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IN THE SUPREME COURT
STATE OF MICHIGAN

In re PETITION of MANISTEE COUNTY TREASURER FOR FORECLOSURE.

MANISTEE COUNTY TREASURER,

Petitioner-Appellee,

v.

CHELSEA KOETTER and ANN CULP,

Respondents-Appellants.

/

Supreme Court No. ______

COA Docket No. 363723
Trial Court No. 20-017073-CZ

Hon. David A. Thompson

APPELLANTS CHELSEA KOETTER'S AND ANN CULP'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The Court of Appeals issued its opinion on June 13, 2024. This Court has jurisdiction under MCR 7.305 to grant leave to appeal.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Respondents-Appellants seek leave to appeal the unpublished decision of the Michigan Court of Appeals issued on June 13, 2024, *In re Petition of Manistee County Treasurer for Foreclosure*, Docket No. 363723 (App 172). The decision, relying on *In re Petition of Muskegon County*, No. 363764, __ N.W.3d __, 2023 WL 7093961 (Mich App Oct 26, 2023), *application pending* docket no. 166580, held that Michigan counties could keep the just compensation due to Chelsea Koetter and Ann Culp (Owners) because they failed to submit a preliminary claim form within 92 days of the foreclosure, long before the amount of compensation due could be known and approximately one year before it could be collected, while both women still possessed their homes and were unaware of their peril. The Application seeking leave to appeal the decision in *Muskegon County*, which raises similar questions presented, is pending before this Court. *See* Application for Leave to Appeal, *In re Muskegon*, docket no. 166580 (filed Jan 19, 2024).

Respondents-Appellants—former owners who have been denied just compensation—respectfully request that this Court grant this application for leave to appeal and reverse.

STATEMENT OF QUESTIONS PRESENTED

1. Does the government violate due process under the Michigan Constitution, U.S. Constitution, or 42 USC § 1983 when it deprives a property owner

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of just compensation because—before the amount of compensation is ascertainable and available and before the owner loses possession of the property—the owner did not submit a preliminary, duplicative form to preserve her future right to collect compensation?

Trial Court: No

Court of Appeals: No

Appellants: Yes

Appellees: No

2. Does the General Property Tax Act's process for claiming surplus proceeds, which is unnecessarily complicated, delays payment of the just compensation required by the Constitution, and pays less than is constitutionally required, violate the Michigan Takings Clause, Fifth Amendment Takings Clause, or 42 USC § 1983?

Trial Court: No

Court of Appeals: No

Appellants: Yes

Appellees: No

3. Does the General Property Tax Act's process for claiming "remaining proceeds," which pays less than just compensation and delays payment by a year, preclude owners from seeking constitutionally mandated just compensation?

Trial Court: Yes

Court of Appeals: Yes

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Appellants: No

Appellees: Yes

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The U.S. Constitution's Takings Clause, which is in the Fifth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation."

Article X, Section 2, of the Michigan Constitution provides, in relevant part: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

The U.S. Constitution, Fourteenth Amendment's Due Process Clause provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The Michigan Constitution's Due Process Clause provides: "No person shall be . . . deprived of life, liberty or property, without due process of law."

MCL 211.78t is reproduced in the Appendix to this Application ("App") at 180.

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INTRODUCTION

This case raises important property rights and due process questions about a Michigan statute that allows counties to forfeit Michiganders' constitutional right to collect just compensation. The statute inverts the government's affirmative constitutional duty to pay just compensation into a burden on owners to preserve their right to collect compensation, and it does so before the Owners know what is at stake. The result is stomach-turning. Here, Chelsea Koetter, a single mother of two boys, mistakenly failed to pay part of her 2018 taxes. *See* App 98–100, 104–05. Her 2019 and 2020 taxes were paid. *Id.* The County foreclosed anyway, taking title on April Fool's Day in 2021. *See* App 12. In June 2021, Ms. Koetter, who was still living in her home, went to the County Treasurer's office to pay her debt, but was told she was too late. App 99, 102. No one told her that under MCL 211.78t(2) she needed to submit a notarized form, by personal service or certified mail, by July 1, 2021, to preserve her right to be paid just compensation for the excess property taken by the County in the foreclosure. *Id.* She found out later and submitted the form only eight days late—three weeks before the County sold her home and a full year before she could get paid for the surplus property taken. App 99–101. She timely filed a motion for the surplus proceeds, as required by MCL 211.78t(3)(i), (k); (4), but the courts below denied relief because her claim form was filed eight days late, giving the County a $102,636 windfall at Ms. Koetter's expense. App 22, 161, 172.

Similarly, the County capitalized on Ann Culp's mistake. She filed her claim form after the sale, but before anyone could collect a dime of the surplus proceeds from the County's 2021 foreclosures. *See* App 36. She timely filed a motion for the

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surplus proceeds, but was denied relief. App 5, 35. Based on her tardy claim form, and MCL 211.78t, the County reaped a $66,348 windfall at her expense. App 36, 161, 172.

The Michigan Court of Appeals held that under *In re Petition of Muskegon County Treasurer*, No. 363764, __ NW3d __, 2023 WL 7093961 (Mich App Oct 26, 2023), *application pending* docket no. 166580, the County's confiscation of Ms. Koetter's and Ms. Culp's just compensation was perfectly consistent with due process and the constitutional mandate that government pay for what it takes.

Both *Muskegon* and this case arise from MCL 211.78t, which allows counties to take large windfalls at the expense of struggling property owners, despite this Court's decision in *Rafaeli, LLC v Oakland County*, 505 Mich 429 (2020), and the United States Supreme Court's decision in *Tyler v Hennepin County*, 598 US 631 (2023). *Rafaeli* and *Tyler* recognize that the government violates the Constitution when it uses a tax debt to take more than what it is owed. The government must pay an owner for the excess property that it takes to collect a debt; failure to do so takes private property without just compensation in violation of both the United States Constitution and the Michigan Constitution. *Rafaeli*, 505 Mich 474–77; *Tyler*, 598 US at 647.

Rather than follow *Rafaeli* and *Tyler*, and proceed like all other debt collectors by only taking what is owed, the State of Michigan devised MCL 211.78t, an

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extraordinary and self-serving debt-collection statute.[1] Following foreclosure, and before any property is sold or the amount of surplus, if any, is known, owners must properly serve a notarized and completed claim form with the foreclosing government unit within 92 days. MCL 211.78t(2). Approximately a year after foreclosure, and many months after the sale of their properties, owners must file a separate motion in the foreclosure action that took their homes, seeking distribution of any surplus proceeds. MCL 211.78t(3)(i), (k); (4). Failing to meet the first condition renders futile any attempt to meet the second condition. When property owners fail to follow both procedures to the letter, counties keep the proceeds as a windfall. MCL 211.78t(9). Unsurprisingly, property owners across Michigan are failing to clear the unusual hurdles for claiming their own money, as lawsuits filed across the state demonstrate.[2]

---

[1] *Compare, e.g.*, MCL 211.78t *with* MCL 600.3252 (surplus money "shall be paid over . . . on demand, to the mortgagor, his legal representatives or assigns"); MCL 600.6044 ("the officer shall pay over such surplus" from sale from execution on judgment to the former owner "on demand"); Utah Code 59-2-1351.1(7), 67-4a-201(14), 67-4a-903(1) (giving owners three years to claim surplus proceeds); Wis Stat 75.35, 75.36(3)(c); Fla Stat 197.582(2)(a), 197.522(1)(a) (counties automatically reimburse surplus proceeds to former homeowner).

