IN THE SUPREME COURT
STATE OF MICHIGAN

In Re PETITION OF ALGER COUNTY TREASURER FOR FORECLOSURE.	Supreme Court No. 167712
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 REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Iron County unjustly confiscated $21,755 of Lillian Joseph's money because her administrative notice—though timely mailed—was sent by trackable, express priority mail instead of certified mail, and sat in the Iron County mailroom all day on July 1 before it was claimed by the Treasurer on July 2. App 249. Alger County unjustly confiscated $34,150 from the estate of Jacqueline McGee, because McGee died around the time of foreclosure and her heirs did not sort out her affairs until after the July 1 deadline for administrative notices. This is not unusual: 95% of owners who lose property to tax foreclosure are deprived of the remaining proceeds from the sale of their homes, land, and business, under MCL 211.78t. *See* Application 2.

This case raises several questions of great importance to property owners across Michigan, including whether MCL 211.78t authorizes these confiscations and, if so, whether the statute violates due process and takes private property without just compensation. This case also presents a question that this Court identified as meriting supplemental briefing and oral argument in *Jackson v Southfield Neighborhood Revitalization Initiative*, No. 166320, namely, whether MCL 211.78t may preclude claims seeking just compensation.

Both counties insist this Court cannot interpret the statute to avoid constitutional violations or to limit the injustice the statute is now causing. They are wrong. Courts strive to adopt constructions of statutes—especially curative, remedial statutes—to avoid forfeitures, and return property to the rightful owner. *Nelson v*

Assocs Fin Servs Co of Indiana, Inc, 253 Mich App 580, 590 (2022) (remedial statutes are liberally construed in favor of persons intended to be benefited). Tension exists in Michigan caselaw between this liberal construction of remedial/curative statutes and strict construction of notice statutes. *See, e.g.*, *In re Barry Cnty Treasurer*, No. 362316, 2024 WL 994990, at 4 n3 (Mich App Feb 1, 2024). This Court's review is needed to resolve this conflict. *Cf. Mays v Gov of Michigan*, 506 Mich 157, 204–05 (2020) (Bernstein, J., concurring, with McCormack and Cavanaugh, JJ.) (questioning whether strict compliance with notice claim statutes may defeat otherwise permissible constitutional claims) (citations omitted). In this case, as in others, Michigan's court of appeals strictly construed MCL 211.78t as requiring perfect compliance with the statute's unnecessary obstacles to owners recovering their constitutionally protected surplus proceeds. Thus, the lower court authorized the confiscation of the applicants' property and gave the windfall to the government at their expense.

The Court should grant this application.

ARGUMENT

I. The Questions Presented Are Properly Before This Court

The counties argue that the Application raises unpreserved issues because they fail to discern the difference between arguments and claims. A party can raise new arguments in support of a constitutional claim or a statutory interpretation claim that was raised in the lower courts. *People v Oslund*, No. 165544, __Mich__, 2024 WL 5240629, at *2 (Mich Dec 27, 2024) (new argument about whether a shoe is

a dangerous weapon within meaning of statute was preserved because litigant below raised different argument about why statute did not apply). Once a claim is presented, "'a party can make *any argument* in support of that claim; parties are not limited to the precise arguments they made below.'" *Johnson v VanderKooi*, 509 Mich 524, 537 n5 (2022) (quoting *Yee v City of Escondido*, 503 US 519, 534–35 (1992)) (emphasis added).

The counties here concede—as they must—that Ms. Joseph and Ms. McGee raised below the same *claims* as raised here: that the statute violates their state and federal rights to just compensation and due process, it cannot be the exclusive means of recovery, and that a proper construction of the statute would allow them to recover their money. *See* Alger Response 3–4; Iron Response 6. *See also* App 248–253. Consequently, they may make any arguments in support of their claims, regardless of whether they precisely echo those made below.[1] *Glasker-Davis v Auvenshine*, 333 Mich App 222, 228 (2020) ("[S]o long as the issue itself is not novel, a party is generally free to make more sophisticated or fully developed argument on appeal than was made in the trial court.").

