EXHIBIT A

STATE OF MICHIGAN
IN THE SUPREME COURT

MATTHEW SCHAFER,
HARRY HUCKLEBURY, and
LILLY HUCKLEBURY,

Plaintiffs-Appellees,

v

KENT COUNTY,

Defendant-Appellant,

and

KENT COUNTY TREASURER,

Defendant.
_____/

Supreme Court No. 164975

Court of Appeals No. 356908

Kent County Circuit Court No. 20-009502-CZ

Hon. Paul J. Denenfeld

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF QUESTION PRESENTED

Whether this Court's normal rule of full retroactivity applies to its holding in *Rafaeli, LLC v Oakland County,* which invalidated a 21-year-old statute that this Court had never deemed constitutional based on an 800-year-old constitutional rule prohibiting the government from seizing more than a citizen owes.

ANSWER:

Trial Court:	Yes
Court of Appeals:	Yes
Plaintiffs/Appellees:	Yes
Defendants/Appellant:	No
Amicus Curiae Chamber of Commerce of the United States:	Yes

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts—both federal and state. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. A nonretroactivity rule that would allow Kent County to retain surplus tax-sale proceeds that it unconstitutionally took from property owners before this Court recognized that the practice violated centuries of constitutional tradition would encourage government entities to run roughshod over core property rights without bearing the consequences when their conduct is eventually curtailed by the courts—to the determent of all private-property owners, including businesses owning property in Michigan.

INTRODUCTION

Since the earliest days of statehood, the Michigan Constitutions have protected citizens from government collections that exceed what citizens owe; and for all but a couple decades of Kent County's existence, no Michigan statute even attempted to contradict that constitutional tradition, which indeed extends 800 years back to *Magna Carta*. This Court recently reaffirmed this bedrock rule of law—and since then the United States Supreme Court also unanimously affirmed that the United States Constitution is in full accord. But Kent County still demurs. Rather than give back

[1] Pursuant to MCR 7.312(H)(5), *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, other than amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the brief's preparation or submission.

the ill-gotten gains it never ought to have taken, the County seeks to pocket the money and move forward as if no wrongful taking ever occurred. But that is neither just in this case nor good for the rule of law in general. Michiganders, individuals and businesses alike, rely on constitutional wrongs being not simply identified, but set *right*. This Court can set wrongs right by affirming that *Rafaeli LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020) applies retroactively. It should do so.

SUMMARY OF ARGUMENT

This Court's ruling in *Rafaeli* applied a long-standing principle of Anglo-American and Michigan law when it held that the government's retention of surplus proceeds from a tax foreclosure sale violated the Takings Clause of the Michigan Constitution. From the time of Magna Carta, the Crown could lawfully seize land only to the point that a debt was satisfied. As a corollary principle, a tax collector who seized and sold more than was needed to fulfill a debt was obligated to return the "overplus" to the debtor. 2 William Blackstone, Commentaries 452. The common law defined the landowner's residual rights in property subject to seizure as "equitable title." *Hall v Meisner*, 51 F4th 185, 190 (CA 6, 2022); accord *Pawlett* v *Attorney General*, 145 Eng Rep 550, 551 (1678). Michigan is one of the many States to have long recognized such equitable title. In the event of a sale, the value of this equitable title was the excess of sale proceeds over the tax liability or other debt on the home. E.g., *People ex rel Seaman v Hammond*, 1 Doug 276, 281 (Mich 1844); *Farnham v Jones*, 32 Minn 7, 11; 19 NW 83, 85 (Minn 1884), *infra* at 11–12 n 3.

This Court's ruling in *Rafaeli* is based on core Takings Clause principles, rooted in both long-standing precedent and common sense. "[A] State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v Beckwith*, 449 US 155, 164; 101 S Ct 446; 66 L Ed2d 358 (1980). "This is the very kind of thing that the Takings Clause of the Fifth

Amendment was meant to prevent," *id.*, and "Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain." *Rafaeli*, 505 Mich at 454. As the United States Supreme Court held in a long line of cases —ranging from *Webb's* and *Kaiser Aetna* to *Horne, Cedar Point Nursery,* and, most recently, *Tyler*—the Constitution bars States from exacting a taking by writing the property interest at issue out of existence. "The State may not put so potent a Hobbesian stick into the Lockean bundle." *Palazzolo v Rhode Island*, 533 US 606, 627; 121 S Ct 2448; 150 L Ed2d 592 (2001). See *Rafaeli*, 505 Mich at 471, n 101. And as this Court recently discussed in *Rafaeli*, "[t]o withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and . . . take his property for public use without just compensation." *Id* (citing *United States v Lawton* 110 US 146, 149–150, 3 S Ct 545, 28 L Ed 100 (1884)). Because that rule is neither new nor unforeseen, that long standing rule set forth in *Rafaeli* applies in this case. See *Pohutski v City of Allen Park*, 465 Mich 696.

