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STATE OF MICHIGAN
IN THE SUPREME COURT

MATTHEW SCHAFER, HARRY HUCKLEBURY, and LILLY HUCKLEBURY,

Plaintiffs-Appellees,

v

KENT COUNTY,

Defendant-Appellant,

and

KENT COUNTY TREASURER,

Defendant.

SC: 164975
COA: 356908
Kent CC: 20-009502-CZ

LYNETTE HATHON and AMY JO DENKINS, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN,

Defendant-Appellant.

SC: 165219
COA: 356850
Ct of Claims: 19-000023-MZ

JOINT BRIEF OF THE MICHIGAN ASSOCIATION OF COUNTIES AND THE MICHIGAN ASSOCIATION OF COUNTY TREASURERS AS AMICI CURIAE IN SUPPORT OF APPELLANT IN EACH CASE

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

This brief is submitted on behalf of the Michigan Association of Counties (MAC) and the Michigan Association of County Treasurers (MACT) (together, "Amici") jointly for both of the above-captioned cases, *Schafer v Kent Co* (Docket No 164975) ("*Schafer*") and *Hathon v State of Michigan* (Docket No 165219) ("*Hathon*"). This Court invited MAC and MACT to submit briefs as amici in each case and directed the Clerk to schedule the oral arguments in *Schafer* and *Hathon* for the same future session of the Court. As briefed by Appellants and certain other amici in each case, MAC and MACT support holdings from this Court that (1) this Court's 2020 decision in *Rafaeli, LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020), either applies prospectively only or applies with limited retroactivity for only named plaintiffs in cases pending when this Court decided *Rafaeli*, but does not apply with full retroactivity (at issue in *Schafer* and *Hathon*); and (2) regardless of the resolution of the retroactivity issue, 2020 PA 256 controls the manner in which any plaintiff must claim remaining proceeds (at issue in *Hathon*).

1. MAC is a non-profit association founded in 1898, which consists of 83 Member Michigan Counties. It is a statewide organization dedicated to representing the interests of Michigan's counties and their elected commissioners. It also promotes

[1] Pursuant to MCR 7.312(H)(5), amici curiae affirm that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than amici curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

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the education of county officials and communication and cooperation between them, and it advocates on their behalf in the Michigan and federal legislatures.

2. For many years, Michigan law has imposed on counties a wide range of functions relating to the collection of delinquent real property taxes. The MAC is keenly interested in this case because one of the primary duties of a county is the collection of delinquent real property taxes under the Michigan General Property Tax Act, Michigan Compiled Law (MCL) 211.1, *et. seq* (GPTA). In 77 of Michigan's 83 counties, the county's elected treasurer serves as the foreclosing governmental unit (FGU) on behalf of the State. FGUs have the responsibility to foreclose property for unpaid delinquent real property taxes on behalf of all taxing jurisdictions within the county, take title to unredeemed properties, and to either sell the unredeemed parcels to generate revenue necessary to pay for unpaid property taxes and related collection expenses or transfer the property for a public purpose. Counties also have a role in administering the delinquent tax revolving fund under Michigan statutes.

3. Further, state and federal class action claims, which remain pending at the trial and appellate levels against all 83 Michigan counties—i.e., most of MAC's members—assert claims that parallel those brought here.[2]

4. MACT was formed as a Michigan nonprofit corporation in 1934. Its members include the treasurers of each of Michigan's 83 counties. The treasurer of a

[2] *See Garcia v Title Check, LLC*, No. 21-1449, 2022 US App LEXIS 981, at *1 (CA 6, Jan 12, 2022) (noting the "deluge of litigation" in state and federal courts regarding Michigan's tax foreclosure system). For example, MAC member Wayne County is within the 20 largest counties in the US and is defending many of these cases in state and federal courts.

county is considered the FGU under the GPTA when the county opts to conduct foreclosure proceedings as an agent of the State of Michigan. After significant process and opportunities to redeem property foreclosed for nonpayment of taxes are provided to taxpayers, treasurers are tasked with conducting foreclosure auctions and distributing proceeds from the auctions in a manner mandated by state law under the GPTA.

5. MACT's members have a direct interest in the outcome of this case. As FGUs, who are obligated to carry out Michigan statutory mandates, members have been named as defendants in many lawsuits (including *Schafer*) seeking damages tied to an alleged equity interest in tax foreclosed properties, or a refund of remaining proceeds collected at tax foreclosure auctions.

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SUMMARY OF ARGUMENT

The property tax foreclosure system in Michigan is vital to the operation and sustainability of its counties and its local governments and public schools. As Michigan's legislature recognized when reforming the system decades ago, absent a mechanism to enforce property tax collection, Michigan's municipalities face revenue shortfalls, increased blight, abandoned housing, health and safety issues, and increased taxes spread among those in the community who do timely pay taxes. In this regard, the GPTA was enacted to "strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes." MCL 211.78m(1).

Property tax foreclosure is a last resort that arises when a property owner fails to comply with numerous notices of deficiency and fails to redeem the property within a statutory timeframe. When a property owner fails to make payments after numerous chances to do so and fails to take advantage of opportunities for financial hardship support provided under the GPTA, *see, e.g.*, MCL 211.78h and 78k, the FGUs are often left no choice but to foreclose. And prior to 2020, the GPTA required FGUs to retain any remaining proceeds from foreclosure auctions, and to use those proceeds in a statutorily-defined manner.

In 2020, however, this Court decided *Rafaeli, LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020), holding for the first time that individuals have a property interest in remaining proceeds of a tax sale. This was a reversal of the Court of Appeals' 2017 decision in *Rafaeli*, which had upheld the GPTA in its then-current

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form. This Court concluded that the FGUs' statutorily-mandated retention of excess proceeds following a tax foreclosure violates the Michigan Constitution's Takings Clause. *Rafaeli* held that the property owner's right is to the excess proceeds, which consist of the "proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure sale of the property—no more, no less." 505 Mich at 483-484.

