UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DONALD MORISSION, *et al.*, Plaintiffs,	)	
	)	No. 2:23-cv-120
-v-	)	
	)	Honorable Paul L. Maloney
GOGEBIC COUNTY, *et al.*, Defendants.	)	

OPINION AND ORDER GRANTING IN PART MOTIONS 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 sued nine counties and sixteen current and former county treasurers. Plaintiffs alleged both federal and state law claims. Dozens of similar lawsuits have been filed in this district.

A group of counties and treasurers (Defendants 1) filed a motion to dismiss.[1] ECF No. 50. Ionia County and its county treasurers (Defendants 2), represented by different counsel, also filed a motion to dismiss.[2] ECF No. 55. The court will grant the motions in part. The court will decline to exercise subject matter jurisdiction over Plaintiffs' state law claims. The court will dismiss the federal claims against the county treasurers because they have immunity. The court will then dismiss three of the five federal claims because the factual allegations in the complaint do not support those three claims.

Since Defendants filed their motions, the parties have resolved some of the claims. Plaintiffs Stephen Vicsik and Jeanne Vicsik voluntarily dismissed all of their claims. ECF No. 73. Plaintiffs June Hutchings, Timothy Hutchings, and Michael Epstein dismissed their claims against Berrien County but not against the county treasurers. ECF No. 75. Plaintiffs Edward Johnson and Diana Johnson dismissed their claims against Kalamazoo County but not against the county treasurers. ECF Nos. 76 and 78. Plaintiffs Estate of Julia Johnson, Aaron King, and Estate of Lisa Lee dismissed their claims against Calhoun County but not against the county treasurers. ECF Nos. 77 and 79.

[1] Defendants Berrien County, Shelly VandeCar and Bret Witkowski filed a notice of concurrence. ECF No. 52. Because the Berrien County Defendants seek the same relief as Defendants 1, the court will treat the Berrien County Defendants as part of Defendants 1. The court makes an observation here. The proof of service for Shelly VandeCar, ECF No. 13, indicates that Plaintiffs served Shelly Weich. Weich is the Berrien County Treasurer. Susan VandeCar is the St. Joseph County Treasurer.

[2] Defendants 2 filed two reply briefs, ECF Nos. 63 and 66. The first reply brief, ECF No. 63, appears to be erroneous. Plaintiffs filed their response to Defendants 1's motion on July 3, 2024, and Defendants 2 filed their first reply two weeks later on July 17. Plaintiffs filed their response to Defendants 2's motion on July 17 and Defendants 2 filed their second reply brief, ECF No. 66, two weeks later on July 31.

I.

Plaintiffs filed their complaint July 5, 2023. The complaint named approximately nineteen plaintiffs. Plaintiffs named nine counties as defendants: Berrien, Calhoun, Gogebic, Houghton, Ionia, Kalamazoo, Muskegon, St. Joseph, and Wexford. Plaintiffs also named sixteen current and former county treasurers as defendants: Shelly VandeCar and Bret Witkowski (Berrien); Brian Wensauer and Christine Schauer (Calhoun); Lisa Hewitt and Sue Pertile (Gogebic); Lisa Mattila and Kathleen Beattie (Houghton); Judith Clark (Ionia); Thomas Whitener and Mary Balkema (Kalamazoo); Tony Moulatsiotis (Muskegon); Kathy Humphreys and Judie Ratering (St. Joseph); and Kristi Nottingham and Jayne Stanton (Wexford). The complaint does not plead the year in which Defendants completed the foreclosure process against each plaintiff.

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 five 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 2023, 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.

Plaintiffs sued the individual defendants (County Treasurers) in both their official capacities and their individual capacities. Defendants 1 and Defendant 2 seek dismissal of all of the claims against County Treasurers.

Defendants 1 argue that the official capacity claims against the County Treasurers should be dismissed as redundant with the claims brought against Defendant Counties.

