under MCR 2.116(C)(8). App. 9, 13. Pertinent here, the County argued that Mr. Schafer and Mrs. Hucklebury were not protected by the Michigan Just Compensation Clause, because their lawsuit was filed four months after this Court's decision in *Rafaeli*, 505 Mich. at 437. App. 13. *Rafaeli* held that the government violates the Michigan Just Compensation Clause when it seizes and sells property to collect a debt, and then keeps more than it is owed in taxes, penalties, interest, and costs. *Id*. at 453–73. Noting that the rule announced in *Rafaeli* can be clearly traced back as far as Magna Carta, the circuit court denied Kent County's motion to dismiss the takings claims, because "the *Rafaeli* decision did not announce a new principle of law, nor did it overrule settled precedent or decide an issue of first impression whose resolution was not clearly foreshadowed." App. 15.

Kent County subsequently filed another summary disposition motion (MCR 2.116(C)(4)) arguing that Mr. Schafer's and Mrs. Hucklebury's federal takings claims should be barred by the three-year statute of limitations for claims brought via 42 USC 1983. App. 23–24. The circuit court denied the County's motion because administrative orders issued by this Court during the COVID-19 pandemic extended the statute of limitations by 102 days, making the claim timely. App. 27. Although the court did not decide the issue, Mr. Schafer and Mrs. Hucklebury had also alleged their takings claims were tolled by a class action lawsuit, *Wayside Church v. Van Buren County*, No. 1:14-cv-1274 (WD Mich), which had been filed against Van Buren County and others in 2014. County Br. 14, 16. See *Crown, Cork & Seal Co. v. Parker*, 462 US 345, 353–54 (1983) (filing of purported class tolls claims for purported members "until class certification is denied"); *Grainger*,

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Jr. v. Cnty. of Ottawa, No. 1:19-CV-501, 2021 WL 790771, at *7–8 (WD Mich Mar 2, 2021) (*Wayside* tolled claims for plaintiffs who opted out of that class and into *Grainger*). In *Wayside Church*, Kent County has agreed to a settlement that will pay people who "held a non-contingent interest" in real property foreclosed by Kent County only 64% of the surplus proceeds they are owed, without any of the constitutionally mandated interest or the separately covered attorney fees. Schafer App. 50b (counties pay 80% of surplus proceeds to settlement, but seeking court approval for 20% of that amount to cover attorney fees); App. 89. Mr. Schafer and Mrs. Hucklebury opted out of that class to pursue the full and fair compensation mandated by the state and federal constitutions.

Kent County successfully sought leave to file an interlocutory appeal on the question of whether Mr. Schafer and Mrs. Hucklebury were unprotected by the Michigan Just Compensation Clause since they filed their claims after *Rafaeli* was decided. App. 41. On September 22, 2022, the Michigan Court of Appeals held that *Rafaeli* was fully retroactive because "*Rafaeli* did not announce a new rule of law but returned the law to that which was recognized at common law and by the ratifiers of the Michigan Constitution of 1963." App. 45.

Kent County subsequently petitioned this Court. On June 9, 2023, this Court granted the County's application to decide whether *Rafaeli* applies to claims that accrued before *Rafaeli* was issued but were not filed until after *Rafaeli* was decided. *Schafer v. Kent Cnty.*, 990 NW2d 876 (Mich 2023).

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's decision on a motion for summary disposition under MCR 2.116(C)(8). *El-Khalil v. Oakwood Healthcare, Inc*, 504 Mich 152, 159 (2019). A motion under MCR 2.116(C)(8) may only be granted where the claims alleged are "so clearly

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unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v. Dep't of Corrections*, 439 Mich 158, 163 (1992). The court assumes the facts alleged in the complaint are true and construes them in a light most favorable to the plaintiff. *Id*. at 162. Likewise, whether a judicial opinion applies retroactively is a question of law reviewed *de novo*. *People v. Maxson*, 482 Mich 385, 387 (2008).

ARGUMENT

I

The Just Compensation Clause explicitly requires the County to pay for the taking of Mr. Schafer's and Mrs. Hucklebury's private property and should not be subject to retroactivity analysis

The Just Compensation Clause mandates that Kent County pay Mr. Schafer and Mrs. Hucklebury just compensation for the unconstitutional taking of their property. The County urges this Court to expand its retroactivity doctrine to limit the remedies available to victims of unconstitutional government activity, even when the Court has not issued a new rule. County Br. at 22. The County's proposal is unconstitutional, would violate Michigan and U.S. Supreme Court precedent, and weaken the Michigan Just Compensation Clause. Rather than warp the retroactivity doctrine to deny constitutionally mandated relief, this Court should instead clarify that the Constitution requires full retroactivity be given to this Court's decision in *Rafaeli* as well as to the U.S. Supreme Court's recent decision in *Tyler*.

A. Michigan's robust Just Compensation Clause mandates compensation when government takes more than what is owed

"Michigan has historically held property rights in the highest regard" as a "'sacred right.'" *Rafaeli*, 505 Mich at 462 (quoting 2 Cooley, Constitutional Limitations (8th ed.), p. 745)). The Just Compensation Clause in Article 10, Section 2, of the 1963 Michigan Constitution provides that "private property shall not be taken for public use without just compensation therefore being

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first made or secured in a manner prescribed by law." Michigan's Just Compensation Clause is more protective than its federal counterpart,[1] but this Court commonly looks to federal precedent when interpreting this state's property rights protections.[2] *Rafaeli*, 505 Mich at 454; *AFT Michigan v. State of Michigan*, 497 Mich 197, 213 (2015). Put another way, the federal Constitution is this state's baseline or floor for the property rights protected by Article 10, Section 2, of Michigan's Constitution. See *id.*

The "self-executing" Just Compensation Clause mandates monetary compensation whenever the government takes private property for a public use. *First English*, 482 US at 315–16; *Rafaeli*, 505 Mich at 454, n.54. In most takings cases, property owners cannot get equitable relief; they may only obtain compensation for a taking. *Knick v. Twp. of Scott*, 139 S Ct 2162, 2176–77 (2019); *People ex rel. Wanless v. City of Chicago*, 378 Ill 453, 459 (1941) ("It must be remembered that a landowner whose property is taken or damaged for public use through the exercise of the power of eminent domain is an involuntary creditor who has no right to prevent the city from taking or damaging his property."). "Just compensation" is "the full and perfect equivalent in money" for property. *United States v. Miller*, 317 US 369, 373 (1943); *Kirby Forest Indus. v. United States*, 467 US 1, 10 (1984) (interest on the amount that should have been paid at the time of the taking is required).