[2] *See, e.g.*, *In re Muskegon*, *supra*; *In re Osceola Cnty Treasurer*, No. 363873, 2024 WL 3074371 (Mich App June 20, 2024) (unpublished decision involving two claimants, cited solely to demonstrate the large number of people suffering because of the statute); *In re Ingham Cnty Treasurer*, No. 363797, 2024 WL 3074373 (Mich App June 20, 2024) (unpublished decision involving five claimants, cited solely to demonstrate the large number of people suffering because of the statute); *Fingal v Ontonagon Cnty*, No. 2:23-cv-00061, (WD Mich Mar 31, 2023) (42 plaintiffs, including estates and individuals, named in putative class action seeking surplus proceeds) (pending); *Avery v Kent Cnty*, No. 1:23-cv-00929 (WD Mich Sept 1, 2023) (pending), ECF No. 1-2 (complaint on behalf of individuals, estates, and individuals with power of attorney seeking surplus proceeds from sale of 23 properties); *Havela v Gogebic Cnty*, No. 2:23-cv-00124 (WD Mich July 11, 2023) (pending) (estates, trustees, and individuals seeking surplus proceeds from sale of 26 properties); *The Estate of Marilyn Collins by*

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In 2021, Manistee County reaped $260,155 in surplus proceeds by taking advantage of the unconstitutional claim procedure, including $102,636 from Ms. Koetter and $66,348 from Ms. Culp. *See infra* at 18. Similarly, in Muskegon County, even though 40 Muskegon County properties sold for *significantly* more than the tax debt, owners of only four properties managed to successfully claim their surplus as just compensation and they all required the assistance of a lawyer.[3] Moreover, the statute ensures that even property owners who successfully navigate the system get *less* than the just compensation required by the Constitution by allowing counties to keep more than the taxes, penalties, interest, and costs. *See, infra*, Section III.

This Court should grant review to protect Michigan's struggling property owners from this predatory statute, and to ensure that counties abide by the Michigan and U.S. Constitution's promise to pay just compensation and to give individuals a fair process to recover their property. Prompt resolution will provide needed guidance to state and federal courts and it will benefit the government by allowing foreclosing government units to swiftly change course before accruing greater liability for similar constitutional violations.

The Court should grant this application.

Kevin Collins as Personal Representative v Oakland Cnty, No. 2:22-cv-11647 (ED Mich July 18, 2022) (three plaintiffs seeking surplus proceeds).

[3] *See* Application for Leave to Appeal, *In re Muskegon County*, Michigan Supreme Court No. 166580 at 3 and footnote 3 (using publicly available records to show that of those properties sold in public sales, only four owners managed to claim the surplus proceeds, leaving the County with a windfall of more than $770,000. Dozens of additional properties were given to other government entities at the discount—only asking for payment of the tax debt—meaning that other governmental entities took windfalls, too.). *See* MCL 211.78m(1), (2).

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STATEMENT OF FACTS

A. Legal Background

In *Rafaeli*, 505 Mich 429, Oakland County foreclosed on Uri Rafaeli's rental house because he accidentally underpaid his property taxes by $8.41. The County sold the property at auction for $24,500 and kept all the proceeds, consistent with the General Property Tax Act at the time. *Id.* at 437. This Court held that a former owner of real property sold at a tax-foreclosure sale for more than what was owed in taxes, interests, penalties, and fees had "a cognizable, vested property right to the surplus proceeds resulting from the tax-foreclosure sale." *Id.* at 484. The government violates the Michigan Constitution's Takings Clause when it confiscates that interest by foreclosing, selling the property at auction for more than was owed, and then keeping the surplus proceeds. *Id.* at 484–85.

In response to *Rafaeli*, the Michigan Legislature enacted a law (2020 PA 256) that created the claims procedure at issue here. Under the new law—applicable here and across Michigan—tax foreclosures still occur in the spring. If the debt is not paid by March 31, the foreclosing government unit obtains fee simple title and extinguishes the owner's property interests in the real estate. MCL 211.78k(5)(b). By July 1—while the owner usually retains possession of the real estate, and weeks before the sale of the property—the owner must formally notify the foreclosing government unit that she wants to be paid any future surplus proceeds from the sale of her property, if any, by completing and submitting a notarized Form 5743. MCL 211.78t(2). The Form must be submitted by personal service acknowledged by the foreclosing government unit or by certified mail, return receipt requested. *Id.*

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Between August and November, after giving the state, local city, and then the county the right of first refusal to purchase the property, the foreclosing government unit sells the property at a public auction. MCL 211.78m(1), (2). In January, the government calculates the proceeds remaining (if any) after all tax debts, interest, and penalties are deducted, and informs the claimant that she must file a motion in the circuit court between February 1st to May 15th to recover these proceeds. MCL 211.78t(3)(i), (k); (4). The window to file this motion opens roughly one year after the property was foreclosed and many months after it was sold. But still the owner cannot collect the money constitutionally required.

Property owners receive nothing unless the government responds to the motion by filing with the circuit court a list showing that the claimant timely submitted the notarized Form 5743, and identifying the amount, if any, of remaining proceeds. MCL 211.78t(5); App 87–88. If the government acknowledges timely receipt of Form 5743 and the existence of remaining proceeds, the circuit court holds a hearing to determine the relative priority of all claims (including any lienholders' claims). The government first gives itself a 5% cut of the purchase price before allocating money to paying the tax debt, including interest and sale costs, then other liens, and finally the remainder to the former owner who timely filed both Form 5743 and the motion to recover the surplus. MCL 211.78t(9). The government has 21 days to pay the amounts ordered by the circuit court. MCL 211.78t(10).

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B. The County keeps money that belonged to Chelsea Koetter and Ann Culp

1. **Chelsea Koetter** is a single mom who owned a modern, 2-bedroom home, with a large yard in Bear Lake, Michigan, where she lived with her two boys since 2016. App 100, 108.[4] She owned the home free and clear of any mortgages or other liens. App 22. Unfortunately, she fell behind on her 2018 property taxes. With the help of family, Ms. Koetter paid nearly all her taxes, including her 2019 and 2020 taxes. *See* App 104–05. But she and her family mistakenly did not pay part of her 2018 property taxes because a Bear Lake Township employee gave incorrect information about the debt. App 104–05 (Koetter's father visited the Township's office three times to pay all outstanding taxes and asked the employee "to verify that all taxes were paid and they looked up the records and confirmed that I was paying all taxes that were due"); App 98. Ms. Koetter and her family did not understand her peril or that she still needed to pay taxes to the Township's debt collector—Manistee County (not the Township). *See id.* (Prior to foreclosure, Ms. Koetter "attempted to figure out what was going on" with her property taxes, "but the Treasurer's office was closed due to COVID"); App 104–05.

[4] *See* Public Land Auction Salebook for August 2, 2021 (hereinafter "2021 Salebook") at page 22, https://www.tax-sale.info/forms/salebook/auction/663/print/salebook/2021-08-02_salebook_final.pdf (last checked July 24, 2024) (advertising Ms. Koetter's home as an occupied, "modern," ranch-style home with a detached two-car garage and large yard with a basketball court). Appellants ask this Court to take judicial notice of this publicly available information. *See In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 371 n2 (2007).