Courts treat claims brought against a government official in his or her official capacity as claims against the government entity. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Briner v. City of Ontario*, 370 F. App'x 682, 699 (6th Cir. 2010). When a plaintiff sues the government entity and one of its officials in his or her official capacity, the claim against the individual is "superfluous." *Faith Baptist Church v. Waterford Twp.*, 522 F. App'x 322, 327 (6th Cir. 2013). An official capacity lawsuit against a government official "is *not* a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Thus, when a plaintiff pleads the same claim against a government entity and one of its officials in his or her official capacity, the court can dismiss the official capacity claim. *E.g., J.H. v. Williamson Cnty.*, 951 F.3d 709, 723 n.4 (6th Cir. 2020) ("The district court correctly dismissed these official capacity claims as superfluous of the claim against the county.") (citing *Foster v. Michigan*, 573 F. App'x 377, 390 (6th Cir. 2014)). District courts in the Sixth Circuit routinely dismiss official capacity claims against a government official when the plaintiff also sues the entity itself. *See Whiting v. City of Athens*, 699 F. Supp. 3d 652, 659 (E.D. Tenn. 2023); *Rodgers v. Oakland Cnty.*, No. 18cv12832, 2019 WL 3777031, at *4 (E.D. Mich. Aug. 12, 2019) (collecting cases); *Agema v. City of Allegan*, No. 1:12cv417, 2015 WL 1022084, at *4 (W.D. Mich. Mar. 9, 2015) (collecting cases); *Scott v. Tipton Cnty.*, No. 10-2616, 2011 WL 2515976, at *3 (W.D. Tenn. June 22, 2011) (collecting cases).

Defendants 2 argue that the official capacity claims against Judith Clark, the Ionia County Treasurer, should be dismissed because she enjoys Eleventh Amendment immunity. The Eleventh Amendment bars claims in federal court against a state and against state agents for damages. *Kerchen v. Univ. of Michigan*, 100 F.4th 751, 761 (6th Cir. 2024). Courts

treat claims against a state agent in his or her official capacity as a claim against the state. *Id.* The Sixth Circuit Court of Appeals has held that a county treasurer acts as an arm of the state, not the county, when conducting tax foreclosure proceedings. *Bowles v. Sabree*, No. 22–1912, 2024 WL 1550833, at *3 (6th Cir. Apr. 10, 2024). The court found that the county treasurer, therefore, enjoyed immunity under the Eleventh Amendment. *Id.*; *Fakhreddine v. Sabree*, No. 24–1829, 2026 WL 674319, at *1 (6th Cir. Mar. 10, 2026); *see, e.g., Felkers*, 2025 WL 2887532, at *5.

The court finds both reasons, redundancy and the Eleventh Amendment, to be a sufficient basis for dismissing the official capacity claims. The court dismisses all federal claims for damages against the individual defendants in their official capacities without prejudice. *See Ernst v. Rising*, 427 F.3d 351, 367 (6th Cir. 2005).

Defendants 1 and Defendants 2 argue that the County Treasurers enjoy qualified immunity from the claims brought against them in their individual capacities. While qualified immunity is an 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 2 argue that the statute of limitations expired for the § 1983 claims brought by the three plaintiffs who lost property in Ionia County: Estate of Hibbard, Vicki Currigan, and Chris Simpson. 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). To avoid a statute of limitations defense, a plaintiff must commence the lawsuit within a prescribed period of time that begins when the claim accrues. *See Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 105 (2013). When analyzing a statute of limitations defense, a court must consider (1) when the claim accrued, (2) the date plaintiff filed the lawsuit, and (3) any permissible delay between those two events. *Future Now Enters., Inc. v. Foster*, 525 F. App'x 395, 398 (6th Cir. 2013).

Plaintiffs do not plead when each of them lost their properties to foreclosure. The documents the court can consider as part of this motion include enough information for the court to determine when these three plaintiffs lost their properties. Plaintiffs attach an exhibit to the complaint identifying each property lost to foreclosure, including the foreclosing county, the property address and the parcel number. ECF No. 1-1 PageID.27. Defendants 2 attach court records—judgments of foreclosure—to their motion. ECF Nos. 56-1 through 56-6. Using the parcel numbers in Plaintiffs' exhibit and comparing those numbers to

information in Defendants 2's exhibits, the court can determine when the three plaintiffs from lost their properties: Estate of Hibbard (2014), Chris Simpson (2015), and Vicki Currigan (2018).

A.

