STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

MATTHEW SCHAFER, HARRY HUCKLEBURY, and LILLY HUCKLEBURY,

Plaintiffs-Appellees,

v.

KENT COUNTY,

Defendant-Appellant,

and

KENTY COUNTY TREASURER

Defendant.

Supreme Court No. 164975

Court of Appeals No. 356908

Kent Circuit Court
No. 20-009502-CZ

BRIEF OF *AMICI CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF QUESTION PRESENTED

1. Did the Court of Appeals correctly hold that *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 952 N.W.2d 434 (2020) applies retroactively?

The Trial Court say "yes."

The Court of Appeals say "yes."

Plaintiffs- Appellees say "yes."

Defendants-Appellants say "no."

Amici Curiae National Taxpayers Union Foundation and Mackinac Center Legal Foundation say "yes."

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STATEMENT OF INTEREST OF AMICI CURIAE1

National Taxpayers Union Foundation ("NTUF") is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. NTUF participated as *Amicus Curiae* in *Tyler v. Hennepin County*, 598 U.S. 631, 143 S. Ct. 1369 (2023), and its sister case, *Fair v. Continental Resources*, 598 U.S. ___, 143 S. Ct. 2580 (2023), and in other states applying these landmark decisions.

The Mackinac Center for Public Policy is a Michigan-based, non-partisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. The Mackinac Center for Public Policy has advocated against the retention of equity in excess of the tax debts owed in foreclosure matters, and against the imposition of excessive fines and penalties. Mackinac has joined with petitioner's attorneys, the Pacific Legal Foundation, as local counsel in a related matter in Michigan. Mackinac participated as *Amicus Curiae* in *Tyler v. Hennepin County*, 598 U.S. 631, 143 S. Ct. 1369 (2023).

Because *Amici* have worked extensively on the issues involved in this case, this Court's decision may be looked to as authority, and any decision will significantly impact taxpayers and property owners, *Amici* have institutional interests in this Court's ruling.

[1] Counsel for *Amici* certify that counsel for *Amici* authored the brief in whole, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *Amici* contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

This Court recognized an individual's right to receive the surplus—the difference between taxes owed and the sale price—from a foreclosure sale in *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 952 N.W.2d 434 (2020).[2] Now, Kent County is threatening this basic right by arguing it should not have to comply with takings which occurred before the decision in *Rafaeli*. Such an interpretation harms individuals like Matthew Schafer, Harry Hucklebury, and Lilly Hucklebury (the "property owners") whose properties were sold close in time to the *Rafaeli* holding.

The *Rafaeli* decision rested on historical sources, sources inherent to Michigan's founding, and precedent to reach its conclusion the property owners have the right to the surplus proceeds from a foreclosure sale. In doing so, *Rafaeli*'s holding did not create a new principle of law. Rather, it represented a continuation of an already existing rule. *Rafaeli*'s continuation of the fundamental principle means that a government may not take more than it is due. Any surplus from a tax foreclosure sale must be returned to the (now former) property owners. That is, the *Rafaeli* decision must be given retroactive application.

Line drawing on how far back to retroactively apply *Rafaeli* may be a concern. Certainly governments knew from the time of the Magna Carta, the ratification of the United States Constitution, and the founding of the State of Michigan that taking property implicated key constitutional rights. That a government illegally held the surplus of so many tax sales is a problem of it's own making. Yet, some limiting principle needs to apply. Therefore *Amici* point to MCL § 205.27a as a good first step in applying *Rafaeli*. Doing so grants relief to the property owners here without implicating too wide a net of potential plaintiffs in future cases.

STATEMENT OF FACTS

Amicus Curiae relies on the factual background contained in *Schafer v. Kent Cnty.*, No. 356908, 2022 Mich. App. LEXIS 5692 (Sept. 22, 2022).

STANDARD OF REVIEW

[2] The Supreme Court of the United States agreed this Court's holding and used a similar rationale striking down Minnesota's law in *Tyler v. Hennepin County*, 598 U.S. 631, 143 S. Ct. 1369 (2023).