In response, the Michigan Legislature adopted 2020 Public Acts 255 and 256, which provide a process for former interest holders in tax foreclosed property to claim an interest in remaining proceeds as defined by *Rafaeli*. The Supreme Court of the United States has repeatedly upheld such statutory systems of the states which provide a mechanism for claiming remaining proceeds, most recently in May 2023 in *Tyler v Hennepin County*, 598 US 631; 143 S Ct 1369, 1378-79 (2023) (citing *Nelson v City of New York*, 352 US 103, 110; 77 S Ct 195 (1956), as an example where the Court upheld the constitutionality of an ordinance that "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").

Thus, Michigan has perfectly exemplified a "state laboratory" for its own constitutional experimentation. *See generally* Jeffrey S. Sutton, 51 Imperfect Solutions, States and the Making of American Constitutional Law (New York: Oxford Univ Press 2018); *see also* Jeffrey S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation (New York: Oxford Univ Press 2022). Michigan revamped its property tax system in 1999 with great success; it was making continual

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improvements and adjustments all along (including in ways that *Rafaeli* held were required and were already underway, but became expedited by the decision); this Court protected the constitutional rights of the State's citizens when called upon to do so in *Rafaeli*; and the Legislature then immediately responded by enacting 2020 PA 256.

But the fact that the system is working in Michigan does not dictate retroactive application of *Rafaeli*, which risks undoing all of the work that has been accomplished over the past twenty-five years. Deeming *Rafaeli* to have full retroactive effect would likely have catastrophic effects on Michigan's property tax law and the viability of collecting those taxes. Under those circumstances, Michigan's public finances would more than likely be eviscerated due to the massive potential monetary exposure of the counties (and, if plaintiffs have it their way, the treasurers themselves) to pre-*Rafaeli* claims through procedural and substantive remedies outside of the GPTA. This result is legally unwarranted and unsound as a matter of the administration of justice, particularly due to the total reliance that Amici's members placed upon the GPTA in faithfully discharging their statutorily-mandated duties with respect to filing actions for foreclosure, conducting sales, and applying the proceeds with no indication prior to *Rafaeli* that the GPTA was unconstitutional as to the retention and application of excess proceeds.

Accordingly, MAC and MACT respectfully support the positions of the appellant in each above-captioned case because *Rafaeli* should be given only prospective application or, alternatively, limited retroactivity for only named

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plaintiffs in cases pending at the time of *Rafaeli*, and all claims should proceed as provided under the GPTA, particularly since the class action device would rarely if ever properly apply to the differing claims and characteristics that Amici's members have seen repeatedly attempted by plaintiffs in so many prior and pending cases.

BACKGROUND

I. Property Tax Collections Among The States.

Different states collect overdue property taxes owed on real property in different ways. Some states ("Tax Lien States") sell liens on the property to private buyers who purchase the right to collect from the owners. Other states ("Tax Deed States") collect overdue taxes by foreclosing real property for non-payment of taxes owed on the property. In Tax Lien States, property owners retain ownership while taxes remain unpaid, subject to the private buyer's purchased interest. In Tax Deed States, property owners do not. Instead, after the government forecloses the property and the redemption period expires, ownership vests in the government, which retains or disposes of the property as provided under state law.

II. State Legislative Changes To Property Tax Collections.

For years, Michigan's delinquent tax collection process was not working well. The process took "about six years to complete" and, as a result of this delay, many homes and businesses lingered in the tax reversion process and were left abandoned and hazardous. *See* House Legislative Analysis Section, Analysis of GPTA Amendment Bills Package, July 23, 1999, https://bit.ly/2Dat95V. The longer they were left unaddressed, the more costly and burdensome the rehabilitation.

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Abandoned properties also contributed to crime, blight, and decay. *Id*. The burden of these consequences frequently fell on local governments, adjoining property owners, and taxpayers.

As the Michigan Legislature recognized, this posed "several public policy problems." *Id*. Among those problems, the system was "unfair to those who pay their taxes on time"; the lack of tax revenue that was owed and budgeted "thwart[ed] local government operations"; the tax collection process was "labor intensive and time-consuming"; the back-taxed, often abandoned properties "cause[d] urban blight"; and the system "hamstr[ung] land acquisition and redevelopment projects." *Id*.

Given these systemic flaws, the Michigan Legislature revised the process for collecting delinquent property taxes in 1999 with Public Act 123. This new process included significant safeguards to assist property owners and prevent foreclosure. Numerous property tax exemptions apply to those who, for example, are impoverished, disabled, and mentally incapacitated. And for those required to pay property taxes, multiple notices—both of delinquency and of potential foreclosure—must be provided to the parcel owner.

Under Act 123, on March 1 of each year, all unpaid property taxes from the prior year are "returned delinquent" to the county treasurer for collection. MCL 211.78 *et seq*. Multiple notices—both of delinquency and of potential foreclosure—are provided. MCL 211.78f. And if, after these notices, the taxpayer still fails to pay the taxes owed, the property is relinquished and "shall" be foreclosed subject to the right of redemption. MCL 211.78g(1), 211.78h(1)-(2). A small percentage of individuals,

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however, failed to take advantage of the numerous safeguards in place to assist them in keeping their property.[3]