The Just Compensation Clauses of both the Michigan and U.S. Constitutions mandate payment for the takings here. See *Tyler*, 598 US at 647; *Rafaeli*, 505 Mich at 462–73. In *Rafaeli*,

[1] See, e.g., Article 10, Section 2, provides that "just compensation" for the taking of a person's "principal residence" is at least "125% of that property's fair market value, in addition to any other reimbursement allowed by law."

[2] The Fifth Amendment's Takings Clause provides, "nor shall private property be taken for a public use without just compensation." This is made applicable to the State's through the Fourteenth Amendment. *Palazzolo v. Rhode Island*, 533 US 606, 617 (2001) ("The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment.").

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this Court held that Michigan's "Constitution protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, § 2.… Because this common-law property right is constitutionally protected by our state's Takings Clause, the Legislature's amendments of the GPTA could not abrogate it." *Id*. at 473.

In *Tyler*, the Supreme Court of the United States unanimously held that taking a home worth more than its tax debt, without compensation for the excess value, violates the Constitution. *Tyler*, 598 US at 639. Minnesota's statutes authorized the confiscation of Geraldine Tyler's Minneapolis property to collect $15,000 in taxes, penalties, interest, and fees. *Id*. at 635–36. Hennepin County sold it for $40,000 and, like Kent County here, kept all the surplus proceeds pursuant to state law. But the Supreme Court held that "state law cannot be the only source" of property rights, otherwise state legislatures could define away any property it wished to take. *Id*. at 638. The government "had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due." *Id.* at 639.

Similarly, in *Hall v. Meisner*, which was cited and quoted approvingly by *Tyler*, the Sixth Circuit held that the government violates the federal Just Compensation Clause when it takes "equitable title," commonly "called the equity in real estate." *Hall v. Meisner*, 51 F4th 185, 187 (CA 6, 2022). The government took absolute title to Tawanda Hall's home worth more than $300,000 as payment for a total tax debt of about $22,000. *Id*. at 187–88. But unlike *Rafaeli*, there were no surplus proceeds because the government did not sell the property in a public sale. *Id*.[3]

[3] Instead, the County conveyed Ms. Hall's former home to the City of Southfield, which exercised a statutory right to purchase the property for only the amount of the tax debt. *Hall*, 51 F4th at 187–88. The City of Southfield conveyed the property to a company connected with City officials for $1. *Id.* The company later sold the property for $308,000. *Id*.

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The Sixth Circuit held that the confiscation of "absolute title," including Ms. Hall's equity interest, effected an unconstitutional taking. *Id.* at 196. The Sixth Circuit disagreed with this Court's "dictum" in *Rafaeli* that landowners had a property interest *only* in the surplus proceeds that a treasurer received at a foreclosure sale. *Id.* at 189. The Sixth Circuit explained that the "owner's right to the surplus after a foreclosure sale" as recognized in *Rafaeli* arises "directly" from the owner's interest in the excess value of the property that existed before the sale.[4] *Id.* at 195 ("That right does not arise in manner akin to quantum mechanics, materializing suddenly without any apparent connection to anything that existed before.… The surplus is merely the embodiment in money of the value of that equitable title."); see also *Fox v. Saginaw Cnty., Michigan*, 67 F4th 284, 290 (CA 6, 2023) (same); *Rafaeli*, 505 Mich at 515 (Viviano, J., concurring). Recently, the Sixth Circuit further clarified that although unfair auctions could potentially allow a property owner to recover less than just compensation, ordinarily fair market value for that equity interest will be the surplus proceeds, plus interest. *Freed v. Thomas*, 81 F4th 655, 659, n1 (CA 6, 2023) (discussing *Tyler*, *Hall*, and *Rafaeli* and affirming district court's decision regarding what constitutes just compensation); *Freed v. Thomas*, No. 17-CV-13519, 2021 WL 942077, at *4 (ED Mich Feb 26, 2021) ("Plaintiff is also owed interest on this amount from the date of the foreclosure sale.").

[4] Indeed, shortly after *Rafaeli* this Court signaled a similar view of the property interest at stake when it revived the takings claim raised in a case like *Hall* where there were no surplus proceeds. See *Jackson v. Southfield Neighborhood Revitalization Initiative*, 507 Mich 866, 866 (2021) (vacating lower court's decision and remanding for reconsideration "in light of *Rafaeli*"). See also *Jackson v. Southfield Neighborhood Revitalization Initiative*, No. 361397, __NW2d__, 2023 WL 6164992, at *6 (2023) (agreeing with *Hall*, in part because the Michigan Constitution is *more protective* than the federal Constitution).

