**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MICHIGAN**

THOMAS A. FOX, for himself and all those similarly situated

Plaintiff,

v

COUNTY OF SAGINAW, et al,

Defendants.

Case No. 19-cv-11887
Hon. Thomas L. Ludington
Magistrate Judge: Patricia T. Morris

**ORAL ARGUMENT REQUESTED**

---

**DEFENDANTS COUNTY OF WASHTENAW'S AND CATHERINE MCCLARY'S MOTION TO DISMISS**

For the reasons explained in the accompanying Brief in Support, which is incorporated herein, Defendants County of Washtenaw and Catherine McClary respectfully request that this Court grant Defendants' Motion to Dismiss Plaintiff's Amended Complaint for lack of jurisdiction or failure to state a claim.

Dated: October 6, 2020

By: /s/ *Theodore W. Seitz*

Theodore W. Seitz (P60320)
Kyle M. Asher (P80359)
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, Michigan 48933
Telephone: (517) 374-9100
TSeitz@dykema.com
*Attorney for Defendants County of Washtenaw and Catherine McClary*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 6, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using the electronic filing system, which will send notification of such filing to all counsel of record at their respective addresses as disclosed on the pleadings.

By: /s/ *Theodore W. Seitz*
Theodore W. Seitz (P60320)

*Attorney for Defendants County of Washtenaw and Catherine McClary*

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

084100.000039 4822-5319-0605.1

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MICHIGAN**

THOMAS A. FOX, for himself and all those similarly situated

Plaintiff,

v

COUNTY OF SAGINAW, et al,

Defendants.

Case No. 19-cv-11887
Hon. Thomas L. Ludington
Magistrate Judge: Patricia T. Morris

**ORAL ARGUMENT REQUESTED**

---

**DEFENDANTS COUNTY OF WASHTENAW'S AND CATHERINE MCCLARY'S MOTION TO DISMISS**

For the reasons explained in the accompanying Brief in Support, which is incorporated herein, Defendants County of Washtenaw and Catherine McClary respectfully request that this Court grant Defendants' Motion to Dismiss Plaintiff's Amended Complaint for lack of jurisdiction or failure to state a claim.

Dated: October 6, 2020

By: /s/ *Theodore W. Seitz*

Theodore W. Seitz (P60320)
Kyle M. Asher (P80359)
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, Michigan 48933
Telephone: (517) 374-9100
TSeitz@dykema.com
*Attorney for Defendants County of Washtenaw and Catherine McClary*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 6, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using the electronic filing system, which will send notification of such filing to all counsel of record at their respective addresses as disclosed on the pleadings.

By: /s/ *Theodore W. Seitz*
Theodore W. Seitz (P60320)

*Attorney for Defendants County of Washtenaw and Catherine McClary*

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

084100.000039 4822-5319-0605.1

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MICHIGAN**

THOMAS A. FOX, for himself and all those similarly situated

Plaintiff,

v

COUNTY OF SAGINAW, et al,

Defendants.

Case No. 19-cv-11887
Hon. Thomas L. Ludington
Magistrate Judge: Patricia T. Morris

**ORAL ARGUMENT REQUESTED**

---

**DEFENDANTS COUNTY OF WASHTENAW'S AND CATHERINE MCCLARY'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

## CONCISE STATEMENT OF ISSUES PRESENTED AND CONTROLLING OR MOST APPROPRIATE AUTHORITY TO DECIDE THOSE ISSUES

1. Does Plaintiff have standing to sue the Washtenaw Defendants when he has not alleged any injury that is traceable to the acts of those Defendants?

   **The Washtenaw Defendants Answer: No.** *See Perry v. Allstate Indemnity Co.*, 953 F.3d 417 (6th Cir. 2020) ("Perry lacks standing to pursue her claims against those entities because her injury is not traceable to them. It does not matter that Perry brought this suit as a putative class action on behalf of policyholders of the other Allstate entities. The rule works the other way around. Potential class representatives must demonstrate individual standing vis-à-vis the defendant; they cannot acquire such standing merely by virtue of bringing a class action. As Perry is the only named plaintiff in the action, no other named plaintiffs exist to create standing against the remaining Allstate entities."); *Holland v. J.P. Morgan Chase Bank, N.A.*, No. 19 Civ. 00233, 2019 U.S. Dist. LEXIS 146553, at *14 (S.D.N.Y. Aug. 28, 2019) ("A plaintiff proceeding against multiple defendants must establish standing as to each defendant and each claim.").