Foreclosures under the GPTA are initiated by a "foreclosing governmental unit" or "FGU." Either the treasurer of a county or the State of Michigan (if the county does not opt to foreclose property under the Act) can act as an FGU. MCL 211.78(8)(a). Counties had to decide whether to opt-out of becoming an FGU and instead elect to have Michigan foreclose real property no later than December 1, 1999. MCL 211.78(3). In December 2004, counties had the opportunity to reconsider their status. This was, by statute, the final chance for counties to opt-out of becoming an FGU. From January 1, 2009, through March 1, 2009, counties could reconsider their status and opt-in to becoming FGUs, but not opt-out. MCL 211.78(4). After 2010, counties could opt-in to becoming an FGU in any given year after February of the following year by a resolution adopted at a meeting held pursuant to the open meetings act and with the written concurrence of the county treasurer and county executive. MCL

[3] In Michigan, property owners lose their property to tax foreclosure after three years of unpaid taxes. MCL 211.78h and 78k. It is true that some taxpayers struggle to pay their property taxes, and if they fail to avail themselves of the assistance and stopgaps provided in Michigan's GPTA—which are designed to prevent foreclosure—the state circuit court where the property is located will enter a judgment of foreclosure. *Id*. Most of the arguments about lost equity and Takings are focused on these aggrieved taxpayers who, for whatever reason, failed to pay their property taxes. But these arguments fail to acknowledge that the great majority of property owners pay their taxes on time and do not become delinquent. This is significant — these taxpayers are supporting the services that are being provided to all property owners and residents of their respective municipality. They are also subsidizing their fellow property owners who are not paying their property taxes. Those delinquent taxpayers are, however, benefitting from all of the local services such as police and fire protection, garbage collection, street lighting, parks and others.

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211.78(5). 77 of Michigan's 83 counties elected to act as the FGU whereas the State is the FGU for six counties.

The Act regulates the entire process for the FGU. If the properties with delinquent taxes are not redeemed after the notices discussed above, the treasurer "shall" file a petition for foreclosure in the circuit court. MCL 211.78h(1). Following a hearing and additional process, the court will award the county fee simple title to the property if it is not redeemed by a certain date. MCL 211.78k(6). At that point, the FGU becomes the owner of the tax-foreclosed properties as a matter of law.

A significant reason that the Legislature passed Act 123 was to eliminate blight and facilitate the return of vacant properties to use. *See City of Bay City v Bay Cnty Treasurer*, 292 Mich App 156, 168; 807 NW2d 892 (2011) (stating that Act 123 was intended "to effectuate the efficient and expeditious return to productive use of property returned for delinquent taxes"). On both fronts, Act 123 has been a resounding success. First, Act 123's process has "significantly benefitted property owners who are delinquent in their property taxes." Kevin T Smith, Mich Real Prop Rev, 30 (Spring 2009). Second, it is working for local communities as the Legislature intended by, among other things, reducing blight and improving title work and notice to taxpayers.[4] *Id*.

[4] Commenting on the new tax-foreclosure process, the Treasurer for Berrien County, Michigan observed: "The way we're doing it really helps put properties back into productive use much quicker. This has worked phenomenally well for us." Thomas P. Langhorne, Tax sale: Going a Different Way in Michigan, Evansville Courier & Press, Sep. 14, 2014, http://goo.gl/wwSy1K.

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Notably, as further evidence of the effectiveness of Act 123, before the adoption of 2003 Pub Act 246, which amended Michigan statutes to require the City of Detroit to turn over its delinquent taxes to the county for collection, many Detroit property owners paid their county taxes *but not* their city taxes because the city did not routinely foreclose liens for delinquent taxes. *See* Delinquent Property Taxes as an Impediment to Development in Michigan, Citizens Research Council of Michigan, Report 325, April 1999, p. 6, https://crcmich.org/publications/delinquent-property-taxes-as-an-impediment-to-development-in-michigan, last accessed Dec 20, 2023.

Other states have amended their tax-foreclosure statutes in similar ways to address similar problems. Indiana (a Tax Deed state), for example, amended its law in 2016 to streamline the tax-foreclosure process to combat blight and allow investors to quickly return valuable properties to the market. *See* Indiana's 2016 Public Law 183; *see also* Indianapolis Star, Indiana Blight Bills Take Aim at Zombie Squatters, https://bit.ly/2X3mWAd; Indiana Legislature Fiscal Impact Statement, https://bit.ly/2GazL4T. Like Michigan, Wisconsin formerly did not recognize any right of the former owner to any excess proceeds. *US Bank Trust Nat'l Ass'n v. Walworth County*, 2022 US Dist LEXIS 22153, at *13-14 (ED Wis, Jan. 6, 2022). Like Michigan, Wisconsin amended its law to provide homeowners' rights to excess proceeds after their tax and interest obligations are discharged. Wis Stat § 75.36(2m).

III. Emerging Litigation Regarding State Property Tax Collection.

Notwithstanding these improvements under Act 123, and the FGUs' strict compliance with Act 123's requirements, beginning in 2014 delinquent taxpayers

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alleged that the requirement directing FGUs to retain all sale proceeds—and use the proceeds to pay unpaid taxes, maintain tax-foreclosed property that cannot be sold, and for costs associated with the foreclosure process—violates the Takings Clause. For years, these cases ran on parallel tracks in state and federal courts. The courts initially rejected these challenges. *See Rafaeli, LLC v Oakland Cty*, unpublished per curiam opinion of the Court of Appeals decided Oct 24, 2017 (Docket No 330696); *see also Wayside Church v Van Buren Cty*, 2015 US Dist LEXIS 196461, at *20-21 (WD Mich, Nov 9, 2015).[5] These decisions only strengthened the presumption that Amici's members were legally entitled to make, i.e., that the GPTA was valid. This "presumption of constitutionality is especially strong with respect to taxing statutes." (*Schafer* Appellant's Br p 28, citing *Caterpillar, Inc v Dep't of Treasury, Revenue Div*, 440 Mich 400, 413; 488 NW2d 182 (1992).) Amici's members, therefore, reasonably

