No. 21-1108

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS A. FOX,
and all those similarly situated,

Plaintiff – Appellee,

v.

SAGINAW COUNTY, MI,
by its Board of Commissioners, et al.,

Defendants – Appellants

On Appeal from the United States District Court
for the Eastern District of Michigan – Northern Division
Honorable Thomas L. Ludington, District Judge

APPELLEE CLASS MEMBERS' BRIEF

E. POWELL MILLER
THE MILLER LAW FIRM, P.C.
950 W. University Dr. #300
Rochester, MI 48307
(248) 841-2200
epm@millerlawpc.com

PHILIP L. ELLISON
OUTSIDE LEGAL COUNSEL PLC
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

Class Counsel for Appellee
(Additional Counsel Listed in Signature Block)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1(a), Appellee Thomas Fox states as follows: Appellee is not a corporate entity and, as such, has no parent corporation and is not a publicly-held corporation owning 10% or more of stock of a party.

Dated: July 1, 2021

/s/ E. Powell Miller
E. Powell Miller (P39487)
Sharon S. Almonrode (P33938)
THE MILLER LAW FIRM, P.C.
950 W University Drive, Ste 300
Rochester, MI 48307
(248) 841-2200
epm@millerlawpc.com
ssa@millerlawpc.com
Attorneys for Plaintiff-Appellee

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COUNTER STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case seeks to secure redress for thousands of taxpayers whose property has been unconstitutionally taken by their local governments. Moreover, Appellants' arguments, if adopted, would radically expand Eleventh Amendment immunity and make federal lawsuits against local governments all but impossible. For these reasons, the Class requests oral argument to the extent the Court deems it necessary.

COUNTER JURISDICTIONAL STATEMENT

The District Court has jurisdiction to entertain and hear this case pursuant to 28 U.S.C. § 1331 and § 1343 as this case involves federal questions under the United States Constitution and federal civil rights under 42 U.S.C. § 1983 and it has supplemental jurisdiction over the state law claims as well, 28 U.S.C. § 1367.

As for the issue of sovereign immunity, this Court has jurisdiction under the collateral order doctrine. *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002).

As for the issue involving juridical link, this Court currently lacks jurisdiction under 28 U.S.C. § 1291 because the issue falls outside the scope of the collateral order doctrine. Appellants are seeking to appeal the District Court's class certification decision. In fact, they have filed pending petitions under Fed. R. Civ. P. 23(f) raising the same issues as in their brief here. Sixth Circuit Case Nos. 20-110 and 20-111. The Rule 23(f) process is the proper procedure; Appellants cannot bootstrap their class certification arguments to a sovereign immunity appeal under the collateral order doctrine.

Appellants seek to do just this by arguing that they have raised a "standing" issue; that standing is always a threshold issue; and that, therefore, as long as they are properly before this Court on their sovereign immunity argument, the Court must hear their standing appeal as well.

Appellants' effort fails. Their "standing" argument is actually a thinly-veiled attack on the District Court's decision to certify the Class. Even if they have presented a *bona fide* standing issue, such an issue is not grounds for interlocutory appeal.

Again, 28 U.S.C. § 1291 generally limits this Court's jurisdiction to appeals of final orders. The collateral order doctrine is a narrow exception. "[T]he collateral order doctrine accommodates a 'small class' of rulings, not concluding the litigation, but conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action.'" *Will v. Hallock*, 546 U.S. 345, 349 (2006) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996)). "The requirements for collateral order appeal have been distilled down to three conditions: that an order '[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Id.* (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)). "The conditions are 'stringent'" in order to avoid overwhelming the usual finality requirement and the resulting hazard of successive appeals. *Id.* at 349-50 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)) (additional citations omitted). Accordingly, "the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has

been entered ...” *Id.* at 350 (quoting *Digital Equipment*, 511 U.S. at 868). “[A]lthough the Court has been asked many times to expand the ‘small class’ of collaterally appealable orders, we have instead kept it narrow and selective in its membership.” *Id. See also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949) (discussing doctrine).

Thus, courts have pervasively rejected Appellants’ argument that standing is reviewable on an interlocutory basis. “[T]he question of standing does not fit within the collateral order doctrine, and, therefore, … Appellants may not as of right take an immediate interlocutory appeal on this issue” because, “[a]lthough a district court’s standing determination conclusively resolves a disputed question and settles an important issue separate from the merits of the case, courts have recognized that the issue of standing is not effectively unreviewable on appeal from a final judgment and, thus, fails the last prong of the collateral order doctrine.” *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334-35 (11th Cir. 1999) (discussing cases). *See also Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496-97 n. 2 (7th Cir. 1993) (holding that standing is not appealable immediately under collateral order doctrine); *Shanks v. City of Dallas, Tex.*, 752 F.2d 1092, 1098 n. 9 (5th Cir. 1985) (rejecting interlocutory appeal of standing on the ground that issue was “enmeshed” with merits of cause of action); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 474-75 (2d Cir. 1974) (refusing to review standing question on interlocutory appeal because

resolution of issue was merely a "'step [ ] towards final judgment in which [it] will merge'") (citation omitted)).[1]

This Court directly declined to adopt Appellants' argument in *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412 (6th Cir. 1996), despite an argument in the concurrence adopting their theory. *Id.* at 1419-20. And the majority was not alone: the theory does not appear to have been later adopted in this or any other Circuit.

Appellants alternatively challenge the District Court's decision on the theory that, based on their standing argument, the Court lacked jurisdiction. But as with standing, "challenges to jurisdiction do not present immediately appealable

[1] Appellants cite *United States v. Van*, 931 F.2d 384 (6th Cir. 1991) for its language that "[s]tanding is a threshold inquiry that a court must consider prior to addressing the merits of an appeal." *Van*, 931 F.2d at 387. But *Van* does not stand for the proposition that this Court should consider all parties' standing regardless of the issue before it. Rather, in *Van*, this Court considered the standing of the *appellant*: "Before we can address [appellant]'s arguments on appeal we must consider an issue not raised by the parties, namely that of [its] standing to appeal," because "we must determine whether the named appellant has a personal stake in the outcome of the controversy before this court." *Id.* at 387-88. While the appeal is premature as to multiple issues, there is no question that Appellants here have standing to appeal.

collateral issues." *Haynes v. Marshall*, 887 F.2d 700, 704 (6th Cir. 1989) (characterizing *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989)).[2]

Finally, the Court lacks jurisdiction at this time over Appellants' argument that the District Court erred in declining to dismiss Appellee's claim under 42 U.S.C. § 1983. Appellants seek interlocutory appeal of a straightforward merits issue, which falls well outside of any conception of the collateral order doctrine. Instead, Appellants argue that the Court has "pendent appellate jurisdiction" over the issue because it is "inextricably intertwined" with the sovereign immunity issue, citing *Chambers v. Ohio Dep't of Hum. Servs*., 145 F.3d 793, 797 (6th Cir. 1998). But *Chambers* made clear that "a claim can be regarded as 'inextricably intertwined' with a properly reviewable claim only if the pendent claim 'is coterminous with, or subsumed in, the claim before the court on interlocutory appeal.'" *Id.* (quoting *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1025, 1028 (10th Cir. 1998)). "The 'inextricably intertwined' requirement of pendent appellate jurisdiction is not meant to be loosely applied as a matter of discretion; rather, such jurisdiction only may be exercised when the appealable issue at hand cannot be resolved without addressing the nonappealable collateral issue." *Id.* (citing *Archie v. Lanier*, 95 F.3d 438, 443

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[2] *Am. Telecom Co. v. Republic of Lebanon*, 501 F.3d 534 (6th Cir. 2007) was a properly postured appeal of a final decision, and does not involve the collateral order doctrine.

(6th Cir. 1996)). *Chambers* was an appeal of an injunction relating to notice of an already-existing administrative order to Medicaid beneficiaries. *Id.* The appellees conceded that the Court had jurisdiction over the notice-related injunction, but argued that the Court could not consider the content of the order being served because there was no timely interlocutory appeal of the order's substance. *Id.* The Court found pendent jurisdiction because, it reasoned, it could not evaluate the notice-related injunction without considering the order's contents. *Id.* Here, by contrast, the Court can easily resolve the Eleventh Amendment issue without resolving the merits of the Class's claims.

COUNTER STATEMENT OF THE ISSUE(S) PRESENTED FOR REVIEW

I. Are Appellants protected by sovereign immunity?

Appellee answers: **No.**

II. Does this Court have jurisdiction to consider Appellants' appeal of the juridical link doctrine because it implicates standing?

Appellee answers: **No.**

III. Has the judicial link doctrine been incorrectly applied?

Appellee answers: **No.**

IV. Does this Court have jurisdiction to consider Appellants' appeal of the District Court's decision to deny their motions to dismiss Appellee's claim under 42 U.S.C. § 1983?

Appellee answers: **No.**

V. Did the District Court error in denying Appellants' motions to dismiss Appellee's claims under 42 U.S.C. § 1983?

Appellee answers: **No.**

INTRODUCTION

The Appellant counties foreclosed on Class Members' properties for non-payment of taxes. They auctioned off the properties for amounts often far greater than the tax debts; kept the surplus; and refused to refund the difference between what the Class Members owed and what the properties were worth. This was a taking. *Rafaeli, LLC v. Oakland Cty.*, 952 N.W.2d 434 (Mich. 2020).

