No. 22-166

In the Supreme Court of the United States

GERALDINE TYLER, on behalf of herself and all others similarly,
Petitioner,
v.
HENNEPIN COUNTY, and MARK V. CHAPIN, Auditor-Treasurer, in his official capacity,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE MICHIGAN ASSOCIATION OF COUNTIES AND THE MICHIGAN ASSOCIATION OF COUNTY TREASURERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

This brief is submitted on behalf of the Michigan Association of Counties (MAC) and the Michigan Association of County Treasurers (MACT), which recommend that this Court hold that the Petitioner lacks Article III standing, or in the alternative, affirm the United States Court of Appeals for the Eighth Circuit if it had subject matter jurisdiction over Petitioner's claims.

1. MAC is a non-profit association founded in 1898, which consists of 83 Member Michigan Counties. It is a statewide organization dedicated to representing the interests of Michigan's counties and their elected commissioners. It also promotes the education of county officials and communication and cooperation between them, and it advocates on their behalf in the Michigan and federal legislatures.

2. For many years, Michigan law has imposed on counties a wide range of functions relating to the collection of delinquent real property taxes. The MAC is keenly interested in this case because one of the primary duties of a county is the collection of delinquent real property taxes under the Michigan General Property Tax Act, Michigan Compiled Law (MCL) 211.1, *et. seq* (GPTA). In 75 of Michigan's 83

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* affirm that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

counties, the county's elected treasurer serves as the foreclosing governmental unit (FGU) on behalf of the State. FGUs have the responsibility to foreclose property for unpaid delinquent real property taxes, take title to unredeemed properties, and to either transfer the property for public purpose or sell the unredeemed parcels to generate revenue necessary to pay for unpaid property taxes, and related collection expenses. Counties also have a role in administering the delinquent tax revolving fund under Michigan statutes.

3. Further, state and federal class action claims, which remain pending at the trial and appellate levels against all 83 Michigan counties—i.e., most of MAC's members—assert claims that parallel those brought here.[2] Depending upon the outcome, this case could have serious and detrimental consequences for Michigan's counties, and their residents.

4. MACT was formed as a Michigan nonprofit corporation in 1934. Its members include the treasurers of each of Michigan's 83 counties. Those treasurers are considered the FGUs. After significant process and opportunities to redeem property foreclosed for nonpayment of taxes are provided to taxpayers, those treasurers are tasked with conducting foreclosure auctions and distributing

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[2] See *Garcia v. Title Check, LLC*, No. 21-1449, 2022 U.S. App. LEXIS 981, at *1 (6th Cir. Jan. 12, 2022) (noting the "deluge of litigation" in state and federal courts regarding Michigan's tax foreclosure system).

proceeds from the auctions in a manner mandated by state law.

5. MACT's members have a direct interest in the outcome of this case. As FGUs, who are obligated to carry out Michigan statutory mandates, members have been named as defendants in many lawsuits seeking damages tied to an alleged equity interest in tax foreclosed properties, or a refund of "surplus proceeds" collected at tax foreclosure auctions.

SUMMARY OF THE ARGUMENT

If this Court determines that Petitioner has Article III standing, and thus, can meet her jurisdictional burden — even though Petitioner had no equity in the tax foreclosed property at issue — this Court should affirm the judgment of the Eighth Circuit. And, in so affirming, this Court should reiterate the principles of federalism in a manner that will require the Sixth Circuit to vacate its decision on the same issues in *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022) (cert. petition filed Mar. 10, 2023).[3]

Affirming the Eighth Circuit would also correctly validate the Michigan Supreme Court in closing the door on Fifth Amendment Takings claims in this context, and foreclose a "fair market value" right of "just compensation" that would diverge from the just compensation amount found by the Michigan

[3] Respondent in this case has raised Petitioner's lack of Article III standing due to the Petitioners lack of any equity in the tax foreclosed property. (Respondent's Brief pp. 11-14.)

Supreme Court under state law. Otherwise, Michigan's and many other states' property tax frameworks will be upended under the guise of protecting state law property rights, when in reality it would do just the opposite, and pronounce a new federal right even though the sovereign states are well-equipped to handle (and are handling) such matters of state law property rights.

As in Minnesota and elsewhere, the property tax foreclosure system in Michigan is vital to the operation and sustainability of its counties. As Michigan's legislature recognized when reforming the system decades ago, absent a mechanism to enforce property tax collection, Michigan's municipalities face revenue shortfalls, increased blight, abandoned housing, health and safety issues, and increased taxes spread among those in the community who do timely pay taxes. In this regard, the GPTA was enacted to "strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes." Mich. Comp. Laws § 211.78m(1).