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B. Federal precedent requires courts to give full retroactive effect to *Tyler*, making this case moot

The United States Constitution requires a backward-looking remedy for an unconstitutional taking in violation of the federal Constitution. In *Harper*, 509 US at 100–01, 132, the Supreme Court instructed that the Fourteenth Amendment requires backward-looking relief for constitutional violations and the Supremacy Clause does not allow state retroactivity doctrine to "supplant[]" remedies required by "federal retroactivity doctrine." *Harper* summarized and rejected a 20-year foray into limiting retroactivity in the civil context, *id*. at 94–97, then announced the retroactivity rule that still applies today: "When th[e] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and *as to all events, regardless of whether such events predate or postdate our announcement of the rule*." *Id*. at 97 (emphasis added). Consequently, because *Tyler* found a taking (on the facts alleged) and applied the Just Compensation Clause protection to Geraldine Tyler, the same just compensation rule must be applied retroactively here. See *id*. at 101 (states must provide some sort of "meaningful backward-looking relief to rectify any unconstitutional deprivations"); *Tyler*, 598 US at 647 (reversing dismissal of Tyler's takings claim and noting "relief under the Takings Clause would fully remedy her harm") (internal quote and brackets omitted). See also *Montgomery v. Louisiana*,[5] 577 US 190, 198 (2016), *as revised* (Jan 27, 2016) ("[C]ourts must give retroactive effect to new substantive rules of constitutional law."); *United States v. U.S. Coin & Currency*, 401 US 715, 722–24 (1971) ("No circumstances call more for the invocation of a rule of complete retroactivity" than where

[5] Even in some cases already decided and final, the Supreme Court allows parties retroactive relief with *collateral* attacks on prior judgments, as *Montgomery* explains, 577 US at 198. See also *People v. Stovall*, 510 Mich 301, 313 (2022) (noting *Montgomery* held prior decision was "a substantive rule of constitutional law; therefor applied retroactively" in collateral attack).

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unconstitutional forfeitures are involved). Thus, state courts *must* give retroactive relief for takings in violation of *Tyler*.

Because *Tyler* must be applied with full retroactivity, the question presented here is likely moot. A moot case presents "nothing but abstract questions of law which do not rest upon existing facts or rights." *Gildemeister*, 212 Mich at 302; *T.M. v. M.Z.*, 501 Mich 312, 317 (2018) (a case is moot where "a judgment cannot have any practical legal effect upon a then existing controversy") (internal quotes omitted). Any grounds to avoid mootness would rest upon pure speculation at this point.[6] This Court generally avoids answering moot questions, and thus could dismiss this appeal as improvidently granted. See *id.*

C. The Michigan Just Compensation Clause also mandates retroactive application of *Rafaeli*

Michigan's Just Compensation Clause is *more* protective than the U.S. Constitution's counterpart. *Rafaeli*, 505 Mich at 454, 477. "It would be peculiar, then, for *Rafaeli* to be read in a manner" or applied in a manner that makes it less protective than the federal Constitution. *Jackson v. Southfield Neighborhood Revitalization Initiative*, No. 361397, __NW2d__, 2023 WL 6164992 at *6 (2023).

Moreover, the Michigan Constitution's Just Compensation Clause expressly mandates just compensation. The government here forced Mr. Schafer and Mrs. Hucklebury to each make "a far greater contribution to the public fisc than [] owed." *Tyler*, 598 US at 647. Kent County's request to bar retroactivity would leave those forced, unconstitutional contributions in place. "To permit such forced contributions to stand would undermine the very rights our Takings Clause seeks to

[6] For example, if this case is certified as a class action on remand, and there is a member of the class whose claim would be barred by the federal statute of limitations but not by Michigan's statute of limitations, the question presented here could become relevant. But those facts are not "existing facts" and are solely speculative.

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protect." *Rafaeli*, 505 Mich at 481. See also *Wisconsin Cent. Ltd. v. Pub. Serv. Comm'n of Wisconsin*, 95 F3d 1359, 1368 (CA 7, 1996). ("The just compensation requirement of the Takings Clause places takings in a class by themselves because, unlike other constitutional deprivations, the Takings Clause provides both the cause of action and the remedy.") *overturned in part on other grounds by Knick*, 139 S Ct 2162.

The Court should decline Kent County's invitation to muddy the clear waters of the Just Compensation Clause by employing the retroactivity doctrine's multi-factor, policy-centric balancing test[7] to decide whether to allow that constitutionally mandated remedy. See County Br. 17, 21 (describing this Court's retroactivity doctrine as "muddled" and "confusing"). Cases seeking just compensation under the Just Compensation Clause can never be candidates for limiting retroactivity. See *Peterman v. State Dep't of Nat. Res.*, 446 Mich 177, 184 (1994) ("it can never be lawful to compel any man to give up his property, when it is not needed, or to lose it, whether needed or not, without being made whole") (quoting *Paul v. Detroit*, 32 Mich 108, 119 (1875)); *Rafaeli*, 505 Mich at 545 n.54 ("property owner's right to bring an inverse-condemnation action is derived from 'the self-executing character of the constitutional provision with respect to compensation'") (quoting *United States v. Clarke*, 445 US 253, 257 (1980)). This constitutional guarantee does not include an exception for situations where the government relies on statutes authorizing an uncompensated taking. See *Rafaeli*, 505 Mich at 454–55 ("the property owner is entitled to just compensation for the value of the property taken"). Yet the County's arguments about limiting retroactivity hinge entirely on such policy considerations. This Court should decline introducing improper balancing tests into a takings case. Cf. *Mays v. Snyder*, 323 Mich App 1, 33

[7] *Lindsey v. Harper Hosp.*, 455 Mich 56, 68 (1997) (explaining the "flexible approach" to retroactivity that involves a "balance" of factors).

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(2018) (courts will not enforce "a procedural requirement that would, in practical application, completely divest an individual of his or her ability to enforce a substantive [constitutional] right guaranteed thereunder.").

D. This Court's retroactivity cases uphold constitutional rights and thus full retroactivity must be appropriate in a case seeking just compensation

Only full retroactivity fully protects Mr. Schafer's and Mrs. Hucklebury's constitutional rights. This Court employs its retroactivity doctrine to uphold constitutional rights, not undermine them. See, e.g., *League of Women Voters of Michigan v. Secretary of State*, 508 Mich 520, 569 (2022) (prospective-only application because throwing out signatures that were collected "on checkbox-lacking petitions" would confuse voters in a way that would "infringe the electors' rights"). See also *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 SC 429, 433 (2011) ("The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively.") (quotation omitted).