The District Court certified a class of Appellants' victims, and granted Appellants' motions to dismiss only in part. In particular, the District Court properly rejected Appellants' radical claim of Eleventh Amendment immunity. The jurisprudence is clear that such immunity is reserved for states, not counties; that the only exception to this rule is a "narrow" exception for when counties act as an arm of the state; and that this exception cannot apply when a county acts voluntarily. Here, the counties did act voluntarily, and they acted for themselves—not on the state's behalf. This Court should thus affirm the District Court's decision on this issue. Any other result would result in chaos: local governments are creatures of state law; and if Appellants prevail in their argument that following a statute gives them Eleventh Amendment immunity, then local governments will pervasively—if not inherently—enjoy such immunity.

Moreover, Appellants also improperly try to raise a challenge to the jurisdiction of the District Court by this interlocutory appeal. That issue is not subject

to the collateral order exception to the final judgment rule of 28 U.S.C. § 1291, and must be dismissed for lack of jurisdiction as premature.

Even if it is not, the argument fails. The District Court properly applied the well-established juridical link doctrine in certifying the class. The victims here were injured by a common course of conduct imposed by all Appellants acting pursuant to a common statute. This is precisely the sort of case for which class certification is appropriate. As Judge Kethledge has noted, Appellants' conduct imposed a "gross injustice" that "[i]n some legal precincts… is called theft." *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 823-24 (6th Cir. 2017) (J. Kethledge dissenting). This Court should not deprive Appellants' victims of well-established tools to ensure government accountability.

STATEMENT OF THE CASE

Thomas A. Fox was the owner of residential property in Gratiot County (the "Property"), (First Am. Compl., R. 17, ¶16, Page ID # 222), which, like the other Appellant Counties, has affirmatively elected to administer the tax foreclosure process instead of allowing the State of Michigan to administer it. (*Id.*, ¶33, Page ID # 224). *See also* MCL 211.78(6). As of the auction sale, the Property had an outstanding tax delinquency of $3,091.23. (*Id.*, ¶18, Page ID # 222). Appellant Gratiot County seized ownership of the Property on or about February 21, 2017. (*Id.*, ¶19, Page ID # 222). The Property had a fair market value of at least $50,400.00. (*Id.*, ¶20, Page ID # 222). Appellant Gratiot County later sold the Property at a tax auction on August 16, 2017 for only half its actual value—$25,500.00. (*Id.*, ¶21, Page ID # 222). The Property had equity—that is, the difference between what the Property was worth and the tax delinquency that Appellee owed. (*Id.*, ¶¶23-24, Page ID # 223). Appellee Fox had a property interest in this equity. (*Id.*, ¶¶52, 63, 71, Page ID ## 231, 232, 233). But Appellant Gratiot County seized it and failed to return it. (*Id.*, ¶25, Page ID # 223). The Gratiot Appellant even retained the entire value of the sales proceeds even though the sales proceeds were $22,408.77 more than the amount of the tax delinquency.

On June 25, 2019, Appellee Fox filed a class action lawsuit on behalf of the victims from the counties of Alcona, Alpena, Arenac, Bay, Clare, Crawford,

Genesee, Gladwin, Gratiot, Huron, Isabella, Jackson, Lapeer, Lenawee, Macomb, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Sanilac, St. Clair, Tuscola, and Washtenaw against those same counties and their treasurers. The putative class members were the owners of over 9,000 parcels of property across the Eastern District of Michigan. (Mot. for Class Cert., R. 93, Page ID # 1295). The District Court certified the class turning the putative class members into class-plaintiffs. (Order, R. 124, Page ID # 2305). The District Court named Mr. Fox as the class representative to act on behalf of all of the class-plaintiffs and appointed class counsel. (*Id.*). As noted, Appellants, under Fed. R. Civ. P. 23(f), appealed the certification order. Sixth Circuit Case Nos. 20-110 and 20-111.

On January 13, 2021, the District Court denied in part and granted in part the Appellant counties' various motions to dismiss. (Order, R. 148, Page ID # 3307-3335). The District Court found that Counts I, III, VI, and VIII may proceed against the County Appellants; dismissed Counts II, IV, V, and VII; and dismissed the treasurers individually due to qualified immunity. (*Id.* at Page ID # 3334-3335). The Counties took an immediate appeal (Notice, R. 153, Page ID # 3351) claiming that they are immune under the Eleventh Amendment. In their Brief on Appeal, they also argue that the District Court should not have certified the class because Appellee was only injured by Gratiot County and not the other Appellants, although this issue

falls outside the collateral order doctrine and, therefore, does not warrant appellate consideration at this time.

SUMMARY OF ARGUMENT

Appellants do not enjoy Eleventh Amendment immunity, which is reserved for states and is unavailable to counties. The only exception is the narrow "arm of the state" exception, which is inapplicable here. Appellants were not acting on behalf of the state when taking taxpayers' equity. They were acting for themselves and illegally taking money for themselves. In fact, their role in the process was entirely voluntary. Thus, Appellants' argument would radically expand the scope of Eleventh Amendment immunity. Local political subdivisions are creatures of state law—if the fact that their conduct is governed by a statute is enough to make them an "arm of the state," then local governments would generally enjoy sovereign immunity from federal suit.

Moreover, Appellants have appealed under the collateral order doctrine asserting jurisdiction based on their sovereign immunity argument. But they also extensively argue issues raised in pending petitions under Fed. R. Civ. P. 23(f). This is procedurally improper: Appellants cannot avoid the operation of Rule 23(f) or otherwise use a "collateral order" appeal as a vehicle for seeking interlocutory appeal of issues outside the collateral order doctrine. This is especially true where, as here, Appellants have triggered the doctrine's application through a tenuous sovereign

immunity argument. If local governments can enjoy collateral order review through the mere assertion of an Eleventh Amendment defense, *and* use such review as a vehicle to secure interlocutory appeal of other issues, then local political subdivisions will enjoy a *de facto* right to widespread interlocutory appeal.

Moreover, even if Appellants' non-Eleventh Amendment arguments were properly before the Court, they would fail. Appellants argue that the District Court erred in applying the juridical link doctrine when it certified the class. The doctrine permits a plaintiff to represent a class of persons injured by multiple defendants carrying out a common course of conduct, including those class members injured by defendants that did not directly injure the named plaintiff. While the doctrine is not always applied to private sector defendants, it is nearly unanimously applied where, as here, the defendants are public sector entities acting pursuant to a common statutory scheme.

Appellants also argue that they were not acting pursuant to a policy or practice. But each Appellant affirmatively decided to administer the detailed statutory tax foreclosure process, and there is no suggestion at all that their seizure of equity was the work of rogue officials.

STANDARD OF REVIEW

Questions of law are reviewed de novo. *Matheny v. Tennessee Valley Auth.*, 557 F.3d 311, 315 (6th Cir. 2009).

However, as discussed above with respect to this Court's jurisdiction, Appellants largely—and improperly—seek to challenge the District Court's decision to certify the class. The proper method for them to do so is through their pending Rule 23(f) petitions. But even if, *arguendo*, the issue should be considered here, the same standards would apply as in the Rule 23(f) context. "Rule 23(f) review should be a rare occurrence." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005). These appeals "are disruptive, time-consuming, and expensive." *Id.* at 959 (citing *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000)). Thus, a Rule 23(f) appeal "is never to be routine," and "Rule 23(f) appeals will be the exception, not the norm." *In re Delta Air Lines*, 310 F.3d 953, 959-60 (6th Cir. 2002).

Accordingly, the burden on the Appellants to disturb the District Court's class certification decision would be very high. The "deferential standard of review" is not the regular abuse of discretion. *Id.* at 960. Rather, appellate review of a class certification decision is "narrow" and "very limited," and this Court "will reverse the class certification decision … only if [Defendant] makes a strong showing that the district court's decision amounted to a clear abuse of discretion." *In re Whirlpool*

Corp. Front-Loading Washer Prod. Liab. Litig., 722 F.3d 838, 850 (6th Cir. 2013) (citations omitted). "An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012) (citation omitted). A district court is given "'substantial discretion in determining whether to certify a class, as it possesses the inherent power to manage and control its own pending litigation." *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 761 (6th Cir. 2018) (citing *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 504 (6th Cir. 2015)).

COUNTER ARGUMENT

I. Sovereign immunity is unavailable for Appellants.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Am. 11. Appellants are not states; they voluntarily decided to administer the foreclosure process; and they were acting for themselves when they took the Class Members' property. Thus, the District Court was correct that the Eleventh Amendment does not divest it of jurisdiction over this case.

A. Eleventh Amendment immunity is generally unavailable to counties.

Eleventh Amendment immunity applies to states, not to counties. The Supreme "Court has repeatedly refused to extend sovereign immunity to counties." *N. Ins. Co. of N.Y. v. Chatham Cty., Ga.*, 547 U.S. 189, 193 (2006). "The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (citing *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459 (1945); *Lincoln Cty. v. Luning*, 133 U.S. 529, 530 (1890); and *Moor v. Alameda Cty.*, 411 U.S. 693, 717-21 (1973)). *See also Jinks v.*

Richland Cty., 538 U.S. 456, 466 (2003) ("municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"); *Owen v. City of Indep., Mo.*, 445 U.S. 622 (1980) (same); *Port of Seattle v. Oregon & W. R. Co.*, 255 U.S. 56 (1921) (same); *Chicot Cty. v. Sherwood*, 148 U.S. 529 (1893) (same).