Property tax foreclosure is a last resort that arises when a property owner fails to comply with numerous notices of deficiency, and fails to redeem their property within a statutory timeframe. Like Minnesota's system, when a property owner fails to make payments after numerous chances to do so, and fails to take advantage of opportunities for financial hardship support provided under the GPTA, *see, e.g.*, Mich. Comp. Laws §§ 211.78h and 78k, the FGUs are

often left no choice but to foreclose. And prior to 2020, the GPTA required FGUs to retain surplus proceeds from foreclosure auctions, and to use those proceeds in a statutorily-defined manner.

In 2020, however, the Michigan Supreme Court decided *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434 (Mich. 2020), holding for the first time that individuals have a property interest in surplus proceeds of a tax sale. From there, the Court concluded that the FGUs' statutorily-mandated retention of surplus proceeds following a tax foreclosure violates the Michigan Constitution's Takings Clause. *Rafaeli* held that the property owner's right is to the surplus proceeds—which it defined as "proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure sale of the property—no more, no less," rather than the property's fair market value. 952 N.W.2d at 466.

In response, the Michigan Legislature adopted 2020 Public Acts 255 and 256, which provide a process for former interest holders in tax foreclosed property to claim an interest in surplus proceeds as defined by *Rafaeli*.

Michigan courts have since applied *Rafaeli* to further refine the relief to surplus proceeds available to claimants who are not subject to the amended law's claims procedure. In a recent published decision, the Michigan Court of Appeals rebuffed attempts to gain additional relief beyond that allowed under *Rafaeli* by adding federal claims, observing that state law

establishes the extent of a property interest, and the Fifth Amendment merely protects that interest, if any. *Proctor v. Saginaw Cty. Bd. of Comm'rs*, 340 Mich. App. 1, 29; __ N.W.2d __ (Mich. Ct. App. 2022), *application pending.*[4]

In the meantime, Alabama's Supreme Court has determined that Alabama law also provides its property owner residents with a right to surplus proceeds in tax foreclosures. The Eighth Circuit concluded that the Minnesota legislature validly abrogated any common law right to such proceeds with its tax foreclosure statute in this case. And the Nebraska Supreme Court has held that there is no right under Nebraska law to the surplus proceeds. In that case, the plaintiff urged the court to follow *Rafaeli*'s analysis, but the Nebraska Supreme Court found no support for such a common law or other right existing *under Nebraska law* and determined that Nebraska law is more aligned with Minnesota law, as decided by the Eighth Circuit in this case, not recognizing any such right.

These cases reached differing conclusions, with Alabama and Michigan finding a right to surplus proceeds and Minnesota and Nebraska finding no such right. But each was faithful, as required, to federalism principles in looking to *state law* to determine property rights, and to the respective *state*

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[4] Recent decisions of the Michigan Court of Appeals that are pending on applications to the Michigan Supreme Court held that *Rafaeli* applies retroactively and that plaintiffs are not entitled to fair market value compensation. *See Schafer v. Kent Cty.*, MSC Case No. 164975; *Hathon v. State of Mich.*, MSC No. 165219.

constitutions to determine whether a state law property right exists and, if so, what just compensation entails. Principles of comity and federalism demand this approach. It is a recognition that the federal Fifth Amendment Takings Clause does not create rights, but exists only to protect state law rights. It is also a recognition that different states have different laws and different constitutions with varying rights and degrees of protection, which do not always match those of the U.S. Constitution. *See generally* Jeffrey S. Sutton, 51 Imperfect Solutions, States and the Making of American Constitutional Law (New York: Oxford Univ. Press 2018); *see also* Jeffrey S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation (New York: Oxford Univ. Press 2022).

Last October, the Sixth Circuit turned these principles on their heads when it decided *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), which has exacerbated the "deluge of litigation" in Michigan regarding the GPTA that the same court had noted just months earlier in *Garcia v. Title Check, LLC*, No. 21-1449, 2022 U.S. App. LEXIS 981, at *1 (6th Cir. Jan. 12, 2022). *Hall* ignored that Michigan's Supreme Court in *Rafaeli* had already confirmed and defined the scope of Michigan property rights, and that the Michigan legislature had swiftly amended the GPTA to comply with *Rafaeli*. *Hall* concluded that, in addition to the state law right already announced by *Rafaeli*, Michigan property owners had a federal common law right to their "equitable title" and, therefore, the procedures of the GPTA which did not compensate for this "equitable title" constituted a

taking without just compensation under the *federal* Fifth Amendment's Takings Clause.

Until *Hall*, Michigan perfectly exemplified a state laboratory for its own constitutional experimentation. It revamped its property tax system in 1999 with great success; it was making continual improvements and adjustments all along (including in ways that *Rafaeli* held were required and were already underway, but became expedited by the decision); Michigan's highest court protected the constitutional rights of the state's citizens when called upon to do so; and the legislature then immediately responded. This is how federalism is supposed to function. But *Hall* eviscerated that autonomy by finding a federal common law right which, while purporting to protect that newfound right with the federal Constitution, could potentially lead to the catastrophic result of crippling Michigan's property tax law and the viability of collecting those taxes—particularly if, contrary to Michigan law, "just compensation" under the federal Takings Clause is interpreted more broadly to include fair market value. Moreover, it is more than likely that many states' public finances, including Michigan's, will be eviscerated.