The County fails to cite a single example of this Court—or the U.S. Supreme Court—denying substantive constitutional rights with its retroactivity doctrine. Instead, the County relies on tax cases, *see* County Br. 15–16, which have no bearing on the constitutional question here. See *Rafaeli*, 505 Mich at 479–81 ("taxation should not be confused with the power of eminent domain" and the government is using its eminent domain power—not its taxing power—when taking surplus proceeds); *Tyler*, 598 US at 637 (taxes and takings are different). For example, the County cites *Washtenaw County v. State Tax Commission*, 422 Mich 346 (1985), which addressed methods of establishing valuation for real property under the GPTA. County Br. 29. Similarly, the County cited *Penn Mutual Life Insurance v. Department of Licensing & Regulation*, 162 Mich App 123 (1987), which decided whether the state could impose higher taxes on insurance

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premiums for foreign insurance companies than domestic companies. County Br. 29. These are inapposite. *Rafaeli* is not a tax case. 505 Mich at 479–81 (defendants make an "exceedingly poor attempt at disguising a physical taking of property requiring just compensation as an arbitrary and disproportionate tax."). The question here is not about the appropriateness of the amount owed in property taxes, fees, interest, or costs. See *id*. at 479–81. Rather, the question answered by *Rafaeli* and *Tyler* and at issue here was whether, after collecting the taxes, fees, interest and costs, the government could take more than it was owed.

Kent County also relies on an incorrect view of *County of Wayne v. Hathcock*, 471 Mich 445, 484 (2004). *Hathcock* denied requests to bar retroactive relief even though it overturned a prior Michigan Supreme Court decision. *Id.* ("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."). The decision did not specifically exclude retroactive relief to any non-parties; instead, retroactive relief was available in a case where the public use question had been preserved and was not barred by res judicata. *Id.* ("our decision to overrule *Poletown* should have retroactive effect, applying to all pending cases in which a challenge to *Poletown* has been raised and preserved."). The Court's language is consistent with the concern with *collateral* attacks on final judgments—not attacks in undecided lawsuits. See *James B. Beam Distilling Co. v. Georgia*, 501 US 529, 540–42 (1991) (explaining why cases barred by res judicata normally cannot get retroactive relief). Concerns with collateral attacks and claim preservation are particularly heightened in the conventional condemnation context where the Public Use Clause normally arises. *See* MCL 213.2. Under Michigan's law, governments may use quick-take procedures to take title before the property owner has an opportunity to challenge the amount of just compensation deposited by the government. MCL 213.57. The remedy for a

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violation of the Public Use Clause is *injunctive —i.e.*, a return of the property to the private owner. See *Hawaii Hous. Auth. v. Midkiff*, 467 US 229, 245 (1984) (A private taking is "void."); *Dahlen v. Shelter House*, 598 F3d 1007, 1010 (CA 8, 2010) (no amount of compensation can remedy a private taking). Thus, this Court would have been concerned with throwing countless chains of title into question if it allowed attacks to final condemnation actions. By contrast, full retroactive application of the Just Compensation Clause does not throw title into question; it only requires the government to pay for the private property that it has taken. *Rafaeli*, 505 Mich at 452; *Knick*, 139 S Ct at 2170 (remedy for a taking is money).

Here, the government must pay for the windfall it took from Mr. Schafer and Mrs. Hucklebury.[8] No authority supports the proposition that this constitutional right may be abrogated based on the government's ignorance of the Constitution's demands. "'[P]roperty rights cannot be so easily manipulated.'" *Tyler*, 598 US at 645 (quoting *Cedar Point Nursery v. Hassid*, 141 S Ct 2063, 2076 (2021)); *Hart v. City of Detroit*, 416 Mich 488, 494 (1982) ("victim of [] a taking is *entitled* to just compensation[.]").

II

Rafaeli affirmed an old rule, long recognized in the United States and in Michigan, and thus requires full retroactivity

Even if this Court applies its retroactivity analysis to this takings case, that doctrine favors Mr. Schafer's and Mrs. Hucklebury's takings claims. Decisions of the Michigan Supreme Court are normally given full retroactive effect. *Bezeau v. Palace Sports & Ent., Inc.*, 487 Mich 455, 462 (2010). Courts may take the "extreme measure" of departing from this rule only in "exigent circumstances" when a decision creates a new and unforeseen rule and if full retroactivity would

[8] The Michigan Constitution's requirement that government pay 125% of fair market value for a home is not at issue in this case. See *Rafaeli*, 505 Mich at 453–54.

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cause injustice. *Pohutski*, 465 Mich at 696; *Devillers*, 473 Mich at 586. The "threshold question" for limiting a decision's retroactive application is "whether the decision clearly established a new principle of law." *Pohutski*, 465 Mich at 696. A principle is "new" when the decision "overrule[s] clear and uncontradicted case law." *Hathcock*, 471 Mich at 484 n.98 (quote omitted). See, e.g., *W. A. Foote Mem'l Hosp. v. Michigan Assigned Claims Plan*, 504 Mich 985, 985 (2019) (Michigan Supreme Court's decision did not establish a new rule, therefore applies retroactively). Indeed, courts cannot deny retroactive application unless a decision abandons a "previously valid common-law doctrine or prior judicial rule of constitutional interpretation." *Stanton v. Lloyd Hammond Produce Farms*, 400 Mich 135, 146 (1977). The rule in *Rafaeli* was not new. It was consistent with more than 800 years of Anglo-American common law. 505 Mich at 456–73. *Rafaeli* did not overturn a decision by this Court or *any* longstanding Michigan decisions. Instead, it was foreshadowed by previous decisions by this Court, including *Dean* and by decisions in other state supreme courts and by the U.S. Supreme Court. See cases cited *infra* at 18–20. Thus, under this Court's judicial-retroactivity doctrine, *Rafaeli* must apply with full retroactivity, and therefore Mr. Schafer and Mrs. Hucklebury are entitled to just compensation.