Michigan's three-year statute of limitations for personal-injury claims applies to claims brought under 42 U.S.C. § 1983. Because Congress did not provide a statute of limitations for § 1983, the Supreme Court directs trial courts to use "a State's personal injury statute of limitations . . . for all § 1983 claims." *Nance v. Ward*, 597 U.S. 159, 174 (2022) (citing *Wallace v. Kato*, 549 U.S. 384, 387 (2007)); *see Reguli v. Russ*, 109 F.4th 874, 879 (6th Cir. 2024) ("At the outset, state law determines the *length* of § 1983's statute of limitations. The Supreme Court has held that the statute incorporates the limitations period for personal-injury torts from the State where the events occurred."). Michigan has a three-year statute of limitations for personal-injury claims, which the Sixth Circuit has held must be borrowed for § 1983 claims arising in the state. Mich. Comp. Laws § 600.5805(10); *Wolfe v. Perry*, 412 F.3d 707, 714 (6th Cir. 2005); *see, e.g., Lyndon's LLC v. City of Detroit*, No. 23–1895, 2024 WL 3427176, at *2 (6th Cir. July 16, 2024) (applying the three-year statute of limitations period to a Fifth Amendment takings claim).

B.

Plaintiffs' § 1983 claims accrued when the judgments of foreclosure became final. Federal law determines when a § 1983 claim accrues and when the statute of limitations begins to run. *Reguli*, 109 F.4th at 879. A claim accrues when "the plaintiff has a complete and present cause of action." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603

U.S. 799, 810 (2024) (citation omitted). The Supreme Court has "explained that a cause of action does not become complete and present for limitations purposes—it does not *accrue*—until after the plaintiff can file suit and obtain relief." *Id.* (citation modified). "Put differently, this 'injury-occurrence' or 'occurrence' rule triggers the limitations period on the first day that every element of a claim has occurred such that the plaintiff may sue in court over the claim." *Reguli*, 109 F.4th at 879. "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)).

The Fifth Amendment to the United States Constitution provides, in part, that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). The plain text of the amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Id.* at 536 (citation omitted). The clause does not "limit governmental interference with property rights *per se*," rather it "'secure[s] *compensation* in the event of otherwise proper interference amounting to a taking.'" *Id.* at 537 (citation omitted). The Takings Clause does not require payment prior to a taking. *Hurley v. Kincaid*, 285 U.S. 95, 104 (1923). The government must, however, provide some mechanism for compensation. *See Stringer v. United States*, 471 F.2d 381, 383 (5th Cir. 1973) ("It is well established that a property owner is not entitled to actual compensation before the Government takes possession of his land, but only to an

adequate provision for compensation[.]"). Additionally, "the availability of state-law compensation remedies cannot delay or undo the accrual of a takings claim." *Wilson*, 145 S. Ct. at 20 (citing *Knick*, 588 U.S. at 193–94).

For § 1983 claims arising from tax foreclosures of property in Michigan prior to the recent amendments to the GPTA, the claims accrued on the date the circuit court entered a final judgment terminating all of the rights to the property held by the former property owner. Property owners generally possess an interest in the equity of their property. *Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022); *see Tyler*, 598 U.S. at 638–39. "History and precedent" have established the "principle that a government may not take more from a taxpayer than she owes[.]" *Tyler*, 598 U.S. at 639. Following the public sale of a tax-foreclosed property, under "long-settled principles, the debtor would then be entitled to any surplus proceeds from the sale, which represented the value of the equitable title thus extinguished." *Hall*, 51 F.4th at 194. But under the GPTA at the time Ionia County foreclosed on the three plaintiffs' properties, they did not retain any interest at all to their properties. Under the earlier versions of the GPTA, when the circuit court entered a final judgment "[a]ll redemption rights to the property expire," Mich. Comp. Laws § 211.78k(5), and "fee simple title" to the property "vests absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property," *id.* § 211.78k(6). *See Hall*, 51 F.4th at 194. "Before that event, the plaintiffs held equitable title; after it, they held no title at all." *Id.* at 196. Importantly, prior to the recent amendments, the GPTA did not provide any mechanism by which a former property owner could obtain surplus proceeds following a tax foreclosure sale. *Rafaeli*, 952 N.W.2d at 447–48.

Absent a period of delay, the statute of limitations expired for the three plaintiffs' § 1983 claims. Estate of Hibbard's claims accrued in 2014. Simpson's claims accrued in 2015. Currigan's claims accrued in 2018. The three-year statute of limitations for all three plaintiffs expired well before they filed this lawsuit in 2023.

C.

The three plaintiffs argue that a class action lawsuit, *Wayside Church v. Van Buren County*, No. 1:14cv1274 (W.D. Mich. 2014), tolled the statute of limitations for their claims. The *Wayside* lawsuit began on December 11, 2014. *Wayside* involved both a plaintiff class and a defendant class. The complaint pled a class of former owners of real property in Michigan who lost property for non-payment of real property taxes, where the property was then sold for an amount in excess of the amount owed, and where the property owners were denied the surplus proceeds. The court preliminarily approved the proposed class action settlement on March 24, 2023.

In addition to borrowing Michigan's statute of limitations, federal courts also apply state tolling rules for class action lawsuits, so long as the tolling rules are not "inconsistent with the federal policy underlying the cause of action under consideration." *Wershe*, 112 F.4th at 370 (citation omitted). Michigan Court Rule 3.501 sets forth the procedures for class actions and subrule (F) provides for tolling. Rule 3.501(F)(1) states that the statute of limitations "is tolled as to all persons within the class described in the complaint." Rule 3.501(F)(2) identifies events that cause the statute of limitations to resume running. And Rule 3.501(F)(3) provides that if the event identified in (F)(2) is superseded by an order of

the trial court, "the statute of limitations shall be deemed to have been tolled continuously from the commencement of the action."

Applying Rule 3.501(F), the *Wayside* lawsuit tolled Estate of Hibbard's, Simpson's, and Currigan's statute of limitations. On November 5, 2015, in the *Wayside* lawsuit, the court granted a motion to dismiss and entered judgment. In February 2017, the Sixth Circuit vacated the court's opinion and order and remanded the action with instructions to dismiss the lawsuit for lack of subject matter jurisdiction. In March 2017, this court reopened the case and then promptly dismissed the action for lack of subject matter jurisdiction. The court granted a motion to reopen the lawsuit in March 2019 based on new authority issued by the Supreme Court. In a companion case also involving a *Wayside* opt-out, the Sixth Circuit looked at this series of events and found that the statute of limitations for the claims of the members of the *Wayside* class were tolled upon the filing of the *Wayside* lawsuit in December 2014. *Perry v. St. Joseph Cnty.*, No. 25-2012, 2026 WL 2476333, at *2 (6th Cir. Aug. 24, 2026). Following this court's order reopening the case in 2017, Rule 3.501(F)(3) applied so that the class members' claims were tolled continuously until the plaintiff in *Perry* opted out. *Id.* at *2.

Following *Perry*, the statute of limitations for these three plaintiff's claims had not yet expired when they filed this lawsuit. Like the plaintiff in *Perry*, Estate of Hibbard, Simpson, and Currigan were members of the class described in the initial *Wayside* complaint. When

these three plaintiffs opted out of the *Wayside* lawsuit and filed this action, they were still within the three-year limitation period.[3]

V.

Plaintiffs pled five causes of action under federal law. Relying on 42 U.S.C. § 1983, Plaintiffs asserted claims for violations of (1) substantive due process (Count 6); (2) procedural due process (Count 7); (3) the Takings Clause in the Fifth Amendment (Count 8); and (4) the Excessive Fines Clause in the Eighth Amendment (Count 10). Plaintiffs also pled a claim arising directly from the Takings Clause (Count 9). Defendants 1 seek dismissal of each of the federal causes of action. Defendants 2 seek dismissal of three of the five causes of action: the substantive due process claim, the excessive fines claim, and the arising-directly claim.

A.

The court will dismiss Plaintiffs' substantive due process claim (Count 6). 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 v. Ottawa Cnty.*, No.

[3] In *Perry*, the Sixth Circuit did not determine whether St. Joseph County had the notice required by the Michigan Court Rule. *Perry*, 2026 WL 247633, at *3. The circuit court left the issue for this court to resolve in the first instance. Defendants did not raise the notice issue as part of this motion to dismiss. Whether Defendants had notice of the *Wayside* lawsuit likely could not be resolved as part of a 12(b)(6) motion in this lawsuit.

1:19cv501, 2021 WL 790771, at *13 (W.D. Mich. Mar. 2, 2021); *Fox v. Saginaw Cnty.*, No. 1:19cv11887, 2021 WL 120855, at *15 (E.D. Mich. Jan. 13, 2021).