Whether a Supreme Court decision should have retroactive application is a "question of law[] . . . ." *People v. Sexton*, 458 Mich. 43, 52, 580 N.W.2d 404 (1998). Questions of law are reviewed under a de novo standard. *Id*. "Resolution of this matter in turn rests on the decisional basis of the holding." *Id.*

ARGUMENT

In order to determine whether *Rafaeli* should be granted retroactive effect, it is essential to analyze the decision's reasoning. For if it is merely a new development in the law, this Court has limited retroactive application of a decision of first impression. *See League of Women Voters of Mich. v. Sec'y of State*, 508 Mich. 520, 566, 975 N.W.2d 840 (2022). But, on the other hand, if the decision of this Court rested on historical precedent and case law that made clear the statute was always unconstitutional, then *Rafaeli* has retroactive effect. *See Cnty. of Wayne v. Hathcock*, 471 Mich. 445, 484, 684 N.W.2d 765 (2004). Given property rights are historically protected since as far back as the Magna Carta through the latest adoption of the Michigan Constitution, this Court's decision in *Rafaeli* should have retroactive effect. How far to give that retroactive effect is a matter of line drawing, but looking to the provisions for the Department of Revenue to reopen a tax filing for audit is a good starting point.

I. *Rafaeli* Established the State Cannot Keep the Surplus from a Tax Foreclosure Proceeding.

Rafaeli examined whether the retention of excess proceeds from a foreclosure sale under the General Property Tax Act violated the Takings Clause by failing to provide just compensation. *Rafaeli*, 505 Mich. at 437. There, plaintiff Rafaeli, LLC, owed $285.11 in taxes, interest, penalties, and fees. *Id.* As a result, Oakland County foreclosed on Rafaeli LLC's property for delinquency and sold it at public auction for $24,500. *Id.* Because the General Property Tax Act "does not provide for any disbursement of the surplus proceeds to the former property owner, nor does it provide former owners a right to make a claim for these surplus proceeds[,]" Oakland County kept all proceeds from the sale. *Id.* at 447.

On appeal, this Court conducted an extensive historical and precedent analysis to determine whether a taking occurred. The Court noted the "'primary objective' in interpreting . . . our state's Takings Clause is 'to determine the text's original meaning to the ratifiers, the people, at the time

of ratification.'" *Id.* at 456 (quoting *Hathcock*, 471 Mich. at 471). The Court's "review of English common law supports the notion that an owner of real or personal property has a right to any surplus proceeds that remain after property is sold to satisfy a tax debt." *Id.* at 463.

The *Rafaeli* Court examined prominent historical works such as the Magna Carta and writings of William Blackstone and Justice Cooley. This Court recognized that "[t]he Magna Carta guaranteed property owners due process of law, so too did the sacred text limit the King's ability to take his subject's property, real or personal, under principles of eminent domain." *Id.* at 462-63 (quotation omitted). Indeed, "[j]ust as the Magna Carta protected property owners from uncompensated takings, it also 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." *Id.* at 463. Justice Cooley, "[d]rawing on Sir William Blackstone . . . further recognized that the Magna Carta 'guaranteed' the protection of private property against government overreach. . . . Thus, it is without surprise that private-property rights have been protected from unlawful government takings in every version of this state's Constitution." *Id.* at 462-63. This Court further relied on Blackstone's commentary regarding bailments: "[W]henever the government seized property for delinquent taxes, it did so subject to 'an implied contract in law' to either return the property if the tax debt was paid or 'to render back the overplus' if the property was sold to satisfy the delinquent taxes." *Id.* at 463-65 (quotation omitted).

Rafaeli recognized that the "right to collect the surplus proceeds was also firmly established in the early years of Michigan's statehood." *Id.* at 464. Justice Cooley wrote in his treatise on the Law of Taxation "various methods that states used to save the surplus proceeds for the former owner when that owner's land was sold for unpaid taxes." *Id.* (citing Cooley, Law of Taxation (3d ed), p. 952). The principle "that the government shall not collect more taxes than are owed, nor shall it take more property than is necessary to serve the public . . . have remained a staple in this state's jurisprudence well after the most recent ratification of our Constitution in 1963." *Id.* at 468 (citations omitted).