A. *Rafaeli* affirmed a longstanding property right recognized at the U.S. Founding and by this Court in 1978

The Just Compensation Clauses in the Michigan and United States Constitutions do not create property interests. US Const, Am V; Mich Const art 10, § 2. Rather they protect existing "private property." To determine whether something is private property within the meaning of the state or federal constitutions, courts look to state law, the common law, history, traditional property interests, and Supreme Court precedents. See *Tyler*, 598 US at 638. *Rafaeli* and *Tyler* followed that rule, enforcing pre-existing property rights.

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In *Rafaeli*, this Court looked to what the ratifiers of the 1963 Constitution would have understood as "property" within the meaning of the Constitution, history, and the law. *Rafaeli*, 505 Mich at 468. "The principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as … Magna Carta[.]" *Tyler*, 143 S Ct at 1376; *Rafaeli*, 505 Mich at 473. The "doctrine became rooted in English law" and was accepted at the founding of this nation, through the adoption of the Fourteenth Amendment, and beyond. *Tyler*, 143 S Ct at 1376. The "overwhelming consensus" in this nation was "that a government could not take more property than it was owed." *Id*. at 1377. See also *Hall*, 51 F4th at 190–96, reh'g denied, No. 21-1700, 2023 WL 370649 (CA 6, Jan. 4, 2023), and cert. denied, No. 22-874, 2023 WL 4065633 (U.S. June 20, 2023) (summarizing centuries-old principles proving that landowners have a constitutionally protected property interest in the excess value of real estate taken to pay a debt).

In this state, that rule was well-understood "early in Michigan's statehood" and "remained a staple in this state's jurisprudence well after the most recent ratification of our Constitution in 1963." *Rafaeli*, 505 Mich at 466–68. As *Rafaeli* explained, this Court recognized the debtor's property interest in the surplus proceeds in *Dean v. Dep't of Nat. Res.*, 399 Mich 84, 88 (1976), where pursuant to statute, the government took absolute title to property to recover a homeowner's debt of only $146. The government sold the property for $10,000 and kept the proceeds. *Id.* The former owner brought an unjust enrichment claim. Consistent with "a common-law right to these surplus proceeds," this Court held that the plaintiff had a "right" to seek them with her claim for unjust enrichment. *Rafaeli* 505 Mich 469–70 (citing *Dean*, 399 Mich. at 88). Moreover, longstanding U.S. Supreme Court "precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed." *Tyler*, 598 U.S. at 642 (citing *United States*

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v. Taylor, 104 US 216 (1881); *United States v. Lawton*, 110 US 146 (1884)). Thus, far from issuing a new rule, *Rafaeli* affirmed longstanding American property rights.

B. *Rafaeli* was foreshadowed by decisions in Michigan and elsewhere

Despite this clear history, Kent County argues that *Rafaeli* was completely "unforeseen." County Br. 35. But *Rafaeli* was easily foreseeable, not just because of this Court's decisions in *Dean* or the overwhelming history and tradition recognizing the property right, but because of this state's own treatment of all other types of debts and because of takings decisions in other jurisdictions.[9]

Long before this Court decided *Rafaeli*, most states protected debtors' property interests by guaranteeing the surplus proceeds from the sale of tax-indebted property to the former owner. *Tyler*, 598 US at 638–39. Indeed, Michigan itself protected debtors in other debt-collection contexts, including mortgages, executions on judgment, and other government debt collections.[10] These laws implicitly acknowledged the property interest at stake in *Rafaeli*. *See Tyler*, 598 US at 638 (government cannot carve out an exception where it is the one doing the taking).

Moreover, decisions in other jurisdictions also foreshadowed *Rafaeli*. Before *Rafaeli*, the state supreme courts in New Hampshire, Vermont, Mississippi, and Virginia struck down as unconstitutional statutes that—like Michigan's—confiscated more property than was due. *Thomas*

[9] The County's reliance on legally dubious statutes and refusal to consider the possibility that its takings could ever result in liability for just compensation reflects willful blindness that Michigan courts disfavor. See, e.g., *Johnson v. Hale*, No. 349594, 2020 WL 5495273, at *4 (Mich App Sept 10, 2020) (defendants "citations of evidence favorable to them while simultaneously ignoring unfavorable evidence, evidence[s] a willful blindness to the existence of conflicting evidence").

[10] See, e.g., MCL 600.6044 (surplus due to debtor when executing judgments); *Bank of America, NA v. First American Title Ins. Co.*, 499 Mich 74, 91 (2016) ("No one disputes that the mortgagee is entitled to recover only his debt. Any surplus value belongs to others, namely, the mortgagor or subsequent lienors.") (internal quotes omitted); MCL 324.8905c (surplus when seizing car to pay misdemeanor littering fine).

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Tool Services, Inc. v. Town of Croydon, 145 NH 218, 220 (2000) (violates state constitution's takings clause); *Bogie v. Town of Barnet*, 129 Vt 46, 55 (1970) (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation, contrary to … Vermont Constitution"); *Griffin v. Mixon*, 38 Miss 424, 436–37 (Miss Err & App 1860) (violation of due process and just compensation guarantee); *Martin v. Snowden*, 59 Va 100, 142–43 (1868). Some federal district courts similarly had already recognized such confiscations were unconstitutional. *King v. Hatfield*, 130 F 564, 579 (CCD W Va 1900); *Coleman through Bunn v. D.C.*, 70 F Supp 3d 58, 80 (DDC 2014) (takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman through Bunn v. D.C.*, No. 13-1456, 2016 WL 10721865, at *1, *3 (DDC June 11, 2016) (recognizing district law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits). Many more courts had also at least implied that such confiscations were unconstitutional or would otherwise be resisted by the courts. See, e.g., *Lake Cnty. Auditor v. Burks*, 802 NE2d 896, 899–900 (Ind 2004) (surplus retention would "produce severe unfairness" and likely violate the Takings Clause); *Shattuck v. Smith*, 6 ND 56 (1896) (indicating such a law would likely be unconstitutional); *Syntax, Inc. v. Hall*, 899 SW2d 189, 191–92 (Tex 1995), as amended (June 22,1995) (interpreting statute to avoid taking and noting "[t]axing authorities are not (nor should they be) in the business of buying and selling real estate for profit."); *City of Anchorage v. Thomas*, 624 P2d 271, 274 (Alaska 1981) (refusing to interpret the law as confiscating the surplus, in part because injustice that would result).