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On February 12, 2021, the Circuit Court entered a judgment to foreclose her home to collect $1,199.59 in 2018 property taxes, plus $831.93 in interest and fees. App 28, 34. The County took title to Ms. Koetter's home on April 1, 2021, which Zillow estimates was worth $159,000 at the time.[5]

The County asserts that it mailed two notices—one before the foreclosure and one after—that stated owners must submit a claim form to make a claim for any remaining proceeds. App 49. Neither notice includes Form 5743. *See* App 68–71. The one-page notices do not state how much money is at stake, because the property has not yet been sold, and the amount is thus unknowable. *Id.*

In June 2021, not realizing that it was too late to save her home, Ms. Koetter visited the Treasurer's office with her grandmother "to attempt to correct things." App 99. But at the Treasurer's office, she was "told it was too late" to save her home. *Id.*; *see also* App 102. Even worse, "No one mentioned that a form could be filled out for claiming proceeds for the sale and no one gave [her] the form." App 99; App 102 ("In June of 2021, I accompanied my granddaughter to the Manistee County Treasurer's Office in an effort to straighten out her taxes. She was told she was too late and her property had been foreclosed and that nothing could be done. No one ever informed her that she had to file a form by July 1. In fact, no one ever mentioned anything about filing a form of any type. . . .").

[5] https://www.zillow.com/homedetails/8073-Lake-St-Bear-Lake-MI-49614/106454494_zpid/.

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Ms. Koetter only later found out about the claim form requirement from a family friend. App 99. On July 9, 2021—just 8 days after the deadline—Ms. Koetter submitted a notarized claim form, seeking to preserve her future right to collect just compensation for the taking of more property than was needed to pay her debt. App 99–101. The County rejected the claim as tardy. App 101.

On August 2, 2021, the County auctioned her home, selling it to Ms. Koetter's father for $106,500—$102,636 more than Ms. Koetter's total debt of $3,863.40 including all costs, interest, and fees. App 22.

The following month, with the help of counsel, she again attempted to submit a completed Form 5743 on August 18, 2021—only 48 days after the July 1 deadline. App 66. The County again denied her claim as tardy. App 64.

On May 10, 2022, she timely filed a motion to reopen the foreclosure case and to claim the surplus proceeds for the County's taking of her property. App 4. The County opposed Ms. Koetter's motion solely because her claim form was filed a week late. App 47. In response, Ms. Koetter obtained permission from the court to file a supplemental brief, which argued, *inter alia*, that denial of her claim would violate due process under the Michigan and U.S. Constitutions and would result in an unconstitutional taking under Article X, § 2, of Michigan's 1963 constitution and the Fifth Amendment of the United States Constitution. *See* App 161. The County filed a supplemental response brief opposing those arguments. *See id.*

On August 29, 2022, the trial court denied Ms. Koetter's claims, holding that because she failed to follow the statutory claim process to the letter, the government

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could avoid its duty to pay her just compensation. *Id*. The County took a $102,636 windfall at Ms. Koetter's expense. App 22.

2. **Ann Culp**, in 2017, purchased 37 acres of land next to her home in Copemish for $40,000. App 39, 46. Ms. Culp fell behind on her property taxes. Her total debt, including all penalties, interest, fees, and costs was $3,151. App 36. She did not have any other liens on the property. *Id.*

The County foreclosed on February 12, 2021, and took title to her land on April 1, 2021. App 35–36. The publicly available auction listing for Ms. Culp's property noted that Ms. Culp "dispute[d]" the legitimacy of the foreclosure. 2021 Salebook at 23, *supra*, note 5. Still, the County sold the property at auction on August 2, 2021, for $69,500. App 36.

After retaining a lawyer, Ms. Culp submitted a correct and notarized claim form to the County on January 24, 2021—several months before she would be entitled to collect any money from the County. *See* App 90–92. The County denied the claim as untimely. App 100.

Ms. Culp timely filed a motion for the surplus proceeds on May 11, 2022. App 5, 35. The County opposed her motion because the preliminary claim form was submitted to the County after the 92-day deadline. App 73. Ms. Culp joined Ms. Koetter's supplemental brief that argued, *inter alia*, that denial of her claim would violate due process under the Michigan and U.S. Constitutions and would result in an unconstitutional taking under Article X, § 2, of Michigan's 1963 constitution and

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the Fifth Amendment of the United States Constitution. *See* App 161. The County filed a supplemental response brief opposing those arguments. *Id.*

On August 24, 2022, the circuit court held a hearing on the motions. App 112. On August 29, 2022, the court denied Ms. Koetter's and Ms. Culp's motions for the surplus proceeds, holding that failure to follow the statutory procedure barred them from any recovery. *See* App 161.

C. The Court of Appeals holds the County did not violate due process or take property without just compensation by keeping the Owners' money

After a failed motion for reconsideration, *see* App 167–68, Ms. Koetter and Ms. Culp each timely filed a Claim of Appeal in the Court of Appeals, App 10, but the court dismissed both claims without prejudice for lack of jurisdiction on October 19, 2022. App 169–70. Pursuant to MCR 7.205(4)(b), Ms. Koetter and Ms. Culp together filed an application for leave to appeal in the Michigan Court of Appeals, which the court granted on June 20, 2023. App 171.

On appeal, Ms. Koetter and Ms. Culp asserted, *inter alia*, that the statute cannot provide the exclusive remedy for the taking of their property and that the County deprived them of their property without due process and just compensation in violation of the Michigan and U.S. Constitutions. *See* App 175–79. Specifically, they alleged that barring recovery of their money by strict adherence to MCL 211.78t's July 1, 2021, deadline for the pre-sale claim form to be filed, prior to any calculation of just compensation (if any), violated due process and thus was void. *See* App 176–77. They also asserted that the statute violated the federal and state takings

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clauses on two independent grounds: (1) the government has an affirmative, constitutionally mandated duty to pay just compensation that it evades via the statutory procedures used here, and (2) it awards owners less than their full just compensation because the government withholds money that does not qualify as a tax, fee, cost, interest, or penalty. *See* App 178–79.

The Court of Appeals ruled against Ms. Koetter and Ms. Culp, holding it was bound by a prior panel's decision, *Muskegon Treasurer*, No. 363764, __ NW3d __, 2023 WL 7093961 (Mich App Oct 26, 2023), *application pending* docket no. 166580. App 174. First, it noted the statute's claim process was the "exclusive mechanism for claiming and recovering remaining proceeds" after a tax foreclosure sale. App 175. The court held that the County satisfied Ms. Koetter's and Ms. Culp's due process rights, because the County "followed the statutory process" and thus "received the process that was due." App 176. The court noted that it does not matter "whether such a scheme makes sense or not, or whether a 'better' scheme could be devised," because those are "policy questions for the Legislature, not legal ones for the Judiciary." App 177.

The Court of Appeals denied the federal and state takings claims, holding that Ms. Koetter and Ms. Culp "did not satisfy the notice requirements of 78t(2)" by filing Form 5743 by July 1, 2021. App 180. Because Ms. Koetter and Ms. Culp failed to give the government such early notice, the government did not have to pay just compensation. App 180–81.

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STANDARD OF REVIEW

This Court reviews questions of constitutional and statutory interpretation de novo. *AFT Michigan v State*, 497 Mich 197, 208 (2015).

