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STATE OF MICHIGAN

IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

NICK YONO,

Plaintiff-Appellee,

vs.

INGHAM COUNTY;
INGHAM COUNTY TREASURER; and
INGHAM COUNTY LAND BANK FAST TRACK AUTHORITY,

Defendants-Appellants.

Supreme Court Case No.: 166791
MCOA Case No. 362536
Lower Court Case No. 20-697-CZ

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SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS INGHAM COUNTY, INGHAM COUNTY TREASURER AND INGHAM COUNTY LAND BANK FAST TRACK AUTHORITY AS DIRECTED BY ORDER OF NOVEMBER 1, 2024

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SUPPLEMENTAL ARGUMENT

By order of November 1, 2024, this Court directed that the parties submit "supplemental briefs" to address two questions. The first question is "*whether the Court of Appeals erred in . . . holding that the plaintiff successfully established that the defendants violated the Takings Clause of the Michigan Constitution, Const 1963, art 10, §2*." The second question is "*whether the Court of Appeals erred in . . . directing the Ingham County Circuit Court to calculate the 'surplus' owed on the property by reference to the value of the property less what the plaintiff owed on it when the foreclosure occurred*."

These questions will be addressed in turn. As described below, the answer to the first question effectively answers the second question as well.

I. NO "TAKING" VIOLATIVE OF CONST 1963, ART 10, §2 HAS OCCURRED.

This Court correctly identified the foundational question as whether the Defendants violated the Takings Clause of the *Michigan* Constitution. Plaintiff-Appellee Yono pleaded his "unconstitutional taking" claim solely by reference to the Michigan Constitution. **(Appellants' Appx., p. 11, Verified Complaint, ¶ 24)**. The Complaint makes no reference whatsoever to the federal Fifth Amendment.

But the consistency of Michigan law with federal law in the context of tax foreclosure compensation claims should not be ignored. The Court of Appeals decided the present case by reference to its own prior decision in ***Jackson v Southfield Neighborhood Revitalization Initiative,*** ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 361397) and the federal Sixth Circuit decision in ***Hall v Meisner***, 51 F4th 185 (CA 6, 2022), upon which the decision in the ***Jackson*** case was based. **(Appellants'**

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Appx., pp. 78-80, COA Majority Opinion, pp. 4-6). But by failing to recognize the fundamental factual dissimilarity between the present case and the shared factual scenario in ***Jackson*** and ***Hall***, the Court of Appeals in the present case erroneously applied ***Hall*** in a manner that subverts the emphatic limitations imposed upon tax foreclosure compensation by this Court under Michigan law in ***Rafaeli, LLC v Oakland County***, 505 Mich 429; 952 NW2d 434 (2020).

Context matters. As this Court recognized in ***Rafaeli***, tax foreclosure is not an exercise of eminent domain whereby the objective of government is to obtain possession of real estate for itself. ***Rafaeli***, 505 Mich at 480; 952 NW2d at 464. Rather, the objective of government in tax foreclosure is to obtain monetary satisfaction of the tax debt through whatever proceeds can be recovered via sale.

In ***Rafaeli***, this Court held that the former owners of tax-foreclosed property have a common law right (protected by Const 1963, art 10, §2) to recover the "surplus proceeds," if any, that result from a tax-foreclosure sale. ***Rafaeli***, 505 Mich at 470-3, 477; 952 NW2d 459-60, 462. By historical analysis looking back to the Magna Carta, this Court recognized that the common law compensatory interest of the former owner of tax-foreclosed property exists only to the extent that proceeds from the tax foreclosure sale exceed the former owner's debt to the government. ***Rafaeli***, 505 Mich at 462-74; 952 NW2d at 454-60. "Indeed, a former property owner only has a right to collect the surplus proceeds from the tax-foreclosure sale; that is, a former property owner has a compensable takings claim *if and only if* the tax-foreclosure sale produces a surplus." ***Rafaeli***, 505 Mich at 477; 952 NW2d at 462, *emphasis added*.

With that context, when property is subjected to tax foreclosure and sold to cover

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the former owner's tax debt, the property that may be improperly "taken" by the government is "the surplus proceeds, not Plaintiffs' real properties." ***Rafaeli***, 505 Mich at 483; 952 NW2d at 465. "[W]hen 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 483-4; 952 NW2d at 466.