Thus, this Court has found that Eleventh Amendment sovereign immunity "limits the [federal courts'] jurisdiction only as to suits against a state." *Lawson v. Shelby Cnty., TN*, 211 F.3d 331, 335-36 (6th Cir. 2000) (citing *Lincoln Cty.*, 133 U.S. at 530).[3] It does "not [protect] state subdivisions such as counties." *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 994 (6th Cir. 2019). *See also Alkire v. Irving*, 330 F.3d 802, 811 (6th Cir. 2003) (county and officer of county are not arms of the state, and thus are not entitled to Eleventh Amendment immunity). Consistent with *Mt. Healthy*, this rule is well established. *See, e.g., Gallagher v. Evans*, 536 F.2d 899, 901 (10th Cir. 1976) ("a county is not within the proscription of the Eleventh Amendment," citing *Lincoln Cty.*, 133 U.S. at 530); *Savage v. Glendale Union High School, Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1040, 1041-42 (9th Cir. 2003) (local governments, such as counties, are not entitled to Eleventh Amendment immunity); *Ceballos v. Garcetti*, 361 F.3d 1168, 1182 (9th Cir. 2004) (*rev'd on other*

[3] Indeed, "[t]he Eleventh Amendment provides no shield for" even "a state official confronted by a claim that he has deprived another of a federal right under color of state law." *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974).

grounds) (county is not entitled to Eleventh Amendment immunity); *Jinks*, 538 U.S. at 466 (same); *Lincoln Cty.*, 133 U.S. 529 (same); *Cowles v. Mercer Cty.*, 74 U.S. 118 (1868); *Webb v. City of Maplewood*, 889 F.3d 483 (8th Cir. 2018), cert. denied, 139 S. Ct. 389 (2018) (unlike states, municipalities do not enjoy a constitutional immunity from suit, any city is liable for its constitutional violations under 42 U.S.C.A. § 1983). *See generally* What Constitutes the State for Eleventh Amendment Purposes, 13 *Fed. Prac. & Proc. Juris.* § 3524.2 (3d ed.).[4]

B. Appellants do not fall within the narrow "arm of the state" exception.

1. The arm-of-the-state exception is narrow.

Appellants do not dispute that Eleventh Amendment immunity is generally unavailable to local governments. Rather, they argue that they fall within the exception to this rule for local governments acting as an "arm of the state." The District Court correctly rejected this argument: Appellants voluntarily chose to take on the foreclosure-and-sale process, instead of deferring to the state; they voluntarily chose to perform the foreclosures; they did so for themselves, not as agents of the

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[4] In fact, *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978), discussed *infra*, belies Appellants' Eleventh Amendment argument, as the Supreme Court in *Monell* found that there was not "any basis for concluding that the Eleventh Amendment is a bar to municipal liability." *Monell*, 436 U.S. at 690 n. 54.

State; they kept the ill-gotten gains; and any recovery would come from the counties and not the State.[5]

The District Court correctly found that the arm-of-the-state exception to the general rule is "narrow." (Order, R. 148, Page ID # 3316). A "[c]ounty may claim immunity neither based upon its identity as a county nor under an expansive arm-of-the-State test," and "is subject to suit unless it was acting as an arm of the State" under the narrow definition set forth in the jurisprudence. *N. Ins. Co. of N.Y.*, 547 U.S. at 194. And "an entity that asserts sovereign immunity … bears the burden of demonstrating that it's an 'arm of the state.'" *Cutrer v. Tarrant Cty. Loc. Workforce Dev. Bd.*, 943 F.3d 265, 270 (5th Cir. 2019), *as revised* (Nov. 25, 2019). As discussed below, Appellants do not meet this burden.

2. Appellants were not acting as "arms of the state".

This Court has recognized the arm of the state exception. "'Where county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the State.'" *Gottfried v. Med. Plan. Servs., Inc.*, 280 F.3d 684, 692 (6th Cir. 2002) (quoting *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir.

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[5] Thus, the Class is not asking the District Court to "punish the County Defendants for not placing additional burdens on the State." (Appellants' Br., Document: 36, Page: 43). They are trying to get compensation from the counties that illegal enriched themselves by taking the equity in the Class Members' property.

1999) and citing *Scott v. O'Grady*, 975 F.2d 366 (7th Cir. 1992); and *Echols v. Parker*, 909 F.2d 795 (5th Cir. 1990)). But, in accordance with *N. Ins. Co. of N.Y.*, it has applied it narrowly. Appellants here fall well outside its scope.

a. Appellants voluntarily administered the process.

"The Sixth Circuit has drawn a distinction between situations in which compliance with state law provides the local official with no discretion and situations in which the state law lays out an end and the local official can choose the means of implementation. If the local official has no choice in the manner of compliance, then he is an arm of the state for the purpose of that law." What Constitutes the State for Eleventh Amendment Purposes, 13 *Fed. Prac. & Proc. Juris.* § 3524.2 (3d ed.) (citing *Brotherton*, 173 F.3d at 566). "On the other hand, however, if 'he could have opted to act differently, or not to act,' then he cannot claim to be an arm of the state." *Id.*

Indeed, in *Gottfried*, the Sixth Circuit did find that the defendant sheriff was acting as an "arm of the state" because he "did not have any discretionary authority regarding the state court injunction." 280 F.3d at 693. But that is in stark contrast to the situation here. Under MCL 211.78(8)(a) and MCL 211.78m(8)(h), each county had the choice to opt out and allow the State to foreclose. They chose to be the foreclosing government unit, or "FGU." "Counties may elect to serve as the

foreclosing governmental unit; otherwise, the state will do so." *Rafaeli*, 952 N.W.2d at 443.

Moreover, a county's "foreclosure of forfeited property … is voluntary and is not an activity or service required of units of local government for purposes of" Mich. Const. art. IX § 29. *See* MCL 211.78(6). And the statute affords counties that elect to function as FGUs broad flexibility in administering the process. *See, e.g.,* MCL 211.78(h)(3).[6]

Conversely, in *Brotherton*, a widow brought action against a county coroner alleging that her deceased husband's corneas had been removed over her objections in violation of state and federal law. *Brotherton*, 173 F.3d at 555. The coroner argued that he was acting as an arm of the State and referred to an Ohio law that allowed coroners to remove the corneas of the deceased. *Id.* at 562-63. The Sixth Circuit disagreed. "Rather than rotely enforce prescribed Ohio law, [the coroner] voluntarily implemented a policy of corneal harvesting." *Id.* at 566. "The essential question," explained the court, "asks whether [the coroner] could have chosen not to use his authority under the state statute and how he would use such authority; if he could have opted to act differently, or not to act, he did not act as an arm of Ohio…" *Id.*

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[6] Appellants subtly misconstrue the District Court's analysis. Contrary to their analysis, the District Court "based its decision" that Appellants had discretion on both MCL 211.78(6) and MCL 211.78(8)(a). *See* Order, R. 148, Page ID # 3317.

Because "[the coroner], acting without state compulsion, chose to harvest corneas," he was not entitled to sovereign immunity. *Id.* at 567.

Likewise, here, Appellants made an affirmative decision to administer the foreclosure process—and receive the resulting windfall that the Class is trying to get returned—instead of deferring to the state. As the District Court found, Appellants each were able to *choose* to be the FGU.[7] (Order, R. 148, Page ID # 3317) ("the County Defendants' decision to act as FGU was solely their own"). By having a discretionary choice, the counties could not be arms of the state for purposes of the Eleventh Amendment.[8]

Appellants respond that *Gottfried* and *Brotherton* together stand for the striking proposition that it does not matter if the local government's undertaking was voluntary if, having made the decision, some mandatory regulation governed its execution. In other words: everything involves a choice somewhere along the line, but nothing is voluntary for Eleventh Amendment "arm of the state" purposes if there are any state requirements governing the conduct at issue.

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[7] The Michigan Supreme Court confirmed the same. *Rafaeli*, 952 N.W.2d at 442. ("Counties may elect to serve as the 'foreclosing governmental unit'" as the county had the choice to opt out and allow the State to foreclose as the FGU.).

[8] Appellants concede that their decision to serve as FGU was voluntary, while claiming that this decision was the "default option" under the statute. Even if so, a passive exercise of discretion is still an exercise of discretion.

This argument fails to follow from the caselaw. If *Gottfried* followed the fact pattern here, it would have involved a sheriff volunteering to commit a blatantly unconstitutional policy in place of the State Police. And Appellants imply that *Brotherton* would have fallen within the exception if the coroner could have pointed to some state requirement in the regulations governing coroner conduct.

The argument also fails as a logical proposition. A county's decision to serve as FGU is simply not analogous to someone deciding to go into a particular line of work. Appellants cannot sweep the issue of voluntariness under the rug by placing it at such a remote point in the process of alleged constitutional violations. Conversely, the fact that the state mandated *something* about the voluntarily undertaken activity does not make it mandatory. Put simply, the fact that a county—or anyone else for that matter—complies with a state law does not make it an arm of the state immune from federal suit.[9]

b. Appellants were not acting on behalf of the state.

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[9] Similarly, Appellants claim that their exercise of this discretion took place before the taxing process, while correctly noting that this case concerns what happens after the completion of taxation itself. But the decision to serve as FGU entailed a decision to administer the post-taxation process at issue in this case. Again, having decided to serve as FGUs and having enjoyed an illegal windfall of excess auction proceeds, Appellants cannot slice the timeline of their conduct to suggest that they had no choice but to commit a taking against the Class Members and that they were actually acting on the state's behalf.