Rafaeli simply affirmed a longstanding property right of debtors across the United States. 505 Mich at 484–85. Because the rule in *Rafaeli* is an old one, as ancient as the law itself, it must be given full retroactive effect.

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III

FAIRNESS AND JUSTICE REQUIRE THAT THE COUNTY PAY JUST COMPENSATION FOR TAKINGS

Even if *Rafaeli* had announced a new and unforeseen rule (it did not), it should be given full retroactive effect. This Court normally gives full retrospective application even to new rules unless the "extreme measure" of limiting its application is supported by three factors: (1) the purpose of the "new" rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Pohutski*, 465 Mich at 696. First, there is no new rule announced in *Rafaeli*, as explained above. Second, all three factors weigh overwhelmingly in favor of full retroactivity.

A. The purpose of *Rafaeli* is to enforce justice itself and a longstanding constitutional right to just compensation

Rafaeli's purpose—to uphold the Michigan Constitution—favors full retroactivity. "[F]airness and justice" are the core "purpose" of the Just Compensation Clause. *Palazzolo v. Rhode Island*, 533 US 606, 617–18 (2001). Indeed, *Rafaeli* held that "confiscation of the sale proceeds in excess of what is actually owed requires delinquent taxpayers alone to bear public burdens which, in all *fairness and justice*, should be borne by the public as a whole." *Rafaeli*, 505 Mich at 480–81 (internal quote omitted) (emphasis added). The government here forced Mr. Schafer and Mrs. Hucklebury to make "a far greater contribution to the public fisc than [] owed." *Tyler*, 598 US at 647. Kent County's attempt to bar retroactive relief to Mr. Schafer and Mrs. Hucklebury, despite the Constitution's unequivocal mandate, would leave these forced contributions in place and "undermine the very rights our Takings Clause seeks to protect." *Rafaeli*, 505 at 481 (internal quote omitted). See also *Tyler*, 598 US at 647 (noting similar "fairness and justice" purpose of Takings Clause and finding a taking accordingly) (internal quotes and citation omitted).

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Moreover, the decision in *Rafaeli* "protect[s] taxpayers and property owners alike from government overreach." *Rafaeli*, 505 Mich at 468. Property rights are "indispensable to the promotion of individual freedom." *Cedar Point Nursery*, 141 S Ct. at 2071. "Equality in the enjoyment of property rights was regarded by the framers of th[e Fourteenth] Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.'" *Lynch v. Household Fin. Corp.*, 405 US 538, 544 (1972) (quoting *Shelley v. Kraemer*, 334 US 1, 10 (1948)). Limiting government power to destroy individuals by taking their assets without just compensation is essential to protecting freedom. See *Cedar Point Nursery*, 141 S Ct at 2071 (without property rights freedom does not exist). Thus the purpose of *Rafaeli* is fairness, justice, and liberty. It should apply with full retroactivity.

B. Only government relied on the old rule and that reliance was unjustifiable

The government argues that it relied on the prior tax statutes to support its unconstitutional and unjust activities. But this Court considers reliance by *all* parties, when deciding how reliance should weigh in the retroactivity analysis. *Pohutski*, 465 Mich at 697. In *Pohutski*, this Court was concerned that the plaintiffs, defendants, and insurance companies had made decisions about insurance coverage in reliance on the Michigan Supreme Court's prior rule regarding tort liability. By contrast, here, only the government relied on the confiscatory rule at issue. The public and average property owners did not rely on the false proposition that government could take everything. Indeed, most real property owners like Mr. Schafer and Mrs. Hucklebury had no idea that government would or could take more than what was owed.[11] And these surprised property

[11] In *Tyler*, more than forty groups, including states, the federal government, and groups across the ideological spectrum participated as amici curiae in support of Ms. Tyler. See Docket, *Tyler v. Hennepin County*, No. 22-166, Supreme Court, https://www.supremecourt.gov /search.aspx?filename=/docket/docketfiles/html/public/22-166.html (26 amicus briefs on the

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owners were proven correct; the government *cannot* use the toehold of a tax debt to take more than what is owed. *Tyler*, 598 US at 647; *Rafaeli*, 505 Mich at 484. Thus, the reliance interests are only one-sided.

And the County's reliance was unjustified. History and the government's treatment of other debts would have warned the County had it been remotely interested in discerning the legality of its practices. See Section I.B. The County cites a few lower court opinions in this state to justify its reliance on an unconstitutional statute. County Br. 14. But homeowners were actively challenging the government's taking of their surpluses in 2017 when the County deprived Mr. Schafer and Mrs. Hucklebury of their lifesavings in their properties. See *Rafaeli*, 505 Mich 439–400, n.4 (noting procedural history from 2015); *Wayside Church v. Van Buren Cnty.*, 847 F3d 812, 822 (CA 6, 2017) (denied for lack of jurisdiction). The unsettled nature of that litigation made any reliance by the County unjustifiable. Indeed, those cases drew sharp criticism from federal judges. See, e.g., *Rafaeli, LLC v. Wayne Cnty.*, No. 14-13958, 2015 WL 3522546, at *3 n.2 (ED Mich, June 4, 2015) (calling the confiscation "a manifest injustice that should find redress under the law"); *Wayside Church*, 847 F3d at 823 (Kethledge, J., dissenting) ("Van Buren County took property worth $206,000 to satisfy a $16,750 debt, and then refused to refund any of the difference. In some legal precincts that sort of behavior is called theft."). Thus, the County's reliance was irrational, particularly by the time it took Mr. Schafer's and Mrs. Hucklebury's former homes. Kent County should have (and may have) reserved in its budget money to pay Mr. Schafer and Mrs. Hucklebury and others like them the just compensation that they sought.

merits supporting Ms. Tyler representing more than 40 parties as amicus). Those groups expressed shock or outrage at the confiscatory law at issue.