Therefore, it is only if the government fails to return "surplus proceeds" to the former owner of the property that the government's action "constitutes a government taking under the Michigan Constitution." ***Rafaeli***, 505 Mich at 479; 952 NW2d at 463. Significantly, the federal Supreme Court and the federal Sixth Circuit have confirmed this same result for purposes of the Takings Clause of the federal Fifth Amendment.

Through historical analysis parallel to that undertaken by this Court in ***Rafaeli***, the federal Supreme Court has held that the Fifth Amendment protects the interest of the former owner of tax-foreclosed property in whatever "overplus," "surplus" or "excess" of proceeds result from the tax-foreclosure sale of the property. ***Tyler v Hennepin County, Minnesota***, 598 US 631, 639-43 (2023). In ***Hall***, the federal Sixth Circuit likewise concluded by historical analysis that Anglo-American common law protects a compensatory interest of the former owner of tax-foreclosed property in the "surplus" of proceeds generated by the tax-foreclosure sale. ***Hall***, 51 F4th at 192-194.

As explained by the Sixth Circuit, a "public sale" has been deemed "the truest test of value of the landowner's equitable interest in the land." ***Hall***, 51 F4th at 193. The "surplus proceeds . . . represented the value of the equitable title thus extinguished." ***Id.***,

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at 194. "The surplus is merely the embodiment in money of the value of that equitable title." ***Id.***, at 195.

Therefore, this Court's own conclusion is legally and historically unassailable. "[A] former property owner has a compensable takings claim if and only if the tax-foreclosure sale produces a surplus." ***Rafaeli***, 505 Mich at 477; 952 NW2d at 462.

But the historical analysis in ***Hall*** led the Sixth Circuit to impose a caveat. Because public sale determines the measure of compensation, the government is *obligated* to offer the property for public sale. ***Hall***, 51 F4th at 194, citing ***Cooley, A Treatise on the Law of Taxation***, 489 (1886). And if the government fails to do so, it has committed a taking violative of the Fifth Amendment by way of denying the former owner the *opportunity* for a potential surplus of proceeds to be generated.

In ***Hall***, Oakland County and the City of Southfield took advantage of provisions of the General Property Tax Act to keep the ***Hall*** plaintiffs' former property in government hands via intergovernmental transfer without sale, so the plaintiffs had "no . . . opportunity at all" to recover surplus proceeds. ***Hall***, 51 F4th at 196. In *that* circumstance, the Sixth Circuit remanded the case for determination of compensation by some (undefined) alternative means.

In ***Jackson***, the Court of Appeals confronted this same transactional scheme involving Oakland County, and the City of Southfield, as had been addressed by the Sixth Circuit in ***Hall***. Understandably, the Court of Appeals followed the reasoning and result of ***Hall*** - - particularly given that the ***Jackson*** plaintiffs had asserted claims under both the federal and Michigan Constitutions. ***Jackson***; slip op at 10-18. In the absence of a public sale, the Court of Appeals reasoned that Michigan law, as much as the Fifth

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Amendment, required compensation to be calculated based on the value of the real property itself. ***Jackson***; slip op at 22.

But under both the Fifth Amendment and the Michigan Constitution, the ***Jackson*** panel reached this result by specific reference to the fact that "*a public sale never occurred*," ***Id.***, at 14. In that circumstance," the government has retained "[a] piece of real property with a certain value." ***Id.***, at 21.

This is not the circumstance in the present case with regard to the former Yono property. The Ingham County Treasurer tried to sell the property via public sale during the statutory period from "the third Tuesday in July immediately succeeding the entry of the [foreclosure] judgment" through the treasurer's December 30 deadline for sale efforts. MCL 211.78m(2) and (6). The property was then transferred by the treasurer to the Ingham County Land Bank by mandate of MCL 211.78m(7), because it failed to find a buyer by that date.

And the effort to sell the property has continued ever since. **(Appellants' Appx., pp. 20-44, Marketing Brochure)**. Unlike the plaintiffs in ***Hall***, Yono has <u>not</u> been denied the opportunity for public sale to generate surplus proceeds. Instead, the property has failed to find a buyer - - despite the continued efforts of the County to be rid of the property (and the ongoing expense of maintaining it).

Under ***Rafaeli***, Yono could demand compensation "only if" his former property had sold for an amount generating "surplus proceeds" over his debt. Because no such "surplus proceeds" exist, no compensable property interest has been "taken" from Yono for purposes of Const 1963, art 10, §2.