Kent County ignores this centuries-old law and argues that the ruling in *Rafaeli* is an unexpected new rule, at best entitled to limited retroactive application. That argument, based in part on a misreading of *Nelson v City of New York*, 352 US 103, 110; 77 S Ct 195; 1 L Ed2d 171 (1956), and *Bennis v Michigan*, 516 US 442, 452; 116 S Ct 994 (1996), is incorrect. Appellant Brief at 33, 35, and 37. In *Nelson*, the United States Supreme Court did not overrule its observation in *United States v Lawton*, 110 US 146, 150 (1884), that to "withhold the surplus from the owner would be to violate the fifth amendment." Rather, the Court concluded that the New York statute before it was not implicated by *Lawton* because a feature of that statute allowed the property owner to obtain the surplus. See *Rafaeli*, 505 Mich at 460–61; *Tyler v Hennepin County, Minnesota*, 143 S Ct 1369, 1378–79; 215 L Ed 564 (2023). And in *Bennis*, the Court addressed a civil-forfeiture statute that was both punitive and deterrent

because the property at issue was related to criminal activity. *Bennis* thus did not mark any shift in the deep-rooted property principles that apply here.

Not only are those property principles hardly "new" or "novel," but the demands of justice dictate retroactive application of *Rafaeli*. To hold otherwise would require "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," which is exactly what the Takings Clause of the Michigan and United States Constitutions "[were] designed to bar." *Armstrong v United States*, 364 US 40, 49; 80 S Ct 1563; 4 L Ed 2d 1554 (1960). Therefore, the Court of Appeals' retroactive application of *Rafaeli* should be affirmed.

ARGUMENT

I. This Court's ruling in *Rafaeli* was a continuation of a centuries-old legal principle and should be applied retroactively.

"In general this Court's decisions are given full retroactive effect." *Beque v Palace Sports & Entertainment, Inc*, 487 Mich 455, 462, 795 NW2d 797 (2010) (citing *Pohutski*, 465 Mich at 695). "The threshold question in determining the application of a new decision is whether the decision in fact clearly established a new principle of law." *Paul v Wayne Co Dep't of Public Serv*, 271 Mich App 617, 620–21, 722 NW2d 922 (2006) (citing *Pohutski*, 465 Mich at 696). A principle of law is "new" when the decision "overrule[s] clear and uncontradicted case law." *County of Wayne v Hathcock*, 471 Mich 445, 484 n 98, 684 NW2d 765 (quote and citation omitted). That is not the case here. Under constitutional principles dating back to the earliest days of Michigan's statehood, and to Magna Carta centuries before that, property owners whose property has been sold to collect a tax debt are entitled to the excess of sales proceeds over the tax liability. *Rafaeli* thus must be applied retroactively.

A. Anglo-American law has long forbidden the government from seizing more property than is required to satisfy a tax debt.

As relevant here, the Takings Clause of the Michigan Constitution provides that "[p]rivate property shall not be taken for public use without just compensation." Const 1963, art 10, § 2. The Michigan Constitution's Takings Clause affords "property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain." *Rafaeli,* 505 Mich at 454 (citation omitted). But like the federal Takings Clause, which embodies the "principles of Magna Carta" that "[t]he colonists brought . . . to the New World, including that charter's protection against uncompensated takings," *Horne v Dep't of Agriculture*, 576 US 350, 358; 135 S Ct 2419; 192 L Ed3d 388 (2015), the Michigan Takings Clause is rooted in the common law Michigan adopted from England. See *Rafaeli*, 505 Mich at 463 (noting that Michigan's "common law is adopted from England."). Both this Court in *Rafaeli* and the United States Supreme Court accordingly "look to 'traditional property law principles,' plus historical practice and [the United States Supreme] Court's precedents." *Tyler*, 143 S Ct at 1375 (citation omitted); *Rafaeli*, 505 Mich at 463.

