IN THE SUPREME COURT
STATE OF MICHIGAN

In Re PETITION OF ALGER COUNTY TREASURER FOR FORECLOSURE.	Supreme Court No.
ALGER COUNTY TREASURER, Petitioner-Appellee, v. JOHANNA MCGEE, a Personal Representative of ESTATE OF JACQUELINE MCGEE, Respondent-Appellant.	COA Docket No. 363803 Alger Circuit Court LC No. 2020-008018-CZ Hon. Michael F. Gadola
In Re PETITION OF IRON COUNTY TREASURER FOR FORECLOSURE.	
IRON COUNTY TREASURER, Petitioner-Appellee, v. LILLIAN JOSEPH, Respondent-Appellant.	COA Docket No. 363804 Iron Circuit Court LC No. 2020-006077-CZ

APPELLANTS LILLIAN JOSEPH AND JOHANNA MCGEE APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The Court of Appeals issued its opinion on September 12, 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Respondents-Appellants seek leave to appeal the unpublished decision of the Michigan Court of Appeals issued on September 12, 2024, in the consolidated cases *In re Petition of Alger County Treasurer for Foreclosure*, No. 363803, and *In re Petition of Iron County Treasurer for Foreclosure*, No. 363804 (App 244). The decision held that Michigan counties could keep the just compensation due to Lillian Joseph and the heirs of Jacqueline McGee because they failed to strictly comply with a preliminary notice of claim form within 92 days of the foreclosure, weeks before the amount of compensation due could be known and approximately one year before it could be collected. Multiple applications seeking leave to appeal the same claim process are pending before this court. *See* Application for Leave to Appeal, *In re Petition of Manistee County Treasurer*, No. 167367 (filed July 24, 2024).

Ms. Joseph and Ms. McGee respectfully request that this Court grant this application for leave to appeal and reverse.

STATEMENT OF QUESTIONS PRESENTED

1. Should the claim statute be strictly construed to require strict compliance by the rightful owner of the surplus proceeds even though courts ordinarily construe remedial statutes to avoid forfeitures and provide remedies wherever possible?

Trial Court: Yes.

Court of Appeals: Yes.

Appellants: No.

Appellees: Yes.

2. Does the government violate due process under the Michigan Constitution, U.S. Constitution, or 42 USC 1983 when it deprives a property owner of just compensation because the owner did not strictly comply with an unnecessarily detailed claim form process to preserve a future right to collect an unknown amount of just compensation for property that is still in the owner's possession?

Trial Court: No.

Court of Appeals: No.

Appellants: Yes.

Appellees: No.

3. May the government avoid paying just compensation owed under the Michigan Takings Clause, Fifth Amendment Takings Clause, or 42 USC 1983 by making such payment contingent on a property owner filing a notice of intent to collect that just compensation in the future?

Trial Court: Yes.

Court of Appeals: Yes.

Appellants: No.

Appellees: Yes.

4. 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 by filing a takings lawsuit?

Trial Court: Yes.

Court of Appeals: Yes.

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 256.

INTRODUCTION

"[F]ew rights and legal principles have greater legal, historical, and constitutional pedigrees than the protection against uncompensated takings, which applies fully to the taking of surplus proceeds following a tax-foreclosure sale." *Schafer v Kent Cnty*, No. 164975, 2024 WL 3573500, at *13 (Mich July 29, 2024). Despite this Court's rulings in *Schafer* and *Rafaeli, LLC v Oakland Cnty*, 505 Mich 429 (2020), Michigan counties continue to act as if surplus proceeds above and beyond the amount of taxes and related costs owed belongs to them, not the tax debtors. This is wrong. As the Supreme Court bluntly held in *Tyler v Hennepin Cnty*, 598 US 631, 647 (2023), "[t]he taxpayer must render unto Caesar what is Caesar's, but no more." Unfortunately, Michigan's intermediate appellate courts are rubber stamping the counties' avarice, depriving hundreds, if not thousands, of tax debtors of the surplus equity that rightfully belongs to them as well as damaging the institutions of governance. *Snyder v United States*, 144 S Ct 1947, 1960 (2024) (Jackson, J., dissenting) ("Greed makes governments—at every level—less responsive, less efficient, and less trustworthy from the perspective of the communities they serve."). Only this Court can provide the constitutional protection due to these Michiganders.

In this case as in others, Michigan's court of appeals strictly construed MCL 211.78t to add unnecessary obstacles to owners recovering their constitutionally protected surplus proceeds, resulting in the applicants' unintended forfeiture of *their own property*. Surplus equity is often all that remains of a debtor's lifesavings when property is foreclosed for delinquent taxes. Yet the court below construed Michigan law so strictly that—as this case demonstrates—even timely mailed notice by debtors

fails to preserve the debtor's right to the surplus proceeds unless the form and delivery of the notice is absolutely perfect. Even worse, the Michigan Court of Appeals held that MCL 211.78t's burdensome claim process is the exclusive means for debtors and their heirs to reclaim their own constitutionally protected money. That means heirs who are scrambling to pick up the pieces after a loved one dies will almost certainly lose their inheritance if the foreclosure and claim deadline occur around the time of death, as happened here.

The resulting deprivation to Michiganders is shocking. The Michigan Department of Treasury's Foreclosure Report for 2021 reveals that most surplus proceeds are confiscated by counties and the state[1] because most owners, like those here, fail to satisfy the technical aspects of MCL 211.78t's claim process. Indeed, public records obtained from Oakland County reveal that in 2022, the county sold 196 foreclosed properties for more than what was owed, but only nine owners successfully reclaimed the surplus proceeds. *See* Pacific Legal Foundation, *Confusing Procedures Can Result in Shadow Equity Theft: Michigan*, https://homeequitytheft.org/shadow-equity-theft (last visited Oct 22, 2024).

Here, Lillian Joseph timely mailed Iron County notice that she (of course) wanted to be paid any surplus proceeds from the sale of her foreclosed property. But

[1] Michigan Department of Treasury, *2021 Foreclosures Report*, https://www.michigan.gov/taxes/-/media/Project/Websites/taxes/Auctions/2021-Foreclosure-Sales-State-Wide-Reports.pdf?rev=2dabee8d90ed4b488 (last visited Oct 22, 2024) (disclosing counties' surplus proceeds windfalls in column xii). 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).

because she mailed the notice by the more expensive, trackable, express priority mail instead of certified mail, and because her mail sat in the Iron County mailroom all day on July 1 and was not claimed by the Treasurer until July 2, the lower court held the County could keep Ms. Joseph's $21,755 as a windfall. App 249.

The Alger County Treasurer foreclosed on Jacqueline McGee's property just 10 days after she unexpectedly died after a weeklong illness at age 53. Her children were left to mourn the loss of their mother and sort out her affairs. Unsurprisingly, they did not manage to sort out their mother's financial situation until after the exceedingly short deadline to provide notice that they wanted their inheritance had run. The County kept the $34,150 that rightfully belonged to Ms. McGee's children. According to the lower court, this daylight robbery was required by Michigan's General Property Tax Act (GPTA) and did not violate their property rights under either the Michigan or U.S. Constitution.

This Court should grant review to ensure Michigan's laws are interpreted fairly to avoid unnecessary confiscations like occurred here and to protect Michiganders' right to just compensation and due process.

The Court should grant this application.

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 GPTA 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 for more than was owed, and keeping the surplus proceeds. *Id.* at 484–85.

In response to *Rafaeli*, the Michigan Legislature enacted "curative" legislation amending the GPTA that created the claims procedure at issue here. *See* Enacting Section 3, 2020 PA 256. Under the new law, tax foreclosures still occur in the spring. If the debt is not paid by March 31, the foreclosing government unit (usually a county) 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 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.*

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.

The government responds to the motion by filing with the circuit court a document showing whether the claimant timely submitted the notarized Form 5743, and identifying the amount, if any, of remaining proceeds. MCL 211.78t(5), (7). The circuit court then holds a hearing to determine the relative priority of all claims (including any lienholders' claims). MCL 211.78t(9). 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).

B. The County keeps money that belonged to Ms. Joseph and the estate of Ms. McGee

1. **Lillian Joseph** owned a home on 2.5 acres in Crystal Falls, Michigan. App 107–109. She inherited the property in 1981 and paid her property taxes for 37 years. *See* App 87. Unfortunately, she fell behind on her property taxes and on February 19, 2021, the Circuit Court entered a judgment to foreclose her property so the County could collect 2018 property taxes. App 88, 96. The County took title to Ms. Joseph's land and home on April 1, 2021. Ms. Joseph's total debt including penalties, interest, fees, and expenses was $5,744.85. App 135.

Ms. Joseph sent Form 5743 by Priority Mail Express for $26 on June 29, 2021, to the correct address that omitted only the suite number for the Treasurer's office. App 111, 247. The Iron County mailroom received Ms. Joseph's form on July 1 at 8:17am, and held it for the Treasurer's office, which retrieved it the following day. *Id.*

On August 4, 2021, the County sold Ms. Joseph's property at auction for $27,500, much more than the $5,745 that Ms. Joseph owed. App 247. Because the County Treasurer retrieved the form from the County mailroom a day late, the County kept all the proceeds from the sale—$21,755 more than Ms. Joseph's total debt. *Id.*

On February 24, 2022, Ms. Joseph timely filed a motion to claim the surplus proceeds from the sale of her property. App 83–86. The County opposed Ms. Joseph's motion because she mailed her claim form by Express Priority Mail instead of certified mail and while her notice was received by Iron County on July 1, the Treasurer did not retrieve it until the next day. App 247. Ms. Joseph's brief in support of her motion for surplus proceeds argued that the County misinterpreted the GPTA and that depriving Ms. Joseph of the surplus proceeds violates the Michigan and federal constitutions' due process and just compensation guarantees. *See* App 120–132.

On April 26, 2022, the trial court denied Ms. Joseph's claims, holding that because she failed to follow the statutory claim process to the letter, the government could avoid its duty to pay her just compensation and retain the otherwise unconstitutional windfall. App 214–216, 234–235, 239.

2. **Johanna McGee's** late mother, Jacqueline McGee, owned and lived in a modest home at 7219 County Rd. H15 in Shingleton in Alger County. App 72. In 2018, she fell behind on her property taxes. Ms. McGee died unexpectedly at age 53 of complications from pneumonia on February 7, 2021. *Id*. Ten days later, Alger County Treasurer obtained a judgment of foreclosure against Ms. McGee's property, which became final March 31, 2021, and transferred title to the County. App 246.

