UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN BEHOVITZ, *et al.*, Plaintiffs,	)	No. 1:24-cv-332
-v-	)	Honorable Paul L. Maloney
BARRY COUNTY, *et al.*, Defendants.	)	

OPINION AND ORDER GRANTING IN PART MOTION TO DISMISS

Plaintiffs neglected to pay their property taxes and lost their properties through tax foreclosure proceedings. Following the procedures then required by Michigan statutes, the counties where the properties were located sold the properties and kept all of the proceeds, including the surplus (the amount that exceeded what Plaintiffs owed in taxes and fees). The Michigan Supreme Court subsequently found this tax foreclosure scheme violated the Michigan Constitution. *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 435 (Mich. 2020). The United States Supreme Court found a similar statutory scheme violated the United States Constitution. *Tyler v. Hennepin Cnty.* 596 U.S. 631 (2023). The Michigan Legislature has since amended the General Property Tax Act (GPTA).

Plaintiffs filed this lawsuit in March 2024. The complaint named nineteen plaintiffs. Plaintiffs identified nine counties and thirteen current and former county treasurers as defendants. Plaintiffs pled eleven causes of action, six under state law and five under federal law. Dozens of similar lawsuits have been filed in this district.

Defendants Barry County, Cass County, Chippewa County, Muskegon County, St. Joseph County and their county treasurers filed a motion to dismiss. ECF No. 9. Defendants Berrien County, Calhoun County, Ingham County and their county treasurers filed a concurrence. ECF No. 17. Collectively these defendants (Defendants) all raise the same arguments and seek the same relief. The court will grant the motion in part. The court will decline to exercise subject matter jurisdiction over Plaintiffs' state law claims. The court will dismiss the federal claims brought against the individual defendants in their individual capacities because they enjoy qualified immunity. The court will also dismiss three of the five federal claims because the factual allegations in the complaint do not support those three claims.

I.

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a plaintiff to allege facts that provide both fair notice of the nature of the claim and the facts giving rise to that claim. *In re I.E. du Pont de Nemours and Co.*, 87 F.4th 315, 320 (6th Cir. 2023). "The complaint must 'contain either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory.'" *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) (citation omitted). The factual allegations need not be detailed but must be "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Hobart-Mayfield, Inc. v. Nat'l Operating Comm. on Standards for Athletic Equip.*, 48 F.4th 656, 663 (6th Cir. 2022). Those factual allegations, taken to be true, must show that a legal claim is plausible, not merely possible. *Darby v. Childvine, Inc.*, 964 F.3d 440, 444 (6th Cir. 2020).

Rule 12(b)(6) provides a vehicle for a defendant to challenge whether a plaintiff pleads a plausible claim. *See Heyward v. Cooper*, 88 F.4th 648, 653 (6th Cir. 2023). When resolving motions to dismiss brought under Rule 12(b)(6), a court generally considers only the complaint and attached exhibits. *Diei v. Boyd*, 116 F.4th 637, 643 (6th Cir. 2024). The court must accept as true all well-pled factual allegations in the complaint and must draw all reasonable inferences in the plaintiff's favor. *Ogbonna-McGruder v. Austin Peay State Univ.*, 91 F.4th 833, 839 (6th Cir. 2024). A plaintiff pleads a facially plausible claim when the well-pled facts allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 962 F.3d 882, 887 (6th Cir. 2020); *see Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Ordinarily, a defendant bears the burden of proof for an affirmative defense. A party responding to a pleading must "affirmatively state any . . . affirmative defense." Fed. R. Civ. P. 8(c)(1). The rule includes a non-exhaustive list of affirmative defenses that must be pled in the response to a pleading. *Jones v. Bock*, 549 U.S. 199, 212 (2007). The responding party may raise an affirmative defense in a Rule 12(b)(6) motion when factual allegations supporting that defense appear in the complaint or in documents that may be considered at the pleading stage. *VCST Int'l B.V. v. BorgWarner Noblesville, LLC*, 142 F.4th 393, 399–400 (6th Cir. 2025) (citing *Bock*, 549 U.S. at 215).

II.

Plaintiffs pled six causes of action under state law. In an exercise of discretion, the court *sua sponte* declines to exercise jurisdiction over the state law claims. *See*

Transcontinental Leasing, Inc. v. Michigan Nat'l Bank of Detroit, 738 F.2d 163, 165–66 (6th Cir. 1984) (noting that supplemental or pendent jurisdiction "is a doctrine of discretion"). The court exercises subject matter jurisdiction over this civil action under 28 U.S.C. § 1331 because Plaintiffs pled federal constitutional claims. Under 28 U.S.C. § 1367(a), federal courts may exercise supplemental jurisdiction over the state law claims when those claims relate to the federal law claims.

