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STATE OF MICHIGAN

IN THE SUPREME COURT

* * * * *

LYNETTE HATHON and AMY JO DENKINS, et al

Plaintiffs-Appellees,

v.

STATE OF MICHIGAN,

Defendant-Appellant.

_____/

Supreme Court No. 165219

Court of Appeals No.: 356850

Court of Claims No.: 19-000023-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule of regulation, or other State governmental action is invalid.

AMICI CURIAE BRIEF ON BEHALF OF THE DONNA L. EMANOUIL TRUST AND EDWARD SATTLER

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STATEMENT OF AMICI CURIAE INTEREST[1]

The Donna L. Emanouil Trust ("Emanoiul Trust") and Edward Sattler ("Sattler") (cumulatively "Amici") file this Amicus Brief to draw the Court's attention to the constitutional issues not fully briefed in the Application for Leave and Answer or the Briefs filed to date. Some of these constitutional issues were raised and partially considered by the Court of Appeals below, which then ultimately did not reach a decision on the constitutional challenge to 2020 Public Act 256 ("PA 256").[2] See *Breiner v State of Michigan*, __Mich App __, __ NW2d __ (December 1, 2022). Amici are concerned that the petition and response, as presently postured, do not sufficiently apprise this Court of the inherent constitutional problems. Even if the Court decides that the Court of Appeals was correct that the constitutionality of PA 256 does not need to be decided in this case, the Court should be fully informed of the issue so it may avoid inadvertently giving the impression that the question has been answered, to the prejudice of numerous other cases which are not yet before the Court where this issue has been raised and preserved. While the issues asserted by the parties may not make danger abundantly clear, there is one statement in the Application that raises the specter of danger in this case – "This Court should reject the lower court's rationale and hold that Public Act 256 applies to these and all similar claims pending in courts across Michigan." (Application, page 21).

Michigan jurisprudence will be substantially harmed, and numerous hours wasted by the trial courts and the Court of Appeals, if the Court grants leave in this case without addressing the underlying constitutional issues inherent in PA 256, or making clear that it has not decided them.

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[1] In accordance with MCR 7.312(H)(5), no party or counsel for a party authored any part of this brief and no party or counsel for a party made any contribution intended to fund the preparation or submission of this brief.

[2] 2020 Public Act 256 was passed and given immediate effect as of December 22, 2020.

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A. Status of Amici and Similar Persons

The Donna L. Emanouil Trust has two claims against Kent County and its Treasurer. The Trust owned two properties (16988 Kenowa Avenue and 17090 Kenowa Avenue in Kent City, Michigan) that were foreclosed in 2018 to satisfy a debt. 16988 Kenowa Avenue was sold on September 10, 2018 for $222,750.00. The amount of taxes due (with associated charges) was $37,000.00, generating surplus proceeds in the amount of $185,750.00.[3] 17090 Kenowa Avenue was sold on September 10, 2018 for $87,000.00. The amount of taxes (with associated charges) was $6,100.00, generating surplus proceeds in the amount of $80,900.00. Kent County is still holding $266,650.00.

Edward Sattler ("Sattler") is a wheelchair confined individual whose home at 1614 Hamilton Ave NW, Grand Rapids in Kent County was foreclosed effective March 31, 2020. Sattler owed Kent County $7,309.81 (including penalties, interest and other charges permitted by *Rafaeli*). His former property was sold to satisfy this debt on September 11, 2020 for $102,500.00 – generating "surplus proceeds" (as described in *Rafaeli*) of $95,190.19. After the sale, Sattler sent a letter to the Treasurer to inform the Treasurer of *Rafaeli* and demand payment (**Exhibit A**). Despite the written demand, and the passing of more than two additional years, Sattler remains deprived of his property to this day.

Counsel for the stated Amici represents over 1,200 surplus proceeds owners in nearly every county in the State of Michigan, so the concerns expressed by Amici are not isolated.

With the exception of Oakland County, surplus proceeds owners in Michigan have been wholesale stonewalled by the foreclosing governmental units ("FGUs") since the issuance of *Rafaeli*.

[3] In the context of this brief, the term "surplus proceeds" is intended to mean that term as defined in *Rafaeli v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020).

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The FGUs have been unwilling to return surplus proceeds despite this Court's proclamations in *Rafaeli*. This is true even for Sattler's surplus proceeds generated after *Rafaeli* was released on July 17, 2020 and before enactment of 2020's Public Act 256 ("PA 256") effective December 22, 2020. Some surplus proceeds owners who made demand for return of their surplus proceeds were told that the FGUs were waiting for legislation that would authorize them to return the funds (**Exhibit B**) – in obvious reference to 2020 Public Act 256 (now MCL § 211.78t) which was then currently being drafted with substantial assistance of the Association of County Treasurers.[4] In short, the FGUs' position was that they lacked the ability to turn over property that *Rafaeli* said was not theirs. Once PA 256 was passed, the FGUs continued their position of not turning over property they did not own, but now the excuse became that PA 256 stands in the way. For surplus proceeds owners whose property was sold prior to *Rafaeli*, the FGUs steadfastly refuse to pay -- hiding behind an excuse that the Michigan Supreme Court has not said *Rafaeli* applies retroactively. Surplus proceeds owners whose properties were sold in August or September of 2020 were told PA 256 was applicable to them – even though it was not in existence when the surplus proceeds were generated and the July 1 notice deadline required in PA 256 had already passed prior to their sale and prior to the passage of PA 256. For surplus proceeds generated after 2020, owners of those funds have been denied their surplus proceeds by FGUs based solely on their failure to file an administrative notice. In fact, since *Rafaeli* was decided, not one surplus proceeds owner outside of Oakland County has received the surplus proceeds -- which are theirs under *Rafaeli*.

There are numerous trial court cases where the constitutionality of PA 256 has been challenged. Some of the trial courts have avoided the constitutional issue by determining that PA

[4]Nearly all of Public Act 256 was drafted by the Association of County Treasurers. See acknowledgement at page 22 of attached **Exhibit C** as well as deposition of Amanda Price at pages 6-11 of **Exhibit D**.

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256 is not an exclusive remedy.[5] Some trial courts have questioned the constitutionality and at least one has determined that PA 256 in unconstitutional as applied.[6] There are more than 20 cases currently pending before the Michigan Court of Appeals in which the constitutionality of PA 256 has been raised.[7] In addition, it has been challenged in at least two cases pending in the United States District Court for the Western District of Michigan.[8] As discussed below, the constitutional flaw occurs where the certain but capricious administrative deadlines in PA 256 intersect with its exclusivity provision. Should this Court determine that this case is appropriate for its review, it should include within its scope of review whether the statute passes constitutional muster. Addressing the issues presented but not preserved without undertaking a thorough review of the constitutional flaws will undoubtedly lead to several years of wandering in a jurisprudential wilderness.

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[5] See *In Re Schoolcraft County Treasurer v Certain Parcels of Land,* Opinion and Order dated July 1, 2022 (Case No. 20-5456-CZ) (**Exhibit E**); *In Re Alger County Treasurer*, Court of Appeals Docket No. 363803; *In Re Barry County Treasurer*, Court of Appeals Docket No. 360920; *In Re Muskegon County Treasurer*, Court of Appeals Docket No. 363764; *In Re Hillsdale County Treasurer*, Court of Appeals Docket No. 362862.

[6] See *In Re Berrien County Treasurer v Certain Parcels of Land*, Initial Order and Order Denying Reconsideration attached as **Exhibit F and Exhibit G,** respectively, Berrien County Circuit Court Case No. 2020-0105-CH.

[7] The cases and their respective docket numbers are listed in the attached **Exhibit H**. One published opinion has been issued by the Court of Appeals finding PA 256 to be constitutional. *In Re Petition of Muskegon County Treasurer,* __ Mich App __; __NW2d __ (2023) (Docket No. 363764). However, the briefing in that case did not include several federal cases issued in the interim and the 15 minutes for oral argument did not allow for development. A motion for reconsideration was timely filed on November 16, 2023. Two other cases have been orally argued and opinions have not been released yet as of the date of the filing of this brief.

[8] The Defendants have requested that the federal court refrain from ruling in favor of the state courts deciding the issue.

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The State's Application simply assumes that PA 256 is constitutional and presents its position as issues of application and interpretation. Like a structurally unsound house, the entire discussion and analysis comes crumbling down if the foundational issues are not addressed first. Why build an entire body of jurisprudence on an insecure foundation? While in most situations, the parties and the courts may rely on a presumption of constitutionality, that is not a wise course to follow when the imperfections are so facially and in effect observable at the onset.[9]

SUMMARY OF ARGUMENT

Appellant asserts that 2020 Public Act 256 ("PA 256") is the beginning and end of all questions that might be raised in the underlying litigation. It resolves both substance and procedure in the Appellant's eye. Appellant describes it as comprehensive, remedial, curative, and working harmoniously within the tax foreclosure provision (Appellant's Brief, page 9). And that is the viewpoint of the governmental units engaged in foreclosing. Having been drafted primarily by the Association of County Treasurers, PA 256 succeeds in thwarting this Court's decision in *Rafaeli v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020).