Alger County also concedes "the Court of Appeals reached the issues raised in Claimant's appeal" but argues that the trial court's failure to decide the same

[1] Regardless of preservation, this Court would still have jurisdiction. *McNeil v Charlevoix Cnty*, 484 Mich 69, 79 (2009) ("[T]his Court may review an unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented"); *Walters v Nadell*, 481 Mich 377, 387 (2008) ("[T]his Court has [the] inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice. . . .").

questions bars the issues on appeal. Alger Response 6. This Court disagrees: A litigant need only raise the issue to preserve it. *Peterman v State Dept of Nat Res*, 446 Mich 177, 183 (1994); *Wells v State Farm Fire & Cas Co*, 509 Mich 855; 969 NW2d 67, 68–69 & n7 (Mich 2022) ("a party should not be punished for the omission of the trial court") (cleaned up; citations omitted).

The questions presented and the Application's supporting arguments are unambiguously within this Court's jurisdiction, MCR 3.03(B)(1), and—as the Application describes—the Court should grant leave because the appellate decision was wrong and will cause injustice, conflicts with Supreme Court precedent, and raises issues of major significance to the state and about the validity of a state statute. Application 1–3, 10–40; MCR 3.05(B).

Alger County also suggests that Ms. McGee abandoned her constitutional claims in the circuit court because her attorney argued that the circuit court could avoid the constitutionality question by extending the notice of claim deadline via the Death Savings Provision of MCL 600.5852. Alger Response 5. But Ms. McGee merely proposed the doctrine of constitutional avoidance, which counsels that wherever possible, courts should avoid reaching a constitutional question if a case can be resolved adequately on nonconstitutional grounds—like through a saving statutory construction. *See, e.g., People v Nyx*, 479 Mich 112, 124 (2007). Indeed, the Court of Appeals implicitly recognized that the constitutional questions were properly presented by deciding them. *See* App 251–253.

Nor did McGee "disavow[] any claim to surplus proceeds," Alger Response at 6, by arguing that the Court could avoid the constitutional infirmity in the claim statute by construing MCL 211.78t as offering the "exclusive remedy" *only for obtaining "remaining proceeds"*—which are defined differently than the constitutionally protected "surplus proceeds" recognized in *Rafaeli, LLC v Oakland Cnty*, 505 Mich 429 (2020). *Rafaeli* defined "surplus proceeds" to equal the amount remaining after deducting what "plaintiffs owed in unpaid delinquent taxes, interest, penalties, and fees under the General Property Tax Act." *Id.* at 437. But MCL 211.78(t)(11) defines the "remaining proceeds" to equal only 95% of the "surplus proceeds" because the County skims 5% off the top. *See In re State Treasurer for Foreclosure*, No. 369124, 2024 WL 5204188 at 2 n2 (Mich App Dec 23, 2024) ("'remaining proceeds' are functionally equivalent to 95% of surplus proceeds."). Michigan courts might rely on this statutory distinction to protect owners' recovery of their constitutionally mandated just compensation in the form of surplus proceeds.

II. The Court Should Grant Review to Construe the Statute to Avoid Unconstitutional Forfeitures

Michigan courts and the U.S. Supreme Court have a longstanding tradition of construing statutes to avoid forfeitures. *See* Application 10–13; *In re Forfeiture of 2006 Saturn Ion*, No. 164360, 2024 WL 3503577, at *4 (Mich July 22, 2024) (narrowly construing "for the purpose of sale or receipt" to avoid forfeiture of car where drug was used in the car). The counties here do not dispute this history or rule of statutory construction. Instead, Iron County argues that the statute's mandatory language for each step of the claim process means the legislature intended counties to keep the

surplus should owners falter at any point. Iron Response 10–11. But the statute never states an intention to confiscate property; instead, it casts its provisions as "curative" to remedy the unconstitutional takings that occurred prior to *Rafaeli*. *See* Enacting Section 3, 2020 PA 256. Consequently, it is appropriate for this Court to assume a milder construction here and, at minimum, treat this money as any other proceeds remaining after sales to satisfy other types of judgments. *See Bennett v Hunter*, 76 US 326, 336 (1869) (refusing to construe "forfeit" in a confiscatory manner because "it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction"); *United States v Taylor*, 104 US 216, 221–22 (1881) (Though the 1862 Act "ma[de] no mention of the right of the owner of the lands to receive the surplus proceeds of their sale," the Supreme Court inferred one and employed a statutory "construction consistent with good faith on the part of the United States" to ensure claimant could recover compensation.).