[5] For some time, Michigan surplus proceeds cases under the GPTA were brought primarily in Michigan's state courts. That was likely due to the Sixth Circuit's 2017 decision in *Wayside Church v Van Buren County*, 847 F3d 812 (CA 6, 2017), expressly holding that the Tax Injunction Act and the doctrine of comity prevented federal courts from exercising jurisdiction over these claims. In 2020, however, the Sixth Circuit deemed its analysis in *Wayside Church* to be dicta, permitting these claims to proceed in federal courts. *Freed v Thomas*, 976 F3d 729 (CA 6, 2020). Since then, identical issues of Michigan law have been litigated on a prolific scale on parallel tracks in state and federal courts—often with different results. For example, the Sixth Circuit held that a plaintiff can state a federal Takings claim based upon the FGUs' retention and application of surplus proceeds as mandated by the GPTA in *Hall v Meisner*, 51 F4th 185, 196-197 (CA 6, 2022). Prior to *Hall*, some courts had held that a federal takings claim was not ripe since Michigan law provides an adequate post-deprivation remedy for the property loss under the Takings clause of the Michigan Constitution, as the Fifth Amendment to the US Constitution does not proscribe the taking of property; it proscribes taking without just compensation. *See, e.g., Rafaeli, LLC v Wayne Cty*, No 14-13958, 2015 US Dist LEXIS 72199, at *23-25 (ED Mich, June 4, 2015) (dismissing case for lack of jurisdiction).

understood that their compliance with legislative mandates of the GPTA equated to constitutional compliance.

IV. This Court's 2020 Decision In *Rafaeli*.

In 2020 this Court held in *Rafaeli* that Michigan's Takings Clause is violated when FGUs sell tax-foreclosed property at auction and retain more than the taxes owed—as the GPTA then required. As of 2018, Michigan's tax foreclosure system was not unique. It was "one of nine states with a statutory scheme that requires the foreclosing governmental unit to disperse the surplus proceeds" from a foreclosure auction "to someone other than the former owner." *Rafaeli*, 505 Mich at 448. *Rafaeli* held as a matter of Michigan property law that those with property interests in foreclosed property have a "right to collect the surplus proceeds that are realized from the tax-foreclosure sale," and that a county's "retention of those surplus proceeds under the GPTA amounts to a taking of a vested property right requiring just compensation" under the Michigan Constitution. *Id* at 470, 474. This Court reasoned that, "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." *Id* at 483-484. This Court further clarified a number of issues with surplus proceeds claims under the GPTA and rejected fair market value as a measure of compensation

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for claimants. *Id* at 483.[6] Finally, *Rafaeli* stated that "[n]othing in [its] holding . . . prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id* at 473 n108; *see also Tyler*, 143 S Ct at 1378-79; *Nelson*, 352 US at 110.

Both before and after *Rafaeli*, Michigan's Legislature and Michigan interest groups have worked to successfully reduce the amount of property tax foreclosures, and to provide state law remedies to those who had already been foreclosed on. At the time *Rafaeli* was decided, "[r]ecent legislation" was already in the works "requiring the [FGU] to 'remit an amount equal to that excess' to the former property owner if the property was owned and occupied as a principal residence before the judgment of foreclosure was entered." 505 Mich at 448 n36 (citing 2019 HB 4219). When this Court decided *Rafaeli* and invited the Legislature to take action, this process was expedited. *See id* at 473 n108.

In sum, Michigan is the perfect example of successful state experimentation. The Legislature acted in good faith when drafting the GPTA in the first instance and addressing public welfare concerns. Indeed, as this Court recognized, Act 123 was

[6] Since *Rafaeli*, Michigan courts have applied its holding and further refined the relief available to excess proceeds for claimants not subject to the Act 256 claims procedure. In *Proctor v Saginaw Cty Bd of Comm'rs*, 340 Mich App 1; __ NW2d __ (2022), *application pending* (MSC No. 164266), the Court of Appeals rebuffed attempts to gain additional relief beyond that allowed under *Rafaeli*. The court "disagree[d] with plaintiffs' contention that they are entitled to any recovery beyond the surplus proceeds from the tax foreclosure sale," but "agree[d] that plaintiffs are entitled to post-tax sale interest on such surplus proceeds." *Id* at 27.

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never meant to be punitive. *See Rafaeli*, 505 Mich at 449 (the GPTA "is not punitive in nature. Its aim is to encourage the timely payment of property taxes and to return tax-delinquent property to their tax-generating status, not necessarily to punish property owners for failing to pay their property taxes."). And once the statute was struck down by this Court with respect to the retention of remaining proceeds, the Legislature and interest groups took immediate action to amend the statute going forward and provide remedies to those whose properties had been foreclosed on. Indeed, this legislation was passed unanimously[7] and with broad support from entities that included the Pacific Legal Foundation[8] — the very organization that served as lead counsel and argued orally in *Rafaeli*.

ARGUMENT

I. ***Rafaeli* Should Apply Prospectively Only, Or, Alternatively, With Limited Retroactivity For Only Named Plaintiffs In Cases Pending At The Time That This Court Decided *Rafaeli*.**

The parties have extensively briefed the law surrounding full and limited retroactive application of decisions under Michigan jurisprudence. Thus, Amici do not endeavor herein to recite that law to this Court again. But Amici's members are the embodiment of those who wholly relied on the GPTA as it existed prior to *Rafaeli*. It

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[7] *See* 2020 Senate Journal 2250 and 2020 House Journal 2760-2761 (2020 PA 255), https://www.legislature.mi.gov/(S(vwrdiqsqz0drvncumqslcx45))/mileg.aspx?page=GetObject&objectname=2019-SB-0676; *see also* 2020 Senate Journal 2250-2251 and 2020 House Journal 2760-2761 (2020 PA 256), https://www.legislature.mi.gov/(S(soxgpilp1taqi3yqmc3k5frz))/mileg.aspx?page=GetObject&objectname=2020-SB-1137.