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Finally, the County's argument that it did not know what the constitutions demanded amounts to an ignorance-as-a-defense argument. This Court never extended such protection to individuals ignorant of their tax debts or the consequences of such debts. See, e.g., *Sidun v. Wayne Cnty. Treasurer*, 481 Mich 503, 510–12 (2008). So long as constitutionally required due process is satisfied, seizure of title and a forced sale to pay delinquent taxes will be upheld. *Id.* Such forced sales by auction impose severe burdens on property owners, selling for less than their actual value. See, e.g., *Freed*, 81 F4th at 658 ($98,800 house sold at auction for only $42,000). Since this Court does not grant regular individuals like Mr. Schafer and Mrs. Hucklebury shelter based on their ignorance, it would be shocking and inequitable to extend such one-sided shelter to the government. See *Hall*, 51 F4th at 187–88 (Michigan's legislature created a "self-dealing" "exception to this rule for just a single creditor: namely, the State itself (or a county thereof) to collect property taxes.").

This Court should hold that any reliance interests favor full retroactivity.

C. Justice requires full retroactive application to allow Mr. Schafer and Mrs. Hucklebury to obtain just compensation

1. *Rafaeli* and *Tyler* held it was unjust to allow the government to take and keep a windfall

Fairness and justice require the government to pay Mr. Schafer and Mrs. Hucklebury just compensation for taking surplus proceeds from a tax sale. *Tyler*, 143 S Ct at 1376. By confiscating more than what they owed, the government forced "delinquent taxpayers 'alone to bear public burdens which, in all *fairness and justice*, should be borne by the public as a whole.'" *Rafaeli*, 505 Mich at 481 (quoting *Armstrong v. United States*, 364 US 40, 49 (1960)). Indeed, Kent County's actions forced Mr. Schafer and Mrs. Hucklebury to "to contribute to the general government revenues beyond their fair share." *Rafaeli*, 505 Mich at 480. Similarly, in *Dean* this Court recognized the injustice caused by such confiscations when it ruled that the former owner could

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press a claim for unjust enrichment challenging the same sort of confiscation. 399 Mich at 93. Thus, this Court has long recognized justice requires the government to disgorge the windfall it makes at the expense of people like Mr. Rafaeli, Mr. Schafer, and Mrs. Hucklebury.

Justice can only be served by making Kent County pay just compensation for taking more than it was owed. See *Bogie*, 270 A2d at 900 (Vt 1970) (taking more than what it is owed is "unconscionable"); *Burnquist v. Flach*, 6 NW2d 805, 809 (Minn 1942) (any "unprejudiced mind" would recognize "justice" demanded that any surplus proceeds—above and beyond the tax debt—to be returned to former owner).

2. The County's budgetary complaints cannot absolve it of its constitutional duty to pay just compensation

Kent County pleads that its budgetary interests justify sacrificing Mr. Schafer's and Mrs. Hucklebury's constitutional rights. But the County's financial preferences have no bearing on the need to pay just compensation. See *Wayne Cnty. Rd. Comm'rs v. GLS LeasCo*, 394 Mich 126, 135 (1975) (in a condemnation case, the government attorney denies the landowner a fair trial if he "exploit[s] his position as representative of the taxpayers, including the jurors, to the detriment of the landowner") (citing *West v. State*, 150 SW2d 363, 364 (Tex Civ App 1941) (new trial ordered where condemning authority told jury that they would pay any award "out of (their) own pockets" through taxes). It further ignores the devastating consequences of denying just compensation.

Most importantly, the County's unwillingness to pay just compensation does not override the Constitution's self-executing requirement of just compensation. See *First English*, 482 US at 316 ("[T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution."). But even if the County's dismay were relevant, it does not tip the equities in favor of Kent County. See *Hall*, 51 F4th at 196. In *Hall*, the Sixth Circuit rejected similar arguments "about the 'serious fiscal consequences' of a decision in the plaintiff's

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favor," holding that "the equities run very much" in favor of the former owners whose constitutional rights had been violated. *Id*.

The same equities at issue in *Hall* favor full retroactivity here. If the County's potential liability is large (rather than small) then that is a sign of the gross injustice it has sowed. *Hall*, 51 F4th at 196. Such a great injustice must weigh in favor of holding the government accountable to the Constitution—not letting it off the hook. *Id.* On the other hand, if it has engaged in relatively few confiscations, then its liability is small, indeed, and there is no reason for the argument against retroactivity.

The County is silent here about how paying just compensation in cases like this one will affect the County's finances. But its most recent financial report assures the public that there is no problem: "[T]he County and its Corporate Counsel" concluded that resolution of lawsuits "related to sales of auctioned/foreclosed properties" "will not have a material adverse effect on the financial condition of the County." County of Kent, Michigan, *Annual Comprehensive Financial Report* (Year Ended December 31, 2022) at 108.[12] Indeed, this financial report estimates the County's "maximum potential" liability from these sorts of cases is "$3.4 million." *Id.* The County has ample assets and revenue and it has already included this $3.4 million within its calculated liabilities. See *id*. at 29, 108. See also *id*. at 29, 48, 50–51 (noting delinquent tax collection is profitable for the County).