The Court could avoid the constitutional problem created by the lower court's construction by holding that the County remit surplus proceeds to claimants or to the State unclaimed money administrator—just like it does to all other unclaimed money—for the benefit of the claimants. The Court should grant leave to appeal to determine the proper interpretation of the statute.

III. The Court Should Grant Review to Hold the Statute, if Authorizing Confiscations Here, Is Unconstitutional

A. The statute takes property without just compensation and cannot preclude takings claims

Alger County and Iron County do not debate that the lower court's decision conflicts with the U.S. Supreme Court or this Court's modern takings decisions as described in the Application 30–37. Instead, the counties rely on *dicta* in *Nelson v City of New York*, 352 US 103 (1956), and the Michigan Court of Appeals decision in *Muskegon* that relied on *Nelson*. Alger Response 10 (declining to address arguments because *Muskegon* held that "there can be no unconstitutional taking if the property owners fail to avail themselves of the statutory mechanism."). This Court should grant the Application to decide whether that reliance is warranted and to hold that the statute unconstitutionally and unjustly imposes public burdens on Ms. Joseph, the McGee Estate, and many other owners who *paid their debts in full* and only seek the return of their own money. *See Tyler v Hennepin Cnty*, 598 US 631, 647 (2023); *Rafaeli*, 505 Mich at 481.

Iron County incorrectly argues that *Tyler v Hennepin County* "reaffirmed *Nelson*." Iron Response 23. *Tyler* didn't reaffirm *Nelson*—it distinguished it—because that was all that was required. *Tyler*, 598 US at 643 (*Nelson* "is readily distinguished."); *see also* Application 36; *Rafaeli*, 505 Mich at 461–62 (distinguishing *Nelson*). 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' Natl Bank of Piqua*, 111 US 156, 167 (1884).

Iron County also erects a strawman by construing the Application as "suggest[ing] that a statutory deadline can never be established for a constitutional claim, such as a takings claim." Iron Response 24. Applicants suggest no such thing. Instead, the Application notes that Michigan generally permits between three and six years to file constitutional claims. *See* Application 19, 26. The 92-day notice of claim requirement *truncates* those generally applicable statutes of limitations, significantly reducing an *otherwise* reasonable opportunity to protect the right. Application 12–13, 28–29; *see Dover & Co v United Pac Ins Co*, 38 Mich App 727, 730 (1972) (Levin, J., concurring) ("[I]t frequently 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.").

However described, a mere 92 days, strictly construed to bar constitutional challenges to the taking or deprivation of property, conflicts with multiple U.S. Supreme Court decisions. *See* Application 18–19, 27–28 (citing *Felder v Casey*, 487 US 131, 142 (1988); *Burnett v Grattan*, 468 US 42, 55 (1984)). Unlike tort-based claims statutes, the purpose of the notice statute is not to permit investigation of claims to assess the validity of the plaintiff's claim on the public treasury; the purpose is to allow FGUs to purchase foreclosed property for less than fair market value as established by an auction. Iron Response 28. Here, no public money is at stake—the only money at issue *belongs to the owners*. And yet, the harshness of MCL 211.78t bears no resemblance to any other claim process or to how Michigan treats debtors in

all other circumstances; it uniquely and exclusively benefits the government.[2] Application 25–26. Government cannot "make[] an exception only for itself" to avoid paying just compensation. *Tyler*, 598 US at 645.

B. The statute violates procedural due process

Rather than respond to the Application's arguments about the unreasonable notice of claim deadline, Alger County relies entirely on *Muskegon*'s holding that notice under the claim statute is sufficient. Alger Response 9. This Court is not bound by the Michigan Court of Appeals[3] and due process requires *more than notice*. Application 19–22. Rather, the government must adopt procedures that are designed to return property to its rightful owner, not enrich itself. *Id.*; *cf. 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 government has "an *obligation* to return property when its owner can be located," and a short period of time before property escheats to the state, combined with minimal notice requirements, "raises important due process concerns." *Taylor v Yee*, 136 S Ct 929, 930 (2016) (Alito, J., concurring on denial of cert) (emphasis added). As the

[2] *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"); *O'Connor v Eubanks*, 83 F4th 1018, 1021 (CA 6, 2023) (unclaimed money statute holds the money *indefinitely*); MCL 213.55(5) (in eminent domain context, money deposited in escrow for benefit of owner).