ARGUMENT

I. This Court should grant the application to hold that denying property owners constitutionally mandated compensation based on the claim procedures in MCL 211.78t violates due process

The Michigan and federal constitutions guarantee that the government may not deprive any person of their property without due process of law. US Const, Am V; US Const, Am XIV; Const 1963, art I, § 17. Due process "provide[s] a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State." *Collins v City of Harker Heights*, 503 US 115, 125 (1992). The government must adopt fair procedures designed to protect private property. *See, e.g.*, *Todman v Mayor & City Council of Baltimore*, 104 F4th 479, 490 (CA4, 2024) ("notice should be readily accessible and easily understood and should be of a form that drafters of the ordinance would appreciate if their own property were at risk"); *Jones v Flowers*, 547 US 220, 229 (2006) (due process requires the sort of notice that would be used by one "who actually desired to inform a real property owner of an impending tax sale").

The procedures necessary to satisfy due process depend on circumstances. *Mathews v Eldridge*, 424 US 319, 332 (1976). Laws that allow government to profit from confiscations are more likely to violate due process, as a majority of U.S. Supreme Court justices most recently noted in *Culley v Marshall*, 601 US 377, 396 (2024) (Gorsuch, J., concurring) (troubling "financial incentives to pursue forfeitures" raise serious due process concerns); *id.* at 405 (Sotomayor, J., dissenting) (due process

requires heightened protection in cases where "cash incentives . . . encourage counties to create labyrinthine processes for retrieving property").

The statutory procedures here suffer from perverse incentives that elevate government's interests in retaining windfalls over the Owners' constitutional right to just compensation, imposing an unfair and unnecessary process that violates due process. The statute requires Owners to file a notarized form submitted by personal service or registered mail while they retain possession (and often, occupancy) of their property and long before they know how much money, if any, is at stake. Later, Owners must figure out how to file a motion in court—in a relatively short window of time—seeking to be paid what is rightfully theirs. And as documented in the pending Application for Leave to Appeal in *Muskegon*, owners of only four of the forty foreclosed properties that realized a surplus after Muskegon County's 2021 foreclosure obtained any of the proceeds, and all had to hire a lawyer to do so. *See*, *supra*, note 3. In Manistee County's 2021 foreclosures, owners of only five out of 18 foreclosed properties apparently succeeded in claiming remaining proceeds, leaving the County with a $260,155 windfall according to records posted online by the Department of Treasury. *See 2021 Foreclosures Report* at 48, Michigan Department of Treasury;[6] App 9.

[6] https://www.michigan.gov/taxes/-/media/Project/Websites/taxes/Auctions/2021-Foreclosure-Sales-State-Wide-Reports.pdf?rev=2dabee8d90ed4b488e9d01bdb543176e&hash=7BC32BA8083586D6CEB91C5CB22E9909 (last checked July 18, 2024) (noting a total of 18 properties were foreclosed).

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Due process requires more protection for property owners. The fundamental constitutional rights at stake, the risk of erroneous deprivations under MCL 211.78t, and the ease of providing fairer process and a longer claim period indicate that the County has taken the Owners' money without due process of law. *See Mathews*, 424 US at 332.

A. All three *Mathews* factors suggest this process provided here violates due process

The procedures necessary to satisfy due process depend on circumstances. *Id.* Courts consider three factors to decide whether a procedure satisfies due process: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation under the challenged procedures, and the probable value of additional or substitute safeguards; and (3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedures would entail. *Id.* at 335. All three *Mathews* factors weigh in favor of requiring a more forgiving process for the Owners.

1. Ms. Koetter's and Ms. Culp's interest in the surplus proceeds is a longstanding, constitutionally protected property right

The protection required by due process depends on the "extent to which [an individual] may be 'condemned to suffer grievous loss.'" *Goldberg v Kelly*, 397 US 254, 263 (1970). A debtor's right to be paid the surplus proceeds left over from the sale of foreclosed property is no mere statutory interest—it is deeply rooted in history and required by the Michigan and United States Constitutions. *See Tyler*, 598 US at 647; *Rafaeli*, 505 Mich at 466–68.

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For most Americans, the equity in their home is their single biggest asset, Jenny Schuetz, *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap*, Brookings (Dec 9, 2020).[7] Most individuals who lose a home to tax foreclosure are elderly or poor, and the surplus proceeds from the sale often reflect their lifesavings. *See, e.g.*, *Cherokee Equities, LLC v Garaventa*, 382 NJ Super 201, 211 (Ch Div, 2005) (Tax foreclosure defendants are often "among society's most unfortunate."); Jennifer CH Francis, Comment, *Redeeming What is Lost: The Need to Improve Notice for Elderly Homeowners Before and After Tax Sales*, 25 Geo Mason U Civ Rts LJ 85, 86 (2014). Losing those lifesavings imposes a grievous loss on individuals, potentially rendering them homeless while the government enjoys an unearned windfall. *Cf. Goldberg*, 397 US at 263. The fundamental property interest at stake here weighs heavily in favor of substantial procedural protections. *United States v James Daniel Good Real Prop*, 510 US 43, 54 (1993) (the "economic value" of a home "weigh[s] heavily in" favor of a pre-deprivation hearing).

2. The risk of erroneous deprivation is high and could be easily avoided by treating the property interest here like other takings or all other types of private property held by the government

This case demonstrates the high risk of deprivation. Ms. Koetter and her family tried multiple times to pay her debt in full and mistakenly believed she could still save her home, even after the County took her title. App 98–99, 102, 104–05. She

[7] https://www.brookings.edu/articles/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/.

visited the County Treasurer's office to save her home in June, before the claim deadline had run. App 99, 102. Yet no one at the office told her about Form 5743, or gave her a copy. *Id.*

The County asserts that it mailed each owner two notices—one before the foreclosure and one after—that warned they would need to make a claim for any remaining proceeds by July 1, 2021. App 50, 75. The first notice (a warning of impending foreclosure) states that if foreclosed, the property "may be sold" and "you have a right to claim any excess funds remaining after the sale or transfer of the property by filing a Notice of Intention form by July 1, 2021." App 94. The second, sent to both owners on April 23, 2021, states that "[a]ny person that held an interest in this property at the time of foreclosure" must submit "Form 5743" to make a claim for any "remaining proceeds." App 50, 75. Neither notice included a copy of Form 5743. *See* App 47, 67–72, 94, 97. Nor do the bland, one-page notices convey the urgency one would expect the government to give to individuals in Ms. Koetter's and Ms. Culp's position. The notices are sent while owners are still enjoying possession of the property. And since the notices are sent before the property is sold, they do not and *cannot* state how much money is at stake. There's no neon sticker attached to the owner's door—like that commonly placed on doors across America of homes in danger of condemnation, or stuck on cars in danger of towing—warning that tens or hundreds of thousands of dollars will soon be forfeited. No sheriff shows up to warn the owner that all of her savings in the home will soon be gone. With such grave consequences, most people would expect something more substantial from their own government

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charged to serve and protect them. *See Niz-Chavez v Garland*, 593 US 155, 172 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.").

Yet according to the lower court, to receive any share of just compensation after a tax foreclosure, Michigan property owners must comply with two separate, duplicative procedures. First, they must receive the notice summarizing the 2,619-word statute, comprehend it, and then obtain and properly submit by personal service or registered mail a notarized and complete pre-sale claim form within 92 days of foreclosure, notifying the government that they do not waive their constitutional right to just compensation. Second, months later, after the County sells the property and calculates the amount of surplus to be returned to the property owner as just compensation, owners have a brief window to file a separate motion in court seeking payment. Property owners who fail to satisfy both steps are deemed to waive their constitutional right to just compensation, allowing the government to keep the money as a windfall. MCL 211.78t. As demonstrated above, the risk of erroneous deprivation is not just hypothetical; most owners fail to overcome the obstacles presented by the claim procedure and cannot collect their own money.