"The principle that the government may not take more from a taxpayer than she owes can trace its origins at least as far back as Runnymeade in 1215," where King John first signed Magna Carta. *Tyler*, 143 S Ct at 1376 (citation omitted). Among its various protections for private property, Magna Carta made clear that the Crown's power to seize land to satisfy debts to the government was strictly limited. As relevant here, Magna Carta prohibited the Crown from "seiz[ing] any land or rent in payment of a debt, so long as the debtor ha[d] movable goods sufficient to discharge the debt." Magna Carta ¶ 9 (1215). Only if the debtor's chattels were insufficient could his land be taken—and then, *only to the extent necessary* to satisfy the debt. *Id* (permitting seizure "until they have received satisfaction for the debt that they paid for him");

Den ex dem Murray v Hoboken Land & Improvement Co, 59 US 272, 277; 18 How 272 (1855). "Just as the Magna Carta protected property owners from uncompensated takings, it . . . recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess." *Rafaeli,* 505 Mich at 453.

That rule became one of the enduring legacies of the great charter. As Blackstone explained, officials who seized property for delinquent taxes were "bound by an implied contract in law to restore [the property] on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus." *Tyler*, 143 S Ct at 1376 (quoting 2 Commentaries on the Laws of England 453 (1771)). Under the common law, therefore, where the property seized was worth more than the tax owed, any surplus "would be paid back to the owner." *Rafaeli*, 505 Mich at 464 (citing *Martin v Snowden*, 59 Va 100, 110 (Va 1868)).

The rule that a landowner was entitled to the surplus value of the property after a tax sale was consistent with the common law's recognition of the landowner's "equitable title," which "arose primarily in the context of what we now call mortgages." *Hall*, 51 F4th at 190 (holding that the Michigan GPTA violated the United States Constitution Takings Clause.) The original practice was severe: a mortgagor who failed to make full payment by a specific date—the "law day"—had no recourse; the land was, in Lord Coke's words, "taken from him forever, and so dead to him." *Id* (quoting 1 Edward Coke, Institutes of the Laws of England, 205a (1628)).

"But irrevocable forfeiture of the debtor's entire interest in the land, no matter what the reason for the borrower's failure to pay on the law day—for example if, on that day, the lender was nowhere to be found—was before long regarded as an intolerably harsh sanction for the borrower's default." *Id.* Courts of equity thus recognized that "[t]he mortgagor 'had an equitable estate in the land'"—an "Equity of Redemption." *Id* (quoting 6 Holdsworth, A History of English Law 663 (1924), and

Dutchess of Hamilton v Countess of Dirlton and Lord Cranborne, 21 Eng Rep 539 (1654)). As those courts recognized, a mortgage was "in substance 'but a Security,'" which was considered personal property. *Id.* (quoting *Emanuel College* v *Evans*, 21 Eng Rep 494, 494–495 (1625)). "[T]he mortgagee's right" was thus re-conceived "as a right to money rather than land." *Id.* (quoting Sugarman & Warrington, *Land Law, Citizenship, and the Invention of "Englishness"*, in *Early Modern Conceptions of Property*, pp 111, 120 (1995)). Conversely, the mortgagor's interest was, as Lord Hale put it, "a title in equity." *Id* (quoting *Pawlett*, 145 Eng Rep at 551). "And this equitable estate . . . could be devised or conveyed like any other interest." *Id.* at 192 (citing *Casborne v Scarfe*, 26 Eng Rep 377, 379 (1737)).[2] Just as the right to property arises in these contexts, this Court properly recognized in *Rafaeli* based on the long tradition and understanding that the property "owner's right to surplus after a foreclosure sale . . . follows directly from her possession of equitable title before the sale. The surplus is merely an embodiment of money of the value of that equitable title." *Hall*, 51 F4th at 195 (discussing *Rafaeli*, 505 Mich at 462).

B. American law embraced the English common-law tradition.

These features of the common law—that the government could not seize more than it was owed, that it was obligated to return any surplus, and that landowners possessed an equitable interest in their property—were each embraced at the Founding and beyond. American courts broadly agreed that the government was

[2] Michigan recognized equitable title in other contexts, and, in the land-contract context, Michigan's "process for divesting a property owner of equitable title was no different than the process the U.S. Supreme Court described in *Bronson [v Kinzie*, 42 US 311, 318, 1 How 311, 11 L Ed 143 (1843)]" in the same context. *Hall*, 51 F4th at 195 (discussing *Graves v American Acceptance Mortgage Corp*, 469 Mich 608, 615; 677 NW2d 829 (2004)). Moreover, Michigan has recognized equitable title in timber and mineral rights. *See City of Marquette v Mich Iron & Land Co*, 132 Mich 130, 132, 92 NW 934 (1903) (timber); *Stevens Mineral Co v Michigan*, 164 Mich App 692, 418 NW2d 130, 133 (1997) (mineral).

limited to seizing only as much property as needed to satisfy the taxes owed. Thomas M. Cooley, A Treatise on the Law of Taxation 343 (1876). See *Rafaeli*, 505 Mich at 464-65. For example, Chief Justice Marshall wrote for the United States Supreme Court that a tax collector had "unquestionably exceeded his authority" when he sold more land than "necessary to pay the tax in arrear." *Stead's Ex'rs v Course*, 8 US 403, 414 (1808). While early decisions often interpreted particular statutes, it was widely understood that "[t]he rule must be the same," even "without any positive law for the purpose." *Tiernan v Wilson*, 6 Johns Ch 411, 414 (NY Ch 1822) (citing *Course*, 8 US 403)).

Other jurisdictions agreed, and by the time the Fourteenth Amendment was ratified, only one state deemed delinquent property entirely forfeited for failure to pay taxes. *See Tyler*, 143 SCt at 1377. That consensus reflected the widespread belief that a just government's ability to seize property was necessarily limited. As South Carolina's high court put it just after the Bill of Rights was adopted: "It was against common right, as well as against Magna Charta, to take away the freehold of one man and vest it in another; and that too, to the prejudice of third persons, without any compensation." *Bowman v Middleton*, 1 SCL 252, 252 (SC 1792). And just as the general principle of just compensation for a taking was grounded in "reason, justice and moral rectitude" (*VanHorne's Lessee v Dorrance*, 2 US (2 Dall) 304, 310 (CCD Pa 1795)),[3] so too was the principle forbidding over-collection grounded in "principles of obvious policy and universal justice." *Tiernan*, 6 Johns Ch at 414; see *Margraff v Cunningham's Heirs*, 57 Md 585, 588 (Md 1882) (same). While a minority of jurisdictions deviated from the deeply rooted common-law protection of a property owner's equitable interest in seized property, this overwhelming consensus persisted

[3] See also *Gardner v Village of Newburgh*, 2 Johns Ch 162, 166 (NY Ch 1816) (stating the principle of "fair compensation" is "adopted by all temperate and civilized governments, from a deep and universal sense of its justice").

well into the Twentieth Century and remained the majority rule which the United States Supreme Court unanimously confirmed in *Tyler* that it was required by the U.S. Constitution's Fifth Amendment. *Id* at 1378.[4]

Michigan was firmly a part of this consensus from its earliest days. In 1844, just seven years after statehood, this Court held in *Seaman* that "[t]he surplus money produced by the tax sale" rightly belonged to the landowner. "[A]lthough the surplus spoken of is produced by the sale of land, yet the right to receive and control it, no more follows the title to the land, than does the ownership of the cattle and farming utensils that a man may happen to have on his farm when it is sold for taxes, and the purchaser may, with as much propriety, claim a right to the latter as the former." 1 Doug at 281. "[A]t the time *Seaman* was decided, . . . it was commonly understood

[4] *Farnham v Jones*, 32 Minn 7, 11; 19 NW 83, 85 (Minn 1884) ("After the lien of the state is satisfied, any surplus realized from the sale must re-vert to the owner."); *McDuffee v Collins*, 117 Ala 487, 492; 23 So 45, 46 (Ala 1898) (recognizing that the "legal owners" of a property, which "the tax collector lawfully seized and sold [ ] for a sum which, after paying the taxes and costs, left a surplus [ ] were entitled, on demand, to receive [the surplus]."); *Douglas v Roper*, 2022 WL 2286417, *11-*12 (Ala June 24, 2022) ("[T]he right of a property owner to recover excess funds that are generated from a tax sale is a vested right that existed at common law."); *State v Wilson*, 107 Md 129, 137; 68 A 609, 611 (Md 1908) ("tax collector's bond is liable to the owner for any surplus" after "sales of property" for "taxes"); *Farmer v Ward*, 71 A 401, 402 (NJ Super, Ch Div, 1908) (mortgagee is entitled to "any excess paid by the purchaser over and above the tax lien"); *Moore v Rogers*, 100 Tex 361, 363; 99 SW 1023, 1024 (Tex 1907) (landowner had the right to any "excess in the bid over the amount which the sheriff could lawfully collect" and "the right to make the sheriff account to him"); *Brockway v Humphrey*,4 Neb 403, 403; 94 NW 625, 625 (Neb 1903) (purchaser would "pay the surplus into court, and then step out and leave the holder of the equity and the mortgagee to contest for it"); *Hughes v Kelley*, 69 Vt 443, 443; 38 A 91, 91 (Vt 1897) (debt collector may give notice, "sell the property at public auction," "deduct[] the tax and his charges," and, "on demand, return the balance realized from the sale to the person whose property was distrained"); *People ex rel McColgan v Palmer*, 10 App Div 395, 396; 41 NYS 760 (NY App Div 1896) (recognizing right of owner to "take the surplus arising on the sale"); *Irish v Johnston*, 11 Pa 483, 488 (Pa 1849) (right to "surplus tax-money" belonged to owner with "an interest in the land, however small," who "had a right to have it sued").

that the delinquent taxpayer would continue to be the legal owner of the property at the time of the foreclosure sale as the 'owner or claimant' of the land," and thus "would have been entitled to any surplus, which no more followed title to the land than the former owner's other personal property." *Rafaeli*, 505 Mich at 465–66.

The principle that the government must refund a taxpayer the surplus proceeds from a tax-foreclosure sale is thus hardly novel in Michigan or anywhere else in America. By confirming that the government's retention of surplus proceeds from a tax-foreclosure sale beyond the debt owed was a taking, this Court merely applied long-standing Anglo-American law recognized in Michigan, breaking no new ground.

C. The long-standing protection of a property owner's interest against government seizure without just compensation continued to be applied after 1963 in both Michigan and federal courts.

After the ratification of its current Constitution in 1963, Michigan continued to recognize the long-standing common-law right of property owners' entitlement to the surplus proceeds from a tax-foreclosure sale of their property. In *Dean v Department of Natural Resources*, 399 Mich 84; 237 NW2d 876 (1976), the plaintiff failed to pay her property taxes to both the city and the county for $230.68 and $146.90, respectively. After failing to redeem her property, the property was deeded to the State, which, in turn, sold it to an investor for $10,000. This Court reversed the trial court's grant of summary disposition to the defendant, holding that the plaintiff property owner could bring a claim for unjust enrichment. "Inherent in *Dean*'s holding is Michigan's protection under our common law of a property owner's right to collect the surplus proceeds that result from a tax-foreclosure sale." *Rafaeli*, 505 Mich at 470. Moreover, in reaching its conclusion, the *Dean* court did not rely on a statutory right, but rather, recognized the plaintiff property owner's common-law right to the surplus proceeds. See *id.* As this Court properly concluded in *Rafaeli*, "[h]aving originated as far back as the Magna Carta, having ingratiated itself into English

common law, and having been recognized both early in our state's jurisprudence and as late as our decision in *Dean* in 1976, a property owner's right to collect surplus proceeds from the tax-foreclosure sale of his or her property has deep roots in Michigan common law." *Id* at 471.

Federal courts also continued to apply this long-held common-law property right in Takings Clause cases. The "existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v Wash Legal Foundation*, 524 US 156, 164; 1185 S Ct 1925; 141 L Ed 174 (1998) (emphasis added) (quoting *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed2d 548 (1972)). "To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's*, 449 US at 164. "This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent." *Id.* A State may not exact a taking by creating a "mismatch" between the property taken and the specific property interest under state law. *Cedar Point Nursery v Hassid*, 141 S Ct 2063, 2076; 210 L Ed2d 369 (2021) (citing *Webb*'s, 449 U.S. at 164). After all, "the Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Hall*, 51 F4th at 190.

Following that principle, the United States Supreme Court has repeatedly rejected attempts to exact takings by redefining the underlying right. The year before *Webb's*, for example, the Court in *Kaiser Aetna v United States*, 444 US 164, 170, 179; 100 S Ct 383; 62 L Ed2d 332 (1979), held that the United States could not force a marina to open its private pond to the public by reclassifying the pond as part of the navigable waters of the United States. Instead, "if the Government wishe[d] to make [the pond] into a public aquatic park," it would have to "invok[e] its eminent domain power and pay[] just compensation." *Id* at 180. Similarly, the United States Supreme Court held in *Horne* that the federal government could not avoid liability for taking raisin

growers' produce simply by passing a statute that either abrogated their right to their raisins or conditioned their right to sell *any* raisins on relinquishing whatever percentage the government demanded. 576 US at 365–67. As the Court explained, "property rights 'cannot be so easily manipulated'"; the government cannot avoid compensation by recasting "basic and familiar uses of property." *Id* at 365–66.

Most recently, the United States Supreme Court unanimously held in *Tyler* that a county's retention of the surplus proceeds from a tax-foreclosure sale in excess of the taxpayer's liability was an unconstitutional taking. In reaching its decision, much like this Court in *Rafaeli*, the *Tyler* court discussed the rich and deep legal history including the United States Supreme Court's own precedents which "recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed." *Tyler*, 143 S Ct at 642 (discussing *United States v Taylor*, 104 US 216, 26 L Ed 721 (1881); *United States v Lawton*, 110 US 146, 3 S Ct 545, 28 L Ed 100 (1884)).

D. Rafaeli *must be applied retroactively because it did not overrule clear and uncontradicted case law.*

In the face of over 800 years of continuous, near universal common-law tradition, Kent County would be hard pressed to demonstrate that *Rafaeli* established a "new rule of law" by "overrul[ing] clear and uncontradicted case law." *Hathcock*, 471 Mich at 484 n 98 (quote and citation omitted). Indeed, Kent County does not even try to establish this threshold test, instead positing a new and completely inverted test that this Court's decisions should not apply retroactively *unless* a ruling was "clearly foreshadowed by earlier decisions." Appellant's Brief at 32. Under any standard, however, Kent County's argument falls well short.

First, Kent County does not cite a single federal or state case that held that the government's retention of the surplus from a tax sale was consistent with the Michigan Takings Clause. So much for "clear and uncontradicted case law."

Second, Kent County's reliance on *Nelson v City of New York*, 352 US 10, 110 is

misplaced, as this Court already recognized in *Rafaeli*. In *Nelson*, the New York statute at issue included something critical that the Michigan Legislature did not include in the GPTA at the time of *Rafaeli*: where the owner "assert[ed] his property had a value substantially exceeding the tax due," "upon proof of this allegation a separate sale should be directed so that the owner might receive the surplus." *Nelson*, 352 US at 110. That was the very reason the *Nelson* Court found no conflict with its earlier reasoning in *Lawton*: because the New York statute did not "absolutely preclude[] an owner from obtaining the surplus proceeds of a judicial sale," the Takings Clause was not implicated. *Id*. See *Tyler*, 143 S Ct at 1378–79; *Rafaeli*, 505 Mich at 459–60 (distinguishing *Nelson*).

Third, Kent County's reliance on *Bennis v Michigan*, 516 US 442, 452 (1996), fares no better. *Bennis* involved a civil-asset forfeiture, which "'serves at least in part to *punish* the owner' of the property. But the GPTA is not punitive in nature." *Rafaeli*, 505 Mich at 449 (quoting *Bennis*, 516 US at 451–53) (emphasis added). There was no suggestion that the Supreme Court's approval of civil-asset forfeiture of property tainted with criminality—itself a centuries-old principle rooted in the English common law—had anything to do with whether the Takings Clause permits the government to retain more that it is owed with a tax-lien foreclosure, much less that the Supreme Court was reversing centuries of common law tradition sub silentio. Nor does Kent County point to any state or federal court that had ever construed *Bennis* in this way before the Michigan Court of Appeals' doomed decision in *Rafaeli*. Because *Bennis* involved an "unrelated area of law," it did not effect a change in the long-standing understanding that the seizure of tax-payer property and retention of surplus proceeds was an unconstitutional taking whether under the Michigan or United States Constitutions.