The attempted public sale has demonstrated that (for whatever reason) the

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property has no market value adequate to cover the accumulated "debt" of the delinquent Yono (as defined by ***Rafaeli***). And, even accepting the Sixth Circuit Analysis in ***Hall***, this demonstrated *lack* of market value is the "truest test" for determining whether the property has any value for which compensation is owed. ***Hall***, 51 F4th at 193.

This Court was emphatic in ***Rafaeli*** that the public should not bear financial loss occasioned by tax delinquency, while the delinquent taxpayer escapes (or even benefits). ***Rafaeli***, 505 Mich at 483; 952 NW2d at 465-6. But that is precisely what will befall the public in Ingham County, if they are required to compensate Yono for a property that did not yield any proceeds to cover Yono's debt *and* has done nothing but accumulate continued expense to the county since the foreclosure in 2017.

Moreover, even if the County eventually finds a buyer willing to consummate a purchase, and even if such sale results in surplus proceeds, no "taking" will occur *unless* Yono takes timely action to recover his surplus proceeds in accordance with the procedures of MCL 211.78t. This would be true under *either* Michigan or federal law.

Specifically, this Court's ***Rafaeli*** opinion noted that the legislature could "enact[] legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." ***Rafaeli***, 505 Mich at 473; 952 NW2d at 460, n. 108. And this Court so noted by reference to ***Nelson v City of New York***, 352 US 103 (1956). ***Id***.

The federal Supreme Court has likewise referenced ***Nelson*** to confirm the constitutionality and enforceability of procedural rules for recovery of surplus proceeds under the Fifth Amendment as well. ***Tyler***, 598 US at 644. In ***Nelson***, New York City had foreclosed and sold property to cover water charge delinquencies, and the former owners

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had been denied recovery of surplus proceeds due to their failure to comply with city ordinances providing procedures to make such recovery. As explained in ***Tyler***, by failing to "take advantage of this procedure," the owners had "*forfeited* their right to the surplus." ***Tyler***, 598 US at 644, *emphasis added*. Nevertheless, "[b]ecause the New York City ordinance did not absolutely preclude an owner from obtaining the surplus proceeds of a judicial sale, but instead simply defined the process through which the owner could claim the surplus, we found no Takings Clause violation." ***Id.***

In the wake of this Court's ***Rafaeli*** decision, the legislature enacted MCL 211.78t. That statute now "defines the process" through which Yono could obtain surplus proceeds (if such ever arise) by timely compliance with the applicable procedural steps.

And in ***Schafer v Kent County***, ___ Mich ___; ___ NW2d ___ (2024) (Nos. 164975, 165219), this Court held these procedures of MCL 211.78t to be retroactively applicable for the benefit of claimants such as Yono (whose former property was foreclosed pre-***Rafaeli***). ***Schafer;*** slip op at 33-6. *Only <u>if</u>* surplus proceeds arise - - and then *only <u>if</u>* such surplus proceeds are wrongly denied to Yono by order resulting from the allocation hearing of MCL 211.78t(9) - - could a "taking" occur.[1]

This Court's ***Rafaeli*** opinion recognized "inverse condemnation" as the appropriate theory of recovery, and such claim accrues when the government has "permanently deprived" the former owner of their property. ***Rafaeli***, 505 Mich at 454; 952 NW2d at 450.

[1] This court's ***Schafer*** opinion also afforded statute of limitations relief for the protection of persons whose property was foreclosed and sold pre-***Rafaeli***. ***Schafer***; slip op at 39-41. <u>But Yono does not need such relief</u>. Because Yono's former property has not yet yielded any surplus proceed that could potentially be "taken" by the County, no takings claim has yet accrued and the statue of limitations applicable to such a claim has not yet begun to run.

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No such deprivation occurs, unless "surplus proceeds" exist *and* such proceeds are then denied to the former owner (and kept in the hands of the government) following the MCL 211.78t(9) hearing.[2]

This is akin to the "finality" requirement for a federal Fifth Amendment claim. ***Barber v Charter Township of Springfield, Michigan***, 31 F4th 382, 388 (CA 6, 2022). No Fifth Amendment claim for "taking" of surplus proceeds can accrue *unless and until* the procedures of MCL 211.78t have been pursued to a "final" decision regarding the disposition of the proceeds. See ***Harrison v Montgomery County, Ohio***, 997 F3d 643, 650-1 (CA 6, 2021), ***Beaver Street Investments, LLC v Summit County, Ohio***, 65 F4th 822, 827 (CA 6, 2023).