This demonstrably high risk of deprivation is heightened by the government's direct "pecuniary interest in the outcome" of the procedure failing. *James Daniel Good*, 510 US at 55–56; *see also Marshall v Jerrico, Inc*, 446 US 238, 250 (1980) ("judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement"); *Tumey v Ohio*, 273 US 510, 535 (1927) (mayor serving as a judge

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violated due process "both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village"). The government has a clear pecuniary interest in making it hard for individuals to collect the surplus proceeds that otherwise are diverted to fund public needs. State law permits counties to hold the surplus proceeds when they sell the tax foreclosures. Unlike normal takings, they do not deposit the money in an escrow account or a court for safekeeping.[8] Nor is the money handed over to the State of Michigan to be treated like other unclaimed funds. Instead, counties retain the surplus, earning interest on the money for its own benefit, until a court orders disposition of most of the proceeds. *See* MCL 211.78t. Counties only return surplus proceeds to those very few property owners who manage to fully navigate the complicated claim procedure within the short time limits provided by Michigan's General Property Tax Act.

The high risk of erroneous deprivation could easily be avoided by requiring the government to treat the property like it treats all other similar interests. Michigan holds unclaimed money indefinitely—even for many years—without confiscating it. *See* MCL 567.241(1) (State "assumes custody and responsibility for the safekeeping," but not ownership "of the property"). When government takes private property for a public use via eminent domain, it deposits payment of an estimated amount of just

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[8] These duties to protect other people's money are so well established that an attorney who fails to earmark funds as client property and place them in an account for safekeeping commits misconduct warranting suspension. *Matter of McWhorter*, 407 Mich 278, 291 (1979).

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compensation in escrow, which is "held for the benefit of the owners," MCL 213.55(5), until the court orders payment to the owner. *See* MCL 213.58. Moreover, when government takes property without invoking eminent domain, property owners have six years to bring a claim seeking just compensation under the Michigan Constitution's Takings Clause and three years under the federal Takings Clause. *Hart v City of Detroit*, 416 Mich 488, 503 (1982).

3. The government's proper interest is only in collecting what is owed and the fiscal and administrative burden of treating the claim process like other types of property would be light

The government's proper interest is limited only to collect what it is owed, not a windfall. *Rafaeli*, 505 Mich at 480. And there is no burden on the counties to allow owners to stake their claim by filing Form 5743 with their motions seeking just compensation.

The notarized form requirement that precedes the motion imparts no new or different information than the motion and serves only as a trap for the unwary. *See Zauderer v Office of Disciplinary Council of Supreme Court of Ohio*, 471 US 626, 656 (Brennan, J., concurring in part) (a "potential trap for an unwary" set for a person who was "acting in good faith . . . works a significant due process deprivation"). Michigan's duplicative claim statute functions solely as an obstacle designed to allow the government to take private property without just compensation.

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The *Mathews* factors overwhelmingly weigh in favor of a process that looks more like other takings claims or processes for claiming money. *Cf. Staats v Miller*,

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150 Tex 581, 584–85 (1951) (A cause of action for monies improperly taken is "less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff.") (citation omitted). This Court should grant review to give lower courts guidance about how to weigh due process in the tax foreclosure context.

B. Unfairly short or early deadlines violate due process

This Court could also rely solely on precedent rejecting short claim deadlines as a violation of due process. This Court and the U.S. Supreme Court have rejected even longer deadlines than the 92-day deadline here.

This short claim period operates as a statute of limitations on a property owner's right to just compensation because failure to submit the form forever forecloses their ability to obtain just compensation. "[S]tatutes of limitation affecting existing rights are" constitutional only "if a reasonable time is given for the commencement of an action before the bar takes effect." *Terry v Anderson*, 95 US 628, 632–33 (1877); *see also Kalis v Leahy*, 188 F2d 633, 635 (CADC, 1951). Legislatures have a fair amount of flexibility in setting a statute of limitations, "unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Wilson v Iseminger*, 185 US 55, 63 (1902). *See also Atchafalaya Land Co v FB Williams Cypress Co*, 258 US 190, 197 (1922); *McGahey v Virginia*, 135 US 662, 706–07 (1890). Michigan's case law is similar. As Justice Cooley writing for this Court explained in *Price v Hopkin*, 13 Mich 318, 328 (1865), a "law of limitation [must] afford a reasonable time within which suit may be brought," and "a statute that fails

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to do this cannot possibly be sustained . . . but would be a palpable violation of" constitutional due process. *Id.* at 324–25; *see also Mays v Snyder*, 323 Mich App 1, 33 (2018) ("The Legislature may not impose a procedural requirement that would, in practical application, completely divest an individual of his or her ability to enforce a substantive right guaranteed thereunder.").

In *Burnett v Grattan*, 468 US 42, 55 (1983), the U.S. Supreme Court held that a six-month statute of limitations for raising constitutional claims from administrative proceedings was too short and violated the intent of 42 USC 1983, which was enacted to allow individuals to enforce their federal constitutional rights. *See also United States v Taylor*, 104 US 216, 221–22 (1881) (refusing to interpret a federal statute of limitations as barring a former owner's right to claim surplus proceeds, because "[a] construction consistent with good faith on the part of the United States should be given to these statutes").

The deadline here is much shorter than six months, and because owners like Ms. Koetter and Ms. Culp still possess their property, the deadline will often pass before they even realize they've lost title. Contrast the 92-day deadline with the six-*year* deadline for filing an inverse condemnation action under Michigan's Constitution or three-year deadline for bringing a federal takings claim under 42 USC 1983. *Hart*, 416 Mich at 503; *Grainger v Ottawa Cnty*, 90 F4th 507, 510 (CA6, 2024). The claim statute, MCL 211.78t, purportedly overrides these years-long statutes of limitation by requiring owners to stake their claim with the County within

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92 days or be forever barred from recovering their constitutionally-mandated just compensation. This is *not* reasonable.

The 92-day pre-claim deadline is dramatically shorter than Michigan's Uniform Unclaimed Property Act, which requires the government to hold unclaimed money in trust *indefinitely* until the owners file a *single* document necessary to claim their property. *See* MCL 567.245(1) (claimant files single form—no notarization required—with administrator of unclaimed property).

The County defends the extraordinarily short deadline by arguing that "July 1st makes sense" and "is not just pulled from thin air" because it supports the "purpose of trying to return property to productive use and . . . reduce blight and promote economic revitalization" because it gives local municipalities an opportunity to get the property at a discount for only the amount of the tax debt through the "right-of-first-refusal process." App 139; MCL 211.78m. But the government's desire to take private property without just compensation to benefit public purposes cannot save the statute. Rather it confirms the government's violation of the Michigan and U.S. Constitutions. *Rafaeli*, 505 Mich at 480–81; *Pennsylvania Coal Co v Mahon*, 260 US 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

Moreover, the government did not take these properties to address blight. Instead, Ms. Koetter's father sacrificed substantially to buy the home at auction so that she and his grandsons would have a home. App 166. The County took a $102,636

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windfall at Ms. Koetter's and her family's expense, *see* App 22, demonstrating the property's significant value. Likewise, there is no indication that the 37 acres next to Ms. Culp's home were blighted or in need of public attention. Indeed, the County took a $66,348 windfall by selling it. *See* App 36.