Fourth, the one on-point case cited was the federal district court decision in *Wayside Church v Co of Van Buren*, 2015 WL 13308900 (WD Mich, Nov 9, 2015),

vacated for lack of subject matter jurisdiction, 847 F3d 812 (CA 6, 2017)—hardly "clear and uncontradicted case law." Indeed, Judge Kethledge—the only judge on the appellate panel to discuss the merits of the takings claim—penned a dissent that left little doubt how other judges may view the GPTA process at issue: "Van Buren County took property worth $206,000 to satisfy a $16,750 debt, and then refused to refund any of the difference. In some legal precincts that sort of behavior is called theft. But under the Michigan [GPTA], apparently, that behavior is called tax collection." *Wayside Church*, 847 F3d at 823. Thus, if anything, *Wayside Church* should have put Michigan municipalities on notice in 2017 that Michigan's tax-forfeiture scheme was highly suspect under the federal constitution.

In all events, Kent County's position also ignores the long-standing common-law tradition recognizing equitable title as a discrete property right. "The owner's right to a surplus after a foreclosure sale . . . follows directly from her possession of equitable title before the sale." *Hall*, 51 F4th at 195. "The surplus is merely the embodiment in money of the value of that equitable title." *Id.* "By taking absolute title to the plaintiff['s] property, the County took equitable title[]," and it "did so without a public foreclosure sale and without payment to the plaintiff[] for the value of those titles." *Id* at 194. The County thus pursued "a strict foreclosure—a practice that English courts had steadfastly prevented as far back as the 1600s and that American courts (not least Michigan ones) effectively eradicated as 'unconscionable' and 'draconian' some 200 years ago." *Id* (citations omitted). For Kent County to assert that *Rafaeli* was innovative and surprising disregards over 800 years of legal precedent. Because the foreclosure here "took the plaintiffs' property without just compensation," it was unconstitutional at the time the taking occurred, *id* at 196, and *Rafaeli* should be retroactively applied.

II. Justice requires that *Rafaeli* be applied retroactively to prevent Kent County from receiving a windfall for its unconstitutional takings at the expense of individual property owners.

Recognizing that there is no colorable argument that this Court's vindication of an 800-year-old legal principle in *Rafaeli* "overturned clear and uncontradicted case law," Kent County tries to move the goalposts by asking this Court to "clarify" (i.e., completely upend[5]) Michigan's "confusing" retroactivity jurisprudence by eliminating the one clear threshold question, i.e., whether the Court announced a "new" rule. This case is a poor vehicle for such a revision, given that the United States Supreme Court's decision in *Tyler* clearly applies retroactively to most claims that would overlap with *Rafaeli*, rendering the retroactivity analysis under Michigan law largely moot. When the Supreme Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect . . . as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harper v Va Dep't of Taxation*, 509 US 86, 97 (1993). But even if this Court were to consider limiting *Rafaeli*'s retroactive application as a matter of Michigan law, it should not do so here.

Beyond the doctrinal problems with any rule that permits the government to strip Mr. Schafer, Mrs. Hucklebury, and others like them of equitable title without paying for it, reversing the decision below would run afoul of fundamental fairness and justice. As discussed, from Magna Carta, through the early days of this nation and state, to more recently in *Dean*, *Rafaeli*, and *Tyler*, justice has been at the heart of

[5] Kent County's proposed new rule for retroactivity under which only those who luckily happened to file suit *before* a new rule was announced benefit from it is without precedent and, frankly, bizarre: under such a rule, a property owner whose property was forfeited on July 16, 2020—the day before *Rafaeli* was handed down—would have no claim because she had not had an opportunity to initiate a lawsuit. This is not a clarification but a reversal of this Court's long-standing presumption that, consistent with the common-law tradition, judicial decisions apply retroactively unless they truly announce a new rule and undermine significant reliance interests. *Pohutski*, 465 Mich at 696.

the enduring, 800-year-old common-law right of an individual to surplus property value in excess of a debt owed to the government. See *VanHorne's Lessee v Dorrance*, 2 US at 310; *Gardner*, 2 Johns Ch at 166; *Tiernan*, 6 Johns Ch at 414; *Margraff*, 57 Md at 588; *Seaman*, 1 Doug at 280–81 *Dean*, 399 Mich at 87; *Rafaeli*, 505 Mich 480–81; *Tyler*, 143 S Ct at 1380. Whatever refuge Kent County may seek amidst the loose ends of Takings Clause jurisprudence, it is certainly no novel idea that a person ought not keep property that is not rightly hers. And this basic tenet of justice and fairness is no different for the government in relation to its citizens, as enshrined in the Takings Clause of both the United States and Michigan Constitutions. See *Armstrong*, 364 US at 49.