According to the County, it mailed two notices to the deceased (Jacqueline McGee) of the procedure to claim surplus proceeds from the sale of her home. *See* App 37. The first notice, mailed shortly after her death, primarily warned of imminent foreclosure if the debt was not paid. App 41. The second, mailed just a few weeks later after the County took title to the property, was entitled "NOTICE OF FORECLOSURE" and stated near the top in bold print: "**Any interest that you possessed in this property prior to foreclosure, including equity associated with your interest, has been lost.**" App 43. In the paragraph after this hopeless warning, the notice states, "Any person that held an interest in this property at the time of foreclosure has a right to file a claim for REMAINING PROCEEDS pursuant to MCL 211.78t" and that the "Form 5743" is due "July 1, 2021." *Id*. Form 5743 was not enclosed with the notice. *See id.*

McGee's heirs did not sort out her affairs until after that July 1 deadline passed.[2] Subsequently, the County auctioned the McGee home for $38,250 to collect

[2] *Cf In re Estate of Jennifer M Barker*, No. 297289, 2011 WL 2507843, at *3 (Mich App June 23, 2011) (personal representative "didn't know anything about [the

$3,599.79 in taxes, penalties, interest and fees, plus $500 in attorney fees. App 246, 20. On February 25, 2022, Johanna McGee filed Form 5743 on behalf of her late mother's estate. App 246. On April 6, 2022, she was appointed the personal representative of Jacqueline McGee's estate. App 73. She then moved for disbursement of the remaining proceeds on May 16, 2022. App 8. The County opposed her motion because the preliminary claim form was submitted to the County after the 92-day deadline. App 246. McGee argued that the deadline was extended by Michigan's statute tolling deadlines following death. Supplemental briefs debated whether MCL 211.78t was the exclusive mechanism for claiming surplus proceeds and whether it was constitutional. *See id*.

The trial court's ruling on September 27, 2022, noted "concerns about the constitutionality of MCL 211.78t as a sole remedy." The court denied the claims for surplus proceeds for the late filing of Form 5743 but held that the statute cannot provide "the sole remedy because it does not protect the rights defined in *Rafaeli*."

C. The Court of Appeals holds the County did not violate due process or take property without just compensation by keeping Ms. Joseph's and the McGee estate's money

Ms. Joseph and Ms. McGee each timely filed a Claim of Appeal in the Court of Appeals, but the court promptly dismissed both claims without prejudice for lack of jurisdiction. App 77, 241. Pursuant to MCR 7.205(4)(b), they each then filed separate

foreclosure of decedent's home] until after [he] was made representative of the estate.").

applications for leave to appeal in the Michigan Court of Appeals, which the court granted. App 78, 242.

On appeal, Ms. Joseph and Ms. McGee asserted, *inter alia*, that the statute should be liberally construed to allow their respective claims; 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 248–255.

The Court of Appeals consolidated their cases, App 244, and then ruled against Ms. Joseph and Ms. McGee, strictly construing MCL 211.78t as barring their claims for remaining proceeds because they failed to strictly follow the July 1 notice requirements in the statute. App 245. The court of appeals strictly construed the statute and held that the County could keep Ms. Joseph's surplus proceeds because she sent her notice by Priority Express rather than certified mail, and the County Treasurer actually received it one day late. App 249–250. Similarly, the Court strictly construed MCL 211.78t based on *In re Petition of Barry County Treasurer*, No. 360920, 2024 WL 386939 (Mich App Feb 1, 2024), to hold the McGee estate cannot obtain surplus proceeds because the heirs should have filed the claim notice directly by July 1 prior to the designation of the deceased's personal representative. App 245, 254–255.

The court denied their takings and due process claims because it was bound by *In re Petition of Muskegon County Treasurer*, No. 363764, __ NW3d __, 2023 WL 7093961 (Mich App Oct 26, 2023), *application denied* No. 166580. The court also held

that the statute's claim process was the "exclusive mechanism" for recovering any surplus proceeds after a tax foreclosure sale. App 248.

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 review to hold that the notice of claim requirements in MCL 211.78t should be construed to avoid forfeiture

The appellate court strictly construed the claim statute to bar Ms. Joseph's and the McGee estate's claims in violation of multiple statutory rules of construction. Application of any of these rules would have resulted in returning Ms. Joseph's money to her and Ms. McGee's money to her heirs. This Court should grant review to ensure MCL 211.78t is interpreted to provide a remedy, avoid forfeiture, and allow appropriate leniency for tardy or imperfect notices.

A. MCL 211.78t should be construed to avoid the unintended forfeiture of Ms. Joseph's and Ms. McGee's money to the County treasury

The law strongly disfavors forfeitures and construes forfeiture provisions against the government. *United States v One 1936 Model Ford V-8 DeLuxe Coach*, 307 US 219, 226 (1939) (When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is preferred.). Because the law disfavors forfeitures, the government has the burden of proving its forfeiture is valid. *See People v Campbell*, 198 NW2d 7, 10 (Mich Ct App 1972); *Loeser v Gardiner*, 1 Alaska 641, 645 (1902); *see also Spoon-Shacket Co, Inc v Oakland Cnty*, 97 NW2d 25,

28 (Mich 1959) ("[E]quity can and should intervene whenever it is made to appear that one party, public or private seeks unjustly to enrich himself at the expense of another on account of his own mistake and the other's want of immediate vigilance—litigatory or otherwise.").

Specifically in the context of tax foreclosures, courts have construed statutes to avoid a forfeiture of surplus proceeds to the government. *See, e.g.*, *Lake Cnty Auditor v Burks*, 802 NE2d 896, 899–900 (Ind 2004); *Syntax, Inc v Hall*, 899 SW2d 189, 191–92 (Tex 1995); *City of Anchorage v Thomas*, 624 P2d 271, 273–74 (Alaska 1981) ("We are naturally reluctant to impute to the legislature an intent to impose a forfeiture unless expressly authorized or absolutely necessary to further a legitimate public interest."). For example, in *Lake County*, the Indiana Supreme Court interpreted a statute creating an administrative claim process for distribution of surplus proceeds. The statute specified that only designated purchasers such as the former "owner of record" or a tax sale purchaser upon redemption could recover surplus proceeds from the "tax sale surplus fund." *Lake County*, 802 NE2d at 899. The court of appeals had held the "plain and unambiguous meaning" of the statute barred the heirs' recovery. *Lake Cnty Auditor v Burks*, 785 NE2d 583, 586 (Ind Ct App 2003). But the Indiana Supreme Court held the administrative process defined by the statute could not be the "exclusive" remedy because it "would produce severe unfairness for those who in fact have an interest in the property, albeit unrecorded, and would give the county a windfall." *Lake Cnty*, 802 NE2d at 900. The court held

that heirs or other individuals who could not satisfy the administrative process could still seek relief by filing a complaint in court. *Id.*

Likewise, in *Bennett v Hunter*, the U.S. Supreme Court grappled with language that expressly said property would be "forfeited" to the government as a punishment on owners in confederate states during the civil war. 76 US 326, 335, 337 (1869) ("the title of, in, and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States"). Because it is "proper" to avoid such a "highly penal" provision where milder construction is possible, the Court interpreted "forfeit" to mean that the title of property and not the land itself was transferred to the government to allow for public sale. *Id.* at 335–36. To provide a remedy, the Court then interpreted the statute's 60-day redemption period as extending *beyond* the 60 days until the property was actually sold. *Id.* at 337. *See also United States v Lawton*, 110 US 146, 150 (1884); *United States v Taylor*, 104 US 216, 221 (1881).

The statute here may be remedied with a far more natural construction than that employed by the Supreme Court in *Bennett*. Notably, neither MCL 211.78t nor 2020 PA 256 expressly state that failure to strictly comply with the July 1 notice of claim process allows the government to confiscate the money. While the statute provides it is the "exclusive mechanism" for a claimant to claim "remaining proceeds" it does not state what happens to the proceeds should a claimant fail to strictly comply with all its provisions or miss any deadlines. The provision does not expressly state

an intention to forfeit or confiscate the money to the government.[3] Consequently, it is not "proper" to assume such a "highly penal" outcome from the statute. *See Dover & Co v United Pacific Insurance Co*, 38 Mich App 727, 730 (1972) (Levin, J., concurring) (Because "[s]tatutes requiring notice of claim are not aimed at forestalling litigation altogether," it "would be excessive to treat noncompliance with a notice requirement as being as irremediable as a failure to commence an action within the time period established in a statute of limitation"); *In re Bennett*, 338 F2d 479, 485 (CA 6, 1964) (applying Michigan law to confirm validity of chattel mortgage despite "the failure of the bankrupt to hold up his right hand and take a formal oath before the notary public in accordance with the literal terms of the statutes.").

B. As a curative statute, MCL 211.78t must be interpreted liberally to allow Ms. Joseph and the McGee estate to recover their own money

The claim procedure at issue here, MCL 211.78t, was passed as part of 2020 PA 256, which explicitly states that the law is "curative" and passed to remedy the constitutional defects described in *Rafaeli*. Curative or remedial legislation must be liberally construed in favor of the persons intended to be benefitted. *Nelson v Associates Financial Services Co of Indiana, Inc*, 253 Mich App 580, 590 (2022) (remedial); *Romein v General Motors Corp*, 168 Mich App 444, 456 (1988), *aff'd* 436 Mich 515, 538–39 (Mich 1990), *aff'd* 503 U.S. 181 (1992) (curative*). See also Stewart v Kahn*, 78 US 493, 504 (1870) ("A case may be within the meaning of a statute and

[3] Claim deadlines themselves may be interpreted leniently unless legislation clearly conveys otherwise. *Cf Henderson ex rel Henderson v Shinseki*, 562 US 428, 435, 438–41 (2011) (interpreting statute mandating a notice of intent to appeal as nonjurisdictional claim-processing rule); *Wilkins v United States*, 598 US 152, 165 (2023) (claims processing rule in Quiet Title Act held nonjurisdictional).

not within its letter, and within its letter and not within its meaning. The intention of the law-maker constitutes the law. The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment.") (footnote omitted). For example, in *White v Motor Wheel Corp*, 64 Mich App 225, 230 (1975), a plaintiff timely mailed notice of a claim but failed to verify the notice consistent with state law until long after the statute's 90-day deadline. The court held the technically imperfect notice sufficed, construing the notice requirements "liberally so as to fulfill its [remedial] purposes." *Id.*

Tax debtors unquestionably are the class of people intended to benefit from the post-*Rafaeli* statute that the Legislature explicitly declared was meant to cure the defects in the GPTA that had resulted in home equity theft for decades. Fulfillment of the curative intent requires a more liberal construction. The strict construction observed below, has resulted in only a small fraction of Michigan tax debtors successfully recovering their own money, as noted *supra* at 2.[4] To give effect to the Legislature's intent to "cure" the GPTA to render it compatible with the Michigan and U.S. Constitution, this Court should construe the statute liberally. *Exploration Co v United States*, 247 US 435, 448 (1918) (favorably quoting Justice Story's

[4] Michigan courts are rejecting a steady stream of tax debtors and their estates thwarted by MCL 211.78t in their attempts to recover their own money. *See, e.g.*, *In re Petition of Berrien County Treasurer for Foreclosure*, No. 366509, 2024 WL 4468770 (Mich App Oct 10, 2024) (depriving multiple heirs of their deceased parents' surplus proceeds after tax foreclosure); *In re Petition of Allegan County Treasurer for Foreclosure*, No. 365754, 2024 WL 4438645 (Mich App Oct 7, 2024) (same); *In re Van Buren County Treasurer for Foreclosure*, Nos. 362336, 362464, 2023 WL 8284795 (Mich App Nov 30, 2023) (same).

admonition that "every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs, which it was designed to cure.").