Instead of sharing its own numbers, Kent County estimates that the administrative burden across Michigan will be "staggering, but it is eclipsed by the counties' potential liability, which is conservatively estimated at more than $150 million statewide." County Br. 31. But as Kent

[12] https://www.accesskent.com/Departments/FiscalServices/pdfs/2022/Annual-Comprehensive-Financial-Report.pdf.

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County's financial report demonstrates, each county's liability may be rather small compared to its respective revenue and the balances in revolving tax funds where counties regularly hold surplus proceeds.[13] Moreover, the class action settlements in *Wayside* and *Bowles* have shown that counties are paying much less than the *surplus proceeds* that they unconstitutionally took.[14] The *Wayside* settlement will bar former owners (whose property was taken between 2013–2020) from making any takings claims unless they filed their claim or opt-out paperwork within a claim window that has now closed. App. 83, 86–93, 97. Likewise, *Bowles* also resolved most possible claims in Oakland County. App. 49, 62–63.

As for administrative burdens, in *Wayside Church* the 43 counties in that case, including Kent County, together paid a total of $450,000 to the claims administrator to administer the class settlement. App. 97. This is hardly "staggering." The relatively limited burden on counties may be contrasted with the life-altering consequences such foreclosures have on individuals like Mr. Schafer and Mrs. Hucklebury who lose homes and savings in those homes. Such confiscatory tax foreclosures primarily harm society's most vulnerable members—the elderly, the ill, the

[13] MCL 211.87b explains that the County holds the money in trust in the revolving tax fund where the sale proceeds must be deposited.

[14] In *Wayside Church*, No. 1:14-cv-01274-PLM, apparently fewer than half of former owners have preserved their claims. See Motion for Attorney Fees, *Wayside Church*, Schafer App. 50b (if settlement approved, *total* claims against all 43 counties would be capped at about $40 million and counties will pay less than half of surplus proceeds that they took). Counties will pay only 80% of the total surplus proceeds for each individual that managed to stake a claim, and will not pay any of the constitutionally required interest or the additional attorney fees, which are normally recoverable in federal takings cases. Instead, attorneys' fees will come from the 80% surplus proceeds. After deducting expected attorney fees, former owners will get only approximately 64% of the surplus proceeds. Moreover, in *Bowles v. Sabree*, No. 20-cv-12838, 2022 WL 17582005 (ED Mich, Sept 6, 2022), Oakland County had taken $47.8 million in surplus proceeds from class members, App. 54, but apparently only paid a total $20 million, plus surplus proceeds to 50 additional plaintiffs. County Br. 16. Oakland County may use and keep the remaining funds. App. 79. Former owners received 100% of surplus proceeds, with interest. App. 49, 55, 78. These low claim rates and limited payouts are proof that the County's fears are overblown.

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impoverished, and the bereaved. See *Cherokee Equities, L.L.C. v. Garaventa*, 382 NJ Super 201, 211 (Ch Div 2005) (tax foreclosure defendants are often "among society's most unfortunate."). Delinquent property owners typically cannot afford counsel and the law is often difficult to understand. *See Tallage Lincoln, LLC v. Williams*, 485 Mass 449, 450 (2020). Elderly property owners are especially susceptible to losing their property in this way because they move into senior living or medical facilities or their children's homes and consequently often miss notices. See Jennifer C.H. Francis, Comment, *Redeeming What is Lost: The Need to Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 Geo. Mason U. Civ. Rts. L.J. 85 (2014). Thus, so far as the financial impact on the parties can be considered, such a consideration plainly weighs in favor of full retroactivity.

"Time and again in Takings Clause cases, the [Supreme] Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest." *Arkansas Game & Fish Comm'n v. United States*, 568 US 23, 36–37 (2012) (citations omitted). And time and again, the Supreme Court has "rejected this argument." *Id*. This Court, too, should reject Kent County's similar prophecy that paying just compensation is too expensive and instead hold that to the extent that budgets can be weighed, this factor favors full retroactivity.

3. Denying full retroactivity would be illogical and violate traditional judicial principles

Kent County urges this Court to limit retroactivity so that litigants with pending claims when *Rafaeli* was decided would recover while those who awaited a decision from this Court before filing would not. But denying relief to Mr. Schafer and Mrs. Hucklebury while giving it to others whose claims were filed before *Rafaeli* "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law

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generally." *James B. Beam Distilling Co.*, 501 US at 537. The strength of this principle is greater in the civil context than in the criminal. *Id*.

Kent County resists this obvious point by noting that it would be "inequitable" to allow Mr. Schafer and Mrs. Hucklebury to recover while denying relief to those people who have filed prior lawsuits and failed (pre-*Rafaeli*) and are now barred by res judicata from claiming surplus proceeds. County Br. 25–26. Certainly, Mr. Schafer and Mrs. Hucklebury agree that denying just compensation because of res judicata to such victims (not involved with this case) is tragic. But the remedy cannot be to multiply the injustice by denying everyone just compensation.[15]

Justice and the law demand a remedy for Mr. Schafer and Mrs. Hucklebury. Full retroactive application of *Rafaeli* is both the correct and just course. Consequently, this Court should affirm the lower court's decision.

[15] Rather, such injustice would be grounds to consider whether the case qualifies for the "manifest injustice" exception to res judicata. See *Storey v. Meijer, Inc.*, 431 Mich 368, 377, n.9 (1988); *Nathan v. Rowan*, 651 F2d 1223, 1226 (CA 6, 1981) ("Res judicata is applied if it does not offend public policy or result in manifest injustice.").

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CONCLUSION AND RELIEF SOUGHT

This Court should hold that *Rafaeli* is fully retroactive and affirm the lower court. Alternatively, this Court should dismiss the interlocutory appeal as improvidently granted.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation pursuant to MCR 7.212(B). The Brief contains 9,460 words of Times New Roman 12-point proportional type and 2.0 spacing. The word processing software used to prepare this brief was Microsoft Office 365.

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