In short, the Court of Appeals *erred* in holding that Plaintiff Yono "successfully established" that Ingham County, the Treasurer and the Land Bank had violated the Takings Clause of the Michigan Constitution. There has been no violation of the Michigan Takings Clause (or the federal Fifth Amendment), because Yono's former property has been offered for public sale. And because no "surplus proceeds" have been generated, there is nothing that could be "taken." There have only been further loss to the public, as the County must maintain property for which it cannot find a buyer.

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[2] If surplus proceeds are denied to the former owner as a consequence of such proceeds being awarded to a competing private claimant (e.g., the holder of a lien against the property or a mortgage on the property), of course, the former owner would have no basis to claim a "taking" by a county, treasurer or land bank. By reference to the familiar "bundle of sticks" illustration of property rights, this Court recognized that persons other than the former fee owner of tax-foreclosed property could have a claim to surplus sale proceeds. ***Rafaeli***, 505 Mich at 471; 952 NW2d at 459, n. 101. The statutory procedures of MCL 211.78t accommodate such property interests and protect the due process rights (notice and a hearing) of those who hold them. See MCL 211.78t(2)(f), (6)(f) and (9). Hence the mandate that the circuit court "shall allocate" proceedings among the claimants. MCL 211.78t(9).

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II. IN THE PRESENT CASE, PAYMENT OF COMPENSATION TO YONO (BY *ANY* CALCULATION) IS CONTRARY TO THE EMPHATIC HOLDING OF *RAFAELI*.

What has been said above confirms that the Court of Appeals also *erred* by directing the circuit court "to calculate the 'surplus' owed on the property by reference to the value of the property, less what plaintiff owed on it when the foreclosure occurred." **(Appellants' Appx., p. 80, COA Majority Opinion, p. 6)**. This Court was explicit that "a former property owner has a compensable takings claim *if and only if* the tax-foreclosure sale produces a surplus." ***Rafaeli***, 505 Mich at 477; 952 NW2d at 462, *emphasis added*.

The Court of Appeals went astray by reliance upon ***Jackson*** and ***Hall***. In those cases, Oakland County and the City of Southfield took deliberate steps to avoid public sale, so the City could retain the property for minimum bid and then transfer it at nominal cost to a pre-selected redeveloper. The former owners were deliberately denied the opportunity to recover surplus proceeds.

In the present case, by contrast, Yono has been denied surplus proceeds only because the "truest test" of value - - i.e., offer for public sale - - has shown the market value of Yono's former property to be less than the minimum bid required to cover Yono's tax delinquency and related debt as defined by this Court in ***Rafaeli***.

Payment of *any compensation* to Yono by *any measure* robs the public, which has been left holding nothing but a "white elephant" property at ever-mounting public loss due to the expense of maintaining it. This is precisely the result that this Court's ***Rafaeli*** opinion warned should not be allowed to occur. ***Rafaeli***, 505 Mich at 483-4; 952 NW2d at 465-6.

Even assuming that the deliberate avoidance of public sale justified a market value

compensation award in ***Hall*** and ***Jackson***, there is absolutely no justification for such result in the circumstances of the present case. As demonstrated by the failure of the Yono property to find a buyer, Ingham County, the Treasurer and Land Bank have not obtained *either* a valuable property *or* sale proceeds. Yono's debt to the public has not yet been paid. And any payment to Yono results in further loss of funds that properly belong to the public.

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CONCLUSION AND REITERATION OF RELIEF REQUESTED

For the reasons described above, together with those set forth in the Defendants-Appellants' original application, review of the present case by this Court is justified under the grounds enumerated in MCR 7.305(B)(2), (3) and (5). This Court should grant the application and reverse the decision of the Court of Appeals.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief complies with the applicable formatting and word count described in MCR 7.312(A)/MCR7.212(b).

1. Exclusive of the portions exempted by MCR 7.212(B)(2), the brief contains:

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CERTIFICATE OF COMPLIANCE

I hereby certify that on December 9, 2024, I electronically filed the foregoing document with the Clerk of the court using the ECF system which will send notification of such filing to the following: All Attorneys of Record; and I hereby certify that I have mailed by United States Postal Service the documents to the following non-ECF participants: N/A.

/s/Marie E. Jones
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