[8] *See* September 30, 2020 Senate Committee on Finance Meeting Minutes, available at https://committees.senate.michigan.gov/details?com=FIN&sessionId=13 (noting the support of Daniel Dew of Pacific Legal Foundation for Senate Bills 1137 and 676).

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would be unjust to expose Amici's members to the massive liability that would result from a fully retroactive application of *Rafaeli*. Amici respectfully submit that the overriding factors that should directly control the result of these cases are: (1) reliance on the old rule; and (2) the effect of retroactivity on the administration of justice. *See Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). Giving these factors the heavy weight they deserve under the facts of these cases should result in a holding from this Court that *Rafaeli* applies either prospectively only or with limited retroactivity for only named plaintiffs in cases pending at the time this Court decided *Rafaeli*.

A. Amici's Members Relied On The GPTA.

Amici agree with the *Schafer* appellants that *Rafaeli* announced an unforeseen change in the law affecting a tax statute that was not foreshadowed by earlier decisions of the Michigan courts. Amici's reliance on the old rule is manifest. The GPTA established the rules, and they were mandatory. *See, e.g.*, *Rafaeli*, 505 Mich at 448 (noting the prior GPTA "require[d] the foreclosing governmental unit to disperse the surplus proceeds to someone other than the former owner"); *Wayside Church*, 847 F3d at 824 (Kethledge, J, concurring) ("In the County's defense, the Michigan Act appears actually to *require* the County to short the taxpayer the difference between the value of the property forfeited and the amount of taxes and penalties owed.") (emphasis in original). Amici's members were entitled to presume the validity and constitutionality of the old rule—particularly given that its constitutionality had been upheld by Michigan's state and federal courts, and that similar statutes had been

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upheld elsewhere. *See Caterpillar, Inc*, 440 Mich at 413. The vast majority of Amici's members opted in as FGUs long before any hints of claims by plaintiffs, and certainly well before this Court's holding in *Rafaeli*.

The Legislature responded to *Rafaeli* specifically by amending the GPTA and creating a mechanism for former interest holders in tax foreclosed property to recover the remaining proceeds. In December 2020, the Legislature unanimously adopted 2020 Public Acts 255 and 256, which provide a process for former interest holders in tax-foreclosed properties to claim an interest in sale proceeds in excess of the minimum bid and other foreclosure-related fees. Any person with a "legal interest in property immediately before the effectiveness of a judgment of foreclosure of the property" may submit a claim for excess sales proceeds, including but not limited to former lienholders, mortgagors, and heirs, along with the person listed on the deed for the tax foreclosed property. MCL 211.78t(12). This new process applies to foreclosures occurring after *Rafaeli unless* this Court applies its decision in *Rafaeli* retroactively. Obeying the holding of *Rafaeli*, Acts 255 and 256 allow former interest holders of foreclosed property to recover excess sale proceeds, but not fair market value. MCL 211.78t.

These efforts have been successful. In Detroit, for example, the number of annual Homeowner Property Tax Exemptions that have been granted has grown from 3,712 in 2013 to 14,544 in 2021. Better still, the number of Detroit homeowners subject to property tax foreclosure (unless taxes are paid) has decreased from nearly 20,000 in November 2018 to under 4,000 in November 2022; the number of occupied

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homes in Detroit actually foreclosed upon for failure to pay property taxes has decreased from over 6,400 in 2015 to approximately 250 in 2019 and 2022; and the cumulative property tax debt has decreased from approximately $82 million in November 2018 to $27 million in November 2022. Simply put, the number of homeowners subject to property tax foreclosure is steadily declining to new lows. And those with interests in properties, who had been subject to the tax foreclosure process in the past and could not receive remaining proceeds, now have a statutory mechanism to recover those proceeds. MCL 211.78t.

This process provided certainty to municipalities such as Amici's members and taxpayers as to how to redeem past proceeds consistent with *Rafaeli* and, until the retroactivity and class action certification issues that arose in *Schafer* and *Hathon* added uncertainty, was thought to be the solution going forward.

While these improvements of increased exemptions, reduced foreclosures, and decreased tax debt, among others, were the goals and are immensely desirable, the flip side of that coin is that, historically, the incidences of tax foreclosures prior to these more recent improvements are necessarily overwhelmingly broader. And these higher historical incidences represent the potential claims against Amici's members if *Rafaeli* applies fully retroactively. While the percentage of people who lost their homes to tax foreclosure may be exceedingly small in comparison to those who did not, those nevertheless translate to massive monetary exposure to Amici's members

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when translated to more than a decade of pre-*Rafaeli* foreclosures[9] over seventy-seven counties.

As discussed above, Amici's members have been embroiled in prolific litigation regarding property tax foreclosures and retention of remaining proceeds on dual tracks in state and federal courts for many years now. One of the arguments that plaintiffs have tested (notwithstanding *Rafaeli's* contrary holding) is an assertion to an entitlement to "fair market value" damages rather than remaining proceeds. In this different but related context, the Michigan Attorney General foretold the Sixth Circuit that permitting "fair market value" recovery rather than strict recovery of remaining proceeds has the potential to "cripple the state's property tax law and the viability of collecting those taxes." *See Freed v Thomas*, 976 F3d 729 (CA 6, 2020) (RE 83, Pet for Rehearing at 2). The *Freed* property fetched only half of fair market value at the tax sale. *Id* at 732. If the *Freed* plaintiff's theory of damages based upon fair market value was accepted, it would have subjected FGUs to compensating plaintiffs on each foreclosed parcel well in excess of the amount realized at sale.

In *Freed*, Amici here supplied an amicus brief and the affidavits from county treasurers or their staff detailing county sales data. That data demonstrated the disaster that would result if former-owner-plaintiffs were entitled to recovery based upon "fair market value" instead of based upon remaining proceeds. Amici showed

9 In several instances, plaintiffs have asserted that Counties are liable dating back to 2008. (*See Schafer* Appellant's Br pp 2, 28, 31, 32; *see also Bowles v County of Wayne*, ED Mich Case No 2:20-cv-12838, Dkt 84 (argument by plaintiff that "there has been constant tolling for any accrued claims . . . going back to a date of December 11, 2008").

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the impact of allowing former owners to recover compensation at that ratio vis-a-vis the proceeds actually garnered at the tax sale that the *Freed* plaintiff sought. Amici summarized sales data for thirteen counties. In fact, for the thirteen counties and years reported, collecting $38 million in taxes, fees, penalties, and interest through sales would require these counties to pay $280 million in claims to former owners under the *Freed* plaintiff's theory of recovery at fair market value. Genesee County would annually face a potential payout of over $25 million for sale receipts of under $10 million. (*Freed*, ED Mich Case No 1:17-cv-13519, Aff of Carla Vandefifer, ECF No. 93-7.) Statewide, counties could have seen losses well over $100 million each year in tax collection costs.

FGUs could not have sought foreclosure of property for delinquent taxes if it costs $4.00 for every $1.00 collected and millions of dollars are lost each year. Foreclosure would cease to be a viable means of collecting taxes and, thus, would cease to be an incentive to pay taxes. And without foreclosure as an incentive, there is no means of getting recalcitrant property owners to pay their taxes, let alone ameliorate the public welfare concerns posed by abandoned, hazardous, blighted and decayed properties. The Michigan Attorney General put it best in *Freed*: if plaintiffs are allowed to recover under the "fair market value" theory, this "would shut down collection of delinquent property taxes." *See also Rafaeli*, 505 Mich at 483 ("If plaintiffs were entitled to collect more than the amount of the remaining proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency.").

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It is not hard to compare the devasting effects of basing recovery on the "fair market value" theory to, instead, finding that *Rafaeli* applies fully retroactively. Although the "fair market value" theory and retroactivity are different legal issues, the crippling financial impacts on Michigan counties are comparable, as counties will be suddenly exposed to possibly hundreds of millions of dollars of liability for pre-*Rafaeli* claims during a time when Amici's members were relying on mandates of the GPTA, which could likewise "shut down collection of delinquent property taxes" and other municipal services, at least for a significant period of time while funds are allocated to such historical claims. Indeed, as the State noted in the first paragraph of its Application for Leave to Appeal in *Hathon*, this "matter implicates millions of dollars for the counties, and local taxing authorities, throughout the State." Likewise, the appellants in *Schafer* noted, starting on page 1 of their Application for Leave to Appeal, that, if *Rafaeli* applies "with *full* retroactivity, massive liability will be imposed on counties throughout Michigan, especially as class-action counsel assert that they are entitled to assert *Rafaeli* claims for foreclosure sales dating back to 2008." (emphasis in original). The *Schafer* appellants conservatively estimated this exposure to exceed $150 million in liability for Amici's members. (*Schafer* Appellants' Br p 28.) Amici's members believe this figure is too conservative and that the exposure would likely be much greater, particularly under plaintiffs' position that claims could stem back to 2008. Thus, this is not sky-is-falling, doomsday rhetoric or hyperbole; it is the real and significant potential consequence depending upon how this Court rules on the retroactivity issue.

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B. Amici's Members Did Not Have Reason To Believe That Their Performance Of Statutorily Mandated Duties Was Unconstitutional.

The *Schafer* appellants' brief sets forth in detail the prior decisions and status of Michigan law with respect to the GPTA and excess proceeds prior to *Rafaeli*. (*Schafer* Appellants' Br pp 32-35.) Even after *Rafaeli*, some states still did not recognize a state law property right to such excess proceeds. Similar to Michigan's Act 123, Minnesota did not recognize such a right of a former owner to excess proceeds under its statutory process—the basis for the Supreme Court's decision in *Tyler*, which was not announced until May 2023. In contrast to Michigan, in 2022, the Nebraska Supreme Court concluded that there was "no basis to conclude that Nebraska common law recognizes the property interest that is essential for [plaintiff]'s takings claim to succeed," including nothing under Nebraska law that "entitled [someone] to receive compensation if the value of the property transferred to a tax certificate holder exceeded the tax debt." *Continental Resources v Fair*, 971 NW2d 313, 325 (Neb, 2022).[10] In 2022, the Alabama Supreme Court relied upon the

[10] Many statutes similar to Act 123 in other states had been challenged with regard to the government's retention of surplus proceeds and repeatedly upheld. *See, e.g., Sheehan v Suffolk Co*, 67 NY2d 52; 490 NE2d 523 (1986); *see also Valente v Culver*, 124 AD2d 950, 951; 508 NYS2d 701 (1986) ("the County was under no obligation . . . to return any surplus proceeds to Culver."); *City of Auburn v Mandarelli*, 320 A2d 22, 30–32 (Me, 1974); *Ritter v Ross*, 207 Wis 2d 476, 486; 558 NW2d 909 (1996) (concluding in light of *Nelson* that "when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process require-ments"); *Balthazar v Mari, Ltd*, 301 F Supp 103, 106 (ND Ill, 1969), *aff'd* 396 US 114 (1969); *Spurgias v Morrissette*, 109 NH 275, 278; 249 A2d 685 (1969). *See also Reinmiller v Marion Co, Oregon*, No. 05-1926-PK, 2006 WL 2987707, at *3 (D Or, Oct 16, 2006); *Automatic Art, LLC v Maricopa Co*, No. CV 08-1484-PHX-SRB,

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analysis of this Court's holding in *Rafaeli* in finding that there is such a property right to excess proceeds under Alabama law as well. *Douglas v Roper*, No. 1200503, 2022 Ala LEXIS 55, at *32 (Ala, June 24, 2022). In sum, the ever-changing law, which continues to evolve to this day, was not something that was foreshadowed or foreseen by Amici's members.

This lack of any indication that Act 123 was unconstitutional as to the retention and application of remaining proceeds has parallels to the immunity analysis under federal law that has been a focal issue in many of these GPTA tax foreclosure cases in federal court, particularly with respect to the immunity routinely afforded to treasurers carrying out their statutorily mandated duties under the GPTA.

As the *Schafer* appellants noted, local governments like Amici's members are entitled to presume that state statutes are valid, and that "presumption of constitutionality is especially strong with respect to taxing statutes." (*Schafer* Appellant's Br p 28, citing *Caterpillar, Inc*, 440 Mich at 413). In a similar vein, federal district courts in Michigan have repeatedly held that county treasurers are entitled to qualified or sovereign immunity for carrying out their statutorily mandated duties as the FGUs under the GPTA because "there was not clearly established law informing [the treasurers] that their practice of retaining the surplus proceeds was

2010 WL 11515708, at *5-*6 (D Ariz, Mar 18, 2010); *Miner v Clinton Co, NY*, 541 F3d 464, 475 (CA 2, 2008).

unconstitutional."[11] *Bowles v Sabree*, No 20-12838, 2022 US Dist LEXIS 8172, at *17 (ED Mich, Jan 14, 2022); *see also Fox v Cty of Saginaw*, 2021 US Dist LEXIS 6402, at *22 (ED Mich, Jan 13, 2021) (same). This was "[b]ecause the Michigan Court of

[11] While finding treasurers entitled to immunity, the federal courts to have addressed the issue so far have concluded that counties are not entitled to sovereign immunity. *See, e.g., Fox v Saginaw Cty*, No 21-1108, 2022 US App LEXIS 4950, at *15-16 (CA 6, Feb 22, 2022). But this finding was not based upon any foreshadowing or indication to the counties that Act 123 was unconstitutional. Rather, the *Fox* court distinguished between individual officers like treasurers who have historically been granted immunity versus counties as entities, which historically have not. *See id* at *15. In addition, the *Fox* court found it to be material that counties (unlike treasurers) had the discretion to decide whether to "opt-in" to being the FGU instead of having the State act as the FGU. *Id* at *16. Amici respectfully disagree with the *Fox* holding because the discretionary opt-in decision is utterly divorced from any knowledge of unconstitutionality and is not a fact, transaction or occurrence that forms a basis or accrual for the unconstitutional "Taking" of excess proceeds under either the Michigan or the US constitutions. Under the state and federal case law to date, including *Rafaeli* and *Hall v Meisner*, the taking only occurs when the circuit court "enter[s] a foreclosure judgment that vest[s] 'absolute title' to the property in the county," *Hall*, 51 F4th at 188, 196, which is long after the "opt-in" decision. The actual Taking and whether there was any discretion at the time of the Taking (there was not) should be the driving factor under a sovereign immunity analysis. *See Skatemore, Inc v Whitmer*, 40 F4th 727, 733 (CA 6, 2022) ("[a] property owner has a claim for a violation of the Takings Clause ***as soon as*** a government ***takes*** his property for public use without paying for it . . . And the property owner may sue the government ***at that time*** in federal court for the 'deprivation' of a right 'secured by the Constitution.'") (emphasis added), quoting *Knick v Township of Scott*, 139 S Ct 2162, (2019) (quoting 42 USC § 1983); *see also Beaver St Invs, LLC v Summit Cnty,* 65 F4th 822, 826 (CA 6, 2023) (recognizing that "'the action of taking' is the 'event which gives rise to the claim for compensation'" and that the "dispositive issue" for determining when the limitations period begins is "what constituted the 'act of taking.'" (quoting *Knick*). By the time of the judgment of foreclosure and vesting of absolute title in the county, which is the "taking" that occurs long after the discretionary opt-in by the county, there was no discretion in adhering to the requirements of the GPTA. And, as set forth above, most of the opt-in decisions by the vast majority of Amici's members occurred well before there were any claims or litigation surrounding excess proceeds, and all were before *Rafaeli*.

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Appeals reached an opposite conclusion in 2017 [in *Rafaeli*] and held that former property owners were not entitled to the surplus proceeds from a sale[.]" *Id*.

In *Fakhreddine v Treasurer Sabree*, Judge Steeh granted the treasurer defendant's motion to dismiss the claims against Wayne County Treasurer Eric Sabree via opinion and order dated January 25, 2022. No. 21-CV-12250, 2022 US Dist LEXIS 13776 (ED Mich, Jan 25, 2022), *reversed on other grounds*, 2022 US App LEXIS 29010 (CA 6, Oct 18, 2022). Judge Steeh specifically found that Treasurer Sabree is entitled to immunity because, "'[w]here county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the State.'" *Id*, quoting *Brotherton v Cleveland*, 173 F3d 552, 566 (CA 6,1999). The court further explained, "[t]he Tax Act required foreclosing governmental units to distribute surplus proceeds in a specific way" and Treasurer Sabree "did only what the state law required of him, and so 'by simply complying with state mandates that afford no discretion, [he] act[ed] as an arm of the State, not the county.'" *Id*, quoting *McNeil v Cmty Prob Servs, LLC*, 945 F3d 991, 995 (CA 6, 2019) (quotations omitted); *see also Harbor Watch Condo Ass'n v Emmett County Treasurer*, 308 Mich App 380, 385; 863 NW2d 745 (2014) (explaining the process that mandates the FGU to take absolute title to foreclosed properties and noting that the "[u]se of the term 'shall' [in MCL 211.78k] designates the actions of the county treasurer as mandatory rather than discretionary").

It would be unjust to rightfully recognize in the federal immunity context that there was not clearly established law informing the treasurers that their practice of

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retaining the remaining proceeds as mandated under Act 123 was unconstitutional, while at the same time concluding that there was sufficient foreshadowing of the new rule to apply *Rafaeli* fully retroactively.

II. The GPTA Provides The Manner In Which To Bring Claims.

Rather than repeat the State's analysis, Amici agree with and support the *Hathon* appellant's interpretation of the GPTA as providing the manner for making claims to remaining proceeds under the GPTA, including to pre-*Rafaeli* claims even if this Court were to apply *Rafaeli* fully retroactively. But even besides the mandatory effect of the GPTA, the mass litigation over class certification in these kinds of cases filed as class actions in federal court underscores the patent unworkability and ineligibility of the class action device for takings cases regarding remaining proceeds after tax foreclosures.

In *Fox v Saginaw Cnty*, 67 F4th 284 (CA 6, 2023), the Sixth Circuit recently rejected using the "juridical link" doctrine to certify a class of former property owners with claims to remaining proceeds from across multiple counties in a single class action. The plaintiff "sought to certify a class of landowners from dozens of Counties that had not injured him, so he lacked standing to sue them under traditional principles." *Id* at 291. A "plaintiff who meets the 'actual-injury requirement' does not thereby obtain a license to sue anyone over anything."[12] *Id* at 293 (citation omitted).

[12] The Michigan Court of Appeals has found similarly. *See Proctor*, 340 Mich App at 38-39, *application pending* (explaining that "Michigan law does not allow plaintiffs to bring class actions in the manner of the present cases" (through use of the juridical link doctrine) while recognizing that "the Michigan Legislature has now adopted a specific procedure for a person to claim surplus proceeds under the GPTA").

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Even besides the juridical link issue, the Sixth Circuit in *Fox* had its "doubts" regarding certification of any class upon applying the "rigorous analysis" a court must undertake in refusing to certify a class unless the named plaintiff meets all of Federal Rule of Civil Procedure 23's requirements. *Id* at 300. "[S]everal individual issues may pose obstacles to showing that common issues predominate" in these types of cases. *Id* at 301. "For instance, how will each landowner prove that owner's damages?" *Id*. "[I]f fact-specific damage trials 'will inevitably overwhelm' common liability questions, individual issues may predominate," thereby rendering class certification unavailable. *Id*. The Sixth Circuit had earlier "made this precise point when upholding the denial of class certification for an Ohio class of landowners who alleged similar claims to Fox's." *Id*, citing *Tarrify Props, LLC v Cuyahoga County*, 37 F4th 1101, 1106-08 (CA 6, 2022). And the Sixth Circuit has taken the rare step of granting a petition for interlocutory appeal of a class certification ruling to address that issue under Michigan law. *In re Sabree*, 2023 US App LEXIS 6218, at *4-6 (CA 6, Mar 15, 2023) (stating that "[o]ur opinion in *Tarrify* presents a significant obstacle to class certification in class actions like this one, in which plaintiffs are seeking surplus equity"; finding interlocutory appeal warranted "in light of the growing number of class actions throughout the circuit challenging tax-foreclosure schemes"; and noting that a "denial of interlocutory appeal" could be the "death knell" given a $38,000,000 settlement by one Michigan county to resolve such claims, and that "the scope of [Wayne County's] liability could greatly exceed that number").

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"Apart from damages, the district court should consider to what extent the Counties have unique defenses against class members." *Fox*, 67 F4th at 301. The *Fox* court also recognized the changes to the GPTA following *Rafaeli*, including the new mechanisms for claiming remaining proceeds, and that "the procedures differ depending on when a treasurer took the property." *Id* at 301, citing MCL 211.78t(1)(a)-(b). "This law might also supply different defenses against different class members," which would affect "the predominance inquiry." *Id* at 301-302.

"Lastly, many landowners might have liens on their property from sources other than the government, such as the bank from which they took out a mortgage," which raises questions such as how much in damages should such plaintiffs be entitled to recover and should lienholders be able to sue separately since they are not class members or would that permit double recovery. *Id* at 302.

In short, "Michigan's requirements for class certification are nearly identical to the federal requirements[.]" *Henry v Dow Chem Co*, 484 Mich 483, 499; 772 NW2d 301 (2009). And federal courts have continued to cast considerable doubt as to whether class actions in these cases (and other recent cases) are viable when class wide liability cannot be resolved in "one stroke." *E.g.*, *In re Ford Motor Co*, 86 F4th 723 (CA 6, 2023); *Doster v Kendall*, 48 F4th 608 (CA 6, 2022). As *Fox* and *Sabree* make clear, that is the case here. The class action mechanism is simply not suitable for remaining proceeds cases in the great majority of cases Amici have seen so far. This is perhaps why the Legislature was prescient in establishing the claims procedure

when amending the GPTA to comply with *Rafaeli*, which does not include class actions.

CONCLUSION

MAC and MACT respectfully support the positions of the appellant in each above-captioned case because *Rafaeli* should be given only prospective application or, alternatively, limited retroactivity for only named plaintiffs in cases pending at the time of *Rafaeli*, and all claims should proceed as provided under the GPTA.

Respectfully submitted,

Dated: December 21, 2023

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CERTIFICATE OF COMPLIANCE

I certify that the **Joint Brief Of The Michigan Association Of Counties And The Michigan Association Of County Treasurers As Amici Curiae In Support Of Appellant In Each Case** complies with the type-volume limitation set forth in MCR 7.212(B). This brief uses a 12-point proportional font, has double-spaced text, and the word count is 8,071 based on the word count of the word-processing system used to produce this document.

Dated: December 21, 2023

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