A court may decline to exercise supplemental jurisdiction when the state law claims raise "a novel or complex issue of State law[.]" *Id.* § 1367(c)(1); *see City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997)*; see, e.g.*, *James v. Hampton*, 592 F. App'x 449, 462 (6th Cir. 2015) (affirming the dismissal of a state common law right-to-privacy claim when the district court found that the "claim presented a novel and complex issue of state law"). Our Supreme Court noted that supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's right[.]" *City of Chicago*, 522 U.S. at 172 (quoting *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966)); *see Habich v. City of Dearborn*, 331 F.3d 524, 535 (6th Cir. 2003). When deciding whether to exercise supplemental jurisdiction over state law claims, a court should consider and weigh factors such as judicial economy, convenience, fairness and comity. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

The holding in *Rafaeli* and the Michigan Legislature's amendments to the GPTA constitute significant developments and changes to the relevant state law. Discussing the amendments, the Michigan Supreme Court explained that "MCL 211.78t creates a controlling and structured system for adjudication of tax-foreclosure disputes as the exclusive means for obtaining surplus proceeds." *Schafer v. Kent Cnty.*, 29 N.W.3d 25, 50 (Mich.

2024). The court then held that the amendments applied to claims arising prior to *Rafaeli*. *Id.* Citing *Schafer*, the Sixth Circuit found that the exclusivity only limits a former property owner's state remedies for seeking the surplus. *Howard v. Macomb Cnty.*, 133 F.4th 566, 572 (6th Cir. 2025).

The balance of factors weighs in favor of declining to exercise supplemental jurisdiction. Judicial economy and convenience weigh in favor of exercising supplemental jurisdiction. Dismissing the state law claims would require Plaintiffs to pursue remedies in two forums. Comity, however, weighs strongly in favor of declining jurisdiction over the state law claims. While Plaintiffs filed this lawsuit in 2024, it remains in the early stages of litigation. No case management order has issued. These state law claims should be resolved by the state courts. Fairness also weighs heavily in favor of declining jurisdiction over the state law claims. Some persuasive authority exists for dismissing the state law claims outright. At least one judge in the Eastern District of Michigan relied on *Schafer* to dismiss a plaintiff's state law claims for a pre-*Rafaeli* foreclosure. *Palakurthi v. Wayne Cnty.*, No. 21cv10707, 2025 WL 1293351, at *6 (E.D. Mich. May 5, 2025). Fairness to Plaintiffs weighs in favor of dismissal without prejudice.

III.

Defendants argue that the County Treasurers enjoy qualified immunity from the claims brought against them in their individual capacities.[1] While qualified immunity is an

[1] Defendants did not raise Eleventh Amendment immunity in their motion. Plaintiffs, nevertheless, addressed Eleventh Amendment immunity in their response. In their reply, Defendants then asked the court to dismiss the official capacity claims against the County Treasurers on the basis of the Eleventh Amendment. The court declines to do so. Defendants can properly raise Eleventh Amendment immunity in a motion for judgment on the pleadings, if appropriate, or in a motion for summary judgment.

affirmative defense, a defendant can raise qualified immunity as part of a motion to dismiss "when the *complaint* establishes the defense." *Siefert v. Hamilton Cnty.*, 951 F.3d 753, 762 (6th Cir. 2020). The Sixth Circuit has held that county treasurers who enforced the state tax foreclosure statute prior to *Rafaeli* enjoy qualified immunity from claims brought against them in their individual capacities. *Freed v. Thomas*, 81 F.4th 655, 660 (6th Cir. 2023); *see Felkers v. Kent Cnty.*, No. 1:24cv392, 2025 WL 2887532, at *5–*6 (W.D. Mich. Sept. 19, 2025). At the time, a presumption of constitutionality attached to the state statute, which had not been invalidated by any court. *Freed*, 81 F.4th at 660. The court dismisses the federal claims against the County Treasurers in their individual capacities with prejudice. *See Chaney-Snell v. Young*, 98 F.4th 699, 710 (6th Cir. 2024).

IV.

Defendants argue that the statute of limitations expired for Plaintiffs' federal claims. A defendant may raise a statute of limitations defense in a Rule 12(b)(6) motion when the allegations in the complaint establish the defense. *Wershe v. City of Detroit*, 112 F.4th 357, 364–65 (6th Cir. 2024). Plaintiffs did not plead when any of the foreclosures occurred. Defendants have not established when any individual plaintiff lost his or her property to the foreclosure process.[2] Without knowing when the foreclosures occurred, Defendants cannot establish when the claims accrued. The court cannot, therefore, determine when the statute of limitations expired. Defendants have not met their burden for this affirmative defense.