The District Court's conclusion is further buttressed by an examination of this Court's further jurisprudence on this narrow exception, which focuses on whether local government entities and officials were working on behalf of the state. In addition to the cases that Appellants discuss, this Court has also articulated a more formalized multifactor test: "[t]o determine whether an entity is an arm of the state, courts have traditionally looked to several factors, including: (1) whether the state would be responsible for a judgment against the entity in question; (2) how state law defines the entity; (3) what degree of control the state maintains over the entity; and (4) the source of the entity's funding." *S.J. v. Hamilton Cty., Ohio*, 374 F.3d 416, 420 (6th Cir. 2004).

After considering the relevant factors, *S.J.* found that a juvenile facility was not an arm of the state, even though it "operates within a statutory framework that vests both the state and [the c]ounty with a role in its administration." *Id.* at 418. Indeed, it explicitly found that sovereign immunity "does not extend to counties and similar municipal corporations," *id.* at 419-20, and emphasized that "'the most important factor bearing on the Eleventh Amendment question' is 'who would pay for a damage judgment' against the entity being sued." *Id.* at 420 (quoting *Alkire*, 330 F.3d at 811). Here, where the entity is not partially administered by a county but is a county itself, there is no question that sovereign immunity is unavailable. Put another way, the distinction between a county and an arm of the state is well

established. *See Mt. Healthy*, 429 U.S. at 280-81 ("[o]n balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.").

Here, even aside from this definitive distinction between counties and arms-of-the-state, Appellants easily fall outside the narrow arm-of-the-state exception:

1. **Whether the state would be responsible for a judgment against the entity in question.** There is no suggestion that the state would be liable here.

2. **How state law defines the entity.** Appellants are self-governing counties. *See, e.g.,* Mich. Const. 1963, Art. VII, §§ 1-13 (establishing counties and granting them broad autonomy).

3. **The degree of control the state maintains over the entity.** Appellants are self-governing counties; as discussed above, they voluntarily decided to administer the foreclosure auction process.

4. **The source of the entity's funding.** Again, appellants are counties themselves and are thus funded as such; indeed, they secured unwarranted funding from the very conduct at issue.

See also Ernst v. Rising, 427 F.3d 351, 359 (6th Cir. 2005) and *Crabbs v. Scott*, 786 F.3d 426 (6th Cir. 2015) (*Crabbs* considered similar factors for determining whether officials are arms of the state, including "(1) the State's potential liability for a judgment; (2) how state statutes and courts refer to the officer; (3) who appoints the officer; (4) who pays the officer; (5) the degree of state control over the officer; and

(6) whether the functions involved fall within the traditional purview of state or local government").

Fundamentally, the *S.J.* and *Crabbs* factors inquire whether the conduct of local governmental entities or officials is undertaken on behalf of the state or on behalf of the local government itself. Indeed, courts frequently consider the arm-of-the-state exception in terms of "agency." *See, e.g., Gavitt v. Ionia Cty.*, 67 F. Supp. 3d 838, 842 (E.D. Mich. 2014), *aff'd sub nom. Gavitt v. Born*, 835 F.3d 623 (6th Cir. 2016) (prosecutors "act as *agents* of the State when prosecuting state criminal offenses and are thus entitled to Eleventh Amendment immunity," citing *Cady v. Arenac County*, 574 F.3d 334 (6th Cir. 2009) (emphasis added)). There is simply no way in which the county Appellants here were acting on behalf of the state. Again: they decided to serve as FGUs, and they, not the state, secured the dubious "benefit" of the resulting funds. While their conduct was regulated by statute, they were acting for themselves, and they are now subject to accountability in the District Court. Fundamentally, the question before the Court is whether Appellants were "political subdivisions," *Lowe v. Hamilton Cty. Dep't of Job & Fam. Servs.*, 610 F.3d 321, 325 (6th Cir. 2010), as opposed to state agents, and the answer is undoubtedly "yes."

c. This Court has recognized that Appellants were not acting on behalf of the state.

In *Wayside Church*, this Court considered the same practice at issue here. It effectively affirmed that Appellants were *not* acting as arms of the state, albeit in a

slightly different context. "Plaintiffs' action … is not an action against the State of Michigan. Instead, Plaintiffs have sued [the c]ounty and the county treasurer, as the county treasurer is the one responsible for effectuating the alleged taking of Plaintiffs' properties." *Wayside Church*, 847 F.3d at 821.[10] Again: the Appellants were acting by and for themselves, and the Class is not directly or indirectly suing the state.

d. Appellants' argument has radical implications.

As a practical matter, local governments are inherently creatures of state law. Thus, ultimately, every local government action is in some manner governed by state statute. *See, e.g.*, MCL 45.1 *et seq.* (Michigan statute governing counties); MCL 45.551 *et seq.* (Michigan county governments); MCL 117.1 *et seq.* (Michigan's Home Rule Cities Act); MCL 125.3101 *et seq.* (Michigan Zoning Enabling Act); MCL 213.51 *et seq.* (Michigan's Uniform Condemnation Procedures Act). In short, nearly everything a local government does involves *some* state-mandated activity.

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[10] Judge Kethledge's observation that the statute "*appears* actually to require the County to short the taxpayer" is, on its own terms, not determinative. (Appellants' Br., Document: 36, Page: 42, quoting *Wayside Church*, 847 F.3d at 824 (emphasis added; other emphasis removed). If Appellants determined that they could not administer the policy in a constitutional manner, then they should have at the very least exercised their choice and declined to administer the unconstitutional process.

For example, based on counsel's search, the word "shall" appears 44 times in the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.* As just one example, under that Act, "[a] decision rejecting, approving, or conditionally approving a site plan *shall* be based upon requirements and standards contained in the zoning ordinance, other statutorily authorized and properly adopted local unit of government planning documents, other applicable ordinances, and state and federal statutes." MCL 125.3501(4)(emphasis added). Thus, under Appellants' theory, local governments are entitled to Eleventh Amendment immunity for site plan decisions.

Likewise, under MCL 213.23(5), which governs condemnations, "[i]f private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking *shall* be not less than 125% of that property's fair market value." (Emphasis added). Under Appellants' theory, a local government foreclosing on a residence is automatically an arm of the state because this compensation is mandatory.

Put simply, local government conduct is pervasively regulated by statute. If this is enough to make a local government an "arm of the state," then the exception is no longer "narrow" and local governments are presumptively—if not automatically—entitled to Eleventh Amendment protection. Such an outcome would be directly at odds with clear Supreme Court precedent. *See, e.g., N. Ins. Co. of N.Y.*, 547 U.S. at 193.

C. The Eleventh Amendment cannot immunize Appellants from a takings claim.

For all of the reasons discussed above, Appellants fall well outside the narrow arm-of-the-state exception. But even if, *arguendo*, they otherwise fell within it, Eleventh Amendment immunity would remain unavailable, because Appellee has brought a takings claim, and the Eleventh Amendment cannot bar a federal takings claim against a local government for several reasons.

First, there is no sovereign immunity protection from the "self-executing" just compensation remedy awarded by the United States Constitution. *See Chicago, Burlington & Quincy RR Co v. Chicago*, 166 U.S. 226 (1897). At the very least, it does not apply to takings claims against a county.

Second, it is unclear whether Eleventh Amendment immunity even applies to takings claims against states, which have arguably waived sovereign immunity as to certain constitutional issues through their adoption of the Fourteenth Amendment. *See, e.g., Anderson v. Tennessee Off. of Econ. Opportunity*, 384 F. Supp. 788, 792 (M.D. Tenn. 1974) (discussing argument). While this Court has found that the Eleventh Amendment does not bar federal-court takings claims against the state itself, *see Ladd v. Marchbanks*, 971 F.3d 574, 578-79 (6th Cir. 2020), "[t]he [Supreme] Court has never applied sovereign immunity in a Takings case" at all.

J.P. Burleigh, *Can State Governments Claim Sovereign Immunity in Takings Cases?* U. Cin. L. Rev. (Jan. 15, 2020).[11]

Third, the Supreme Court has made clear that takings claims against local governments can always be pursued immediately in federal court. "A property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2170 (2019). And as the Sixth Circuit has affirmed, "the defendant in *Knick* was a municipality, so it had no sovereign immunity to assert." *Ladd*, 971 F.3d at 579. Appellants' argument here—that they are immune from a takings claim despite *Knick* because they are somehow "the State"—is flatly inconsistent with *Knick*'s assurance that takings victims can seek relief in federal court without a complex analysis of the state's policies governing local government takings. *Knick*, 139 S. Ct. at 2170 ("[N]o matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it.").[12]

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[11] *See* https://uclawreview.org/2020/01/15/can-state-governments-claim-sovereign-immunity-in-takings-cases/ (last accessed on July 1, 2021).

[12] Moreover, as discussed above, local government condemnations are subject to mandatory statutory requirements, as are the zoning decisions that underlie inverse condemnation claims.

Again, there is no real question that Appellants committed a taking. The Michigan Supreme Court has found that Appellants' conduct at issue here "constitutes a government taking under the Michigan Constitution entitling plaintiffs to just compensation." *Rafaeli*, 952 N.W.2d at 463. And as the District Court found, "*Rafaeli* is persuasive, and there is little reason to believe that the Fifth Amendment would demand a different result." (Order, R. 148, Page ID # 3326). Thus, given that Appellants committed a taking, their victims can sue them in this Court. *See Knick*, *supra*. To find otherwise would directly contravene the Supreme Court's clear holding, deprive takings victims of an important tool to secure compensation, and empower local governments to commit takings without federal accountability. The Court should eschew such a radical conclusion.

II. The District Court properly applied the juridical link doctrine.

As discussed above, Appellants cannot bootstrap their challenge to the District Court's class certification decision to their sovereign immunity appeal. Appellants thus cannot challenge class certification or standing under the collateral order doctrine. Their only mechanism for appealing the District Court's decision to employ the juridical link doctrine is through their petitions under Fed.R.Civ.P. 23(f). But while those petitions remain pending, Appellants raise the same arguments here in this brief. That is procedurally improper, and it asks this Court to conduct a review as to which it currently lacks jurisdiction.

Even if Appellants could raise this argument here, it would still fail. As discussed above, District Courts are afforded great deference when their class certification decisions are reviewed on an interlocutory basis. The District Court's decision to apply the juridical link doctrine followed the jurisprudence of this Court and courts nationwide. Under the doctrine, a plaintiff may bring a class action against the defendant that directly injured the plaintiff along with other juridically linked defendants. Courts are practically unanimous that the doctrine applies in a case such as this, in which multiple local governments have administered the same allegedly unconstitutional statewide policy; and Appellants cite only a single outlier district court case that has declined to apply the doctrine to such a case. Yet, they ask this Court to overturn its prior jurisprudence, render an outlier decision at odds with nearly every other court to consider the issue, and eliminate this well-established and important protection against abusive government conduct. Even if this request were not premature, the Court should decline it.

A. This Court currently lacks jurisdiction to hear any challenge to the use of the juridical link doctrine.

As discussed above in Appellee's Jurisdictional Statement, the denial of a motion to dismiss is rarely immediately appealable because it is not a final order to provide this Court with appellate jurisdiction. *See* 28 U.S.C. § 1291. And a class certification decision can only be interlocutorily appealed under Fed. R. Civ. P. 23(f). However, as discussed above, the collateral order doctrine permits an

interlocutory appeal from an extremely narrow category of non-final orders which finally determine claims of right separable from, and collateral to, rights asserted in the action. Neither standing nor jurisdiction falls within this narrow set of issues.[13] This Court thus lacks jurisdiction at this time to consider any of Appellants' arguments aside from their Eleventh Amendment argument; and it should, therefore, dismiss this portion of the appeal for lack of jurisdiction. *Swanson v. DeSantis*, 606 F.3d 829, 830 (6th Cir. 2010) (when lacking a "final judgment," this Court must dismiss the appeal for lack of jurisdiction).

Even if, *arguendo*, this Court reviews this issue, it should affirm. As discussed below, the juridical link doctrine is well-established nationwide and recognized by this Court. Put simply, courts properly consider standing in terms of the certified class, not the original named plaintiffs. Appellants are, therefore, improperly "conflating the standing inquiry with the inquiry under Rule 23 about the suitability of a plaintiff to serve as a class representative." *Payton v. Cty. of Kane*, 308 F.3d 673, 677 (7th Cir. 2002). "[T]he real issues are whether *the plaintiff class* was injured by the defendants [to create standing], and if so, whether the claims of the proposed named plaintiffs are representative." *Id.* at 679 (emphasis added). Here, the *Fox* class

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[13] The appropriate basis to make such an appeal is upon final order, seek an early certification of the issue under 28 U.S.C. § 1292, or seek to appeal via leave to challenge a class certification order under Rule 23(f).

has long been certified, (Order, R. 124, Page ID ## 2284-2305) and was certified before the various motions to dismiss were decided by the District Court. This means that the case, as structured, consists of approximately ten thousand plaintiffs from 27 counties[14] that suffered loss of equity. Every class member expressly suffered injury caused by at least one defendant that is redressable by a money judgment. Standing is easily met.

B. The District Court did not abuse its discretion when it followed well-settled law and certified the class.

1. The juridical link doctrine is well established.

[14] The class of plaintiffs is defined as "[a]ll persons and entities that owned real property in the following counties, whose real property, during the relevant time period, was seized through a real property tax foreclosure, which was worth and/or which was sold at tax auction for more than the total tax delinquency and were not refunded the value of the property in excess of the delinquent taxes owed: Alcona, Alpena, Arenac, Bay, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Isabella, Jackson, Lapeer, Lenawee, Macomb, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Sanilac, St Clair, Tuscola, and Washtenaw." (Order, R. 124, Page ID # 2291). The record reveals that there are more than 9,000 parcels whose owners (many parcels have more than one owner) were harmed. (Mot. for Class Cert., R. 93, Page ID # 1295).

The District Court followed the law of this Circuit and the consensus of courts nationwide when it certified a class including victims of counties other than Gratiot, because the juridical link doctrine permits a plaintiff who has been injured by a local government's administration of a state law to bring a class action on behalf of class members injured by other local governments that administered the same law. The Court should not diverge from its jurisprudence to eviscerate this doctrine, which affords the victims of government misconduct a critical tool to protect their rights and thereby serve as an important protection against government abuse.

La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973) was one of the first cases to articulate this concept. *Id.* at 462. This Court recognizes the doctrine. *See, e.g.*, *Thompson v. Bd. of Educ. of Romeo Cmty. Sch.*, 709 F.2d 1200, 1204-05 (6th Cir. 1983). *Thompson* found that the doctrine did not apply to the facts of the case, but explained that a class plaintiff can represent those having causes of action against other defendants under certain circumstances, such as "[i]nstances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious." *Id.* at 1204-05. This is most often found where defendants "'are officials of a single state and are charged with enforcing or uniformly acting in accordance with a state statute, or common rule or practice of state-wide application, which is alleged to be unconstitutional.'" *Id*. at 1205 (citing *Mudd v. Busse*, 68 F.R.D. 522, 527-28 (N.D. Ind. 1975)). But the

doctrine has been pervasively applied. *See, e.g., Moore v. Comfed Sav. Bank,* 908 F.2d 834, 838 (11th Cir. 1990) (the plaintiffs borrowed money from one defendant which sold notes to other institutions and the court recognized the "juridical link" exception and held that the defendants were properly joined despite there being no case or controversy between the named plaintiffs and seven of the defendants); *Monaco v. Stone*, 187 F.R.D. 50 (E.D.N.Y. 1999) (class certification appropriate in an action challenging the constitutionality of the New York statutory scheme for involuntary commitment of criminal defendants found incompetent to stand trial for minor felonies and misdemeanors); *In re Comput. Memories Secs. Litig.*, 111 F.R.D. 675 (N.D. Cal. 1986) (court found that juridical link applied where defendant underwriters entered into an agreement among themselves concerning relevant underwriting and were thereby bound to a common course of conduct for purpose of the common-stock offering).[15]

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[15] *See also Clark v. Alan Vester Auto Grp., Inc.*, No. 06 CVS 141, 2009 WL 2181620, at *8 (N.C. Super. July 17, 2009) (the court concluded that there was a sufficient juridical link where multiple entities were related to a common owner); *Driver v. Helms*, 74 F.R.D. 382, 406 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom. Stafford v. Briggs*, 444 U.S. 527 (1980) (alleged concerted program of covert mail intercepts, the maintenance of ongoing files based on information gleaned from intercepts and a conspiracy to conceal the existence of the entire operation; the officials and former officials named were juridically related in that they were all past and present federal officials whose duties included oversight either of foreign or domestic intelligence gathering or proper delivery of the mail; and the named plaintiffs had standing to

Indeed, this Court effectively invoked the doctrine in *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 422-23 (6th Cir. 1998), even if it did not apply it by name. There, "the Sixth Circuit, using juridical link analysis, concluded that once a plaintiff had established a claim against one of the named defendants, the rest of the determination about the suitability of class certification would proceed as usual under Rule 23" and "[t]he court reasoned that, in the presence of the concerted action contemplated in *La Mar*, it is not necessary that each named plaintiff have individual standing to sue each named defendant." *Payton*, 308 F.3d at 679 (citing *Fallick*, 162

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raise the claims of members of their respective subclasses for money damages against former officials whose tenure did not correspond to the dates of individual mail openings alleged by the named plaintiffs); *Weiss v. Winner's Circle*, No. 91 C 2780, 1995 WL 755328 (N.D. Ill. Dec. 14, 1995) (where defendant assigned plaintiffs' contracts to various lenders, juridical link doctrine applied because of the interconnectedness of defendant/lenders' relationship, even though there was no case or controversy between some of the plaintiffs and some of the lenders); *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 214 (N.D. Ill. 1969) (applying the juridical link doctrine in certifying a class where the plaintiffs argued that the defendants' action in discriminating against plaintiffs in housing contracts "resulted from a concert and pattern of discriminatory activity including other similar contracts") *aff'd sub. nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970); *Texas Commerce Bank Nat'l Ass'n v. Wood,* 994 S.W.2d 796, 807 (Tex. App. 1999) (a class plaintiff's representation may extend to other defendants who have a "juridical relationship" to the defendant that allegedly caused plaintiff's injury); *Peters v. Blockbuster, Inc.*, 65 S.W.3d 295, 306 (Tex. App. 2001) ("a corporate affiliation [may be] sufficient to support such a link. Here, the link between Blockbuster and its franchisees may be sufficient"); *Leer v. Washington Educ. Ass'n*, 172 F.R.D. 439, 448 (W.D. Wash. 1997); *Samuel v. Univ. of Pittsburgh*, 56 F.R.D. 435 (W.D. Pa. 1972).

F.3d at 423). As *Fallick* concluded, "[a] plaintiff who has standing to sue at least one of the named defendants also 'has standing to challenge a practice even if the injury is of a sort shared by a large class of possible litigants.'" *Id.* (*quoting Fallick*, 162 F.3d at 423). *See also Reyes v. Julia Place Condominiums Homeowners Ass'n, Inc.*, No. CIV.A. 12-2043, 2013 WL 442524, at *3 (E.D. La. Feb. 5, 2013) (characterizing *Fallick* as "adopting the Juridical Link Doctrine for Article III standing because all defendants committed the conduct being challenged").[16]

In fact, as the District Court acknowledged, this Court declined to overturn these decisions just last year, and instead again reasoned the doctrine remained the law in this Circuit. (Order Certifying Class, R. 124, Page ID # 2293, discussing *Perry v. Allstate Indem. Co.*, 953 F.3d 417, 420 (6th Cir. 2020)). Instead of rejecting the doctrine, "[t]he Sixth Circuit explained that the [juridical link] doctrine applies when the case involves a state statute or uniform policy being applied statewide by the defendants." Order, R. 124, Page ID # 2293 (citing *Perry*, 953 F.3d at 420 n.2). In *Perry*, "[t]he problem for the [plaintiff] was that no such statute or statewide policy

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[16] In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), cited by Appellants, the named plaintiff could not even satisfy the injury-in-fact requirement at all, whereas Appellee here was clearly injured. Likewise, the issue in *Frank v. Gaos*, 139 S. Ct. 1041 (2019) was "whether *any* of the named plaintiffs ha[d] standing to sue" at all. *Frank*, 139 S. Ct. at 1043 (emphasis added). Here, there is no question that the named Appellee and all of the Class Members actually suffered injuries in fact.

was at issue." (Order, R. 124, Page ID # 2293). Thus, as in *Thompson*, this Court approved the doctrine but found that it did not apply on the facts; "[h]ad the Sixth Circuit intended to reject the doctrine *per se*, it could have easily done so." (Order, R. 124, Page ID # 2293).

Indeed, courts nearly unanimously apply the doctrine to government defendants applying a common policy.[17] For example, *Payton* found that the doctrine allowed a class representative to represent class members injured by a government defendant with whom the representative had no contact, as long as it

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[17] *See, e.g., City of Tampa v. Addison*, 979 So. 2d 246, 253 (Fla. Dist. Ct. App. 2007) ("we agree with the [] argument that the enactment of the various occupational license tax ordinances under the authority of the same enabling legislation… provides the requisite 'juridical link'") (citing *DeAllaume v. Perales*, 110 F.R.D. 299, 303-04 (S.D.N.Y. 1986) (other citations omitted)); *Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Illinois, Inc.*, 97 FRD 668, 673-76 (N.D. Ill. 1983); *Doss v. Long*, 93 F.R.D. 112, 119-20 (N.D. Ga. 1981); *Mudd v. Busse*, 68 F.R.D. 522, 526 (N.D. Ind. 1975), *on reconsideration*, 437 F. Supp 505 (N.D. Ind. 1977), *aff'd*, 582 F.2d 1283 (7th Cir. 1978); *Follette v. Vitanza*, 658 F.Supp. 492 (N.D.N.Y. 1987) (class certification allowed against sheriffs, marshals, constables, and other civil-enforcement officers empowered to enforce income executions upon wages or other earnings of judgment debtors in various courts of New York's Unified Court System); *Monaco v. Stone*, 187 F.R.D. 50 (E.D.N.Y. 1999); *Marcera v. Chinlund,* 595 F.2d 1231 (2d Cir. 1979) (county sheriffs implementing a statewide administrative practice of denying contact visitation rights to prison inmates), *vacated on other grounds,* 442 U.S. 915 (1979); *Hudson v. City of Chicago*, 242 F.R.D. 496, 502 (N.D. Ill. 2007) (juridical link applicable where plaintiffs produced evidence that through a common and deliberate scheme, the City and the Chicago Police Department unlawfully used and misapplied an ordinance as a pretext to arrest and/or ticket members of the proposed Classes).

was administering the same policy as the policy that injured the representative. *Payton*, 308 F.3d at 679.[18]

Indeed, given that statewide policies are often administered or enforced at a local level, the doctrine is an important protection against government abuse. This case is an excellent example. Just as the Class Members suffered identical injuries, the Appellants imposed those injuries in an identical manner. They should not avoid accountability by erecting procedural roadblocks to their victims' efforts to secure just compensation.

2. Article III Standing is considered in terms of the class.

Article III standing is considered in terms of the class, not the named plaintiff. In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court recognized that class certification issues are "logically antecedent" to Article III concerns and directed Fed. R. Civ. P. 23 class certification to be "treated first." *Ortiz*, 527 U.S. at 830-31. *See also Sosna*

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[18] Appellants' claim that the Seventh Circuit has "retreat[ed]" from *Payton* is misguided. (Appellants' Br., Document: 36, Page: 39). *Davidson v. Worldwide Asset Purchasing, LLC*, 914 F. Supp. 2d 918 (N.D. Ill. 2012) simply "decline[d] to broaden the Juridical Link Doctrine" to a case with a private sector defendant. *Id.* at 923. And the "retreat[ing]" case was not a juridical link case at all; the issue was whether the plaintiff had standing at all given the nature of his injury. *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008).

v. Iowa, 419 U.S. 393, 399 (1975) (when a class action is certified, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the class representative]"); *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768-69 (5th Cir. 2020) ("the Supreme Court has repeatedly instructed that we should first decide whether a proposed class satisfies Rule 23, before deciding whether it satisfies Article III"); *Molock v. Whole Foods Market Group, Inc.*, 952 F.3d 293, 299 (D.C. Cir. 2020) (similar).[19]

"[O]nce a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs." *Payton*, 308 F.3d at 680. *See also Zeyen v. Boise Sch. Dist. No. 1*, No. 1:18-CV-207-BLW, 2019 WL 403864, at *3 (D. Idaho Jan. 30, 2019) (citing Wright & Miller, *Federal Practice & Procedure* § 1785.1 (2d ed. 2005) for the proposition that "[r]epresentative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical,

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[19] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) does not undermine *LaMar* or its progeny; it addressed the "doctrine of hypothetical jurisdiction," whereby a court assumes jurisdiction "for the purpose of deciding the merits." *Id*. *Steel* does not implicate—much less mention—the juridical link doctrine. And there is nothing hypothetical about the Class here: the Court has already certified it; the class is the relevant litigant for purposes of Article III; and Article III is thus clearly satisfied.

interests depends not on standing, but on an assessment of typicality and adequacy of representation"); *Reyes*, 2013 WL 442524, at *3 ("[t]he [juridical link] doctrine is premised on the idea that the class, not the class representative, is the legal entity for the purposes of Article III standing" (citing *Tex. Med. Providers Performing Abortion Servs. v. Lakey,* 806 F. Supp. 2d 942, 953-54 (W.D. Tex. 2011), *overruled on other grounds*, 667 F.3d 570 (5th Cir. 2012)).[20]

3. Appellants' arguments against application of the doctrine fail.

Despite the foregoing, Appellants claim that the doctrine cannot establish standing. But the cases they cite pervasively involve private sector defendants.

Their primary authority is *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59 (2d Cir. 2012). But the issue in *Mahon* was the extent to which the juridical link doctrine can

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[20] Indeed, contrary to Appellants' suggestion, none of these authorities were making "an error" when they evaluated standing in terms of the class. (Appellants' Br., Document: 36, Page: 35). And here, there is simply no question that the Class, considered as a unit, has standing against all Appellants. "Class certification joins all parties in a single massive suit…" *In re Dow Corning Corp.*, 211 B.R. 545, 585 (Bankr. E.D. Mich. 1997) (quoting Charles Silver, *Comparing Class Actions and Consolidations,* 10 Rev. Litig. 495, 497 (1991)). It is unquestioned that there is at least one member of the certified Class injured by each Defendant county. The Class as a group easily establishes standing: it has "suffered an injury in fact… that is fairly traceable to the challenged conduct of the defendant[s], and … that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Put another way, the District Court did not "ignore the Supreme Court's direction in *Lujan* and *Spokeo*." (Appellants' Br., Document: 36, Page: 36). It followed it.

apply to *private sector* defendants.[21] *Id.* Its concurrence affirmed that courts often accept jurisdiction over defendants "'when a party properly in court seeks to sustain its own opposition to a *public act* by invoking the interests of others.'" *Id.* at 67 (citing 13B Charles Alan Wright et al., *Fed. Prac. & Proc. Juris.* § 3531.9 (3d ed. 2011)) (emphasis added by *Mahon*). Thus, it found, "the [] distinction between public and private interests is at the core of the juridical link doctrine." *Id.* at 67-68 (citing *Washington v. Lee*, 263 F. Supp. 327, 328-329 (M.D. Ala. 1966), *Broughton v. Brewer,* 298 F. Supp. 260, 267 (S.D. Ala. 1969), and *DeAllaume v. Perales*, 110 F.R.D. 299, 302 (S.D.N.Y. 1986), all of which applied the doctrine). It recognized that "[a]n exception to [the rule that at least one named plaintiff must have standing vis-à-vis each named defendant] has been made" when the defendants were "public officials," and that "[i]n these cases standing has been found even though the representative was injured by the conduct of only one of the officials ..." *Id.* at 68 (brackets in the original) (citing 7AA Charles Alan Wright et al., F*ed. Prac. & Proc.*

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[21] In *Esedebe v. Circle 2, Inc.*, No. 3:20-CV-8-HEH, 2021 WL 232595, at *3 (E.D. Va. Jan. 22, 2021), the Court solely considered Fourth Circuit law; the plaintiffs claimed they were not trying to employ the doctrine; and the defendants were in the private sector. And in *Rolaff v. Farmers Ins. Co., Inc.*, No. CIV-19-0689-J, 2020 WL 4939172 (W.D. Okla. Mar. 19, 2020) defendants included different engineering companies; and the court acknowledged the distinction from *Payton* and this case: "in *Payton*, the Circuit found that the plaintiffs had standing to sue several counties which had not injured them only because their injury stemmed from a single state statute requiring all counties to act in the same manner." *Id.* at *3.

Civ. § 1785.1 (3d ed. 2011) (footnotes omitted)). In other words, there is a clear consensus that the juridical link doctrine applies to public sector cases. Any disagreement involves the doctrine's application to private sector defendants, which is simply irrelevant here.[22]

Indeed, since *Mahon*, courts throughout the country have continued to cite *Payton* and follow its reasoning. *See, e.g., Nelson v. Warner*, 336 F.R.D. 118, 124 (S.D.W. Va.) (finding a juridical link where commissioners were to enforce the same statute; ""[t]he 'paradigmatic application of the juridical link doctrine" involves "government officials acting in accordance with an allegedly unconstitutional law,'" citing and quoting 2 *Newberg on Class Actions* § 5:17 (5th ed.), and citing *Payton*, 308 F3d at 681-82; *Monaco v. Stone*, 187 FRD 50, 65-66 (E.D.N.Y. 1999); and *Luyando v. Bowen*, 124 F.R.D. 52, 58-59 (S.D.N.Y. 1989)); *Murphy v. Aaron's, Inc.*, No. 19-CV-00601-CMA-KLM, 2020 WL 2079188, at *8 (D. Colo. Apr. 30, 2020)

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[22] The one arguable exception is *Blackburn v. Dare Cty.*, in which a property owner challenged emergency COVID restrictions. The Court did not reject application of the juridical link doctrine; it merely said that certification under the doctrine did not in itself afford unspecified plaintiffs standing against all defendants, and thus dismissed certain claims. *Blackburn v. Dare Cty.*, No. 2:20-CV-27-FL, 2020 WL 5535530, at *3 (E.D.N.C. Sept. 15, 2020). This outlier decision is indeed contrary to the weight of authority, but it is a single, minimally-reasoned decision at odds with the entirety of the rest of the jurisprudence, which appears to lack any other example of a court declining to find juridical-link-derived standing against multiple public sector defendants—indeed, Appellants have cited no other such case.

("[o]nce certified, the class as a whole is the litigating entity, and its affiliation with a forum depends only on the named plaintiffs," citing *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020), which cited *Payton*, 308 F.3d at 680-81); *Jett v. Warrantech Corp.*, 436 F. Supp. 3d 1170, 1176-77 (S.D. Ill. 2020) (the "argument that [the named plaintiff] lacks standing to pursue class claims outside of Illinois is premature," because she "clearly has standing to pursue her personal claims against Defendants" and "[a]ny standing issues arising from her attempt to represent the proposed multi-state class are class certification issues that will be addressed during the class certification stage of this litigation," citing *Ortiz*, 527 U.S. at 831 for the holding that because "class certification issues are...'logically antecedent' to" the question of the putative class representative's standing, "the issue about Rule 23 certification should be treated first" and *Payton*, 308 F.3d at 680); *In re Chicago Bd. Options Exch. Volatility Index Manipulation Antitrust Litig.*, 435 F. Supp. 3d 845, 860 (N.D. Ill. 2020) ("standing disputes over absent class members need not be resolved until after a class is certified," citing *Payton*, 308 F.3d at 680 and additional authorities).[23]

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[23] *See also Watson v. City of Southlake*, 594 S.W.3d 506, 516 (Tex. App. 2019), *review denied* (Feb. 14, 2020), *review denied* (Apr. 3, 2020) ("'if all the defendants took part in a similar scheme that was sustained either by a contract or conspiracy, or was mandated by a uniform state rule, it is appropriate to join as defendants even parties with whom the named class representative did not have

Similarly, *Wong v. Wells Fargo Bank N.A.*, 789 F.3d 889 (8th Cir. 2015) merely declined to apply the doctrine to private sector banks. *Bahamas Surgery Ctr.,*

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direct contact,'" quoting *Payton*, 308 F.3d at 679); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. CV 2:18-MD-2836, 2019 WL 1397228, at *22-23 (E.D. Va. Feb. 6, 2019), *report and recommendation adopted as modified*, 400 F. Supp. 3d 418 (E.D. Va. 2019)(rejecting standing argument that named plaintiff could not assert claims for absent class members in other states, because question of "whether named plaintiffs may properly represent absent class members is *exactly* the focus of the Rule 23 class certification analysis," following *Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 93 (2d Cir. 2018); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 48-51 (1st Cir. 2018); and *Payton*, 308 F.3d at 682) (emphasis in original); *Murillo v. Kohl's Corp.*, 197 F. Supp. 3d 1119, 1134 (E.D. Wis. 2016)(standing analysis premature before certification, citing *Payton*, 308 F.3d at 680 and *In re Bayer Corp. Combination Aspirin Prod. Mktg. & Sales Pracs. Litig.*, 701 F. Supp. 2d 356, 377 (E.D.N.Y. 2010) for the proposition that "[w]hether the named plaintiffs have standing to bring suit under each of the state laws alleged is 'immaterial' because they are not bringing those claims on their *own* behalf, but are *only seeking to represent* other, similarly situated consumers in those states.") (emphasis added by *Murillo*); *Chipman v. Nw Healthcare Corp.*, 2012 MT 242, ¶ 40, 366 Mont. 450, 463-64 (the court takes it as a given that a juridical link exists "where all the various defendants are related instrumentalities of a single state;" and "federal case law since *La Mar* supports a[n even] wider view of the [juridical link] doctrine," citing *Payton,* 308 F.3d at 679 and collecting additional cases); *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, ¶ 35, 379 Mont. 265, 278 (noting that "courts have applied this juridical link doctrine to circumstances in which all the defendants took part in a similar scheme that was sustained either by a contract or conspiracy, or was mandated by a uniform state rule, such that it was appropriate to join as defendants even parties with whom the *named* class representative did not have direct contact," (internal quotations omitted) citing *Chipman,*¶ 40, which quoted *Payton,* 308 F.3d at 679); *Reyes*, 2013 WL 442524, at *3-4 (rejecting *Mahon* and finding that "[t]his Court, as other district courts have, finds that the Juridical Link Doctrine may be applicable after Rule 23 certification," citing *Lakey*, 806 F. Supp. 2d at 953-54 (vacated in part on other grounds by 667 F.3d 570 (5th Cir. 2012)) and *Mayo v. Hartford Life Ins. Co.*, 214 F.R.D. 465, (S.D. Tex. 2002)).

LLC v. Kimberly-Clark Corp., 820 F. App'x 563, 565 (9th Cir. 2020) also involved private sector defendants. This unpublished, non-precedential memorandum merely found in a footnote that "[t]he juridical link doctrine is irrelevant to … standing *here*." *Id.* at 565-66, n.4 (emphasis added). *See also* Ninth Circuit Rule 36-3. Moreover, the Ninth Circuit has affirmed that, "once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met." *Melendres v. Arpaio*, 784 F.3d 1254, 1261-62 (9th Cir. 2015) (citing 1 William B. Rubenstein, *Newberg on Class Actions* § 2:6 (5th ed.)). *See also Zeyen*, 2019 WL 403864, at *3-4 (discussing Ninth Circuit jurisprudence).[24]

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[24] *Kombol v. Allstate Ins. Co.*, No. 20-70-BLG-SPW, 2020 WL 5816498 (D. Mont. Sept. 30, 2020) involves a private sector defendant. *In re Zantac (Ranitidine) Prod. Liab. Litig.*, No. 20-MD-2924, 2020 WL 7866674 (S.D. Fla. Dec. 31, 2020) was also a private-sector defendant case that distinguished authorities such as *Payton.* And while multiple courts have made clear that juridical link should be analyzed in terms of class certification, as opposed to standing, *see, e.g., La Mar*, *supra,* the implication is that, again, if the class is certified, then the class is the focus of any Article III analysis. *See*, *e.g.*, *Zeyen*, 2019 WL 403864, at *3 (citing Wright & Miller, Federal Practice & Procedure § 1785.1 (2d ed. 2005) for the proposition that "[r]epresentative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation."). Appellants' suggestion that courts pervasively certify classes that they do not believe have standing to litigate is misplaced.

III. The District Court properly found that Appellants' conduct was pursuant to a policy or practice.

Appellants finally argue that the District Court erred in declining to dismiss the Class's claims because, they say, the Class has failed to state a Section 1983 claim against them under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). This is a final merits issue that is again an improper subject of interlocutory appeal. And, once again, even if the issue were ripe for appeal, the District Court was correct: there is no real issue that Appellants' conduct at issue here was pursuant to a policy, as opposed to *ad hoc* official misconduct.

A. Appellate review of this issue is premature.

As discussed above, this appeal is properly limited to Appellant's Eleventh Amendment argument. Appellants cannot bootstrap other arguments in an effort to secure improper interlocutory appeal. This Court should dismiss this portion of the appeal for lack of jurisdiction. *See* 28 U.S.C. § 1291.[25]

B. The District Court's analysis was correct.

Under *Monell*, "[l]ocal governing bodies… can be sued directly under § 1983 for monetary… relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision

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[25] Even if, arguendo, Appellants were acting as an arm of the state, a Michigan state court might still find that they were administering a policy for the purposes of *Monell*.

officially adopted and promulgated by that body's officers," and "'may be sued for constitutional deprivations visited pursuant to governmental "custom"' even though such a custom has not received formal approval through the body's official decision making channels. *Monell*, 436 U.S. at 690-91(citations omitted). Thus, to establish *Monell* liability, "[i]n addition to (1) "legislative enactments or official agency policies," a plaintiff can look to: "(2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations" as evidence of a policy or custom sufficient for municipal liability. *Red Zone 12 LLC v. City of Columbus*, 758 Fed. Appx. 508, 515 (6th Cir. 2019) (quoting *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005)).