C. A liberal construction of a property owner's notice requirements would allow greater recovery by former owners

This Court could overturn the lower court's opinion based solely on the rule that notice provisions are interpreted liberally to protect nonlawyers, as virtually all tax debtors are. Courts "are inclined to favor a liberal construction of notice requirements," because "the inexpert layman with a valid claim should not be penalized for some technical defect," and a notice requirement "should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice." *Meredith v Melvindale*, 381 Mich 572, 579 (1969).

This Court should grant the petition in this case to resolve the tension between the rules granting leniency to individuals in providing notice to the government and the conflicting strict construction of statutes containing notice of claim requirements. This Court has strictly construed the notice of claim requirements in the tort context where the government narrowly waived sovereign immunity against such claims. *See Rowland v Washtenaw Cnty Road Comm*, 477 Mich 197, 200 (2007). But such strict construction is inappropriate where the government has a constitutional obligation to return the property to its rightful owner. *See Bauserman v Unemployment Ins Agency*, 503 Mich 169, 195 (2019) (McCormack, C.J., concurring) ("[T]he Legislature may place whatever conditions it wishes on rights of its own creation, including a notice requirement" but "[t]he Legislature is not the source of the due-process right" and thus "*Rowland* and *McCahan* isn't implicated here."). Indeed, government cannot

demand strict compliance with notice requirements when such strictness bars constitutional claims. As Justice Bernstein, joined by Justices McCormack and Cavanaugh, explained in a concurrence in *Mays v Gov of Michigan*, 506 Mich 157, 204 (2020), "this Court has never held that constitutional claims against the state—and due-process claims in particular—should be treated like the personal-injury claims raised in *Rowland* and *McCahan*." Notice of claim statutes "burden claimants' rights—that's the point" and are "designed to minimize governmental liability." *Bauserman,* 503 Mich at 196, n3. This purpose may be permissible when notice-of-claim statutes "shield the state against statutory claims," but irrelevant in a context where the notice statute must "yield to higher authorities like the Constitution or federal law." *Id.* at n3 (quoting *Felder v Casey*, 487 US 131, 153 (1988) ("A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.")). This case, of course, involves both due process and takings claims.

Here, both Ms. Joseph and Ms. McGee adequately complied with MCL 211.78t's notice requirements to recover their own money. Yet instead of construing notice provisions liberally in favor of the property owners, the lower court held that owners must strictly comply with every jot and tittle of the law or be barred from reclaiming their own money. Before the deadline, Ms. Joseph completed the proper form and mailed it via Express Priority Mail, which included a tracking number and

faster delivery than certified mail. While the statute provides notice must be sent by "personal service" or "certified mail," MCL 211.78t, the Court has a duty under the rules of statutory interpretation to construe this provision liberally to allow for actual notice to be provided by equivalent means.[5] *See, e.g.*, *MMK, LLC v Dubinsky*, 100 Mass App Ct 1104, 2021 WL 3417928, at *3 (2021) ("Delivery by Federal Express . . . serve[d] the same function and provide[d] the same proof of delivery as certified or registered mail" and therefore the notice letter sent by FedEx meets the requirements of a statute the specified certified or registered mail.). In this case, Express Priority Mail demonstrated the date of mailing and tracking equivalent to certified mail. Refusing to credit Ms. Joseph's mailing improperly elevates form over substance to deprive her of her constitutional right to just compensation. *Cf Barlow v MJ Waterman & Assocs, Inc*, 227 F3d 604, 609 (CA 6, 2000) (noting "devastating effect" of elevating form over substance in a way that precludes a person from recovering his own money); MCR 1.105 ("These rules [including the rule for service of process] are to be construed . . . to secure the just, speedy, and economical determination of every

[5] *Cf Electronic Data Sys Corp v Twp of Flint*, 253 Mich App 538, 548 (2002) (distinguishing between certified mail that establishes the date of mailing, and regular first-class mail, which does not).

action and to avoid the consequences of error that does not affect the substantial rights of the parties.").[6]

D. The statute should be construed to avoid violating federal law

Similarly, MCL 211.78t(11) states it is the "exclusive mechanism . . . under the laws of this state" by which an owner can recover "remaining proceeds" from the sale of tax foreclosed property. Yet the lower court went further, construing MCL 211.78t as also extinguishing an owner's right to obtain just compensation by filing a federal claim. This cannot be correct, because such a construction would violate the U.S. Constitution. *Knick v Twp of Scott*, 588 US 180, 189 (2019) (once property is taken, property owners may pursue claims for just compensation regardless of subsequent state procedures).

Moreover, MCL 211.78t cannot bar federal constitutional claims brought via 42 USC 1983. The Supreme Court expressly rejected attempts to bar federal claims with notice-of-claim requirements. In *Felder*, the 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

[6] Similarly, trivial procedural errors in the submission of removal paperwork will not divest federal courts of jurisdiction; the errors are curable, even after the 30-day removal period. *Kuxhausen v BMW Fin Servs NA LLC*, 707 F3d 1136, 1142 (CA 9, 2013); *Countryman v Farmers Ins Exch*, 639 F3d 1270, 1273 (CA 10, 2011); 14C Charles Alan Wright, et al., *Federal Practice and Procedure* § 3733 (2010).