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For good reason, the Michigan and United States Constitutions protect owners' right to the surplus proceeds from the sale of their homes. Ms. Koetter's and Ms. Culp's property interest is of deep historic and personal importance, weighing heavily in favor of fairer processes. The duplicative claim processes used pursuant to MCL 211.78t erroneously deprived the Owners—and others across the state—of their property. The procedures used here depart dramatically from other claim procedures and other laws designed to pay just compensation. In short, the procedures serve only to trap vulnerable people already suffering financial distress, to benefit the government with a windfall when they fail. *See Palazzolo v Rhode Island*, 533 US 606, 628 (2001) ("The State may not by this means secure a windfall for itself."). Every one of the *Mathews* factors supports Ms. Koetter's and Ms. Culp's claims here. And the claim period is so absurdly short that it cannot survive due process review in any event. This Court should grant the application.

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II. This Court should grant the application to hold that the government cannot evade the constitutional duty to pay just compensation, by requiring property owners to notify the government that they will want to exercise their constitutional right to just compensation months before the money is calculated or available

A. The Michigan and United States Takings Clauses mandate just compensation when government takes more what it is owed

The Fifth Amendment to the U.S. Constitution provides that government must pay "just compensation" when it takes private property for a public use. The Takings Clause in Article 10, Section 2, of the 1963 Michigan Constitution similarly provides that "private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." *Rafaeli*, 505 Mich at 454.

The purpose of both constitutions' just compensation guarantee is 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." *Armstrong v US*, 364 US 40, 49 (1960); *Rafaeli*, 505 Mich 480–81. Thus the Michigan Constitution "protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure." *Rafaeli*, 505 Mich at 473. Likewise, the U.S. Constitution ensures that while the government "ha[s] the power" to sell property to recover unpaid property taxes, it cannot "use the toehold of the tax debt to confiscate more property than was due." *Tyler*, 598 US at 639. Taking and keeping more than what is owed violates the Just Compensation Clause. *Id.*

Regardless of the existence of legislatively-enacted procedures, once a government has taken property—as here—[t]he law will imply a promise to make the

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required compensation." *United States v Great Falls Mfg Co*, 112 US 645, 656–57 (1884). *See also Yearsley v WA Ross Constr Co*, 309 US 18, 21 (1940). Indeed, Thomas Cooley described a taking simply as a compelled sale of property to the government. Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 559 (4th ed. 1878) (A taking is "in the nature of a payment for a compulsory purchase.").

B. The lower court's decision impermissibly shifts the government's affirmative duty to pay just compensation onto an owner to avoid accidentally waiving the constitutional right

The lower court's decision allows the government to evade its constitutional responsibility by setting a trap that results in property owners accidentally waiving their right to just compensation.[9] Michigan's statute means that an owner's failure to fill out the paperwork properly, notarize it, and deliver it on time via personal service or registered mail—before the property has been sold, and while the owner still has possession—forever waives the owner's constitutional right to just compensation. In other words, MCL 211.78t imposes burdens on owners to proactively stake their claim before they may even file a motion to recover their money, or statutes deem them to have waived their right to just compensation. This is backward: a government that takes property has an *affirmative obligation* to pay just compensation. *First English Evangelical Lutheran Church of Glendale v Los Angeles Cnty*, 482 US 304, 315 (1987) ("[G]overnment action that works a taking of

[9] This Court frowns on constitutional evasions. *See, e.g.*, *Bacon v Kent-Ottawa Metro Water Auth*, 354 Mich 159, 176–77 (1958) (Courts "look only to the effect and result," and, if the "effect and result" of new legislation "circumvent[s] the constitutional debt limitation provision, we have no choice but to condemn it.") (citation omitted).

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property rights necessarily implicates the 'constitutional obligation to pay just compensation.'"), *quoted in Knick v Twp of Scott*, 588 US 180, 193–94 (2019).

Our Constitution permits no such accidental waiver. The onus is on the *government* to compensate the owner, "without imposing on the owner any bur[d]en of seeking or pursuing any remedy, or leaving him exposed to any risk or expense in obtaining it." *Bonaparte v Camden & AR Co*, 3 F Cas 821, 831 (D NJ, 1830). The Supreme Court generally rejects government attempts to create accidental waivers of constitutional rights. "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v Zerbst*, 304 US 458, 464 (1938) (cleaned up); *People v Smith*, 19 Mich App 359, 369 (1969) ("the basis for the rule which requires us to indulge every reasonable presumption against waiver is 'not far to seek. It rests on the plain fact of human experience that rights easily waived are rights easily lost.'") (citation omitted).[10] If the government wants to deem a constitutional right waived, it bears the burden of showing it. *See Fuentes v Shevin*, 407 US 67, 95 (1972) ("[A] waiver of constitutional rights in any context must,

[10] In other contexts, states guard against accidental waiver. *See, e.g.*, *Commw v Osborne*, 445 Mass 776, 780 (2006) (criminal defendant must affirmatively waive jury trial in writing); *Chapman v Powermatic, Inc*, 969 F2d 160, 163 (CA5, 1992) (construing removal requirements to prevent accidental waiver of right to be heard in federal court); *In re Adelphia Comm'ns Corp*, 352 BR 578, 586 (SDNY, 2006) ("as a matter of common sense and waiver doctrine generally," court refused to find that debtors inadvertently waived exclusivity provision of bankruptcy law by allegedly following improper procedure).

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at the very least, be clear."); *Barker v Wingo*, 407 US 514, 525 (1972) ("[P]resuming waiver of a fundamental right from inaction[] is inconsistent with this Court's pronouncements on waiver of constitutional rights."); *Carnley v Cochran*, 369 US 506, 516 (1962) ("Presuming waiver from a silent record is impermissible.").

In no other takings context must a property owner formally notify the government that he wants to be compensated for taken property beyond the filing of a lawsuit when the government denies the taking has occurred. *See, e.g.*, MCL 213.25; 213.55. That is, property owners may choose to waive constitutional rights, but the government may not *presume* such a waiver and demand that property owners affirmatively invoke their constitutional right to just compensation. In short, Michigan may not displace the constitutional framework requiring voluntary, knowing, and intelligent waiver merely by legislating it away. *See Silver v Garcia*, 760 F2d 33, 38 (CA1, 1985) (Legislatures "cannot legislate away protections provided by the Constitution") (citation omitted).

If this Court approves the statute at issue here, the state will be emboldened to expand its reach, a disastrous consequence for both property owners and constitutional doctrine. If counties could avoid their obligation to pay just compensation for land taken for roads, schools, and parks through a similarly obscure and burdensome claim procedure, they would inevitably do so, shifting their burden to pay just compensation onto property owners to affirmatively claim their constitutional rights or lose them. *See Malik v Brown*, 16 F3d 330, 332 (CA9, 1994) ("A 'use it or lose it' approach [to constitutional rights] does not square with the

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Constitution."). It perhaps reflects the counties' special animus toward owners of tax-foreclosed properties that all other property owners entitled to just compensation need not file any type of form to obtain what they are owed in court.