Reversal of the Eighth Circuit's opinion in this case would have that same result nationwide that *Hall* has had in Michigan.

BACKGROUND

I. Property Tax Collections Among The States.

Different states collect overdue property taxes owed on real property in different ways. Some states including Michigan ("Tax Lien States") sell liens on the property to private buyers who purchase the right to collect from the owners. Other states ("Tax Deed States") collect overdue taxes by foreclosing real property for non-payment of taxes owed on the property. In Tax Lien States, property owners retain ownership while taxes remain unpaid, subject to the private buyer's purchased interest. In Tax Deed States, property owners do not. Instead, after the government forecloses the property and the redemption period expires, ownership vests in the government, which retains or disposes of the property as provided under state law.

II. State Legislative Changes to Property Tax Collection.

For years, Michigan's delinquent tax collection process was not working well. The process took "about six years to complete" and, as a result of this delay, many homes and businesses lingered in the tax reversion process and were left abandoned and hazardous. *See* The House Legislative Analysis Section, *Analysis of GPTA Amendment Bills Package*, July 23, 1999, https://bit.ly/2Dat95V. The longer they were left unaddressed, the more costly and burdensome the rehabilitation. Abandoned properties also contributed to crime, blight, and decay. *Id*. The

burden of these consequences frequently fell on local governments, adjoining property owners, and taxpayers.

As the Michigan legislature recognized, this posed "several public policy problems." *Id*. Among those problems, the system was "unfair to those who pay their taxes on time"; the lack of tax revenue that was owed and budgeted "thwart[ed] local government operations"; the tax collection process was "labor intensive and time-consuming"; the back-taxed, often abandoned properties "cause[d] urban blight"; and the system "hamstr[ung] land acquisition and redevelopment projects." *Id*.

Given these systemic flaws, Michigan's legislature revised the process for collecting delinquent property taxes in 1999 with Public Act 123. This new process included significant safeguards to assist property owners and prevent foreclosure. Numerous property tax exemptions apply to those who, for example, are impoverished, disabled, and mentally incapacitated. And for those required to pay property taxes, multiple notices—both of delinquency and of potential foreclosure—must be provided to the parcel owner. If, after these notices, the parcel owner still fails to pay the back taxes owed, the property is relinquished subject to foreclosure and the right of redemption. Mich. Comp. Laws §§ 78h(3) and 78k. A very small percentage of individuals, however, failed to take advantage of the numerous safeguards in place to assist them in keeping their property.

A significant reason that the legislature passed Act 123 was to eliminate blight and facilitate the return of vacant properties to use. *See City of Bay City v. Bay Cnty. Treasurer*, 292 Mich App 156, 168; 807 NW2d 892 (2011) (stating that Act 123 was intended "to effectuate the efficient and expeditious return to productive use of property returned for delinquent taxes"). On both fronts, Act 123 has been a resounding success. *First*, Act 123's process has "significantly benefitted property owners who are delinquent in their property taxes." Kevin T. Smith, Mich. Real Prop. Rev., 30 (Spring 2009). *Second*, it is working for local communities as the Legislature intended by, among other things reducing blight and improving title work and notice to taxpayers. *Id.* Commenting on the new tax-foreclosure process, the Treasurer for Berrien County, Michigan (where St. Joseph and Benton Harbor are located) observed: "The way we're doing it really helps put properties back into productive use much quicker. This has worked phenomenally well for us." Thomas P. Langhorne, *Tax sale: Going a Different Way in Michigan*, Evansville Courier & Press, Sep. 14, 2014, http://goo.gl/wwSy1K.

Other states have amended their tax-foreclosure statutes in similar ways to address similar problems. Indiana (a Tax Deed state), for example, amended its law in 2016 to streamline the tax-foreclosure process to combat blight and allow investors to quickly return valuable properties to the market. *See* Indiana's 2016 Public Law 183; *see also* Indianapolis Star, *Indiana Blight Bills Take Aim at Zombie Squatters*, https://bit.ly/2X3mWAd; Indiana

Legislature Fiscal Impact Statement, https://bit.ly/2GazL4T.