Public Act 256 does not have a few warts (or, in the words of the Appellant, "some questions remain"), it is full of cancerous lesions attacking both the Michigan and United States Constitutions. PA 256 creates the illusion of due process but it eviscerates due process. Instead of recognizing the significant issues involved and limitations of those people who are losing their real property to satisfy a tax debt, the statute seeks to take advantage of them. A confusing process

[9] A delay in addressing these issues is not in any parties' best interest. It took approximately 20 years for the deep constitutional flaws in the General Property Tax Act to be ruled on in *Rafaeli*. The foreclosing governmental units cried out loudly about how they relied on the GPTA before it was ruled as unconstitutional. While the foreclosing governmental units had a very large hand in the crafting of PA 256, there is no benefit to building a body of case law that addresses PA 256 – until it is determined whether it is unconstitutional.

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with shortened timeframes, it deprives property owners of due process with confusing notices and fails to spell out that a second taking of surplus proceeds will occur -- and does so at a time when there are yet no surplus proceeds and when the former property has no claim it can make in court. It eviscerates property rights and reduces them to a quick claim – and a contingent claim at that. To the extent that fair play and substantial justice are inherent to due process, PA 256 stacks the deck against the former property owner. It creates the appearance of due process and masquerades "a process" as "due process." There is no time, place nor opportunity to be heard.

In addition, for some claimants like Sattler, PA 256 stripped them of their vested property rights. PA 256 was passed effective December 22, 2020 and mandated that former property owners had to file a Notice of Intention to Claim Proceeds by July 1, 2020 – a date before the property ever sold and a date before the *Rafaeli* decision had even been issued.

After specifying a process that did not meet the definition of "due process," Public Act 256 fails to provide compensation in accordance with either the Fifth Amendment of the United States Constitution or Article X, Section 2 of the Michigan Constitution. It does so in an attractively sneaky way by even failing to discuss if, how and when title or ownership of the surplus proceeds gets transferred to the government. The process, of course, does not matter to the government, because the government has possession of the funds, a thief's title which is good to all the world – except the true owner. However, it does matter for analysis of the constitutional protections involved. PA 256 ends with the realization that the government does not own the surplus proceeds - but the owner simply cannot get their property. Thus, *Rafaeli's* mandate that surplus proceeds be turned over to their owners is thwarted.

Appellant's proposition to this Court that PA 256 resolves many of the issues presented in the underlying litigation, is simply wrong. Amici fear that granting of the Application as currently

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presented will allow the parties to argue some issues without resolving the underlying foundational issues of constitutionality.

BACKGROUND

This Court issued its opinion in *Rafaeli v Oakland County* on July 17, 2020. Prior to that date, tens of thousands of properties had been foreclosed on wherein the "foreclosing governmental units" (or "FGUs") kept all of the proceeds – irrespective of whether the properties sold for substantially more than the amount necessary to satisfy the taxes due. That was the way for roughly 20 years under the General Property Tax Act ("GPTA") (MCL § 211.78 *et* seq.) until this Court spelled the state constitutional shortfalls of the GPTA in *Rafaeli*. At the time of *Rafaeli*'s release, a few thousand properties were in the initial stages of foreclosure – having been foreclosed effective as of March 31, 2020 but none had yet been sold. In August and September of 2020, these properties were sold – but the FGUs did not change their behavior. The FGUs still kept the surplus proceeds despite this Court telling them in *Rafaeli* that they did not own the surplus proceeds and had to turn over the proceeds. ("… Similarly, we hold that defendants were required to return the surplus proceeds to plaintiffs and that defendants' failure to do so constitutes a government taking under the Michigan Constitution entitling plaintiffs to just compensation." *Rafaeli* at 479). Even demand letters like that found at **Exhibit I** did not nudge the FGUs to act in conformity with Michigan's Constitution.

The explanation for the delay in turning surplus proceeds over comes from understanding what was happening in the background. The FGUs had grown fond of keeping property belonging to others. After *Rafaeli*, the Association of County Treasurers and their attorneys were working on a "solution". They would draft that "solution" and eventually get the Legislature to adopt the solution in substantially the form they had drafted. The solution was PA 256.

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Most Counties had chosen to be the FGUs. If they did not want to be the FGUs, the State would be the FGU. See MCL § 211.78(3). If a County wanted to be the FGU, it was totally voluntary. See MCL § 211.78(6). Initially, when the current tax foreclosure scheme was enacted in 1999, a significant number of Counties chose not to be the FGUs and designated the State as the FGU. But that did not last long. Counties that chose to act as FGUs started sharing the good news of how much windfall money could be made from tax foreclosures and more Counties wanted "in" on the process. The Legislature accommodated this demand and reopened the FGU election process in 2004[10] and again in 2009[11]. Ultimately, the Counties continued to belatedly want to get on the profit train and the GPTA was amended to provide a permanent window elect to act as the FGU.[12] At present, the Appellant is the FGU for only eight Counties.[13] A few Counties have used their windfall to supplement general fund revenues. Other Counties have kept most or all of the profits in their tax delinquent revolving fund – thus avoiding the substantial expense which would otherwise be required to bond[14] for the funds necessary to fund returned delinquent taxes ("returned" being a term of the GPTA for delinquent taxes turned over to the FGU in exchange for the amount of taxes due) [15]. Amounts not needed to fund payment of local units

[10] MCL 211.78(3).

[11] MCL 211.78(4).

[12] MCL 211.78(5).

[13] Branch, Clinton, Iosco, Keweenaw, Livingston, Luce, Mecosta and Shiawassee Counties (see https://www.google.com/search?q=michigan+fgu+for+county&rlz=1C1GCEA_enUS996US996&oq=michigan+fgu+for+county&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIHCAEQIRigATIHCAIQIRigATIHCAMQIRigAdIBCTEwOTY5ajBqN6gCALACAA&sourceid=chrome&ie=UTF-8 - as of 10/13/2023)

[14] MCL 211.87c and MCL 211.87d.

[15] MCL 211.78(1).

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of government for reverted taxes were generally invested – providing yet additional revenues for the FGU.

PA 256 was passed and given immediate effect on December 22, 2020. Surplus proceeds owners' efforts to secure return of their property came to a swift halt. Some, like Sattler, filed various class actions suits – all of which were stayed as the Counties claimed and were denied immunity, a determination unlocking a Sixth Circuit interlocutory appeal of right.[16]

In late 2022, the Sixth Circuit Court of Appeals issued its opinion in *Hall v Meisner*, 51 F4th 185 (2022). For the first time, an appellate court found that there was a taking based upon the federal Constitution. Then on May 25, 2023, the United States Supreme Court decided *Tyler v Hennepin County*, 598 US 631; 143 S Ct 1369 (2023), which approvingly cited to *Hall*. But more importantly, it found a property right grounded in federal law – pointedly doing so because of potential mischief by state legislatures:

> The Takings Clause does not itself define property. *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998). For that, the Court draws on "existing rules or understandings" about property rights. *Ibid.* (internal quotation marks omitted). State law is one important source. *Ibid.*; see also *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702, 707 (2010). **But state law cannot be the only source. Otherwise, a State could "sidestep the Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate.** *Phillips*, 524 U. S., at 167; see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980); *Hall* v. *Meisner*, 51 F. 4th 185, 190 (CA6 2022) (Kethledge, J., for the Court) **("[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take."). So we also look to "traditional property law principles," plus historical practice and this Court's precedents.** *Phillips*, 524 U. S., at 165–168; see, *e.g.*, *United States* v. *Causby*, 328 U. S. 256, 260–267 (1946); *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1001–1004 (1984).
>
> …This means, the County reasons, that Tyler has no property interest protected by the Takings Clause.

[16] See for example Case No. 1:22-cv-00316 in the Western District of Michigan.

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> History and precedent say otherwise. The County 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. By doing so, it effected a "classic taking in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 324
>
> (2002) (internal quotation marks and alteration omitted). Tyler has stated a claim under the Takings Clause and is entitled to just compensation.
>
> *Tyler* at 638.

Placed in the context of a tax foreclosure and sale, the PA 256 procedure in any given year is as follows:

March 31:	The effective date of foreclosure.
By July 1:	Claimants may notify the government of their intention to claim an interest in future potential proceeds. These intentions must be declared on a government approved form (hereafter "Form 5743" or "NOI"), notarized, verified and delivered by certified mail or personal service. MCL § 211.78t(1). Claimant must cite to liber and page number of incoming vesting deed.
July-November:	FGUs sell foreclosed real estate. The sale establishes the existence of surplus proceeds, if any, and the amount thereof. MCL § 211.78m(2).
By January 31:	FGUs send notices to NOI filers only - that claims for "remaining proceeds" must be made in the Circuit Court by filing a motion.[17] MCL § 211.78t(3).
By March 31:	Claimants may also seek remaining proceeds under subsection 6. If using this subsection, a government approved form (NOI), must be delivered by certified mail or personal service by March 31 at least 180 day after any qualified order.[18] MCL § 211.78t(6).

[17] At this point in the process, the Notice of Intention form ceases to serve any purpose; it is not a prerequisite to filing a motion for distribution and does not need to be referenced in the motion or proved at the hearing. See MCL § 211.78t(8) and (9).

[18] "Qualified order" is not defined by the statute.