But "'property rights cannot be so easily manipulated.'" *Tyler*, 598 US at 645 (quoting *Cedar Point Nursery v Hassid*, 594 US 139, 155 (2021)). The counties' withholding of Ms. Koetter's and Ms. Culp's money is a taking and this Court should protect Michiganders' constitutional right to just compensation from such manipulation.

C. The lower court's decision violates Michigan and United States Supreme Court precedent by unduly burdening the right to obtain constitutionally required just compensation

Both the Michigan and federal takings clauses are "self-executing." *First English*, 482 US at 315–16; *Rafaeli*, 505 Mich at 454 n54. By definition, self-executing constitutional provisions cannot "be burdened or curtailed by supplementary legislation." *League of Women Voters of Mich v Secretary of State*, 339 Mich App 257, 275 (2021); *Hamilton v Secretary of State*, 227 Mich 111, 125 (1924); *see also Seaboard Air Line Ry Co v United States*, 261 US 299, 306 (1923) ("It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions.").[11]

The "right to full compensation arises at the time of the taking, regardless of post-taking remedies that may [or may not] be available to the property owner."

[11] *See also Wolverine Golf Club v Hare*, 24 Mich App 711, 725 (1970), *aff'd* 384 Mich 461 (1971) ("legislature may not act to impose additional obligations on a self-executing constitutional provision").

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Knick, 588 US at 190. In other words, an owner may sue for just compensation under the federal Takings Clause and 42 USC 1983, even if the state has "a state law procedure that will eventually result in just compensation." *Id.*[12] The state procedure cannot extinguish the Constitution's just compensation promise. *Id.*; *see also Monroe v Pape*, 365 US 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). Landowners need not pursue any additional state procedures to collect just compensation that serve only to thwart their ability to recover compensation by sending them "knee-deep in technicalities . . . and making a pretence [sic] of equity . . . ." *Kruse v Village of Chagrin Falls*, 74 F3d 694, 701 (CA6, 1996) (quoting Charles Dickens, *Bleak House* 2 (Oxford University Press ed 1989) (London 1853)). Yet, here, the lower court rejected *Knick*, holding that an owner may seek just compensation *only* through the process described in MCL 211.78t. App 179.

This Court must resist the government's efforts to condition the right to just compensation on procedures that are "manifestly inconsistent" with recovering just compensation. *See Felder v Casey*, 487 US 131, 141 (1988). *See also Mays*, 323 Mich App at 33 (Courts will not enforce "a procedural requirement that would, in practical application, completely divest an individual of his or her ability to enforce a substantive [constitutional] right guaranteed thereunder."); *Mays v Gov of Mich*, 506

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[12] "The [federal Takings] Clause provides: '[N]or shall private property be taken for public use, without just compensation.' It does not say: 'Nor shall private property be taken for public use, without an available procedure that will result in compensation.'" *Knick*, 588 US at 189.

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Mich 157, 207 (2020) (Bernstein, J., concurring) ("To foreclose plaintiffs' claims . . . would effectively divest plaintiffs of the opportunity to vindicate their constitutional rights. . . . If their claims are . . . untimely [under a sixth month claim statute], plaintiffs should be able to utilize the harsh-and-unreasonable-consequences exception.").

In *Felder*, the U.S. Supreme Court held that federal constitutional claims brought via 42 USC 1983 could not be contingent on satisfying Wisconsin's 120-day notice-of-claim statute. 487 US at 142. The Court said it would be inconsistent with the purpose of the federal statute—the vindication of constitutional rights—to deny recovery based on a state law that was designed "to minimize governmental liability." *Id.* at 141. The 120-day claim requirement was not "a neutral and uniformly applicable rule of procedure; rather it is a *substantive burden* imposed only on those who seek redress for injuries resulting from the use or misuse of governmental authority." *Id.* (emphasis added). While victims of intentional torts had two years to recognize and bring a claim, victims deprived of federal constitutional rights had "only four months to appreciate that he or she has been deprived." *Id.* at 142. This government-protecting rule stood out "rather starkly, from rules uniformly applicable to all suits." *Id.* at 145. Thus, the Supreme Court held the notice-of-claim statute could not bar a constitutional claim brought via 42 USC 1983.

Like the 120-day notice-of-claim statute in *Felder*, the claim statute here requires a series of unnecessary procedures plainly designed "to minimize governmental liability" and burden the right to just compensation. *Felder*, 487 US at

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141. While victims of other types of takings have six years to bring their claims in state court,[13] owners of tax-foreclosed property have only 92 days to preserve their inchoate future right to collect surplus proceeds, and still only get paid if (1) they later file a motion in court in another 104-day window, and (2) the government files a notice acknowledging that the owner fully complied with all procedures. MCL 211.78t(3)–(5), (9). Other debt collectors get no windfall from foreclosure sales and former homeowners are not time-barred from collecting their money. *See* MCL 600.3252 (surplus money "shall be paid over . . . on demand, to the mortgagor, his legal representatives or assigns"); MCL 600.6044 (when property is sold via execution on judgment, "the officer shall pay over such surplus to the judgment debtor or his legal representatives on demand"); MCL 324.8905c (surplus "proceeds of the foreclosure sale shall be distributed . . . [t]o the owner of the vehicle"). MCL 211.78t is transparently designed to give the government a windfall.

The Court should grant review and hold that under the federal and Michigan takings clauses, "like any other creditor, defendants were required to return the surplus." *Rafaeli*, 505 Mich at 476.

D. *Nelson* does not save the statute here

The lower court denied just compensation based on *Muskegon*, 2023 WL 7093961, which misapplied *Nelson v City of New York*, 352 US 103 (1956), a case that briefly mentioned a belated *federal* Takings Clause argument. First, in interpreting *Michigan's* Constitution, this Court need not and should not give *any* weight to

[13] *See Hart*, 416 Mich at 503.

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Nelson. *Rafaeli*, 505 Mich at 461 n73. Second, the U.S. Supreme Court itself has cast doubt on *Nelson* with its recent decisions.

In *Nelson*, New York City foreclosed on properties for unpaid water bills and made a windfall from the properties. *Id.* at 106. The property owner brought due process and equal protection claims seeking return of the properties because their agent received actual notice, but the owners themselves did not. *Id.* at 106–07. "In their reply brief before th[e Supreme] Court, the owners also argued for the first time that they had been denied just compensation under the Takings Clause. [The Court] rejected this belated argument." *Tyler*, 598 US at 644 (citing *Nelson*, 352 US at 110). The New York City ordinance did not "'absolutely preclud[e] 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." *Id.* (quoting *Nelson*, 352 US at 110).

Nelson does not mean that the government may adopt *any* convoluted process to avoid its liability under the Takings Clause. The process here is notably different than New York's, requiring owners to satisfy *both* administrative and judicial claims processes.

Moreover, the Supreme Court has cast doubt on *Nelson*, implicitly contradicting it in *Knick*, 588 US at 189 (a taking occurs "without regard to subsequent state court proceedings"), and leaving unanswered in *Tyler* the question of whether *Nelson*'s takings discussion is non-binding *dicta*. *Tyler* called the takings argument in *Nelson* "belated" because it was made for the first time in the case in the reply brief before the U.S. Supreme Court. *Id.* A claim "not brought forward" in the

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lower court "cannot be made" in the Supreme Court. *United States v Williams*, 504 US 36, 41 (1992). *See also Kirtsaeng v John Wiley & Sons, Inc*, 568 US 519, 548 (2013) (court's "rebuttal to a counterargument" that went outside the issue before the court was *dicta*). In *Nelson*, resolution of the takings argument was unnecessary to the case and therefore *dicta*. *Tyler*'s only response to *Nelson* was to distinguish it because the Minnesota statute at issue provided no state law claim procedure whatsoever.