III. Emerging Litigation Regarding State Property Tax Collection.

Notwithstanding these improvements, and the FGUs' strict compliance with Act 123's requirements, beginning in 2014 delinquent taxpayers alleged that the requirement directing FGUs to retain all sale proceeds—and use the proceeds to pay unpaid taxes, maintain tax-foreclosed property that cannot be sold, and for costs associated with the foreclosure process—violates the Takings Clause. For years, these cases ran on parallel tracks in state and federal courts. The courts initially rejected these challenges. *See Rafaeli, LLC v. Oakland Cty.*, 2017 Mich. App. LEXIS 1704 (Mich. Ct. App. Oct. 24, 2017); *see also Wayside Church v. Van Buren Cty.*, 2015 U.S. Dist. LEXIS 196461, at *20-21 (W.D. Mich. Nov. 9, 2015). Takings claims had also been rejected under similar statutes codified in other states. *See Automatic Art, L.L.C. v. Maricopa Cty.*, 2010 U.S. Dist. LEXIS 152359, at *16-21 (D. Ariz. Mar. 18, 2010); *Reinmiller v. Marion Cty.*, 2006 U.S. Dist. LEXIS 75597, at *8-9 (D. Or. Oct. 16, 2006). Amici's members, therefore, reasonably understood that their compliance with legislative mandates of the GPTA equated to constitutional compliance.

IV. The Michigan Supreme Court's 2020 Decision In *Rafaeli.*

That changed when, in *Rafaeli*, the Michigan Supreme Court held that Michigan's Takings Clause is violated when FGUs sell tax-foreclosed property at auction and retain more than the taxes owed—as the GPTA required. *Rafaeli* held as a matter of Michigan property law that those with property interests in foreclosed property have a "right to collect the surplus proceeds that are realized from the tax-foreclosure sale," and that a county's "retention of those surplus proceeds under the GPTA amounts to a taking of a vested property right requiring just compensation" under Michigan's Constitution. 952 N.W.2d at 441. The Court reasoned that, "when a property is taken to satisfy an unpaid tax debt, just compensation requires the [FGU] to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—*no more, no less*." *Id.* at 466 (emphasis added). The Court further clarified a number of issues with surplus proceeds claims under the GPTA, and rejected fair market value as a measure of compensation for claimants. *Id.* at 465. Finally, *Rafaeli* stated that "[n]othing in [its] holding . . . prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." *Id.* at 460 n.108.

The legislature responded by amending the GPTA and creating a mechanism for former interest holders in tax foreclosed property to recover the

surplus proceeds. In December 2020, the legislature unanimously adopted 2020 Public Acts 255 and 256, which provide a process for former interest holders in tax foreclosed to claim an interest in sale proceeds in excess of the minimum bid and other foreclosure-related fees.[5] The new process applies to foreclosures occurring after *Rafaeli*. Like *Rafaeli*, Acts 255 and 256 allow former interest holders of foreclosed property to recover excess sale proceeds, but not fair market value. Mich. Comp. Laws § 211.78t.

Since *Rafaeli*, Michigan courts have applied its holding and further refined the relief available to surplus proceeds for claimants not subject to the Act 256 claims procedure. In *Proctor v. Saginaw Cty. Bd. of Comm'rs*, 340 Mich. App. 1; __ N.W.2d __ (Mich. Ct. App. 2022), *application pending*, the Michigan Court of Appeals rebuffed attempts to gain additional relief beyond that allowed under *Rafaeli* by adding federal claims. The court "disagree[d] with plaintiffs' contention that they are entitled to any recovery beyond the surplus proceeds from the tax foreclosure sale," but "agree[d] that plaintiffs are entitled to post-tax sale interest on such surplus proceeds." *Id*. at 27. The court observed that state law establishes the extent of a property interest, and the Fifth

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[5] Under Michigan law, any person with a "legal interest in property immediately before the effectiveness of a judgment of foreclosure of the property," may submit a claim for excess sales proceeds, including but not limited to former lienholders, mortgagors, heirs, along with the person listed on the deed for the tax foreclosed property. Mich. Comp. Laws § 211.78t(12).

Amendment merely protects that interest, if any. *Id.* at 29.

On September 22, 2022, the Michigan Court of Appeals held that "*Rafaeli* did not announce a new rule of law but returned the law to that which was recognized at common law and by the ratifiers of the Michigan Constitution of 1963, *see Rafaeli* 505 Mich at 472, and should be given full retroactive effect." *Schafer v. Kent Cty.*, 2022 Mich. App. LEXIS 5692, at *9 (Mich. Ct. App. Sept. 22, 2022), *application pending*.

V. *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022).

On October 13, 2022, the Sixth Circuit issued its decision in *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022) (cert. petition filed Mar. 10, 2023).[6] *Hall* recognized the predominance of state law issues that permeate these matters, and ordered the district court to abstain from ruling on the plaintiff's takings claim under the Michigan Constitution. The court "vacate[d] the district court's dismissal of [plaintiffs'] takings

[6] For some time, Michigan surplus proceeds cases were brought primarily in Michigan's state courts. That was likely due to the Sixth Circuit's 2017 decision in *Wayside Church v. Van Buren County*, 847 F.3d 812 (6th Cir. 2017), expressly holding that the Tax Injunction Act and the doctrine of comity prevented federal courts from exercising jurisdiction over these claims. In 2020, however, the Sixth Circuit deemed its analysis in *Wayside Church* to be dicta, permitting these claims to proceed in federal courts. *Freed v. Thomas*, 976 F.3d 729 (6th Cir. 2020). Since then, identical issues of Michigan law have been litigated on a prolific scale on parallel tracks in state and federal courts—often with different results.

claim under the Michigan Constitution . . . , and remand[ed] that claim with instructions for the district court to abstain from adjudicating it" because "[w]hether the facts alleged here violate the Michigan Constitution's Takings Clause is an issue for the Michigan courts to decide." *Id.* at 196 (citing *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500-01, 61 S. Ct. 643 (1941)).

Nevertheless, *Hall* concluded that Oakland County had taken Ms. Hall's "equitable title" to her home, which stated a claim for violation of the *federal* Takings Clause. 51 F.4th 196-97.

ARGUMENT

I. Empirical Evidence Shows That States Are The Proper Laboratories For Their Own Constitutional Experimentation.

This Court has admonished that, as a general matter, "the property rights protected by the Takings Clause are creatures of state law." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021) (cleaned up). The federal constitution "does not create property rights." *Calvert Invest. Inc. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 847 F.2d 304, 307 (6th Cir. 1988). Such rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

As Chief Judge Sutton of the Sixth Circuit has explained, "[s]tate courts have authority to construe

their own constitutional provisions however they wish." Jeffrey S. Sutton, 51 Imperfect Solutions, States and the Making of American Constitutional Law (New York: Oxford Univ. Press 2018), at p. 16; s*ee also* Jeffrey S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation (New York: Oxford Univ. Press 2022). "Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees in the U.S. Constitution when it comes to the rights and guarantees found in their own constitutions, even guarantees that match the federal ones letter for letter." 51 Imperfect Solutions, at p. 16; *see also id*. p. 174. "As long as a state court's interpretation of its own constitution does not violate a federal requirement, it will stand, and, better than that, it will be impervious to challenge in the U.S. Supreme Court." *Id*.

"Our federal system gives state courts the final say over the meaning of their own constitutions." *Id*. "As a matter of power, the fifty-one highest courts in the system may *each* come to different conclusions about the meaning of, say, due process in their own jurisdictions." *Id*. (emphasis in original). "State courts also have a freer hand in doing something the Supreme Court cannot: allowing local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee." *Id*. p. 17.

"Does anyone doubt that the Wyoming Supreme Court might look at *property rights—and takings claims*—differently than the New York Court of

Appeals?" *Id.* (emphasis added);[7] *see also id.* p. 175. "State constitutional law respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history." Imperfect Solutions, at p. 17. "Difficult" and "vexing areas of the law," including "property rights," are appropriately left to states' highest courts. *See id.* at p. 18.

"A modest standard for enforcing the Takings Clause works for national taking-of-property claims, says the Court [citing *Kelo v. City of New London*, 545 U.S. 469, 483 (2005)], but it is by no means clear that every State should embrace the same approach in addressing similar challenges under its own constitution." *Id.* at p. 19. "[I]t may be more appropriate to tolerate fifty-one imperfect solutions rather than to impose one imperfect solution on the country as a whole, particularly when imperfection may be something we have to live with in a given area." *Id.*

"For too long, we have lived in a top-down constitutional world, in which the U.S. Supreme Court

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[7] In this case, the United States filed a motion on March 31, 2023 seeking leave to participate in oral argument as amicus curiae. In the motion, the U.S. stated: "Unlike the Minnesota statutory program at issue here, federal law does not authorize the taking of absolute title to real property for noncriminal nonpayment of taxes without a process for obtaining proceeds from a subsequent sale." This is the point of federalism. Federal law on the topic should not be relevant to the differing property rights recognized by the fifty sovereign states.

announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions." *Id*. at p. 20; *see also id*. p. 175. "Why not do the reverse? That is the way other areas of the law traditionally develop, be it tort, *property,* or contract law." *Id.* (emphasis added). "In these settings, the state courts are the vanguard, the first ones to decide whether to embrace or reject innovative legal claims." *Id*.

Michigan's story reinforces that states and their highest courts are the proper laboratories for interpreting their own rights under state law and constitutions. As of 2018, Michigan's tax foreclosure system was not unique. It was "one of nine states with a statutory scheme that requires the foreclosing governmental unit to disperse the surplus proceeds" from a foreclosure auction "to someone other than the former owner." *Rafaeli*, 952 N.W.2d at 446. But both before and after *Rafaeli*, Michigan's legislature and Michigan interest groups have worked to successfully reduce the amount of property tax foreclosures, and to provide state law remedies to those who had already been foreclosed on.

At the time *Rafaeli* was decided, "[r]ecent legislation" was already in the works "requiring the foreclosing governmental unit . . . to 'remit an amount equal to that excess' to the former property owner if the property was owned and occupied as a principal residence before the judgment of foreclosure was entered." 952 N.W.2d at 466 n.36 (citing 2019 HB 4219). When the Michigan Supreme Court decided *Rafaeli*, this process was expedited. In holding that

the retention of surplus proceeds is a taking, the Michigan Supreme Court explained that "[n]othing in [its] holding today prevents the Legislature from enacting legislation that would require former property owners to avail themselves of certain procedural avenues to recover the surplus proceeds." 952 N.W.2d at 460 n.108. The legislature answered the call, creating a process for those who had been subject to foreclosures in the past to recover surplus proceeds. Mich. Public Act 256 of 2020; Mich. Comp. Laws § 211.78t. This process provided certainty to municipalities and taxpayers as to how to redeem past proceeds consistent with *Rafaeli* and, until the Sixth Circuit's decision in *Hall* added uncertainty, was thought to be the solution going forward.

These state law efforts had been successful. In Detroit, which is within Wayne County, for example, the number of annual Homeowner Property Tax Exemptions that have been granted has grown from 3,712 in 2013 to 14,544 in 2021. Better still, the number of Detroit homeowners subject to property tax foreclosure (unless taxes are paid) has decreased from nearly 20,000 in November 2018 to under 4,000 in November 2022; the number of occupied homes in Detroit actually foreclosed on for failure to pay property taxes has decreased from over 6,400 in 2015 to approximately 250 in 2019 and 2022; and the cumulative property tax debt has decreased from approximately $82 million in November 2018 to $27 million in November 2022. Simply put, the number of homeowners subject to property tax foreclosure is steadily declining to new lows. And those with interests in properties, who had been subject to the tax

foreclosure process in the past and could not receive "surplus proceeds," now have a statutory mechanism to recover those proceeds. Mich. Comp. Laws § 211.78t.[8]

In sum, Michigan is the perfect example of successful state experimentation. The legislature had acted in good faith when drafting the GPTA in the first instance and addressing public welfare concerns. And once the statute was struck down by the Michigan Supreme Court with respect to the retention of surplus proceeds, the legislature and interest groups took immediate action to amend the statute going forward and provide remedies to those whose properties had been foreclosed on in the past.[9] The

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[8] In Michigan, property owners lose their property to tax foreclosure after three years of unpaid taxes. Mich. Comp. Laws §§ 211.78h and 78k. It is true that some taxpayers struggle to pay their property taxes, and if they fail to avail themselves of the assistance and stopgaps provided in Michigan's GPTA—which are designed to prevent foreclosure—the state circuit court where the property is located will enter a judgment of foreclosure. *Id.* Most of the arguments about lost equity and Takings are focused on these aggrieved taxpayers who, for whatever reason, failed to pay their property taxes. But, these arguments fail to acknowledge that the great majority of property owners pay their taxes on time and do not become delinquent. This is significant—these taxpayers are supporting the services that are being provided to all property owners and residents of their respective municipality. They are also subsidizing their fellow property owners who are not paying their property taxes. Those delinquent taxpayers are, however, benefitting from all of the local the services such as police and fire protection, garbage collection, street lighting, parks and others.

[9] Wisconsin is another great example. Wisconsin similarly did not recognize any right of the former owner to any surplus proceeds.

Eighth Circuit's opinion in this case permits this approach, and leaves important issues of state law to the states.

If reversed, states across the country will be subject to a uniform federal common law that fails to account for the different needs of each state. The consequences of that could effectively abolish tax-foreclosures of any kind, particularly depending upon the judicial resolution of plaintiffs' assertions of entitlement to just compensation measured by "fair market value" under the federal Takings Clause. *See, e.g., Freed*, 976 F.3d at 743 ("Freed counters that he does not have a complete remedy in the Michigan courts because the Michigan Supreme Court equated 'just compensation' under its own constitution with the amount of 'surplus proceeds generated from the tax-foreclosure sale,' rather than the full 'fair market value,' which he contends the federal Constitution guarantees.").