"a neutral and uniformly applicable rule of procedure; rather it is a *substantive burden* imposed only upon 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.

Like the 120-day notice-of-claim statute in *Felder*, the claim statute here requires a series of unnecessary procedures that "minimize governmental liability" and burden the right to just compensation. *Felder*, 487 US at 141. While victims of other types of takings have six years to bring their claims in state court,[7] 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 they later file a motion in court in another 104-day window, and the owner perfectly complies with all procedures. *See* App 248–253; MCL 211.78t(3)–(5), (9). As construed below, MCL 211.78t violates *Felder*. This Court should grant review to correct this unacceptable construction.

II. This Court should grant the application to ensure that application of MCL 211.78t satisfies due process

The Michigan and federal constitutions mandate that the government cannot 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

[7] *See Hart v City of Detroit*, 416 Mich 488, 503 (1982).

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); *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").

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, joined by Thomas, J.) (troubling "financial incentives to pursue forfeitures" raise serious due process concerns); *id.* at 405 (Sotomayor, J., dissenting, joined by Kagan and Jackson, J.J.) (due process requires heightened protection in cases where "cash incentives . . . encourage counties to create labyrinthine processes for retrieving property").

The statutory procedures, as interpreted by the Michigan Court of Appeals, allow government to profit by retaining owners' surplus proceeds as a windfall whenever an owner fails to perfectly notify the government that they will, of course, want to be paid the surplus proceeds when they eventually become available. *Any* misstep—no matter how trivial—allows the government to keep the windfall. *See* App 248–250. Later, owners must figure out how to file a motion in court—in a limited window of time—seeking to be paid what is rightfully theirs. As a result, counties are keeping most surplus proceeds as a windfall at the proper owners' expense. *See, e.g.,* Michigan Department of Treasury, *2021 Foreclosures Report* at 24 (Genesee County

kept $5,399,694 in surplus proceeds and returned only $56,171 to the rightful owners).[8]

Due process requires more protection for property owners. The fundamental constitutional rights at stake, the *proven* risk of erroneous deprivations under MCL 211.78t, and the ease of providing a more forgiving claim process demonstrate that the County has taken the owners' money without due process of law. *See Mathews v Eldridge*, 424 US 319, 332 (1976).

A. All three *Mathews* factors show that the MCL 211.78t procedures violate due process

Courts consider the circumstances and weigh 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 321, 335. All three *Mathews* factors weigh in favor of requiring a more forgiving process for the former owners.

1. Ms. Joseph's and the McGee estate's interest in the surplus proceeds is a longstanding, constitutionally protected property right

The "economic value" of a home "weigh[s] heavily" in the *Mathews* three-factor test. *United States v James Daniel Good Real Prop*, 510 US 43, 54–55 (1993); *see also*

[8] https://www.michigan.gov/taxes/-/media/Project/Websites/taxes/Auctions/2021-Foreclosure-Sales-State-Wide-Reports.pdf?rev=2dabee8d90ed4b488e9d01bdb543176e&hash=7BC32BA8083586D6CEB91C5CB22E9909 (last visited Oct. 22, 2024).

Goldberg v Kelly, 397 US 254, 263 (1970) (due process requirements depend on the "extent to which [an individual] may be condemned to suffer grievous loss") (internal quote omitted). 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.

For most Americans, the equity in their home is their single biggest asset,[9] and those who lose property to tax foreclosure are usually elderly, sick, or poor. *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). Confiscating more than what is owed imposes a grievous loss on individuals, potentially rendering them homeless while the government enjoys an unearned windfall. The fundamental property interest at stake here weighs heavily in favor of substantial procedural protections.

[9] Jenny Schuetz, *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap*, Brookings (Dec 9, 2020), https://www.brookings.edu/articles/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/.

2. This case demonstrates the unnecessarily high risk of erroneous deprivation imposed by the lower court's strict interpretation of MCL 211.78t and that additional safeguards for property owners would avoid that risk

This case, as well as statewide records and other challenges, demonstrate that the risk of deprivation is high, with devastating consequences for ordinary people. The counties have argued simple notice of the claim process ought to suffice. Alger County, for its part, asserts that it mailed the deceased Ms. McGee two notices that warned she would need to make a claim for any remaining proceeds by July 1, 2021 (without providing the claim form). App 40, 42. But even if the late McGee's heirs had been able to review those notices in time, the first was primarily a warning that irredeemable foreclosure was imminent. App 40. The second was misleading and confusing at best. Mailed just a few weeks after the County took title to the property, it was entitled "NOTICE OF FORECLOSURE" and stated near the top in bold print: "**Any interest that you possessed in this property prior to foreclosure, including equity associated with your interest, has been lost.**" App 43. In the paragraph after this hopeless and misleading warning, the notice states, "Any person that held an interest in this property at the time of foreclosure has a right to file a claim for REMAINING PROCEEDS pursuant to MCL 211.78t" and that the "Form 5743" is due "July 1, 2021." *Id*. Form 5743 was not enclosed with the notice. *See id.* A notice that is "misleading and confusing at best" cannot satisfy due process. *Todman v Mayor and City Council of Baltimore*, 104 F4th 479, 485 (CA 4, 2024). "Respecting one of the Constitution's most basic guarantees should be simple and straightforward." *Id.* at 490. Ms. McGee was sorting out her late mother's financial

affairs, including identifying this foreclosure and her family's rights under the state law, all while mourning the loss of her mother. The county foreclosed *ten days* after Jacqueline McGee unexpectedly died. App 246. Depriving Ms. McGee's family of their inheritance is unjust and unreasonable.