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February 1-May 15:	Claimants may file a motion for "remaining proceeds."[19] MCL § 211.78t(4). A motion filed under this subsection requires Claimant provide: (1) whether the claimant had a direct or indirect interest in the purchaser of the property at the foreclosure sale and (2) whether the claimant has a direct or indirect interest in the property at the time of filing the motion. The motion must be filed in the same proceeding in which the judgment of foreclosure of the property was effective. MCL § 211.78t(3)(k).
October 1:	Claimants may file a certified motion including additional information set forth in subparts a-h. MCL § 211.78t(6).

STANDARD OF REVIEW

Questions involving statutory interpretation are reviewed on a *de novo* basis. *(Charter Twp of Pittsfield v Washtenaw Co Treasurer*, 338 Mich App 440, 449; 980 NW2d 119 (2021); *Aroma Wines & Equip Inc v Columbian Distribution Servs Inc,* 497 Mich 337; 871 NW2d 136 (2015)) and constitutional issues are reviewed on a *de novo* basis. (*Rafaeli, LLC v Oakland Co*, 505 Mich 429, 448; 952 NW2d 434 (2020)).

ARGUMENT

I. IF THE FORECLOSING GOVERNMENTAL UNIT IS CORRECT THAT PUBLIC ACT 256 IS THE EXCLUSIVE MECHANISM FOR THE RECOVERY OF *RAFAELI* SURPLUS PROCEEDS, THEN A CONSTITUTIONAL CONFLICT EXISTS.

A critical aspect is the assertion of the FGUs that PA 256 provides the exclusive mechanism for recovery of any proceeds. It is this assertion that creates the constitutional quandary. It seems appropriate to delve into the language of the Act as an initial step to evaluate whether the Court deems this trigger of unconstitutionality as real or imaginary. In short, are the FGUs correct that

[19] "Remaining proceeds" are mathematically equivalent to the "surplus proceeds" defined in *Rafaeli* minus five percent of the sale price. MCL § 211.78t(12)(b).

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PA 256 precludes any of the relief specified in *Rafaeli*? Can the Michigan Legislature redefine property rights in spite of the recent United States Supreme Court decision in *Tyler v Hennepin County*, 598 US 631; 143 S Ct 1369 (2023)?

There are two sections of the GPTA that FGUs advance in support of their contention:

1. The first language appears in MCL § 211.78t(11):

> (11) This section is the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state. A right to claim remaining proceeds under this section is not transferable except by testate or intestate succession.

2. The second language appears in MCL § 211.78l(1):

> (1) … An action to recover any proceeds from the sale or transfer of property foreclosed for nonpayment of real property taxes under this act must be brought as provided under section 78t.[20]

The restriction in 78t(11) by its language is clearly limited to "remaining proceeds" "under this section" (78t). The FGUs would suggest that the term "remaining proceeds" is synonymous with "surplus proceeds". But nothing in rules of interpretation, would suggest that such free substitution is appropriate – especially when a fundamental right of the property owner is affected. Indeed, when statutes use different terms suggests different meanings. ("… the proximity of these two terms does not mean that they are synonymous." *United States Fid & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 15; 795 NW2d 101 (2009); ""[W]hen the Legislature uses different words, the words are generally intended to connote different meanings." *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 317, 952 NW2d 358 (2020); *Christenson v Sec'y of State*, 336 Mich App 411, 422; 970 NW2d 417 (2021).)

[20] The Court of Appeals addressed this language in *In Re Muskegon County*, supra, focusing on the language "any proceeds" but did not address the limiting language "under this act."

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Yet, the FGUs continue to advance the fallacy that the two terms are synonymous and can be interchanged when it is clear that "remaining proceeds" is 5% less than "surplus proceeds" by the very definition of "remaining proceeds" in MCL § 211.78t(12)(b).[21] And the confusion at the trial courts continues. On the other hand, assuming that they do mean the same thing, then the 5% taken for a commission on the sale runs afoul of the takings clauses of the United States and Michigan constitutions (as discussed below).

The language of 78l(1) is somewhat different – it uses "any proceeds". It was added at the same time as 78t. But again, the statute referring to "any proceeds" occurs in the context of a claim "under this act"[22]. The early portion of subsection 1 would suggest that it is not inclusive. The earlier subsection prescribes a two-year statute of limitations not only to transfers under "this act" but also "or other violation of this act or other law of this state, the state constitution of 1963, or the Constitution of the United States …". MCL § 211.78l(1). If the last sentence were to be interpreted as is typically advanced by FGUs, then there would have been no need for the Legislature to include the other causes of action in assigning the statute of limitations. The FGUs' interpretation would run afoul of the surplusage canon of statutory interpretation. *People v Rea*, 500 Mich 422, 428; 902 NW2d 362 (2017); and *ree Inc v Dep't of Treasury*, 332 Mich App 155, 164; 955 NW2d 593 (2020), aff'd, 509 Mich 204; 984 NW2d 1 (2022).

[21] And it gets worse. Many FGUs are now asserting that they can also reduce "remaining proceeds" by deducting attorney fees that they incur trying to defeat claims.

[22] An action "under this act" cannot include motions for surplus proceeds because PA 256 only covers actions for "remaining proceeds." Instead, in a circular reference, the act applies only to owners who are seeking the remedy specially created by PA 256 by following the procedure in PA 256. See MCL § 211.78t(12)(a) (defining "claimant" as former owners pursuing remaining proceeds "pursuant to this section").

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Some trial courts have found that *Rafaeli* claims are not barred by PA 256. Some have found so based upon the permissive language of some of PA 256 requirements and others because PA 256 failed in its announced intention of the full implementation of the relief set forth in *Rafaeli*.[23] Most trial courts have not been willing to become engaged in a review of the language and effect of the Act preferring to leave the constitutional decision-making to this Court.

If in the end, PA 256 purports to eliminate any other procedure for obtaining surplus proceeds, then PA 256 must yield to the requirements of the due process and takings provisions of the federal and Michigan constitutions.

II. *PROCTOR* DOES NOT PROVIDE THE DIRECTION THAT THE STATE URGES.

The State cites to *Proctor v Saginaw County Board of Commissioners*, 340 Mich App 1; 985 NW2d 193 (2022) as justification for application of PA 256 to claims arising before PA 256. (Appellant's Brief, page 21.) Yet, the cited language from *Proctor's dicta* is precisely why Amici feel compelled to inform this Court.[24] Decisions that discuss matters that have not been fully vetted, create countless difficulties for those who follow.[25] As a practical matter, even *dicta* creates

[23] See for example, *Barclay v Schoolcraft County,* Schoolcraft County Circuit Court Case No. 20-5456-CZ Opinion dated July 5, 2022, attached as **Exhibit E**.

[24] The same type of error recently arose in *Kakalia Management v Otsego County Treasurer*, unpublished decision of the Michigan Court of Appeals dated April 13, 2023 (Docket No. 361621) where the Court opined "Because the subject property was sold under MCL 211.78m "before July 18, 2020," MCL 211.78t(1)(b) now provides the exclusive mechanism for a former property owner to claim the surplus proceeds from a tax-foreclosure sale. See MCL 211.78t(11)" even though the application of PA 256 was not presented at the trial court. The *Kakalia* opinion, by its own language, illustrates additional confusion by referencing "surplus proceeds" when the statute uses a differently defined term – "remaining proceeds". See **Exhibit J.**

[25] As an example, the undersigned counsel subsequently argued *Schafer v Kent County* (leave granted by the Court on June 9, 2023, Docket No. 164975) at the Court of Appeals, asserting that the language was *Proctor* language now cited by the State of Michigan was *dicta* – with a resulting published decision that *Schafer* is fully retroactive to be applied to all claims.

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almost unsurmountable barriers at the trial court level. Unnecessary cost to litigants and judicial resources can be avoided if this Court either does not grant leave in this case on any issue implicating PA 256, or grants leave with instructions for the parties to address the constitutional issues presented by PA 256.

In *Proctor*, the constitutionality of PA 256 was not briefed because PA 256 did not exist at the time of the lower court's decisions or at the commencement of briefing before the Court of Appeals in this case. As a result, The *Proctor* court's directive that claims filed after December 22, 2022 "should" be filed pursuant to PA 256 was based upon an erroneous assumption that PA 256 was constitutional. *Proctor,* at 39 (stating "unnamed persons and their still-to-be made claims should be subject, instead, to the requirements of 2020 PA 256, MCL 211.78t."). To the contrary, PA 256 is blatantly unconstitutional which makes it ineffective as to all surplus proceeds owners, including the Appellees in this case and to *Amici*. Indeed, PA 256 did not cure the constitutional defects of the prior version of the GPTA--to the contrary, it created additional road blocks which will ultimately result in governmental entities committing additional takings of property without compensation in violation of Article X, § 2 of Michigan's 1963 Constitution and the Fifth Amendment of the United States Constitution as well as the equal protection clauses of the same.

III. PA 256 IS CONSTITUTIONALLY INFIRM.

"As a general rule, an unconstitutional statute is void ab initio; it is void for any purpose and is as ineffective as if it had never been enacted." *Johnson v White,* 261 Mich App 332, 336; 682 NW2d 505 (2004); *see also Stanton v Lloyd Hammond Produce Farms,* 400 Mich 135, 144-145; 253 NW2d 114 (1977). Moreover, "[s]tatutes are presumed to be *constitutional...unless* ***unconstitutionality is clearly apparent."*** *In re Sanders,* 495 Mich 394,404; 852 NW2d 524 (2014) (emphasis added).