2. Does the "juridical link" doctrine displace Article III of the Constitution and allow Plaintiff to sue every county in the State regardless of whether he has ever stepped foot in that county?

   **The Washtenaw Defendants Answer: No.** *See Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 64 (2d Cir. 2012) (finding the juridical link doctrine inapplicable to Article III standing, and stating that the plaintiff's "interpretation of Article III—that it permits suits against non-injurious defendants as long as one of the defendants in the suit injured the plaintiff—is unprecedented . . ."); *Bah Surgery Ctr., LLC v. Kimberly-Clark Corp.*, No. 18-55478, 2020 U.S. App. LEXIS 23100, at *4 n.4 (9th Cir. July 23, 2020) (holding that "[t]he juridical link doctrine is irrelevant to [the plaintiff's] standing here."); *Wong v. Wells Fargo Bank N.A.*, 789 F.3d 889, 895-97 (8th Cir. 2015) ("The juridical link doctrine does not confer standing on the named borrowers. Although our court has not previously addressed this doctrine, we agree with other circuits that, under similar circumstances, have found it inapplicable.").

3. Are the Washtenaw Defendants entitled to sovereign immunity for distributing "surplus proceeds" in exactly the manner that Michigan's General Property Tax Act requires?

**The Washtenaw Defendants Answer: Yes.** *See Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999); *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 995 (6th Cir. 2019).

4. Is Washtenaw County Treasurer Catherine McClary entitled to qualified immunity for acting in accordance with the General Property Tax Act's requirements?

**The Washtenaw Defendants Answer: Yes.** *See Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 441 (6th Cir. 2016) ("The Supreme Court tells us that public officials should generally receive qualified immunity when enforcing properly enacted laws.").

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Cases

Statutes



Rules

## INTRODUCTION

After years of litigation, the Michigan Supreme Court recently held for the first time that those who held interests in foreclosed property have a "right to collect the surplus proceeds that are realized from the tax-foreclosure sale," and that a county's "retention of those surplus proceeds under the GPTA amounts to a taking of a vested property right requiring just compensation" under Michigan's Constitution. *Rafaeli, LLC v. Oakland Cty.*, 2020 Mich. LEXIS 1219 (Mich. July 17, 2020). Many open questions still remain before delinquent taxpayers (and others with property interests) can establish liability, such as whether *Rafaeli*'s holding applies retroactively, whether *Rafaeli*'s logic also extends to the United States Constitution's Takings Clause, and more. Those questions, however, are best left for another day.[1] Plaintiff Thomas A. Fox faces threshold jurisdictional and merits problems that require dismissal even before reaching those unsettled questions of Michigan law. For several reasons, his Amended Complaint should be dismissed.

*First*, Plaintiff lacks Article III standing to sue the County of Washtenaw and its treasurer, Catherine McClary (the "Washtenaw Defendants"). Although Plaintiff alleges that he was wronged by Gratiot County's actions, throughout Plaintiff's 25-page Amended Complaint, there is not a single allegation linking the Washtenaw

[1] The Washtenaw Defendants reserve the right to raise these issues and challenge the merits of Plaintiff's eight claims at a later date in the event this Motion to Dismiss is denied.

Defendants to any wrongdoing committed against any named party. Because there is no "causal connection between the injury and the [Washtenaw Defendants'] alleged wrongdoing," Plaintiff lacks Article III standing to sue the Washtenaw Defendants. *Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017).

*Second*, under the Eleventh Amendment, the Washtenaw Defendants cannot be sued for damages merely for acting in accordance with the GPTA's mandates that provided no discretion as to the method of distributing "surplus proceeds." Thus, the Washtenaw Defendants are entitled to sovereign immunity. *Third*, the claims against McClary should also be dismissed because (1) she is entitled to qualified immunity for any individual capacity claims, and (2) the official capacity claims are duplicative of the claims raised against the County itself.

## BACKGROUND

Although the procedural history in this case is complex, the facts relevant to this motion are not. The only named plaintiff, Thomas Fox, owned a parcel of real property in Alma, Michigan ("the Property"), which he alleges had a fair market value of about $50,000. (Am. Compl. ¶¶ 16–18, 20.) Fox fell behind on his taxes, and owed Gratiot County "approximately $3,091.23." (*Id.* ¶ 18.) After several chances to pay off his debt, Fox still could not do so, and "Defendant Michelle Thomas seized ownership of the Property on behalf of Gratiot County as its duly elected treasurer." (*Id.* ¶ 19.) Once the 21-day redemption period expired, and

Gratiot County obtained absolute title to the Property, a foreclosure auction was held, where the Property sold for $25,500.00. (*Id.* ¶ 21.) Gratiot County kept all proceeds from the sale, "failing to return any of the Equity to Plaintiff." (*Id.* ¶ 25.)