[3] Denial of an application to appeal expresses no opinion on the merits. *Grievance Admin v Lopatin*, 462 Mich 235, 260 (2000).

Application explains at 25–26, the government's windfall from owners' failure to navigate the procedures means that the lower court should have given more scrutiny to the statute. *Bierbusse v Farmers Ins Grp*, 84 Mich App 34, 37 (1978) (rejecting "hard and fast rule" that permits an unwarranted windfall). The counties, like the lower court, ignore such precedent. Worse, Iron County directly contradicts this precedent by arguing that the government's pecuniary interest in confiscating property weighs in favor of the current process and against a better process. Iron Response 28.

Finally, Iron County argues that sending notices warning of the foreclosure action, plus sending two foreclosure notices that include information about seeking remaining proceeds satisfies procedural due process. Iron Response 25. But Iron County mistakes the broader problems with the claim process described in the Application as "substantive" due process claims. *Id.* at 28. To be clear: Applicants assert a *procedural* due process claim. Application 21–29.

IV. The Court Should Grant Review in Light of *Jackson* and to Address the Conflict with *Bowles*

Alger County argues that this Court should not grant review of this case because it denied review in *In re Petition of Muskegon Cnty Treasurer for Foreclosure*, No. 166580. Alger Response at v. Yet this case raises two questions absent from the *Muskegon* litigation: one regarding the statutory interpretation of a remedial statute such as MCL 211.78t and also whether MCL 211.78t "preclude[s] owners from seeking constitutionally mandated just compensation by filing a takings lawsuit." Application xiii–xiv. The preclusion question closely mirrors a question posed by this

Court's order for argument on the application in *Jackson v Southfield Neighborhood Revitalization Initiative*, No. 166320 (Nov. 1, 2024) (asking the parties to brief "whether plaintiffs' constitutional takings claims are precluded by MCL 211.78t.").

Moreover, since this Court's denial in *Muskegon*, the Sixth Circuit held in *Bowles v Sabree* that MCL 211.78t *cannot preclude* federal takings claims. 121 F4th 539, 555 (CA 6, 2024) (citing *Knick v Twp of Scott*, 588 US 180, 185 (2019)). *Bowles* conflicts with the Court of Appeals decision here, which held the claim statute provides the sole means to recover any surplus proceeds and that failure to strictly comply with the statute bars any relief whatsoever. App 251–52. To address this conflict with *Bowles* and any forthcoming decision in *Jackson*, the Court should grant the Application.

Iron County argues that whether or not constitutional claims are available is a "red herring," because Ms. Joseph did not file takings claims for the surplus proceeds in federal court. Iron Response 21. But the lower court didn't merely hold that it lacks jurisdiction over the takings claim because of the claim statute's deadlines; it held as a matter of substantive law that the government did not take property without just compensation by confiscating the excess money from the sale of their properties. App 251. If Ms. Joseph or the McGee Estate filed takings claims in federal court now, the counties would likely move for dismissal based on res judicata. *See, e.g.*, *Hall v Meisner*, 565 F Supp 3d 953, 940–44 (ED Mich, 2021).

The preclusion question is squarely presented and merits review by the Court.

CONCLUSION

"If the rights guaranteed in our Constitution are to be more than words on paper, then they must be enforceable." *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 693 (2022). MCL 211.78t effectively deprives huge numbers of Michiganders of the just compensation they are due for the taking of their property. The lower courts have made their position clear—strict compliance or forfeiture—in conflict with rulings of this Court and federal law. The application should be granted.

DATED: February 6, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply in Support of Application for Leave to Appeal complies with the type-volume limitation pursuant to MCR 7.212(B). The Application contains 3,045 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: February 6, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2025, I electronically filed the foregoing Appellants' Application for Leave to Appeal, which was served by the TrueFiling system of the Michigan Supreme Court.

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