And in Ms. Joseph's case, even with the assistance of counsel, Ms. Joseph's timely mailed notice did not satisfy the County or the lower court. Ms. Joseph signed the form by hand, consistent with the statute, while she was out-of-state (and thus not present with counsel), and still failed to clear the unreasonably high hurdles. *See* App 141.

Yet according to the lower court, to receive any 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 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"). County treasurers have a clear pecuniary interest in keeping surplus proceeds as a windfall because the money may be used for various public activities, including funding wages paid to the County Treasurer's staff. MCL 211.78m(8)(i) (auction proceeds may be used to pay all costs "in connection with the forfeiture, foreclosure, sale, maintenance, repair, or remediation of foreclosed property, the defense of title actions and other legal expenses, *or the administration of this act*") (emphasis added).

The high risk of erroneous deprivation could easily be avoided by treating the unreasonable notice of claim deadline as an excusable "trivial procedural error" or by requiring the government to treat tax foreclosed property like it treats all other property that it holds in custody for the owners. The state of Michigan holds most 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 via its eminent domain power, it ordinarily deposits payment of an estimated amount of just 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*, 416 Mich at 503. Unlike all other analogous circumstances, here counties retain the money unless the owners jump through unnecessary hoops with successive short deadlines. *See* MCL 211.78t. Failure to strictly comply with every jot and tittle bars an individual from recovering her own money.

3. The government's interest in collecting taxes and returning surplus proceeds to the rightful owner will not be burdened by the proposed alternative safeguards

The government's interest under the GPTA is in collecting what it is owed, not taking a windfall at the expense of people like Ms. Joseph or the McGee heirs. *Rafaeli*, 505 Mich at 480. There is no financial or administrative burden imposed on the counties by allowing owners to stake their claim by filing Form 5743 with their later 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 (1985) (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.

Nor would there be any burden by requiring counties to hand over unclaimed surplus proceeds to the state's unclaimed money administrator, consistent with MCL 567.250(1). Likewise, the government could deposit the surplus proceeds in escrow and let this Court treat the money as it treats other similar proceeds from eminent domain proceedings. This would impose no meaningful burden and it would avoid depriving individuals of their own money.

The *Mathews* factors overwhelmingly weigh in favor of a process that looks more like other takings claims or processes for claiming money. This Court should grant review to give lower courts guidance about how to weigh due process in the tax foreclosure context.

B. The unreasonably short notice of claim deadline violated Ms. Joseph's and the McGee estate's right to due process

This Court could reverse solely based on precedent rejecting short claim deadlines as violating due process. As mentioned above, the Supreme Court has held federal constitutional claims, which are brought via 42 USC 1983, cannot be barred even by a 120-day notice of claim requirement. *See supra* 18–19 (discussing *Felder*). The 92-day notice of claim deadline is even shorter and runs before the amount of money at stake can even be known. Similar to *Felder*, in *Burnett v Grattan*, 468 US 42, 55 (1984), 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. *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 short claim deadline here operates like an unconstitutionally short statute of limitations on a property owner's right 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 violate due process when "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). 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 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.").

The 92-day deadline here is so short that most owners still possess their property and the deadline will often pass before they even realize they've irreversibly

lost title. And the deadline runs before the property is even sold and the amount of surplus proceeds can be calculated. By *Rafaeli*'s logic, that means the deadline to preserve your right to just compensation will run before your constitutionally protected property has even been taken. *See Rafaeli*, 505 Mich at 484; *see also Ramsey v City of Newburgh*, No. 23-CV-8599, 2024 WL 4444374, at *3 (SDNY Oct 8, 2024) (taking happens when the property is sold for more than what was owed and the surplus is retained by the government); *Davenport v Town of Reading*, No. 22-12239-RGS, 2024 WL 4495105 (D Mass Oct 15, 2024) (same). The 92-day deadline is *dramatically* shorter than all other comparable Michigan deadlines. *See, e.g.*, MCL 567.245 (state administrator holds unclaimed property in trust for the rightful owner indefinitely until owner files required form); *Hart*, 416 Mich at 503 (6-year statute of limitation for takings claim under Michigan Constitution); *Grainger v Ottawa Cnty*, 90 F4th 507, 510 (CA 6, 2024) (three-year deadline for bringing federal takings claim). MCL 211.78t purportedly overrides these years-long statutes of limitation by requiring owners to stake their claim with the County within 92 days or be forever barred from recovering their constitutionally mandated just compensation. This is *not* reasonable. This Court should grant the application to hold that Form 5743 serves only a claim-processing function and failure to timely submit the form cannot foreclose tax debtors' recovery of their own property.

III. 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 than 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 453.

Both constitutions' just compensation clauses "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 United States*, 364 US 40, 49 (1960); *Rafaeli*, 505 Mich at 80–81. 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.*

B. The lower court's decision impermissibly shifts the government's affirmative duty to pay just compensation onto an owner to avoid unintended waiver of constitutional rights

The lower court's decision allows the government to evade its constitutional responsibility to return surplus proceeds by setting a trap that results in property owners unintentionally waiving their right to that just compensation.[10] An owner's failure to fill out the paperwork properly, notarize it, and deliver it on time via personal service or certified 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, the lower court's interpretation of MCL 211.78t imposes burdens on owners to proactively preserve their right to retrieve their own money long before they may even file a motion to recover it, 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 property rights necessarily implicates the 'constitutional obligation to pay just compensation.'"), *quoted in Knick*, 588 US at 193–94.[11]

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[10] 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).