[2] In their brief, Defendants assert that "the exhibit appended to the complaint indicates the date of foreclosures to have been variously in March of 2015, 2016, 2017, 2018, and 2020. (ECF No. 1-1, PageID.29, Complaint, "Exhibit A")." Plaintiffs did not attach any exhibit to their complaint. PageID.29 is part of the prayer for relief. Curiously, Plaintiffs do not point this out in their response.

V.

Defendants argue that the Estate of Joanne Ellard did not opt out of a class action lawsuit covering these claims, *Wayside Church v. Van Buren County*, No. 1:14cv1274 (W.D. Mich. 2014). This court preliminarily approved the settlement in the *Wayside* lawsuit on March 24, 2023. Joanne Ellard filed an opt out notice on July 20, 2023.[3]

VI.

Plaintiffs pled five causes of action under federal law. Relying on 42 U.S.C. § 1983, Plaintiffs asserted claims for violations of (1) the Takings Clause in the Fifth Amendment (Count 1); (2) the Excessive Fines Clause in the Eighth Amendment (Count 5); (3) procedural due process (Count 6); and (4) substantive due process (Count 7). Plaintiffs also pled a claim arising directly from the Takings Clause (Count 2). Defendants seek dismissal of each of the federal causes of action.

A.

The court declines to dismiss Plaintiffs' § 1983 claim under the Takings Clause (Count 1). In *Tyler*, our Supreme Court held that a plaintiff pleads a plausible § 1983 takings claim by alleging facts to show that the state kept the surplus following the sale of property to satisfy a property tax debt. *Tyler*, 598 U.S. at 647–48; *see Pung v. Isabella Cnty.*, 146 S. Ct. 1964, 1967 (2026); *Hall v. Meisner*, 51 F.4th 185, 196 (6th Cir. 2022).

Defendants argue that Plaintiffs cannot maintain the takings claim because Plaintiffs seek market value equity as damages. While Plaintiffs cannot recover market value as

[3] *Wayside Church*, No. 1:14cv1274 (W.D. Mich. July 20, 2023) (ECF No. 334-1 PageID.6170).

damages, *Pung*, 146 S. Ct. at 1969–72, that portion of the prayer for relief does not require the court to dismiss the claim altogether. Plaintiffs have pled the elements of a federal takings claim.

Defendants also argue that the amendments to the GPTA undermine the Fifth Amendment claim. Michigan now provides a process by which a former property owner can claim the surplus. *See Howard*, 133 F.4th at 568 (involving a 2023 tax foreclosure). After the Michigan Supreme Court found that portions of the GPTA violated the Michigan Constitution, the Michigan Legislature amended the statute in 2020 and established a mechanism for former property owners to claim any surplus following a tax foreclosure and auction. *See* Mich. Comp. Laws § 211.78t. The statute contained a conditional retroactivity provision. The statute became retroactive only if the Michigan Supreme Court determined that the holding in *Rafaeli* applied retroactively. *Id.* § 211.78t(1)(b)(i). In July 2024, the Michigan Supreme Court held that *Rafaeli* applied retroactively "to timely filed cases not yet final at the time of the decision." *Schafer*, 29 N.W.3d at 41. Prior to the time Plaintiffs filed this lawsuit, the Michigan Court of Appeals had reached the same conclusion, that *Rafaeli* applied retroactively to timely filed lawsuits. *Proctor v. Saginaw Cnty. Bd. of Comm'rs*, 985 N.W.2d 193, 216 (Mich. Ct. App. 2022) *vacated in part*, 12 N.W.3d 182 (Mich. 2024).

Because the foreclosures of Plaintiffs' properties occurred before the amendments to the GPTA became effective, their takings claims survive. "A constitutional violation accrues the moment the government undertakes a constitutional act. For example, a violation of the Takings Clause occurs 'at the time of taking.'" *Wilson v. Hawaii*, 145 S. Ct. 18, 20 (2024) (quoting *Knick v. Twp. of Scott*, 588 U.S. 180, 194 (2019)); *see, e.g., Palakurthi,* 2025 WL

1337029, at *5–*6. "And, the availability of state-law compensation remedies cannot delay *or undo* the accrual of a takings claim." *Wilson*, 145 S. Ct. at 20 (quoting *Knick*, 588 at 193–94) (emphasis added). When the final judgments entered, Plaintiffs lost all rights to their properties under the earlier version of the GPTA. *See* Mich. Comp. Laws § 211.78k(5) and (6); *Hall*, 51 F.4th at 194–96.

B.