Case law also dictated the surplus from a foreclosure proceeding be returned to the landowner. Throughout Michigan's history, the Court "has held that the government's takings power is limited to only that property which is necessary to serve the public." *Id.* at 467. The *Rafaeli* Court looked to *In People ex rel Seaman v. Hammond*, decided in 1844, which held in part, "[i]t is perfectly clear that the individual who has the legal title to the land at the time of the tax

sale, is the owner, entitled, under the statute, to the surplus money, if any there be." *Id.* at 457 (quoting *People ex rel Seaman v. Hammond*, 1 Dough 276, 279-80 (1844)). Looking at the 1976 decision in *Dean v. Department of Natural Resources*, 399 Mich. 84, 247 N.W.2d 876 (1976), the *Rafaeli* Court held that this right in the surplus "withstood the most recent ratification of our Constitution." *Id.* at 468; *see also id.* at 470 ("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.").

Given this expansive history of protecting interests in the surplus of a tax sale, this Court concluded "that the ratifiers would have commonly understood this common-law property right" of a landowner to recover the excess proceeds from a tax title foreclosure sale "to be protected under Michigan's Takings Clause at the time of the ratification of the Michigan Constitution in 1963." *Id.* at 471-72 (citing *Hathcock*, 471 Mich. at 471). The Court held a landowner's right to receive surplus from a tax title foreclosure sale is a protected right, explaining, "[t]his right existed at common law; was commonly understood to exist in the common law before the 1963 ratification of our Constitution; and continues to exist after 1963, as our decision in *Dean* demonstrates." *Id.* at 473.

Accordingly, the Court ordered Oakland County to return the excess sale proceeds to the *Rafaeli* plaintiffs. Notable in *Rafaeli* is that its framework is comprised of a historical analysis of controlling and persuasive sources and precedent to arrive at the conclusion a landowner's right to excess proceeds from a tax title foreclosure sale is a protected right. This framework illustrates *Rafaeli* does not represent new case law, but rather is a continuation of established precedent which affirms this protected right.[3]

II. *Rafaeli* Should be Given Full Retroactive Effect.

This Court has faced the question whether a case is retroactive on numerous occasions. When undergoing such an analysis, "judicial decisions are [generally] given full retroactive effect." *Pohutski v. City of Allen Park*, 465 Mich. 675, 696, 641 N.W.2d 219 (2002) (citing *Hyde v. Univ. of Michigan Bd. of Regents*, 426 Mich. 223, 240, 393 N.W.2d 847 (1986)). The threshold question is "whether the decision clearly established a new principle of law." *Pohutski*, 465 Mich. at 696

[3] Indeed, the majority opinion of *Rafaeli* is devoid of the term "overrule," suggesting there was no prior valid precedent that had to be overruled.

(citation omitted). "A rule of law is new for purposes of resolving the question of its retroactive application . . . either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision." *League of Women Voters of Mich.*, 508 Mich. at 566 (emphasis omitted) (quoting *Phillips*, 416 Mich. at 68). If this threshold question is answered affirmatively, then the court examines three factors to determine if a ruling should be applied retrospectively. *See Pohutski*, 465 Mich. at 696. "Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id.* (citing *People v. Hampton*, 384 Mich. 669, 674, 187 N.W.2d 404 (1971)).

Therefore, the threshold issue in this case is whether *Rafaeli* "established a new principle of law." *Id.* (citation omitted). We recommend the Court finds it does not. As explained *supra*, the decision in *Rafaeli* was a continuation of existing case law and centuries-old historical understanding. *See Rafaeli*, 505 Mich. at 473. A plain reading of *Rafaeli's* holding and rationale illustrates the right for a property owner to collect surplus proceeds from a tax title foreclosure sale continued to exists under the Takings Clause of the Michigan Constitution *despite* the passage of the General Property Tax Act. *See id.* ("Because this common-law property right is constitutionally protected by our state's Takings Clause, the Legislature's amendments of the G[eneral] P[roperty] T[ax] A[ct] could not abrogate it."). In other words, although the Legislature may have amended the General Property Tax Act to preclude surplus proceeds from being distributed to previous property owners, this does not eradicate the existence of this constitutional right. *Id.* (explaining rights pursuant to Article 10, § 2 of the 1963 Constitution can not be abrogated by the General Property Tax Act).