[11] Even a government that goes bankrupt still must pay just compensation. *United States v Sec Indus Bank*, 459 US 70, 75, (1982); *Louisville Joint Stock Land Bank v Radford*, 295 US 555, 589 (1935) ("The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.").

Neither the Michigan nor the U.S. Constitution permit such an unintended 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). "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights" and ordinarily require "intentional relinquishment . . . of a known right." *Johnson v Zerbst*, 304 US 458, 464 (1938) (cleaned up); *People v Smith*, 19 Mich App 359, 369 (1969). If the government wants to deem a constitutional right waived, it bears the burden of proving it. *See Fuentes v Shevin*, 407 US 67, 95 (1972) ("[A] waiver of constitutional rights in any context must, at the very least, be clear."); *Barker v Wingo*, 407 US 514, 525 (1972). 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 (CA 1, 1985) (Legislatures "cannot legislate away protections provided by the Constitution") (citation omitted).

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. But 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 (CA 9, 1994) ("A 'use it or lose it' approach to [constitutional rights] does not square with the Constitution.").

"'[P]roperty 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. Joseph's and the McGee estate's money is a taking and this Court should grant the application to protect the 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. 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.").

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." *Knick*, 588 US at 191.[12] The state procedure cannot extinguish or replace 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."). Yet, here, in contradiction to *Knick*, the lower court held that an owner may seek just compensation *only* through the process described in MCL 211.78t. *See* App 251.

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*, 487 US at 141; *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 Mich at 207 (Bernstein, J., concurring).

[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.

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 *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 took 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 lower court "cannot be made" in the Supreme Court. *Magruder v Drury*, 235 US 106, 113 (1914). *See also United States v Williams*, 504 US 36, 41 (1992); *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. *Tyler*, 598 US at 643 (*Nelson* "is readily distinguished."); *see also Rafaeli*, 505 Mich at 461–62 (distinguishing *Nelson*). Courts cannot rely on judicial remarks that are "entirely tangential" to a court's holding. *United States v Perry*, 360 F3d 519, 528 (CA 6, 2004); *Schafer*, 2024 WL 3573500, at *13 ("Judicial decisions generally decide only the case or question before the court."). Moreover, a case that is distinguished is no more reaffirmed than it is overruled. *See Pueblo v Haas*, 511 Mich 345, 371 (2023); *Moores v Citizens' Nat'l Bank of Piqua*, 111 US 156, 167 (1884).

As explained above, *Nelson*, 352 US at 110, also conflicts with the Supreme Court's more recent takings decisions, including *Knick* (a state remedy that would result in payment of just compensation cannot supplant a property owner's right to seek just compensation for a taking through a traditional takings claim). *See supra* 34. Thus, *Nelson* should not be treated as binding 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 if the lower court correctly construed MCL 211.78t, then it unconstitutionally takes property without just compensation.

IV. 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) states it is the "exclusive mechanism" by which an owner can recover "remaining proceeds" from the sale of tax foreclosed property. According to the lower court's interpretation of MCL 211.78t, it extinguishes an owner's traditional right to file a takings claim in court to obtain full just compensation for the taking of more property than what was owed. But the legislature lacks authority to replace "just compensation" with less than just compensation, *see In re Financial Oversight and Mgmt Bd*, 41 F4th 29, 44–45 (CA 1, 2022), (Because "just compensation is different in kind from other monetary remedies. . . . [I]t 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."). 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 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.

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). Yet MCL 211.78t expressly pays less than the surplus proceeds and retains the interest on the rightful owners' principal.

The statute gives the government a 5% kickback (designated a "sale commission")[13] 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.*[14] Moreover, the 5% cannot be an additional commission for the county acting as a realtor, because Alger and Iron outsource the auction process to a private company, which charges buyers a 10% commission *on top of the sale price*.[15] The 5% "commission" is nothing more than an illegal taking; the former owners are entitled to recover it.

Moreover, all County Treasurers hold money belonging to former owners of foreclosed properties, including Ms. Joseph and the McGee Estate, for nearly a year

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[13] "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 (CA 6, 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 former 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; former owners are left to their own initiative to discover Form 5743 and other obstacles to recovering their just compensation.

[14] *Compare* MCL 211.78t(9) (government keeps "sale commission equal to 5% of the amount for which the property was sold") *with* MCL 211.78t(12)(b)(ii) (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).

[15] *See* App 107 (listing was through tax-sale.info); Public Land Auction 2021 Salebook, Rules and Regulations 4(A) (Aug 31, 2021) ("The full purchase price consists of the final bid price *plus a buyer's premium of 10% of the bid price*, any outstanding taxes due on the property including associated fees and penalties, and a $30.00 deed recording fee.") (emphasis added), *publicly available at* https://www.tax-sale.info/forms/salebook/auction/682/print/salebook/2021-08-31_salebook_final.pdf.

and earn interest on it before paying 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 (CA 6, 2023) ("When 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").

The lower court erred in holding that Ms. Joseph's and the McGee estate's 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*, 509 Mich at 687.

CONCLUSION AND RELIEF SOUGHT

This Court should grant the application and reverse the Court of Appeals, holding that MCL 211.78t should be interpreted to avoid forfeiture and that it *cannot* be the exclusive remedy, since that would violate the Michigan Constitution, United States Constitution, and 42 USC 1983.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Application for Leave to Appeal complies with the type-volume limitation pursuant to MCR 7.212(B). The Application contains 10,995 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: October 24, 2024.

/s/ Donald R. Visser
Donald R. Visser (P27961)

CERTIFICATE OF SERVICE

I hereby certify that on October 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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