No constitutional provision is more essential than the Takings Clause for fostering the investment necessary for national prosperity. As James Madison wrote, "What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an in-constant government?" The Federalist No 62, 381–382. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 US at 49. Michigan's Takings Clause was adopted to protect these same interests. *Rafaeli*, 505 Mich at 481.

When the public gets the benefit, the public must pay the cost; there is no political gain from overstating one or understating the other. But if policymakers may pick and choose who bears the cost, then factional politics will reign. "This is not simply an adjustment of the benefits and burdens or economic life to promote the common good. Rather this confiscation of the sale proceeds in excess of what is actually owed requires delinquent taxpayers" to bear that public burden alone. *Id.* at 480–81. The

individual property owner should not bear the burden when the government assumes the risk of confiscating and retaining private property in the face of over 800 years of legal precedent. Only a retroactive application of *Rafaeli*, which is a continuation of the deep-rooted requirement of just compensation for takings, prevents this unjust result.

Nor should this result come as any surprise. As this Court explained, "like any other creditor, [the government is] required to return the surplus" following a foreclosure sale. *Rafaeli*, 505 Mich at 476. See also *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 91, 878 NW2d 816 (2016) ("No one disputes that the mortgagee is entitled to recover only his debt. Any surplus value belongs to others, namely the mortgagor or subsequent lienors.") (quotation marks and citation omitted)). For Kent County to claim that it was "unforeseen" that the county ought to return property that was owned by another strains credulity given common sense and the long-standing common law. The only "surprise" is that Michigan and its municipalities were able to violate bedrock principles enshrined in the federal and state constitutions for nearly two decades, and the only injustice here is that Kent County and others got away with taking property from citizens without paying compensation for so long.

Likewise, Kent County's concerns about budgetary disruption ring hollow when the government had no right to the surplus funds in the first instance—it is no answer for a thief to deny restitution to his victim because he has already spent what he stole. Nor should the government be able to fund itself via unconstitutional windfalls taken from parties who are innocent or lack the wherewithal to fight City Hall. *Armstrong*'s lesson that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (364 US at 49) resonates with particular force when those compelled to bear the burdens face sizeable hurdles to defend themselves.

Without full retroactivity of *Rafaeli*, GPTA's seizure methods prior to *Rafaeli* echo those "employed in England in early times for the collection of debts to the Crown," which were "turned to purposes of oppression" before "*Magna Charta* provided for their restraint." *Snowden*, 59 Va. at 136.

Kent County's contrary proposal to limit retroactivity is an unnecessary boon for government, which may account for the risk that it creates by passing statutes it should know are constitutionally suspect or adjust taxes to cover a shortfall. And slashing away at normal retroactivity principles as Kent County proposes would create perverse incentives for the government to "push the envelope" and take what it can before the courts strike down its latest scheme. See e.g., *Leonard v Texas*, 580 US 1178, 137 S Ct 847, 848 (2017) (Thomas, J., respecting denial of certiorari) ("civil forfeiture has in recent decades become wide-spread and highly profitable," and "because the law enforcement entity responsible for seizing the property often keeps it, these entities have strong incentives to pursue forfeiture"). The better rule is that when the government decides to tread on or near long-standing, constitutionally protected ground, it should bear the risk that the courts will later invalidate its conduct.

At bottom, government should not be allowed to keep more than it is owed. If a small tax liability allows the government to take private property without providing compensation, thus circumventing both the Michigan and United States Constitutions, then no landowner's rightfully owned property is secure against the myriad tax, regulatory, and other restrictions that permeate modern life. In *Rafaeli*, this Court applied time-honored law to protect the rights of Michigan property owners; in this case, it should not hesitate to make clear that this holding is fully retroactive and thus fully remedial of the constitutional wrong that has been done.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief complies with the type-volume limitation pursuant to MCR 7.212(B). The Brief contains 7,179 words of Century Schoolbook, 12-point proportional type, and 2.0 spacing. The word processing software used to prepare this brief was Microsoft 365.

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