The court will dismiss Plaintiffs' arising-directly under the Fifth Amendment takings claim (Count 2). The Sixth Circuit has consistently found that 42 U.S.C. § 1983 provides the exclusive remedy for constitutional violations. *See Foster v. Michigan*, 573 F. App'x 377, 391 (6th Cir. 2014) ("To the extent that Appellants attempt to assert direct constitutional claims, they fail; we have long held that § 1983 provides the exclusive remedy for constitutional violations."); *c.f., O'Connor v. Eubanks*, 83 F.4th 1018, 1029 (6th Cir. 2023) (Thapar, J., concurring) ("Perhaps our circuit should allow suits against officials directly under the takings clause."). Multiple district courts, including this one, have already rejected the same arising-directly claim in the context of tax foreclosure cases. *See, e.g., Grainger v. Ottawa Cnty.*, No. 1:19cv501, 2021 WL 790771, at *11 (W.D. Mich. Mar. 2, 2021); *Fox v. Saginaw Cnty.*, No. 19cv11887, 2021 WL 120855, at *13 (E.D. Mich. Jan. 13, 2021).

C.

The court will dismiss Plaintiffs' Eighth Amendment excessive fines claim (Count 5). The Supreme Court and the Sixth Circuit have rejected this cause of action raised in the context of a tax foreclosure proceeding. *Pung*, 146 S. Ct. at 1973; *Freed*, 81 F.4th at 659; *Hall*, 51 F.4th at 197.

D.

The court declines to dismiss Plaintiffs' § 1983 procedural due process claim (Count 6). To prove a procedural due process claim, a plaintiff must establish (1) a deprivation by state action of a protected interest in life, liberty, or property, and (2) inadequate state process. *Reed v. Goertz*, 598 U.S. 230, 236 (2023). The claim arises not when the deprivation occurs, but when the state fails to provide due process. *Id.* (citation omitted); *see Bozzo v. Nanasy*, 159 F.4th 1111, 1118 (6th Cir. 2025) ("And, again, the 'injury' in a procedural due process claim is the 'infirm process' that accompanies a deprivation."). "When the denial of procedural due process itself creates an injury" the plaintiff need not pursue potential administrative remedies or seek a final decision. *Bigelow v. Michigan Dep't of Nat. Res.*, 970 F.2d 154, 160 (6th Cir. 1992).

Defendants again argue that Plaintiffs failed to pursue their remedies under the amended GPTA. Defendants insist that the new statutory process for obtaining the surplus undermines Plaintiffs' procedural due process claim.

Defendants have not established that Plaintiffs' procedural due process claims fail as a matter of law. Plaintiffs seek actual damages and nominal damages. The new statutory process does not render moot Plaintiffs' claim for damages from the initial failure to provide due process. The injury is complete when the state fails to provide any process and the procedural due process claim is "instantly cognizable in federal court." *Braun v. Ann Arbor Chapter Twp.*, 519 F.3d 564, 572 (6th Cir. 2008) (quoting *Nasierowski v. Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991)).

E.

The court will dismiss Plaintiffs' substantive due process claim (Count 7). The Sixth Circuit affirmed the dismissal of a substantive due process claim brought in the context of a tax foreclosure action. *Hall*, 51 F.4th at 197 (adopting the reasoning of the district court). Several district courts, including this one, have reasoned that because our Constitution provides an explicit provision for a taking without just compensation, the substantive due process clause will not cover the same government conduct. *Grainger*, 2021 WL 790771, at *13; *Fox*, 2021 WL 120855, at *15.

VII.

Plaintiffs allege causes of action arising from the tax foreclosure of their properties. Since the foreclosures, the Michigan Supreme Court declared a portion of the state statute violated the Michigan Constitution and the Michigan Legislature amended the statute. The state law claims thus present novel and complex matters that should be resolved by the state courts. The court will decline to exercise subject matter jurisdiction over those claims and dismisses them without prejudice. The County Treasurers enjoy qualified immunity from the federal claims brought against them in their individual capacities. Defendants have established that allegations in the complaint do not support three causes of action: the arising-directly takings claim, the claim for violation of the Excessive Fines Clause in the Eighth Amendment, and the claim for violation of substantive due process. The § 1983 claims for a takings and for procedural due process against the Counties and County Treasurers in their official capacities remain.

ORDER

Consistent with the accompanying Opinion, the court **DECLINES** to exercise subject matter jurisdiction over the state law claims and **DISMISSES** the state law claims without prejudice. The court **GRANTS IN PART** Defendants' motion to dismiss. ECF No. 9. The court DISMISSES the federal claims against the County Treasurers in their individual capacities as the County Treasurers enjoy qualified immunity. The court DISMISSES Plaintiffs' arising-directly Fifth Amendment claim, their Eighth Amendment claim, and their substantive due process claim because the allegations in the complaint do not support those causes of action. The § 1983 claims for a takings and for procedural due process against the Counties and County Treasurers in their official capacities remain. Defendant must file its answer to the complaint within twenty-eight (28) days of this order. **IT IS SO ORDERED.**

Date: September 30, 2026

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge