UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

EDWARD THEISON, *et al.*, Plaintiffs,	)	
	)	No. 2:23-cv-129
-v-	)	
	)	Honorable Paul L. Maloney
DICKINSON 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 sued six counties and nine 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 defendants (counties and treasurers) filed a motion to dismiss.[1] ECF No. 36. 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 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 motion, the parties have resolved some of the claims. Plaintiff Edward Theison voluntarily dismissed his claims. ECF No. 49. Plaintiffs Brian Mason, Estate of Kenneth Powell, Estate of Janet Carr, and Jeffrey Lehman dismissed their claims against Ingham County but not their claims against the county treasurers.[2] ECF Nos. 50. Plaintiff Lori Drogemuller dismissed her claims. ECF Nos. 51 and 52. Plaintiff Jeremias Gaytan, Maribel Gaytan, Lake Development of Michigan, Mitchell Bouwkamp, Luann Bouwkamp, and Estate of Rodney Smith dismissed their claims against Oceana County and the county treasurers. ECF Nos. 55 and 56. And Plaintiffs Estate of Theodore Lone, Dennis McKeen, Estate of Beverly Metcalf, Kimberly Miller, and Dennis Newton dismissed their claims against Calhoun County but not their claims against the county treasurers. ECF Nos. 57 and 58.

[1] The remaining defendants, represented by different counsel, filed a memorandum of concurrence. ECF Nos. 38. Because all of the defendants seek the same relief, the court will refer to them collectively as "Defendants" without distinguishing between the motion and the concurrence.

[2] The Estate of Janet Carr filed a second dismissal of its claims. ECF Nos. 53 and 54.

I.

Plaintiffs filed their complaint July 14, 2023. The complaint named approximately twenty-five plaintiffs. Plaintiffs named six counties as defendants: Antrim, Calhoun, Cass, Dickinson, Ingham, and Oceana. Plaintiffs also named nine current and former county treasurers as defendants: Sherry Comben (Antrim); Brian Wensauer and Christine Schauer (Calhoun); Hope Anderson (Cass); Lorna Carey (Dickinson); Alan Fox and Eric Schertzing (Ingham); and Mary Lou Phillips and Sheila Gowell (Oceana). 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 seek dismissal of all of the claims against County Treasurers.

Defendants 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)).

The court will dismiss the federal claims brought against the County Treasurers in their official capacities. 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 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.

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 seek dismissal of each of the federal causes of action.

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 v. Meisner*, 51 F.4th 185, 197 (6th Cir. 2022) (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. 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 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.

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.

V.

Defendants ask the court to dismiss several individual plaintiffs: Linda Smith, Casimer Kucharek, John Beck, Linda Beck, David Groner, Estate of Billy Gene Brown, JKK Silhouette LLC, Amanda Davies, and Estate of Jennie Sheperd.[3] This court presided over a class action lawsuit involving claims arising from tax foreclosures. *See Wayside Church v. Van Buren Cnty.*, No. 1:14cv1274 (W.D. Mich. 2014). 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 *Wayside* class covered individuals who lost properties to tax foreclosures from January 1, 2013, through December 31, 2020. In their response, Plaintiffs assert that the nine plaintiffs were not members of the *Wayside* class. The complaint includes no information indicating when each plaintiff lost his or her property. The court cannot, therefore, determine whether any plaintiff was or was not a member of the *Wayside* class.

[3] Defendants also asked the court to dismiss Edward Theison and Lake Development of Michigan. Theison and Lake Development voluntarily dismissed their claims after Defendants filed this motion.

VI.

Defendants 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 plaintiff must provide prompt notice "*if*: (B) 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) (emphasis added). 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 and the county. *Bowles v. Sabree*, No. 22–1912, 2024 WL 1550833, at *2 (6th Cir. Apr. 10, 2024).

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 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 – Brian Mason, Estate of Kenneth Powell, Estate of Janet Carr, Jeffrey Lehman, Estate of Theodore Lone, Dennis McKeen, Estate of Beverly Metcalf, Kimberly Miller, and Dennis Newton;

(2) All individual defendants (County Treasurers); and

(3) Calhoun County.

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. 36. 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. Antrim County and Cass County must file its answer to the complaint within twenty-eight (28) days of this order. **IT IS SO ORDERED.**

Date: September 28, 2026

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