B.

The court declines to dismiss Plaintiffs' § 1983 procedural due process claim (Count 7). 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 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)).

C.

The court declines to dismiss Plaintiffs' § 1983 claim under the Takings Clause (Count 8). 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*, 51 F.4th at 196.

Defendants again 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*, 145 S. Ct. at 20 (2024) (quoting *Knick*, 588 U.S. at 194); *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.

D.

The court will dismiss Plaintiffs' arising-directly under the Fifth Amendment takings claim (Count 9). 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*, 2021 WL 790771, at *11; *Fox*, 2021 WL 120855, at *13.

E.

The court will dismiss Plaintiffs' Eighth Amendment excessive fines claim (Count 10). 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.

VI.

Defendants 1 ask the court to dismiss several individual plaintiffs: Donald Morrison, Peter Shaw, Estate of Joseph Behrns, Estate of Eugene Hamilton, Raymond Bachtal, Estate of Fay Swinehart, and Nathan Pierce. Defendants argue that these individual plaintiffs did not opt out of the *Wayside* class and cannot bring claims in this lawsuit.

The court declines to dismiss these plaintiffs at this point in the litigation. The Estate of Joseph Behrns filed a notice to opt out.[4] Adam Hamilton, the personal representative of the Estate of Eugene Hamiltion, filed several opt out notices.[5] The Estate of Fay Swinehart also filed a notice to opt out.[6] The *Wayside* class covered individuals who lost properties to tax foreclosures from January 1, 2013, through December 31, 2020. In their response, Plaintiffs assert that at least some of them were not members of the *Wayside* class. The complaint includes no information indicating when each plaintiff lost his or her property.

[4] *Wayside Church*, No. 1:14cv1274 (W.D. Mich. June 23, 2023) (ECF No. 301-1 PageID.4844).

[5] *Wayside Church*, No. 1:14cv1274 (W.D. Mich. June 23, 2023) (ECF No. 301-1 PageID.4858-60).

[6] *Wayside Church*, No. 1:14cv1274 (W.D. Mich. June 23, 2023) (ECF No. 301-1 PageID.4884).

The court cannot, therefore, determine whether any of these plaintiffs were or were not a member of the *Wayside* class.

VII.

As part of the motion, Defendants 1 argue that, because the complaint attacks the constitutionality of a state statute, the Michigan Attorney General must be notified. *See* Fed. R. Civ. P. 5.1(a) and (b).

The court will not dismiss this lawsuit for the reason that Plaintiffs did not provide notice to the Michigan Attorney General upon the filing of the complaint. Defendants have not cited any authority to establish that the failure to provide the required notice provides a basis for dismissing the lawsuit. The rule suggests otherwise. Subsection (c) provides that a court may not enter a final judgment holding the statute unconstitutional before the time to intervene expires. Subsection (c) thus anticipates that a court might find a statute unconstitutional at some point in the litigation but may not enter a final judgment until the attorney general has been afforded time to appear and defend the statute. The rule also provides a caveat that might apply here. The plaintiff must provide prompt notice if "the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity." Fed. R. Civ. P. 5.1(a)(1)(B). As noted above, the initial complaint included claims against the county treasurers in their official capacities. The Sixth Circuit has found that, when county treasurers conducted tax foreclosure proceedings, they acted as agents of the state. *Bowles v. Sabree*, No. 22–1912, 2024 WL 1550833, at *2 (6th Cir. Apr. 10, 2024).

VIII.

Plaintiffs alleged 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 County Treasurers enjoy immunity from the federal claims brought against them. 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. This leaves only Plaintiffs' § 1983 claims for a taking and for a violation of procedural due process.

Accordingly, the following parties may be terminated:

(1) Plaintiffs – June Hutchings, Timothy Hutchings, Michael Epstein, Edward Johnson, Diana Johnson, Estate of Julia Johnson, Aaron King, and Estate of Lisa Lee; and

(2) All individual defendants (County Treasurers).

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' motions to dismiss. ECF Nos. 50 and 55. The court DISMISSES the federal claims against the County Treasurers. 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. Defendant Counties must file their answer to the complaint within twenty-eight (28) days of this order. **IT IS SO ORDERED.**

Date: September 29, 2026

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