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When the State enacts legislation which totally deprives a party from asserting his or her rights, such legislation is unconstitutional. *See Ramey v State,* 296 Mich 499, 461; 196 NW 323 (1941) (finding that "vested rights may not be impaired by legislative action"). *See also Cove Creek Condo Ass'n v Vista! Land & Home Dev, LLC,* 330 Mich App 679, 701; 950 NW2d502 (2019) (quoting *Attorney Gen v Mich Pub Serv Comm,* 249 Mich App 424,435; 642 NW2d 691 (2002) (finding that "[d]ue process is violated only when legislation impairs vested rights"). PA 256 directly impairs and even eliminates the vested rights of numerous surplus proceeds owners. Even a cursory review of PA 256 reveals its blatant unconstitutionality; any presumption of constitutionality is easily defeated.

A. Surplus Proceeds Owners are Treated Unequally.

As an initial matter, PA 256 creates multiple unconstitutional classification schemes. Although all surplus proceeds owners seeking to recover their remaining proceeds are similarly situated, PA 256 treats surplus proceeds owners differently based upon when their claims accrued, when they filed their claims, when they submitted notice to the foreclosing governmental unit ("FGU") of their intention to pursue their claims, and the type of mailing used to submit notice of their intention to pursue their claim to the FGU. As a result, many surplus proceeds owners are denied equal protection of the law, and at minimum, the classification schemes employed are not "rationally related to a legitimate governmental interest." *Phillips v Mirac, Inc,* 470 Mich 415,433; 685 NW2d 174 (2004). And contrary to the State's argument, the application of PA 256 does "abrogate divest or otherwise harm any existing vested rights." (Appellant's Reply

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at pg. 8).[26] The effect that PA 256 has on various surplus proceeds owners' rights is easily demonstrated in the examples below.

PA 256 is written such that surplus proceeds owners will ***never*** have a remedy. PA 256 as applied to Amici constitutes an additional taking without just compensation. Under PA 256's statutory scheme, the claims process set forth by Section 78t is available to those with "foreclosed property transferred or sold under section 78m before July 18, 2020…***only if*** the Michigan [S]upreme [Court] orders that its decision in *Rafaeli, LLC v Oakland County,* docket no. 156849, applies retroactively" yet PA 256 then proceeds to restrict the time available for bringing such claims to "…within 2 years after the judgment of the property is effective under section 78k." MCL § 211.78t(1)(b); MCL § 211.78l. PA 256 was enacted in December of 2020 but to date, the Michigan Supreme Court still has not ruled on the retroactivity of *Rafaeli.* As a result, surplus proceeds owners such as the Emanouil Trust whose property was transferred or sold before July 18, 2020 are left unable to bring a claim because the condition precedent (a Michigan Supreme Court ruling on the retroactivity of *Rafaeli*) has not been met—yet the statute of limitations purportedly set forth in PA 256 has now run to bar any potential claims (on March 31, 2022).

Surplus proceeds owners whose foreclosed properties were sold in August and September of 2020 (i.e. after *Rafaeli* was released) have an even more graphic illustration of the unconstitutionality of PA 256. On December 21, 2020, the surplus proceeds owners were the rightful owners of surplus proceeds and the FGUs were mandated to return their property, but on December 23, 2020 their claims had seemingly evaporated into thin air since they did not have a time machine and therefore had not filed a Notice of Intention by July 1, 2020 as mandated by PA

[26] Interestingly, the State's interpretation that PA 256 "does not divest any right" (Appellant's Brief, page 16) may then have to yield to an interpretation that the cause of action only arose when *Rafaeli* was decided--on July 17, 2020.

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256. *See Ramey v State*, 296 Mich 499, 461; 196 NW 323 (1941) (finding that "vested rights may not be impaired by legislative action"). PA 256 completely fails to provide a remedy for these surplus proceeds owners, instead eliminating their rights to claim their remaining proceeds without recourse. As each of these examples demonstrate, PA 256 constitutes yet another taking of property without just compensation in violation of Article X, § 2 of Michigan's 1963 Constitution and the Fifth Amendment of the United States Constitution.

Those whose foreclosed property was transferred or sold after *Rafaeli* are also not free from constitutional violations. PA 256 retroactively assesses a five percent (5%) sales commission as to all surplus proceeds owners - a charge that did not exist at the time of the sale, did not exist at the time many surplus proceeds owners filed their lawsuits, retroactively imposed on December 22, 2020. MCL § 211.78t(12). Surplus proceeds less 5%, less any attorney fees FGUs attempt to charge are referred to as "remaining proceeds" in PA 256.

The United States Supreme Court and the Sixth Circuit have made clear that the rational basis test does not apply to allegations of an unlawful taking. ("Equal-protection challenges to tax or economic statutes are subject to rational-basis review, *unless the plaintiff alleges an unlawful taking*, or that the law infringes upon fundamental rights or creates a 'suspect' classification," citing *US RR Ret Bd v Fritz,* 449 US 166, 175; 101 S Ct 453 (1980)." *Knochelmann v Comm'r*, 455 F App'x 536, 540 (6th Cir 2011).

B. "A Process" Does Not Equate to Due Process.

Drawing on a footnote expressed in *Rafaeli*, the Michigan Association of County Treasurers devised a plan that would provide a process – and allow them to continue to take taxpayer's property. Now the State raises that footnote to essentially argue to this Court that it

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ought to accept PA 256 without scrutiny. Amici suggest that such would not only violate the Michigan Constitution, but also the federal Constitution and its amendments.

At the core of the Appellant's argument is that *Nelson v New York, 352 US 103; 77 S Ct 195 (1956)* stands for the proposition that any procedure is good enough to satisfy constitutional due process. As a result, Amici feels that it is necessary to critically review both the process and application of *Nelson*. But first, it is necessary to address the "jumping off" point by which Appellant introduces the issue in its brief. Appellant asserts that *Rafaeli* found "…Public Act 123 of 1999 was constitutionally deficient because the "scheme under the GPTA [did] not recognize a former property owner's statutory right to collect these surplus proceeds." *Id*. at 462–462.[sic]. The quoted portion of *Rafaeli* is much more significant than that. It introduces the central issue the Court addressed (which is described in the next sentence): "Therefore, we must determine whether plaintiffs have a vested property right to these surplus proceeds through some other legal source, such as the common law." *Id.* at 462. *Rafaeli* then found a property right and also found that property right was protected by the Michigan Constitution since it existed at the time the Constitution was adopted. This established property right thus has protection from erosion by the Legislature.

C. *Nelson* is Distinguished.

In *Nelson*, no state constitutional property right was involved. Thus, *Rafaeli* distinguished *Nelson*. ("Significantly, *Seaman*, *Lawton*, and *Nelson* all address a former property owner's *statutory* right to recover the surplus proceeds." *Id*. at 460.) Additionally, at the time, the *Nelson* Court did not examine any federal property rights – as now established in *Tyler*. *Nelson* addressed only state statutory rights in a due process context. Similarly, while citing *Nelson*, *Tyler* specifically distinguished it ("The County argues that *Taylor* and *Lawton* were superseded by *Nelson v. City of New York*, 352 U.S. 103, 77 S.Ct. 195, 1 L.Ed.2d 171 (1956), but that case is readily distinguished." *Tyler* at 643.)

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In *Nelson*, foreclosed property owners sought to set aside the New York state court's foreclosure of two properties for unpaid water bills. The New York foreclosure statute was a one-step legal proceeding that divested New York property owners of absolute title, possession and rents as well as equity in real property at the time of tax foreclosure without the requirement of later sale. Significantly however, a property owner under the New York law could interpose a defense or counter-claim in the foreclosure proceeding asserting that the property being foreclosed upon was worth more than the tax being collected - forcing a separate sale of the property and return of the surplus proceeds. *Nelson*, 352 US at 110 (citing *City of New York v Chapman Docks Co,* 1 AD2d 895; 149 NYS2d 679 (1956). The appellant in *Nelson* did not need a separate process to claim surplus proceeds, as it was part of the *in rem* proceeding itself.

In contrast, Michigan's General Property Tax Act does not allow a counterclaim for excess proceeds to be raised at foreclosure. It entails a multi-step process. First, the FGU forfeits and then forecloses on the real property by mail for delinquent taxes assessed against the property. Next, fee simple interest free and clear of liens (absolute title) is transferred to the county by judicial action unless cause is shown at the February Show Cause hearing or if the property is not redeemed prior to March 31st. These tax-foreclosure judicial actions do not require personal service and do not allow *in rem* defendants to make counter claims. In clear divergence from the procedure in *Nelson*, the GPTA permits only 6 limited issues by the property owner – and none address surplus proceeds. MCL § 211.78l(2). There is no right to redeem after the judicial foreclosure date. The owner or occupant is not divested of possession of the real property at the time of judicial foreclosure. In a final independent step, the property is sold at an independent auction in August or September at which time the surplus proceeds are established, and the auction purchaser will take steps to secure possession. Surplus proceeds must, as a Michigan constitutional matter, be

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paid over the former owner by order of Michigan's Supreme Court. Contrast with the New York Constitution which did not guarantee that property right to Nelson or New York property owners.

Nelson is distinguishable factually, as well. The appellants challenged the underlying foreclosure, arguing that they had not received actual notice of the proceeding due to the malfeasance of the bookkeeper who hid the notices. Appellants argued this was similar to the facts in *Covey v Town of Somers*, 351 US 141; 76 S Ct 724 (1956), decided the previous term. The Court disagreed because of the *in rem* nature of the proceedings:

> Appellants make the further contention that the City officials should have known from the state of the records of the two parcels that mailed notice would probably be ineffective. That is, the fact that water charges were not paid while the much larger real estate taxes were paid should have indicated to the officials that something was amiss. They rely on *Covey v. Town of Somers*, supra. We cannot so hold. In the *Covey* case, there were uncontroverted allegations that the taxpayer, who lived on the foreclosed property, was known by the officials of a small community to be an incompetent, unable to understand the meaning of any notice served upon her; no attempt was made to have a committee appointed for her person or property until after entry of judgment of foreclosure in an *in rem* proceeding.
>
> *Nelson*, 352 US at 108.

Finally, the *Nelson* appellants did not raise their "takings" argument until their Reply brief and therefore *Nelson* afford no analysis of the takings claim. ("In their reply brief before this Court, the owners also argued for the first time that they had been denied just compensation under the Takings Clause. ... We rejected this belated argument." *Tyler*, 598 U.S. at 644); see also *Nelson*, 352 U.S. at 110. The *Nelson* Appellees were at pains to ensure the Court was aware that the New York tax-foreclosure statute was also amended prior to oral argument before the *Nelson* court to include a retroactive right to redeem the property after judicial foreclosure, and the appellant in *Nelson* was eligible to take advantage of this change with respect to the bulk of his loss, which Appellees were at pains to ensure the Court was aware. *Nelson*, 352 U.S. at 111.

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By contrast, *Rafaeli* addresses two takings – the initial taking of the fee and the subsequent taking of the surplus proceeds after the foreclosure sale (see *Rafaeli* at 453). The first taking is an *in rem* proceeding with publication, certified mail to the last known address, and posting on the subject real estate – essentially alternate service of process. Because of its *in rem* nature, Michigan has decided personal service is not necessary to foreclose on real estate and courts have determined that the FGU has a legitimate State interest which is advanced by taking the real property to satisfy the debt. But the second taking of the surplus proceeds gets no such pass. There is no way to gain *in rem* jurisdiction by posting on the surplus proceeds. But the process hampers a just compensation claim because the FGUs can avoid a discussion of the time and manner by which ownership transfers. Why is that significant? Because when the taking occurs there is a requirement for a process to determine just compensation. ("The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right." *Knick v Twp of Scott, Pennsylvania*, 139 S Ct 2162, 2171; 204 L Ed 2d 558 (2019)).

Moreover, under Michigan's Constitution, the amount to be paid for the just compensation must be determined by a court. Michigan Constitution, Article X, Section 2.

In sum, *Nelson* differs from these facts in that (1) victims are not challenging the *in rem* action foreclosing their real property, but only the taking of their personal property after sale of their real property and after the debt has been satisfied; (2) a former owner's right to the surplus proceeds (as a separate personal property right) is recognized in Michigan by *Rafaeli*, 952 NW2d at 484, and by now the Supreme Court of the United States, *Tyler*, 598 U.S. at 643; (3) Michigan's judicial process of foreclosure does not afford owners the right to interpose a counter-claim for as

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part of the *in rem* foreclosure proceedings as the New York statute did; and (4) Federal law does not require a party to exhaust all state remedies before bringing a federal claim for a taking under the Fifth Amendment, *Knick v Twp of Scott, Pennsyl*vania, 139 S Ct 2162, 2172; (2019).

D. PA 256 Violates Due Process.

The notice deadline in MCL § 211.78t(2) abrogates or overrides the right to proceeds - though in a more camouflaged manner than the version of the GPTA that *Rafaeli* invalidated. The due process clauses of the Michigan and US Constitutions provide heightened protection against government interference with certain fundamental rights and liberty interests. *Seal v Morgan*, 229 F3d 567, 574 (CA 6, 2000); *People v Sierb*, 456 Mich 519, 523-4; 581 NW2d 219, 221 (1998). Government action that burdens a fundamental right will survive a substantive due process challenge only if it can survive strict scrutiny, i.e., if it is narrowly tailored to a compelling governmental interest. *United States v Brandon*, 158 F3d 947, 956 (CA 6, 1998) (applying strict scrutiny to fundamental right and surveying cases). Michigan courts have recognized that "substantive due process prevents… action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 202; 761 NW2d 293 (2008). Under strict scrutiny, the burden upon the right must be justified by a compelling state interest advanced in a narrowly tailored way, as proven by the Government. See, e.g., *Phillips v Mirac, Inc,* 470 Mich 415, 432-33 (2004); *McCullen v Conkley,* 134 S Ct 2518 (2014) (applying strict scrutiny to free speech clause).

The Legislature's imposition of procedural mandates and the FGUs' confiscation of proceeds should both be subject to strict scrutiny. Both actions restrict equity owners' vested property interest in, and the corresponding right to obtain, surplus proceeds. The rights to due process and just compensation when the government deprives persons of property are

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fundamental rights under both the Michigan and federal constitutions. The fundamental rights protected by substantive due process include "the specific freedoms protected by the Bill of Rights." *Washington v Glucksberg*, 521 US 702, 720, 117 S Ct 2258, 138 LEd2d 772 (1997); *accord Range v Douglas*, 763 F3d 573, 588 (6th Cir 2014) (citing *Bell v Ohio State Univ*, 351 F3d 240, 250 (6th Cir 2003) ("Interests protected by substantive due process . . . include those protected by specific constitutional guarantees"). The Michigan Supreme Court spilled considerable ink in *Rafaeli* to make clear that the right to proceeds was fundamental, calling it a "sacred right" rooted in "the old fundamental law." *Rafaeli* at 462.[27]

PA 256's 78t(2) notice deadline fails both strict scrutiny and a rational basis evaluation. (The Notice of Intention to Claim Proceeds Form 5743) appears to serve no purpose at all, other than to inhibit recoveries. The mechanics of submitting the form are conspicuously burdensome.[28] There is no articulable compelling state interest in requiring citizens to affirmatively, pre-emptively declare a state of mind (i.e., their intentions) or else forfeit their property. Claims for surplus proceeds pose no threat to the safety or welfare of the state. Because the property did not belong to the government in the first instance, FGUs do not suffer any harm by learning of equity

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[27] See *Rafaeli* at 462:

> "Like the founders of our nation, Michigan has historically held property rights in the highest regard. Former Michigan Supreme Court Justice Thomas M. Cooley, one of our nation's preeminent jurists and learned scholars, wrote that the "right to private property is a sacred right; ... it was the old fundamental law, springing from the original frame and constitution of the realm."
>
> . . . "Accordingly, these fundamental principles—that the government shall not collect more taxes than are owed nor shall it take more property than is necessary to serve the public—protect taxpayers and property owners alike from government overreach".

[28] This is especially true for surplus proceeds owners dealing with some of the circumstances commonly attending foreclosure—e.g., disability, incapacity, pending homelessness and death.

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owners' intentions, or the existence of claims, at a later date. Under MCL § 211.78t(3), equity owners cannot even make a claim for their proceeds until at least six months after the notice deadline.[29]

Coloring both an analysis of PA 256 as a remedial statute and its functioning in providing due process is the enacting provision of PA 256 which reads:

> This amendatory act is curative and is intended to codify and give **full effect** to the right of a former holder of a legal interest in property to any remaining proceeds resulting from the foreclosure and sale of the property to satisfy delinquent real property taxes . . . **as recognized by the Michigan supreme court in *Rafaeli, LLC v Oakland County*,** docket no. 156849, consistent with the legislative findings and intent under section 78 of the general property tax act. [Enacting section 3 of Act 256 of 2020.] (emphasis added).

PA 256 thus fails since it gives less than what was compelled by *Rafaeli*, and instead erodes claims for compensation and puts unnecessary restrictions on the constitutionally protected right. Moreover, PA 256 fails under any standard of review. The interest is purely financial – as adeptly explained by a County to another panel of this Court that the purpose is to provide an opportunity for a governmental unit to acquire the property at "a steal":

> And that July 1 date is not arbitrary. It's not something that the County came up with at all and it's not something the legislature just pulled out of a hat. It's important for a couple of reasons. One is that there's a right of first refusal for local municipalities to purchase tax foreclosed property. To protect the former owner's equity the statute now provides that if a claim has been made then a city or township has to pay the greater of the delinquent tax minimum bid or fair market value, right? **So a city can't get a steal on tax foreclosed property if someone has made a claim**, that former owner, because we want to make sure.
>
> (See **Exhibit K**, page 15) (emphasis added).

[29] Under subsection 4 it was February 1, 2022 – some seven months after the Form 5743 July 1 deadline. Under subsection 6 it was October 1, 2022 – some six months after the Form 5743 March 31, 2022 deadline.

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Such callous financial interests were thoroughly trashed by the Sixth Circuit in *Ingram v Wayne County*, 81 F4th 603 (August 31, 2023) ("Finally, the government's interest here is anything but weighty. Although Wayne County ostensibly seized the vehicles because of reasons related to health, safety, and/or drugs, the record suggests otherwise—that the county seized the vehicles in order to obtain proceeds from fees." *Id.* at 619).

Ingram, supra makes it clear that "a process" does not equate with "due process," and it is the Court's responsibility to weigh and measure the process to make sure it is "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard' . . . to insure that they are given a meaningful opportunity to present their case." Citing *Mathews v Eldridge*, 424 US 319, 349; 96 S Ct 893 (1976) (quoting *Goldberg v Kelly,* 397 US 254, 254 and 268–69; 90 S Ct 1011(1970)).[30] But the most troubling aspect of PA 256 is that the notice requirement is calculated to take advantage of the "capacities and circumstances" of the foreclosed parties instead of in consideration of those capacities and circumstances. PA 256 makes a mockery of "insuring" that owners of surplus proceeds will have a meaningful opportunity to present their case. The word insure, as used in this context by the Supreme Court, should not be deemed a nugatory word. The State's view that "a process" is good enough also eviscerates *Mathews*', *supra*, use of the word "tailored". If any process was sufficient, there would be no need for "tailoring". In that light, *Ingram* drove the point home:

[30] The burdens imposed by narrow filing windows (three months for Form 5743 and three and a half months for claim filing) fall especially hard on foreclosed property owners. Death, disability and incapacity are common circumstances that contribute to foreclosure and often continue to complicate equity owners' lives after foreclosure. On top of these pre-existing circumstances, many equity owners are also facing impending homelessness. This state has a public policy of flexibility concerning procedural requirements, especially where vulnerable citizens are impacted, which is evident in countless statutes and judicial doctrines. This Court should set aside the notice and claim filing deadlines because they are unduly burdensome and result in unreasonably harsh consequences for surplus proceeds owners.

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> [D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. [D]ue process is flexible and calls for such procedural protections as the particular situation demands." Mathews, 424 U.S. at 334 (citation omitted). Therefore, in defining "timely," we must remember due process is somewhat fact dependent.
>
> *Ingram* at 620.

The timing of the notice of intention requirement is antithetical to due process. Any due process analysis requires both the property and the timing of the deprivation to be identified specifically pre-deprivation. In other contexts, a notice of claim is required after a cause accrues – "when all the necessary elements have occurred and can be alleged in a proper complaint." *Thomas v Process Equip Corp,* 154 Mich App 78, 86; 397 NW2d 224 (1986). But Form 5743 is due before any claim is possible, before it is apparent whether any proceeds will be available and ostensibly before any taking has occurred. *Rafaeli*, *supra*, at 476 (takings claim are not compensable until after tax sale occurs). This requires clairvoyance on the part of surplus proceeds owners. Cf. *Mays v Snyder*, 323 Mich App 1, 36 n 9; 916 NW2d 227 (2018), *sub nom Mays v Governor of Michigan*, 506 Mich 157; 954 NW2d 139 (2020) (rejecting government's argument that a statutory notice of claim deadline was reasonable because "plaintiffs only needed to know that a claim was possible" in order to comply).[31]

PA 256 impermissibly requires surplus proceeds owners to file a Notice of Intention (Form 5743) with the FGU to give notice that they intend to retain their interest in their surplus proceeds. But in the context of property rights, the onus to provide notice of taking is thrust upon the governmental unit initiating the taking, not upon the property owner to preserve their rights.

[31] At least one court has found PA 256 unconstitutional for the reason that the "res" which was being forfeited did not yet exist at the time the notice was required. See *In the Matter of the Petition of the Berrien County Treasurer*, Opinion and Order Denying Petitioner's Motion for Reconsideration, Case No. 2020-0105-CH, **(Exhibit G)**.

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The concept that the property owner is required to initiate notice to continue that person's ownership finds no foundational support in the Michigan Constitution or the United States Constitution. Rather, once the property is identified, if the government wishes to take it, they must initiate the appropriate notice, then, after due process is satisfied, just compensation must be paid. Changing the property at issue illustrates the absurdity of PA 256's notice requirement. Assume for example that the State passed a law requiring vehicle owners to file an annual notice indicating their intent to retain ownership of their vehicle -- and if vehicle owners missed that deadline, their ownership interest automatically escheated to the applicable governmental unit. There is no doubt that everyone would be outraged and quick to identify this scenario as a textbook example of an unconstitutional taking in clear violation of the Michigan and US Constitutions. The same is true here. In *Rafaeli,* the Michigan Supreme Court made it abundantly clear that surplus proceeds constitutionally belong to the former property owner. To take that property, ***the governmental entity*** must provide ***both*** due process and just compensation. Surplus proceeds owners should not be required to provide notice to retain their property.

It is worth noting that the procedural requirements of PA 256 are also directly contrary to *Rafaeli* since they require surplus proceeds owners to file a Notice of Intention ***before*** they even have an identifiable property right which gives rise to such claim. *Rafaeli* is clear that the former property owner does not have a claim until tax foreclosure proceeds are identifiable after the property is sold.[32,33] As such, a property owner does not have a claim to make prior to

[32] "As our holding today makes clear, the property 'taken' is the surplus proceeds from the tax foreclosure sale of plaintiffs' properties to satisfy their tax debts." *Rafaeli,* 505 Mich at 482. And there is no surplus on July 1 when PA 256 mandates a Notice be filed.

[33] "In the same way that the foreclosure process does not eliminate the former property owner's interest in the personal property that sits on the foreclosed land, the vesting of fee simple title

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the foreclosed property being sold.[34,35] Obviously, a property interest which arises out of the sale of the property cannot constitutionally be taken before it can even be identified or claimed.[36] Due process would require appropriate notice and opportunity for hearing **after** the property interest is in existence and can be identified. Despite PA 256 claiming to be curative, FGUs have attempted to bar surplus proceeds owners from obtaining their surplus proceeds when the Notice of Intention required by PA 256 is not timely submitted.[37] Enforcement of PA 256 in this manner results in an unconstitutional taking of the owners'

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to the real property does not extinguish the property owner's right to collect the surplus proceeds ofthe sale. This is a separate property right that survives the foreclosure process. Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property- no more, no less." *Rafaeli,* 505 Mich at 476, and 483-484. (footnotes omitted).

[34] "…a former property owner has a compensable takings claim **if and only** if the tax-foreclosure sale produces a surplus. Once the sale produces a surplus, the former owner may make a claim for the surplus proceeds." *Rafaeli,* 505 Mich at 477 (emphasis added).

[35] Accordingly, we must canvass the body of law so that we may ascertain the "common understanding" of Article 10, § 2 and the property rights protected thereunder.";"[i]t is clear that our 1963 Constitution protects a former owner's property right to collect the surplus proceeds **following** a tax-foreclosure sale under Article 10, § 2." *Rafaeli,* 505 Mich at 456 and 473.

[36] "Further, in the context of eminent domain, it was axiomatic that the government shall take no more property than necessary for the particular public use for which the taking was done This Court has consistently recognized this constitutional precept. Throughout this state's history, thisCourt has held that the government's takings power is limited to only that property which is necessary to serve the public." *Rafaeli,* 505 Mich at 467 (footnotes omitted).

[37] When a Notice of Intention is submitted to the FGU might have some functional difference **if** the FGUs had a property interest in the remaining proceeds. Indeed, the approach to this issue under PA 256 seems to assume that FGUs have a property interest in the remaining proceeds and that surplus proceeds owners must take an affirmative step to reclaim that property interest. This approach would mandate that the FGU had already taken the property and all that the former owner had was a claim for just compensation. To the contrary, *Rafaeli* was clear that remaining proceeds belong to the former property owner and the FGUs have an affirmative obligation to return that property after it is generated at the sale.

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property without compensation.[38] *Rafaeli* also recognized this property right as a constitutional vested one and went on to state that " ... the Legislature may not write this constitutionally protected vested property right out of existence." *Id.* at 459 and 473 n 108. Yet, that is precisely what would occur if FGUs are successful in applying PA 256 in this manner.

With the release of *Tyler*, PA 256 became even more problematic. Under a federal law analysis, property rights are federally protected from government and transcend the ability of the state legislature to modify them. The state legislature cannot impede or redefine those rights. The *Tyler* court founded its decision in federal rights to ensure that they could not be tampered with by the legislature. The Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected." *Felder v Casey*, 487 US 131, 151; 108 S Ct 2302; 101 L Ed 2d 123 (1988).

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." US Const, Am XIV, § 1. Michigan guarantees the same: "No person shall … be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. Due process of law entitles a person whose interest is at stake to notice and an opportunity to be heard. *Dusenbery v United States,* 534 US 161, 167, 122 S Ct 694, 151 L.Ed.2d 597 (2002), quoting *United States v James Daniel Good Real Prop,* 510 US 43, 48, 114 S Ct 492, 126 LEd.2d 490 (1993) (emphasis added).

> The touchstone of due process is protection of the individual against arbitrary action of government… By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions. And by barring certain

[38] The State Legislature cannot remove self-executing constitutional rights. See *Promote the Vote v Secy of State,* 333 Mich App 93; 958 NW2d 861 (2020).

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> government actions regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being used for purposes of oppression.
>
> *Daniels v Williams*, 474 US at 331-32 (1986) (internal citations and quotations omitted).

The article cannot be so construed as to leave the legislature free to make any process "due process of law," by its mere will. *Den ex dem Murray v Hoboken Land & Imp Co*, 59 US 272, 276; 15 L Ed 372 (1855) ("It is manifest that it was not left to the legislative power to enact any process which might be devised"). Affording due process in a specific case cannot save a statute that makes such conduct dependent upon the discretion of the government. *People v Campbell*, 39 Mich App 433, 439; 198 NW2d 7 (1972) (invalidating vehicle forfeiture statute). Due process is imposed upon the State and its agencies, not upon citizens. *Himes v City of Flint*, 38 Mich App 308, 315; 196 NW2d 321 (1972).

If the State is correct, then PA 256 allows confiscation of property by default. In this scenario, the government can shift the burden of notice onto citizens, and without having to do anything else, it magically and automatically acquires ownership of their private property. The FGU did not notify property owner that it was going to confiscate his/her proceeds, and PA 256 does not require FGUs to do so. It merely requires FGUs to post, along with the foreclosure notice, "an explanation of the right … to claim that person's interest in any remaining proceeds…." MCL § 211.78i(3)(d). Neither the GPTA nor the FGUs' foreclosure notices satisfy due process with regard to the deprivation of proceeds from the tax sale. Like the plaintiffs in *Rafaeli*, the owners of the surplus proceeds are not disputing the validity of the foreclosure. The FGUs' notices, while sufficient for purposes of foreclosing the real property, are insufficient to provide

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notice and due process absent a pending confiscation of personal property, much less provide a hearing with regard to that confiscation.[39]

The foreclosure notices were also insufficient because they did not specifically identify the property to be taken. The property at issue was not in existence yet and the amount of proceeds was unknown. *Rafaeli* held that equity owners' right to recover surplus proceeds only arises after the sale. Once that has occurred, then procedural due process must be observed. The FGU did not provide any due process to owners of surplus proceeds after their proceeds became identifiable. It is important to identify the property interest at issue specifically and not generically. Even in a criminal context, it is necessary to specifically identify the property being taken; the government cannot say to a convict that it intends to take "all your interest in property related to the crime." Such notice would potentially allow the government's seizures to be endless and render the notice meaningless.

Finally, even if real estate the foreclosure notices were sufficient to announce a confiscation of surplus proceeds, due process also requires a timely hearing. See *Ingram supra* (holding that a hearing regarding seized property must be held within weeks of the seizure). There is no hearing for those that did not file a Notice of Intention and PA 256 fails to provide for a timely hearing for those who did file a Notice of Intention. The FGU began withholding surplus proceeds in August and September but no hearing are then provided for at least 9 months. The foreclosure hearings were not meaningful opportunities to be heard with regard to proceeds. It

[39] While the GPTA authorizes notice by posting, it is difficult to see how such notice can attach to proceeds which do not yet exist. Similarly, it is not clear that mailing notice to the property facing foreclosure satisfies due process when the equity owner does not reside at the address. In an analogous case, the sufficiency of mailed notice to a decedent is presented directly in Court of Appeals Docket No. 362464.

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would be meaningless to invite an equity owner to appear at a foreclosure hearing to contest a deprivation that had not yet occurred of funds that did not yet exist.

A notice of claim deadline that is unreasonable may be "set aside," without a showing of substantial compliance or prejudice.[40] *Mays, supra,* at 32. The question of reasonableness is made on a case-by-case basis. In *Mays*, the plaintiffs failed to satisfy the notice provision of the Court of Claims Act (CCA), MCL § 600.6401 et seq., which is a condition on the right to sue governmental agencies of the State of Michigan. The court observed that the notice of claim deadline arrived before plaintiffs could have known their claim had accrued. *Mays* at 35 (the "event giving rise to the cause of action was not readily apparent at the time of its happening"). The Court held that relief from the notice of claim deadline was warranted because under those circumstances, depriving plaintiffs of a remedy for alleged constitutional violations was too harsh.

IV. PA 256 VIOLATES REQUIREMENTS OF JUST COMPENSATION.

The FGUs advocates that if due process is met by PA 256, they are then excused from paying just compensation. While that may be the thought of governmental officials who have forgotten that their job is to serve the public and not victimize the public, at least our state and federal constitutions stand in the way of such abhorrent thoughts.

> The strength of the Constitution lies entirely in the determination of each citizen to defend it. Only if every single citizen feels duty bound to do his share in this defense are the constitutional rights secure.
>
> - *Albert Einstein*

[40] Although this doctrine does not require a showing of prejudice, the FGUs cannot demonstrate any prejudice. First, government does not have a right to due process. *Himes v City of Flint*, 38 Mich App 308, 315; 196 NW2d 321 (1972) (noting that Due process is imposed upon the State and its agencies, not upon citizens). Second, as detailed elsewhere, the FGU does not have a property interest at stake.

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The Takings Clause's purpose is "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Lingle v Chevron,* 544 US 528, 537; 125 S Ct 2074 (quoting *First English Evangelical Lutheran Church of Glendale*, 482 US at 315; 107 S Ct 2378). "The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right." *Knick, supra.* at 2171.

A. The FGU Has No Legal Interest in Surplus Proceeds.

As noted above, *Rafaeli* held that surplus proceeds are the property of equity owners. In that regard, *Rafaeli* is consistent with the GPTA which declares that the FGU has no ownership interest in the surplus proceeds. ("All money, property, and assets acquired by the county treasurer, whether as revenues or otherwise, shall be held by it in trust for the taxing units in the county for which the taxes are levied. The county shall have no right, title, or interest in the delinquent tax revolving fund except for the right to payment provided for in section 87b(7) or 87c(3)." MCL § 211.87b(1).) The only interest that the County could conceivably allege having in surplus proceeds is the five percent sales commission granted by MCL § 211.78t(9) ("The court shall require payment to the foreclosing governmental unit of a sale commission equal to 5% of the amount for which the property was sold"). Other than the sales commission, PA 256 does not provide for any of the remaining proceeds to be paid to the FGU; they must be disbursed. MCL § 211.78t(9) ("The court shall allocate any remaining proceeds based upon its determination and order that the foreclosing governmental unit pay applicable remaining proceeds to 1 or more claimants consistent with its determination under this subsection").

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PA 256 does not authorize FGUs to seize funds. In other circumstances, the State holds private property indefinitely without confiscating it. *See* Uniform Unclaimed Property Act, Public Act 29 of 1995, codified at MCL § 567.238; Michigan Unclaimed Property FAQ, https://unclaimedproperty.michigan.gov/app/faq-general (last viewed May 15, 2023) ("Treasury takes custody of the property but never assumes ownership. Properties held by Treasury are claimable in perpetuity"). The government may seize and forfeit assets in very limited situations such as for punitive purposes in criminal cases. See *In re Forfeiture of $109,901*, 210 Mich App 191, 193; 533 NW2d 328 (1995) (upholding civil asset forfeiture related to criminal conviction).[41] Such assets are clearly defined as "subject to forfeiture" and the government's interest is explicitly granted by statute. *Id*. This is not one of those situations. Failure to pay property taxes on time is not a crime, and surplus proceeds are not subject to forfeiture under the GPTA. See *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 450; 952 NW2d 434 (2020) (declining to apply civil asset forfeiture precedent). But the FGU could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a "classic taking in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council Inc* v *Tahoe Regional Planning Agency*, 535 US 302, 324 (2002). "The consensus that a government could not take more property than it was owed held true through the passage of the Fourteenth Amendment." *Tyler* at 641. "The Takings Clause "was designed to bar Government

[41] Notably, the issue of whether retention of surplus proceeds violates the Eighth Amendment is implicated here. In *Tyler*, the United States Supreme Court granted certiorari on that question but resolved the case on other grounds. *Tyler v Hennepin County, Minnesota*, 598 US 631 (2023) (Docket No. 22-166); slip op at 14. The question is the subject of the sole concurring opinion. *Id*. (GORSUCH, J., concurring); slip op at 1. Joined by Justice Jackson, Justice Gorsuch was clear that the Eighth Amendment was certainly in play when equities were taken as part of tax foreclosures.

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from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong*, 364 US at 49." *Tyler* at 647.

The FGUs' limited interest is reflected in its limited role in the disbursement process. If the FGU has any interest in the outcome of the hearing, it is limited to the five percent sale commission. Yet, the FGUs are using the toe-hold of the GPTA precluded by *Tyler* to gain possession of, and keep possession of, surplus proceeds belonging to others.

B. Michigan's Constitution Guarantees Compensation.

"Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, Art X, § 2. The FGUs' failure to refund owners' surplus proceeds is a taking requiring just compensation. *Rafaeli, LLC v Oakland County*, 505 Mich 429, 476-77; 952 NW2d 434 (2020) (government must return proceeds "or face a takings claim").

Michigan's Takings Clause is a self-executing provision. See *Rafaeli*, 505 Mich at n 54; *Detroit v Oakland Circuit Judge*, 237 Mich 446, 450, 212 NW 207 (1927) (all provisions of the Constitution, unless drafted only to reflect mere general principles, are self-executing). "It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision." *Wolverine Golf Club v Hare*, 24 Mich App 711, 725; 180 NW2d 820 (1970) (citing *Soutar v St Clair County Election Comm'n*, 334 Mich 258; 54 NW2d 425 (1952). "The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions, is that the rights guaranteed shall not be curtailed or any undue burdens placed thereon." *Id*. (quoting *Hamilton v Secretary of State*, 227 Mich 111, 125; 198 NW 843 (1924)) (internal quotation marks omitted); *see also Promote the Vote v Secy of State,* 333 Mich App 93; 958 NW2d 861 (2020) (Legislature cannot remove self-executing constitutional

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rights). This rule allows the Legislature only to "impose *reasonable* procedural restrictions on a claimant's pursuit of claims under self-executing constitutional provisions." See *Mays v Snyder*, 323 Mich App 1, 32 n4; 916 NW2d 227 (2018), aff'd *sub nom Mays v Governor of Michigan*, 506 Mich 157; 954 NW2d 139 (2020) (emphasis in original).

Equity owners' rights to surplus proceeds enjoy a heightened level of protection under the Michigan Constitution. See *Rafaeli* at 454-56, 475-76. The Michigan Supreme Court recognized the right "to be 'vested' such that the right is to remain free from unlawful governmental interference." *Id*. at 471. A vested right "must be more than a mere expectation as may be based upon an anticipated continuance of the present general laws; it mut have become a title, legal or equitable, to the present or future enjoyment of property…" *Id*. Equity owners' rights to recover their surplus proceeds goes "beyond a mere expectancy or claim or entitlement. It is as much an interest in property as our kitchen tables…" *Id*. Although "the legislature is typically free to abrogate common law, it is powerless to override a right protected by Michigan's Takings Clause." *Id*. at 473 (emphasis added); see *also Ramey v State*, 296 Mich 449, 461; 196 NW 323 (1941) (holding that "vested rights may not be impaired by legislative action"). Accordingly, the legislature cannot make the right to proceeds "simply vanish[] into thin air." *Rafaeli* at 476.

The FGUs will urge this Court to make equity owners' right to compensation vanish into thin air by reading an additional phrase into Michigan's Takings Clause: "Private property shall not be taken for public use without just compensation *unless property owners fail to comply with pre-taking administrative procedures*." This Court should decline to eviscerate the Takings Clause by making the right to just compensation optional at the state's discretion. If the state can condition its obligation to pay just compensation on any pre-taking, pre-claim administrative procedure that

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the state designs then the right to compensation is illusory. It is reduced to a privilege that the state allows at its whim.

It is abundantly clear that, despite *Rafaeli, Tyler,* the Michigan Constitution, and the United States Constitution, the FGUs plan on keeping other people's money under the guise that the FGU converts ownership of the surplus proceeds as a function of possession. PA 256 is silent as to ownership (which may contribute to its many flaws). But for the FGU to keep the money, it must claim ownership. If the FGU claims change of ownership occurred prior to July 1, one analysis applies. If the FGU claims ownership changes after July 1 but before the trial court rules on motions, another analysis likely applies. And if the FGU asserts that change of ownership occurs after the trial court rules on the motions, yet another takings analysis likely is necessary. At a minimum, such definition is necessary to define when the statute of limitations begins to run.

By contrast, the GPTA does not lack clarity as to when ownership of the fee to the real property occurs. See MCL § 211.78k(5)(b). *Rafaeli* distinguished title to real estate from an interest in surplus proceeds.[42] *Rafaeli* makes it clear that neither the notices prior to foreclosure nor the foreclosure order terminate an equity owner's rights to surplus proceeds. *Rafaeli* also made it clear that equity owners' rights were not enforceable until after the foreclosure sale produced surplus proceeds.

The United States Supreme Court addressed a distinction between federal and state takings claims in *Williams County v Hamilton Bank*, 473 US 172; 105 S Ct 3108 (1985)[43] ruling that just

[42] "… Notably, plaintiffs do not dispute the legitimacy of defendants' authority to foreclose on their properties, nor do plaintiffs contest the adequacy of defendants' efforts to notify plaintiffs of the tax delinquency, forfeiture, and foreclosure. Instead, plaintiffs challenge defendants' retention of the surplus proceeds as an unconstitutional taking. …" *Id.* at 452-453.

[43] For clarity, *Knick, supra,* overruled the *Williamson* requirement that resort to federal courts can only be commenced after efforts to recover have been exhausted in state court.

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compensation under the Fifth Amendment is not required prior to a taking. ("Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a " 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Id*. at 194). In contrast, Michigan's Constitution does require just compensation be paid before the taking. (Article X, Section 2).[44]

Adding to a FGUs' woes on this issue, the FGUs cannot define what their "notice" is really addressing. Is it an "expectancy" on July 1?[45] A cause of action does not exist before all the elements necessary to that cause of action exist. *Thomas v Process Equip Corp,* 154 Mich App 78, 86; 397 NW2d 224 (1986). If an equity owner demanded his or her property back on July 1, the FGU would undoubtedly profess that the right could not be enforced because *Rafaeli* said no claim exists until the foreclosed property is sold and produces a surplus ("… Once the sale produces a surplus, the former owner may make a claim for the surplus proceeds"). *Rafaeli, LLC* at 477. And the FGU would be correct on that point. But when that property comes into existence and becomes identifiable, the FGU has another answer – the property was gone before it came into existence. No matter the facts or circumstances, the FGUs always find a way to prevent reuniting owners with their surplus proceeds.

The Michigan Supreme Court made the rule clear:

> Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to

[44] This distinction is the likely reason that Michigan's eminent domain statute requires a good faith estimate of value (MCL § 213.55(1) and the depositing of those funds with the court before commencement of condemnation (MCL § 213.55(5). If Michigan's Constitution did not require prior payment, government could simply take property and "work out the details later."

[45] For example, an expectancy or contingent claim might exist on July 1, but the property itself not exist until the surplus is generated.

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> the foreclosure and sale of the property—no more, no less. [*Rafaeli, LLC* at 483-484.]
>
> " … 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. While the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause." [*Rafaeli* at 473.][46]

C. The United States Constitution Guarantees Compensation.

The Fourteenth Amendment[47] also guarantees compensation for equity lost through a tax foreclosure. (See *Tyler, supra,* equity converted to excess proceeds via tax sale and *Hall v Meisner*, 51 F4th 185, 196 (CA 6, 2022) (real property not sold, deeded to government).[48] *Tyler* held that the state's taxing power could not justify confiscation of more property than was due - and called such confiscation a "classic taking". *Tyler*, 598 US at 639. Like the Michigan Supreme Court,

[46] The concurring opinion of Justice Viviano is even more concise on this issue:

> Though the majority does not make it explicit, I understand its opinion as reasoning that because various past cases and other materials appear to recognize some interest on the part of the previous landowner in the surplus proceeds after a tax foreclosure, the ratifiers would have understood the term "property" in the Constitution to encompass such a property right to surplus proceeds. Consequently, that property right must be considered frozen and inviolable under our Takings Clause. And because it is enshrined in the Constitution, the Legislature may not abrogate that common-law right; to do so would run afoul of the Takings Clause. [*Rafaeli* at 487 (VIVIANO, J., concurring).]

[47] *Chicago, B & QR Co v City of Chicago*, 166 US 226, 236–37, 17 S Ct 581, 584–85, 41 L Ed 979 (1897) (holding that the Fourteenth Amendment incorporates the Fifth Amendment just compensation requirement).

[48] *Hall* contains a helpful review of the law of equitable title but is not binding because it limited its holding to the facts in that case. *Hall*, like *Rafaeli*, reviewed the version of Michigan's GPTA prior to the passage of PA 256, when no procedure existed for former owners to recover the value of their equity.

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the United States Supreme Court was also quite clear that the government cannot get more – whatever its scheme or mechanism is:

> The Takings Clause was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more.
>
> *Tyler* at 647 (internal quotes and citation omitted).

If the Michigan Constitution did not require compensation prior to taking, *Williamson, supra,* would still be applicable as to the need to provide a remedy post-deprivation: "Therefore, a takings claim is not ripe "unless or until the State fails to provide an **adequate postdeprivation remedy for the property loss."** *Id.* at 195 *Hudson v Palmer*, 468 US 517, 532 n.12; 104 S Ct 3194 (1984))." "[T]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner" and "because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time." *Knick* at 2170 (overruling *Williamson supra* which had required exhaustion of state law remedies).

Even without *Knick*'s clear holding, the Supremacy Clause of the United States Constitution bars a legislature from abolishing federal constitutional rights by state statute or through alternate, "preclusive" causes of actions. "[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v Campbell*, 402 US 637, 652; 91 S Ct 1704; 29 L Ed 2d 233 (1971).

Tyler recognized the potential for governmental shenanigans finding a federally protected property right that even States could not mess with: "([T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to

take."). So we also look to "traditional property law principles," plus historical practice and this Court's precedents." *Tyler* at 638. Requiring a Notice to be filed before the claim even exists is one of those shenanigans.

CONCLUSION

PA 256 does not implement *Rafaeli*. Rather, it attempts to eviscerate it. It violates the Constitutions of both Michigan and the United States. This Court should reject the State's Application. In the alternative, this Court should require that constitution deficiencies be fully vetted.

Date: November 22, 2023

Respectfully Submitted,

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STATEMENT OF COMPLIANCE

Pursuant to Michigan Appellate Rules, this brief contains 14,448 words which is within the word limit proscribed. This figure was obtained utilizing the word count feature in Microsoft Word 365 Version 2305 and includes all text, footnotes, quotations, and otherwise conforms with the Court's rules.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2023, the foregoing document was served on all parties of record via electronic mail through the Court's electronic filing system.

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