The Michigan Attorney General foretold to the Sixth Circuit that such an approach has the potential

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US Bank Trust Nat'l Ass'n v. Walworth County, 2022 U.S. Dist. LEXIS 22153, at *13-14 (E.D. Wis. Jan. 6, 2022). That case is on appeal to the Seventh Circuit, case number No. 22-1168. On October 3, 2022, the Seventh Circuit ordered the parties to each "file a supplemental brief . . . to address whether and how the *Rooker-Feldman* doctrine affects this appeal." (citing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149 (1923)). Like Michigan, Wisconsin amended its law to provide homeowners' rights to surplus proceeds from a sale of their property, after their tax and interest obligations are discharged. Wis. Stat. § 75.36(2m).

to "cripple the state's property tax law and the viability of collecting those taxes." *Freed*, 6th Cir. Case No. 18-2312, Pet. for Rehearing at 2, Doc. 83. The *Freed* property fetched only half of fair market value at the tax sale. 976 F.3d at 732. If the *Freed* plaintiff's analysis under the federal Takings Clause were accepted, it will be the norm that FGUs will be subject to compensating plaintiffs on each foreclosed parcel well in excess of the amount realized at sale. In *Freed*, the Association supplied an amicus brief and the affidavits from county treasurers or their staff detailing county sales data. That data demonstrates the disaster that results if former-owner-plaintiffs are entitled to just compensation under the federal Takings Clause based upon "fair market value."

Amici showed the impact of allowing former owners to recover compensation at that ratio vis-a-vis the proceeds actually garnered at the tax sale that the *Freed* plaintiffs seeks. They summarized sales data for 13 counties. In fact, for the 13 counties and years reported, collecting $38 million in taxes, fees, penalties, and interest through sales would require these counties to pay $280 million in claims to former owners under the *Freed* plaintiff's analysis. Genesee County alone (where Flint, Michigan is located) annually faces a potential payout of over $25 million for sale receipts of under $10 million. (*Freed*, E.D. Mich. Case No. 1:17-cv-13519, Aff. of Carla Vandefifer, ECF No. 93-7.) Statewide, counties could see losses

well over $100 million each year in tax collection costs.[10]

FGUs cannot seek foreclosure of property for delinquent taxes if it costs $4.00 for every $1.00 collected and millions of dollars are lost each year. Foreclosure would cease to be a viable means of collecting taxes and, thus, would cease to be an incentive to pay taxes.[11] And without foreclosure as an incentive, there is no means of getting recalcitrant property owners to pay their taxes, let alone ameliorate the public welfare concerns posed by abandoned, hazardous, blighted and decayed properties. The Michigan Attorney General put it best in *Freed*: if federal courts are able to hear these cases and allow plaintiffs to recover under the "fair market value" theory, this "would shut down collection of

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[10] Wayne County, Michigan, where Detroit is located, is within the 20 largest counties in the U.S. and is defending numerous of these cases in state and federal courts. The second largest county in the U.S. – Cook County, Illinois – was recently sued in federal court as a class action over its tax foreclosure system. *See Bell v. Pappas*, No. 1:2022cv07061 (N.D. Ill.). On February 9, 2023, the court in *Bell* granted defendants' motion to stay pending resolution of this case.

[11] Notably, before the adoption of 2003 Pub. Act 246, which amended Michigan statutes to require the City of Detroit to turn over its delinquent taxes to the county for collection, many Detroit property owners paid their county taxes but not their city taxes because the city did not routinely foreclose liens for delinquent taxes. *See* Delinquent Property Taxes as an Impediment to Development in Michigan, Citizens Research Council of Michigan, Report 325, April 1999, p. 6, https://crcmich.org/publications/delinquent-property-taxes-as-an-impediment-to-development-in-michigan, last accessed Apr. 3, 2023.

delinquent property taxes." *See* also *Rafaeli,* 952 N.W.2d at 465-66 ("If plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency.").

II. The Sixth Circuit Has Taken The Wrong Approach, Which Can Be Rectified In This Case.

In contrast to *Rafaeli*—which held that a taking occurs when a FGU retains surplus proceeds—the Sixth Circuit in *Hall* characterized the taking differently. Without certifying any question regarding state property law to the Michigan Supreme Court, *Hall* undertook an independent historical review of "the rules governing equitable interests in real property" going back to the 12th century. *Hall*, 51 F.4th at 190. Hall eschewed comparable *state* tax-foreclosure cases and looked exclusively at *private-party* transactions—principally those involving mortgages—to conclude that the history of the American common law prohibited so-called "strict foreclosures." *Hall*, 51 F.4th at 190-96.

Hall determined that, "without a public foreclosure and without payment to the plaintiffs of the value of" their "equitable titles" in property, a violation of the federal Takings Clause occurs at the time a foreclosure judgment enters. 51 F.4th at 194. *Hall* stated that that the FGUs "sidestepped the Takings Clause by disavowing traditional property interests long recognized under state law," *id.*, despite

Rafaeli already having weighed in on this issue, and the Michigan legislature having already amended the GPTA.

The Sixth Circuit's decision in *Hall* violates this Court's admonition that state law is the source of Takings litigation. It is contrary to the notion that different state supreme courts may view property rights of those states—and Takings claims—differently. It supplants the Michigan Supreme Court's decision. The Sixth Circuit should have deferred to the Michigan Supreme Court's statement in *Rafaeli* that no taking of property occurs until a taxing authority forecloses on a tax delinquent property and keeps a resulting surplus from a sale.

Hall also reaches the opposite result of the Eighth Circuit in this case. This Court should resolve the first question presented in favor of Hennepin County in concluding, as the Eighth Circuit held, that there does not exist a federal Takings claim here. The Eighth Circuit correctly looked to Minnesota law to determine whether the plaintiff had "a property interest in surplus equity." *Tyler v. Hennepin Cnty.*, 26 F.4th 789, 792 (8th Cir. 2022). The court determined that while there *had* been a common-law right to surplus equity in Minnesota, the Minnesota legislature had since abrogated that right. *Id.* at 792-793. "The statute allocated the entire surplus to various entities but allowed for no distribution of net proceeds to the former landowner."[12] *Id.* at 793. "The

[12] Minnesota's system is like Michigan's system implemented in 1999 — until *Rafaeli* and the resulting amendments to the GPTA. Although *Rafaeli* found that Michigan law recognizes a property

necessary implication is that the 1935 statute abrogated any common-law rule that gave a former landowner a right to surplus equity." *Id.*

In other words, the Eighth Circuit appropriately deferred to Minnesota's own understanding of Minnesota property rights. Following this Court's precedent in *Nelson*, the Eighth Circuit determined that "once title passes to the State under a process in which the owner first receives adequate notice and opportunity to take action to recover the surplus, the governmental unit does not offend the Takings Clause by retaining surplus equity from a sale." 26 F.4th at 794 (citing *Nelson v. City of New York*, 352 U.S. 103 (1956)). In *Nelson*, the plaintiff argued that a judicial foreclosure sale violated the Fifth Amendment's Takings Clause. 352 U.S. at 109. The defendant City of New York had foreclosed Nelson's property for four years of delinquent taxes, sold the property at a foreclosure sale, and kept all of the proceeds, including the surplus equity. *Id.* at 110. This Court held that "nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the

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right of the former owner to surplus proceeds upon the tax sale, whereas the Minnesota statute at issue does not provide such a right, this difference serves to demonstrate that states have different laws recognizing different property rights. The analyses of both the Eighth Circuit and the Michigan Supreme Court were based on state law property rights. Any effort by claimants to use the federal Fifth Amendment to *expand* or *create* state law property rights is without merit.

foreclosure proceedings." *Id.* The notice given in *Nelson* was a single newspaper notice. *Id.* at 105.

Like the Eighth Circuit and the Michigan Supreme Court, the Nebraska Supreme Court focused on state law in *Continental Resources v. Fair*, 971 N.W.2d 313 (Neb. 2022). That court held that there was "no basis to conclude that Nebraska common law recognizes the property interest that is essential for Fair's takings claim to succeed." 971 N.W.2d at 325. In *Douglas v. Roper*, No. 1200503, 2022 Ala. LEXIS 55, 2022 WL 2286417 (Ala. June 24, 2022), the Alabama Supreme Court concluded that, as a matter of Alabama law, property owners have a right to the excess funds generated from a tax sale of his or her property.[13] *Id.* at *33. These courts did not look to federal common law.

Here, the Eighth Circuit correctly held that the Fifth Amendment does not entitle a former property owner to anything beyond their property right established in state law. 26 F.4th at 792 ("we analyze her federal and state takings claims together"). Neither the Fifth Amendment nor (as explained by Respondents) the Eighth Amendment[14] to the United

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[13] On January 10, 2023, the Ohio Supreme Court heard oral argument in *State ex rel. US Bank Trust, N.A. v. Cuyahoga Cnty.*, No. 2021-1090, regarding Ohio's tax-foreclosure system vis-à-vis the plaintiff's Takings claim.
See https://www.ohiochannel.org/video/supreme-court-of-ohio-case-no-case-nos-2021-1090-2021-1091-2021-1181.

[14] Further, the Michigan Supreme Court held in *Rafaeli* that the GPTA "is not punitive in nature. Its aim is to encourage the timely payment of property taxes and to return tax-delinquent property to their tax-generating status, not necessarily to punish

States Constitution provide a viable claim for plaintiffs asserting rights to tax sale proceeds and/or "compensation" where the applicable state law does not provide such a right, such as claims to surplus proceeds under the Minnesota statute or claims to fair market value compensation under the Michigan GPTA.

CONCLUSION

If Petitioner is deemed to have Article III standing, the judgment of the Eighth Circuit should be affirmed and, in so affirming this Court should reiterate the principles of federalism in a manner that will require the Sixth Circuit to vacate its decision in *Hall*.

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property owners for failing to pay their property taxes." 505 Mich. at 449.

Respectfully submitted,

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