Rafaeli does not "establish a new principle of law" as it neither overruled established precedent or addressed an issue of first impression. Rather, it is a return to a right which always existed. Thus, the Court's inquiry as to whether *Rafaeli* should be applied retroactively should stop there.

As this Court has stated, when a holding constitutes a return to an earlier law, like that of *Rafaeli*, it is to be given full retroactive effect. This Court's decision in *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004) is illustrative when it overruled *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981). *Poletown* had initially allowed the condemnation of property and transfer title to private entities. *See Poletown*, 410 Mich.

at 632, 634. *Hathcock* overruled *Poletown*, holding the system violated the 1963 Constitution. *Hathcock*, 471 Mich. at 478, 483. The *Hathcock* Court acknowledged "[i]n the twenty-three years since our decision in *Poletown,* it is a certainty that state and local government actors have acted in reliance on its broad, but erroneous, interpretation of art 10, § 2." *Id.* at 484. Despite this, this Court concluded that its decision to overrule *Poletown* did "not announce a new rule of law." *Id.* Rather, it "*return[ed] our law to that which existed before Poletown and which has been mandated by our Constitution since it took effect in 1963*. Our decision simply applies fundamental constitutional principles and enforces the 'public use' requirement as that phrase was used at the time our 1963 Constitution was ratified." *Id.* (emphasis added). Accordingly, the Court held its decision to overrule *Poletown* should be applied retroactively and "appl[ied] to all pending cases in which a challenge to *Poletown* has been preserved." *Id.*

Another example is *Devillers v. Auto Club Insurance Association*, 473 Mich. 562, 702 N.W.2d 539 (2005), *superseded by statute,* MCL 500.3145. There, the court overruled *Lewis v. Detroit Automobile Inter-Insurance Exchange*, 426 Mich. 93, 393 N.W.2d 167 (1986), which "engrafted onto the text of § 3145(1) a tolling clause that ha[d] absolutely no basis in the text of the statute." *Devillers*, 473 Mich. at 587. The *Devillers* Court analyzed that "*Lewis* itself rests upon case law that consciously and inexplicably departed from decades of precedent holding that contractual and statutory terms relating to insurance are to be enforced according to their plain and unambiguous terms." *Id.* As such, "*Lewis* cannot be deemed a 'clear and uncontradicted' decision" such that a retrospective application is necessary. *Id.* Following the reasoning in *Hathcock*, this Court concluded its decision to overrule *Lewis* "here is *not a declaration of a new rule, but a return to an earlier rule* and a vindication of controlling legal authority . . . ." *Id.* (emphasis added) (citation omitted). Therefore, the Court held its decision was "to be given retroactive effect as usual and is applicable to all pending cases in which a challenge to *Lewis*'s judicial tolling has been raised and preserved." *Id.* (citation omitted).

Rafaeli is akin to *Hathcock* and *Deviller*: All three cases conducted an analysis of precedent and historical sources to return the law to prior, well-established holdings. By doing so, this Court arrived at the conclusion in each case that its holding was a continuation of an already existing rule, not the creation of a new rule. *See*, *e.g.*, *Rafaeli*, 505 Mich. at 473 ("This right existed at common law; was commonly understood to exist in the common law before the 1963 ratification of our Constitution; and continues to exist after 1963, as our decision in *Dean* demonstrates.");

Deviller, 473 Mich. at 587 ("[O]ur decision here is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority . . . ."); *Hathcock*, 471 Mich. at 484 ("Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963."). In this way, *Hathcock*, *Deviller*, and now *Rafaeli* are all decisions controlled by existing authority, and are therefore not "new principle[s] of law." *Pohutski*, 465 Mich. at 696.

Therefore, like *Hathcock* and *Deviller*, *Rafaeli* should be given full retroactive effect here. The property owners preserved their challenges to Michigan's tax title foreclosure proceeding by filing this action. As the Court of Appeals held, "the relevant date is when plaintiffs filed their complaint commencing the case, not when the underlying conduct issued in the complaint occurred." *Schafer*, at *11. Accordingly, the property owners are entitled to the surplus proceeds from the tax title foreclosure sales of their properties.

III. Even if the Underlying Conduct is the Triggering Point for Retroactivity, Rafaeli Should Still Apply.

Since *Rafaeli* rested upon extensive precedent in constitutional, common, and case law, then the holding of *Rafaeli* ought to be given retroactive effect. How far back is an important question, avoiding the extremes of allowing various government entities to retain unconstitutionally seized funds or allowing claims dating back to Michigan's statehood in 1837. Analogizing to state tax law's statute of limitations, *Amici* suggest a window of 4 years pre-*Rafaeli*.

Under MCL § 205.27a, the Department of Treasury may not assess a "deficiency, interest, or penalty . . . after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, whichever is later." MCL 205.27a(2). In other words, the statute of limitations for the Department of Treasury to assess a tax deficiency against a taxpayer is four years.[4] A tax title foreclosure under the General Property Tax Act is, likewise, a tax levied by the State. Given that the Department of Treasury is subject to a four year statute of limitations, the Court should extend the same analysis to properties sold pursuant to a tax title foreclosure.

[4] Michigan's law is about in the middle of the federal analogous statutes of limitations. The Internal Revenue Service generally has only three years to open an audit. 26 U.S.C. § 6501(a). Adjustments for underreporting can happen for up to six years. *See*, *e.g.*, 26 U.S.C. § 6501(e)(1)(A).

Under this approach, *Rafaeli* may be extended to conduct covered by *Rafaeli*, but not preserved at the time of its decision, up to four years prior to the Court's decision. This approach preserves the retroactivity of *Rafaeli* and protects taxpayers who are victims of state overreach in tax foreclosure proceedings, while also giving a deadline to bring claims under this Court's holding under the Constitution. Property rights are an essential bulwark of the American polity, and Kent County's violation of those rights should be fixed retroactively.

CONCLUSION

Rafaeli's analysis, reliance on precedent and historical sources, and protection of fundamental property rights mandate that it should be given full retroactive effect. Accordingly, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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DATED: December 1, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Amici Curiae* Brief complies with the type-volume limitation pursuant to MCR 7.212(B). The *Amici Curiae* Brief contains 3,230 words of Times new Roman 12-point proportional type and 1.5 spacing. The word processing software used to prepare this brief was Microsoft Office 365.

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DATED: December 1, 2023

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CERTIFICATE OF SERVICE

I, Derk Wilcox, hereby certify that on this 1st day of December, 2023, I served the foregoing by causing it to be delivered by MiFile, electronic service, and first class mail to the counsel for the Plaintiff-Appellees: Pro hac vice counsel Christina M. Martin (CMartin@pacificlegal.org), at Pacific Legal Foundation, 555 Capitol Mall, Ste. 1290, Sacramento, CA 95814; pro hac vice counsel Kathryn D. Valois (KValois@pacificlegal.org) at Pacific Legal Foundation, 4440 PGA Blvd., Ste. 307, Palm Beach Gardens, FL 33410; Donald R. Visser and Donovan J. Visser (donv@visserlegal.com) at Visser and Associates, PLLC, 2480-44th St., S.E., Ste. 150, Kentwood MI 49512. I also served the foregoing by causing it to be delivered by MiFile, electronic service, and first class mail to the counsel for the counsel for Defendants-Appellants: Mathew T. Nelson, Ashley G. Chrysler, and Katherine G. Boothroyd at Warner Norcross + Judd LLP, 150 Ottawa Avenue NW, Ste. 1500, Grand Rapids, MI 49503; and Michal G. Brady at Warner Norcross + Judd LLP at 2715 Woodward Avenue, Ste. 300, Detroit MI 48201.

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