If, *arguendo*, the issue of *Monell* liability were properly before this Court, the Court should uphold the District Court's decision.

First, Appellee expressly alleged—which must be treated as true—that the counties are liable under *Monell*. (First Am. Compl., R. 17, Page ID # 224-225). *See also Nolan v. Detroit Edison Co.*, 991 F.3d 697, 707 (6th Cir. 2021) (citing *Hill v. Snyder*, 878 F.3d 193, 203 (6th Cir. 2017) ("'We construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true…'"). This presumption adheres with respect to *Monell* allegations: the issue on a motion to dismiss is whether "plaintiff [has] adequately alleged a custom or policy,

as required by *Monell*." *Farmer v. Denton*, 841 F.2d 1126 (6th Cir. 1988). *See also Hairston v. Franklin Cty. Sheriff's Office Ctr. Main Jail 1*, No. 2:17-CV-581, 2019 WL 2411392, at *4-5 (S.D. Ohio June 7, 2019), *report and recom. adopted sub nom.*, 2019 WL 3416154 (S.D. Ohio July 29, 2019) (issue of fact regarding "policy or custom" for purposes of *Monell* claim precluded summary judgment, let alone dismissal on the pleadings).

Second, contrary to Appellants' argument that "the County Defendants did not affirmatively adopt" the policy at issue and only passively declined to "opt out," Appellants' Br., Document: 36, Page: 47, each county here has made the election both by a formal resolution and by concurrence of the then-elected county treasurer. MCL 211.78(3)-(5). The State of Michigan maintained a list of the FGU counties. *See* List of FGUs, R. 1-5, Page ID # 63-67. At the very least, Appellants have alleged that Appellants made an affirmative decision. (First Am. Compl., R. 17, Page ID # 224-225). Again, this is sufficient to survive a motion to dismiss.[26]

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[26] Even if, *arguendo*, the Appellants only passively adopted the policy and even if, *arguendo*, such passive adoption falls outside the Third Circuit's test for "policy adoption," the policy here would still constitute a "custom" under Third Circuit jurisprudence because it is at the very least "[a] course of conduct… so permanently and well-settled as to virtually constitute law." *McTernan v. City of York, PA*, 564 F.3d 636, 658 (3d Cir. 2009) (quotation and citation omitted).

Third, this is a straightforward *Monell* situation. A plaintiff may bring Section 1983 claims against a local government when the conduct at issue is committed pursuant to a "policy" or "practice." *Monell*, 436 U.S. at 694. Appellee easily meets that test here: there is no real question that Appellants administered the process as Appellee alleges.

Appellants suggest that they are immune from *Monell* liability because, they say, the policy they followed was set forth in the statute that they decided to administer. But when counties voluntarily decide to administer a state law, they adopt the law as a "policy or custom" for purposes of *Monell* liability. *See, e.g., DePiero v. City of Macedonia*, 180 F.3d 770, 787 (6th Cir. 1999); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993); *Vives v. City of N.Y.*, 524 F.3d 346, 354 (2nd Cir. 2008); *Cooper v. Dillon*, 403 F.3d 1208, 1222-23 (11th Cir. 2005). Again, as the District Court recognized, all Appellants had a choice whether to administer the policy themselves or allow the State to do so. *See* MCL 211.78(3) and (6).

Again, a municipality can be held liable under Section 1983 when it unconstitutionally "*implements or executes* a policy statement, ordinance, regulation, or decision officially adopted by that body's officers." *Monell*, 436 U.S.

at 690 (emphasis added). There is no requirement that the local government create the offending policy itself.[27]

The only actual way that this case would not present a *Monell* policy would be if the failure to return the surplus was the work of rogue officials. *See, e.g., Spainhoward v. White Cty., Tennessee*, 421 F. Supp. 3d 524, 543 (M.D. Tenn. 2019) (*Monell* requires showing that conduct was not by "rogue official"). This is contrary to the Appellants' argument that, once they decided to administer the process themselves, they were obligated to carry it out as they did. Put another way, *Monell*'s requirements are intended to distinguish between *de facto* claims of municipal *respondeat superior* and situations such as here where a local government—as opposed to a particular official undertook the challenged activity. *See, e.g., Leatherman v. Tarrant Cty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 166 (1993) ("we reaffirmed in *Monell* that 'a municipality cannot be held liable under § 1983 on a *respondeat superior* theory'… [b]ut… this protection against liability does not encompass immunity from suit.") (citation omitted). *See also Meyers v. City of Cincinnati*, 14 F.3d 1115, 1117 (6th Cir. 1994) (*Monell*'s "requirement that

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[27] The Appellants' decision to administer the policy and keep the resulting illegal windfall is nothing like a county judge's decision interpreting or enforcing a state statute, and the District Court was therefore correct to distinguish *Johnson v. Turner*, 125 F.3d 324 (6th Cir. 1997).

a municipality's wrongful actions be a 'policy' …. is meant to distinguish those injuries for which 'the government as an entity is responsible under § 1983' from those injuries for which the government should not be held accountable," quoting *Monell*, 436 U.S. at 694)).

Appellants' *Monell* argument is ultimately implausible: what are the chances that all of the officials in all of the county Appellants engaged in the same rogue misconduct? Indeed, it is uncontested that all of the Appellants were engaged in this conduct as a matter of course—which means that they were all carrying out policies for purposes of *Monell*.

RELIEF REQUESTED

This Court is requested to affirm the lower court's decision (as to the portions being challenged by this appeal) and remand this matter to the District Court to undertake further proceedings and grant all further proper relief not inconsistent with the decision(s) of this Court.

July 1, 2021

/s/ E. Powell Miller
E. Powell Miller (P39487)
Sharon S. Almonrode (P33938)
THE MILLER LAW FIRM, P.C.
950 W University Drive, Ste 300
Rochester, MI 48307
(248) 841-2200
epm@millerlawpc.com
ssa@millerlawpc.com
Attorneys for Plaintiff-Appellee

Philip L. Ellison (P74117)

OUTSIDE LEGAL COUNSEL PLC
PO Box 107, Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com
Attorneys for Plaintiff- Appellee

Matthew E. Gronda (P73693)
PO Box 70, St. Charles, MI 48655
(989) 249-0350
matthewgronda@gmail.com
Attorney for Plaintiff- Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of the Sixth Circuit Rule 32(a)(7)(B).

This brief has been prepared in proportional typeface using Century Schoolbook 14-point font. The principal brief, including headers and footnotes, contains 10,195 words according to the Word Count feature in the Microsoft Word program, being less than 13,000 words.

The undersigned understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limitations may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

July 1, 2021

/s/ E. Powell Miller
E. Powell Miller (P39487)
Sharon S. Almonrode (P33938)
THE MILLER LAW FIRM, P.C.
950 W University Drive, Ste 300
Rochester, MI 48307
(248) 841-2200
epm@millerlawpc.com
ssa@millerlawpc.com
Attorneys for Plaintiff-Appellee

Philip L. Ellison (P74117)
OUTSIDE LEGAL COUNSEL PLC
PO Box 107, Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com
Attorneys for Plaintiff-Appellee

Matthew E. Gronda (P73693)
PO Box 70, St. Charles, MI 48655
(989) 249-0350
matthewgronda@gmail.com
Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of and a copy of such filing to counsel of record at their email address(es) of record.

/s/ E. Powell Miller
E. Powell Miller (P39487)

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Doc. Entry No.	Date Entered	Page ID Range	Description of the Document
R. 1-5	06/25/2019	63-67	Exhibit- List of Foreclosing Governmental Units
R. 17	09/04/2019	222	First Amended Complaint
R. 17	09/04/2019	224	First Amended Complaint
R. 17	09/04/2019	225	First Amended Complaint
R. 17	09/04/2019	223	First Amended Complaint
R. 17	09/04/2019	231	First Amended Complaint
R. 17	09/04/2019	232	First Amended Complaint
R. 17	09/04/2019	233	First Amended Complaint
R. 93	09/14/2020	1295	Motion for Class Certification
R. 123	10/14/2020	2277	Appellants' Motion to Dismiss
R. 124	10/16/2020	2291	Order Granting Plaintiff's Motion to Lift Stay, Certify Class, and Appoint Class Counsel
R. 124	10/16/2020	2293	Order Granting Plaintiff's Motion to Lift Stay, Certify Class, and Appoint Class Counsel
R. 124	10/16/2020	2305	Order Granting Plaintiff's Motion to Lift Stay, Certify Class, and Appoint Class Counsel
R. 148	01/13/2021	3307	Order Granting in Part and Denying in Part Appellants' Motion to Dismiss
R. 148	01/13/2021	3334-3335	Order Granting in Part and Denying in Part Appellants' Motion to Dismiss
R. 148	01/13/2021	3316	Order Granting in Part and Denying in Part Appellants' Motion to Dismiss
R. 148	01/13/2021	3317	Order Granting in Part and Denying in Part Appellants' Motion to Dismiss
R. 153	02/01/2021	3351	Notice of Appeal