As explained above, *Nelson*, 352 US at 110, also conflicts with the Supreme Court's more recent takings decisions, including *Knick*, because it requires an owner to stake a claim for just compensation *before* the taking occurs. "Compensation under the Takings Clause is a remedy for the constitutional violation that the landowner has *already* suffered at the time of the uncompensated taking." *Knick*, 588 US at 193 (internal quotes omitted). In other words, the lower court's interpretation of *Nelson* transforms the government's burden to pay just compensation into a burden on the owner to seek compensation long before the money is even available to collect.

To be clear, the Owners are *not* challenging the tax foreclosure and transfer of title. The taken property in this case is the surplus proceeds, a property interest that was undefined until after sale of the foreclosed property. *See In re Financial Oversight and Mgmt Bd*, 41 F4th 29, 43 (CA1, 2022) ("Recognizing that the 'right to full compensation arises at the time of the taking,' does not imply that the subsequent denial of that compensation does not also raise Fifth Amendment concerns."); *Ettor v City of Tacoma*, 228 US 148, 158 (1913) (the right to just compensation is a "vested property right."). A property owner who experiences a taking cannot be required to

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seek compensation before the amount of compensation can be known. Thus, *Nelson* should not be treated as good law on the takings question.

This Court should grant the application here to correct the lower court, protect owners across the state, and limit the government's liability by holding that MCL 211.78t violates the state Constitution.

III. This Court should grant the application to hold that the legislature lacks authority to make MCL 211.78t the exclusive remedy for the taking of more property than necessary to pay a debt, because it provides less than just compensation

MCL 211.78t(11) asserts it is the "exclusive mechanism" by which an owner can recover compensation for the excess property taken when government is collecting a property tax debt. Certainly, MCL 211.78t appears designed to extinguish an owner's traditional right to obtain full just compensation for the taking of more property than necessary to pay a tax debt. But the legislature lacks authority to replace "just compensation" with less than just compensation, *see In re Financial Oversight and Mgmt Bd*, 41 F4th at 44–45, (because "just compensation is different in kind from other monetary remedies; . . . it serves also as a structural limitation on the government's very authority to take private property for public use" and, therefore, "the denial of adequate (read: just) compensation for a taking is itself constitutionally prohibited."), and thus this Court should grant review to hold this is merely an alternative state remedy—not the exclusive one.

The Legislature cannot by statute "lower the constitutional minimum of 'just compensation' established by the people who ratified the 1963 Constitution." *Michigan Dep't of Transp v Tomkins*, 481 Mich 184, 193 (2008); *First English*, 482 US

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at 316 n9 ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking."). That is, someone whose property is taken is entitled to recover "the full measure of his injury." *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 377 (2003) (quoting Thomas M Cooley, *Constitutional Law* 341 (1880)). "[T]o diminish a constitutional standard by statute, is to place the legislators in the posture of acting unconstitutionally." *Silver Creek*, 468 Mich at 379. Yet MCL 211.78t expressly lowers the amount of just compensation to be paid by 5% and allows the government to keep the interest on the owners' funds, thus violating the cardinal command of just compensation.

In *Rafaeli*, this Court held that a former owner is entitled to the surplus proceeds remaining after taxes, penalties, interest, and costs were paid. 505 Mich at 474. And it is black letter law that any interest earned by the government on money it holds for another must be paid to the rightful owner of the principal. *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 162 (1980); *Petition of State Hwy Comm'r v Morrison*, 279 Mich 285, 295–96 (1937). Manistee County held money belonging to all owners of foreclosed properties, including Ms. Koetter and Ms. Culp, for nearly a year and earned interest on it before it paid any surplus proceeds—minus the interest—to a handful of successful claimants. The statute that authorizes the government to keep that interest violates the Constitution. *Phillips v Washington Legal Foundation*, 524 US 156, 165 (1998) ("[I]nterest shall follow the principal, as the shadow the body[.]") (quoting *Beckford v Tobin*, 1 Ves Sen 308, 310, 27 Eng Rep 1049, 1051 (Ch 1749)); *O'Connor v Eubanks*, 83 F4th 1018, 1023 (CA6, 2023) ("When

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the government takes custody of private property and earns interest on it, that interest belongs to the owner."); *In re Elmwood Park Project Section 1, Group B*, 376 Mich 311, 319 (1965) ("interest should be added from the date of taking to the date of award").

Moreover, the statute gives the government a 5% kickback (designated a "sale commission")[14] from the sale price for each property, on top of requiring the owner to pay all interest, taxes, penalties, and costs. MCL 211.78t(12)(b)(iii). By the statute's own terms, the 5% "commission" is not one of the costs incurred by the government. *Id.*; *compare* MCL 211.78t(9) (government keeps "sale commission equal to 5% of the amount for which the property was sold") *with* MCL 211.78(12) (all "fees and expenses incurred by the foreclosing governmental unit pursuant to section 78m in connection with the forfeiture, foreclosure, sale, maintenance, repair, and remediation of the property" are disbursed from the remaining proceeds after a sale). Indeed, the costs incurred by the government are easily identified, since counties like Manistee outsource the auction process to a private company. *See* Tax-Sale.info, https://www.tax-sale.info/pastAuctions/2021 (noting at the bottom of the page that these auctions are run by Title Check, LLC, "Michigan's Premier Land Auction

[14] "Commissions" are equivalent to kickbacks when they enrich the recipient on improper grounds. *See Skilling v United States*, 561 US 358, 412 (2010) (quoting federal statute); *United States v Fischl*, 797 F2d 306, 308 (CA6, 1986) (kickback disguised as "commission"). To the extent the government claims to be acting as a real estate agent, it may not profit from the sale of the Owners' properties without "the fullest and most complete disclosure." *Cochrane v Wittbold*, 359 Mich 402, 408–09 (1960). As detailed above, there is no disclosure; Owners are left to their own initiative to discover Form 5743 and other obstacles to recovering their just compensation.

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Service"). The 5% "commission" is nothing more than an illegal kickback; the Owners are entitled the full amount of their just compensation.

The lower court erred in holding that the Owners' claims for just compensation are barred by MCL 211.78t. Certainly, "the Legislature may implement a remedial scheme that provides a means of vindicating the constitutional right," but unless that scheme is "at a level equal to a remedy this Court could afford," this Court retains "the authority—indeed the duty—to vindicate the rights guaranteed by our Constitution" and provide the remedy, including "causes of action seeking money damages." *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 687 (2022). This Court should grant the application

CONCLUSION AND RELIEF SOUGHT

This Court should grant the application and reverse the Court of Appeals, holding that MCL 211.78t violates the Michigan Constitution, United States Constitution, and 42 USC 1983, and that the Owners are entitled to obtain just compensation for the surplus proceeds from the sale of their properties.

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DATED: July 24, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Application complies with the type-volume limitation pursuant to MCR 7.212(B). The Application contains 10,606 words of Century Schoolbook 12-point proportional type and 2.0 spacing. The word processing software used to prepare this brief was Microsoft Office 365.

DATED: July 24, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2024, I electronically filed the foregoing Appellants' Application for Leave to Appeal, which was served by the TrueFiling system of the Michigan Supreme Court.

/s/ Donald R. Visser
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