Plaintiff contends that Gratiot County's retention of the surplus "Equity" in the Property violated the state and federal takings clauses (Counts I, II, and V); Michigan's inverse condemnation law (Count III); the Eighth Amendment's prohibition against Excessive Fines (Count V); Plaintiff's procedural and substantive due process rights (Counts VI and VII); and that it renders Gratiot County liable for unjust enrichment under Michigan law (Count VIII). Going further, Plaintiff alleges that 26 other counties and their treasurers—including the Washtenaw Defendants—have taken the same actions at unidentified times against unidentified individuals and, therefore, that they are liable to those unnamed individuals on a classwide basis.

The Washtenaw Defendants now move to dismiss the Amended Complaint under Federal Rule of Civil Procedure 12(b)(1) because Plaintiff lacks standing to sue them, and under Rule 12(b)(6) because Plaintiff's Complaint fails to state a claim upon which relief can be granted.

## LEGAL STANDARD

The Washtenaw Defendants' arguments for lack of Article III standing implicate this Court's subject matter jurisdiction, and are "properly decided under

[Federal Rule of Civil Procedure] 12(b)(1)." *Am. BioCare Inc. v. Howard & Howard Attys. PLLC.*, 702 F. App'x 416, 419 (6th Cir. 2017). When a Rule 12(b)(1) motion attacks "the claim of jurisdiction on its face"—like this one does—the standard mirrors Rule 12(b)(6). *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must state "sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Two "working principles" underlie the Rule's pleading requirements. *Iqbal*, 556 U.S. at 678. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. This "plausibility" requirement "asks for more than a sheer possibility that a defendant has acted unlawfully," and "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* at 678 (citations omitted). "Threadbare recitals of all the elements of a cause of action, supported by mere conclusory statements do not suffice." *Id.*

## ARGUMENT

### I. Plaintiff Lacks Standing to Sue the Washtenaw Defendants.

To begin, this Court need not reach the merits of Plaintiff's claims against the Washtenaw Defendants because Plaintiff lacks standing to sue anyone other than Gratiot County and its Treasurer.[2] *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 470 (6th Cir. 2007) ("A court should not analyze or resolve substantive issues before addressing the issue of standing. Before turning to the merits, a court must address the plaintiffs' standing.") (cleaned up).

#### A. There Is Not a Single Factual Allegation Linking the Washtenaw Defendants to Plaintiff's Alleged Damages.

"[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). It is assessed on a claim-by-claim basis. *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 255 (6th Cir. 2018). And it is assessed on a party-by-party basis. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). That is, each plaintiff must show that he has standing *against each defendant* for each claim that he raises. *See, e.g.*, *Waskul*, 900 F.3d at 255 (explaining that "a plaintiff must demonstrate standing

[2] Because the Court has an independent obligation to assess Article III standing, the same analysis applies even to counties who did not initially raise this as a defense. *Chapman v. Tristar Prods., Inc.*, 940 F.3d 299, 304 (6th Cir. 2019) ("[W]e are required in every case to determine—sua sponte if the parties do not raise the issue—whether we are authorized by Article III to adjudicate the dispute."); *Casillas v. Madison Ave. Assocs.*, 926 F.3d 329 (7th Cir. 2020); *Frank v. Autovest, LLC*, 916 F.3d 1185, 1187 (D.C. Cir. 2020) ("[W]e have 'an independent obligation to assure that standing exists.'").

for each claim he seeks to press" and "separately for each form of relief sought"); *Holland v. J.P. Morgan Chase Bank, N.A.*, No. 19 Civ. 00233, 2019 U.S. Dist. LEXIS 146553, at *14 (S.D.N.Y. Aug. 28, 2019) ("A plaintiff proceeding against multiple defendants must establish standing as to each defendant and each claim.").

This requires the plaintiff to "establish that: (1) he has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent rather than conjectural or hypothetical; (2) that there is causal connection between the injury and the defendant's alleged wrongdoing; and (3) that the injury can likely be redressed." *Lyshe*, 854 F.3d at 857. These requirements are the same whether the plaintiff's complaint is brought on an individual basis or on behalf of a putative class. "That a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016); *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 771 (5th Cir. 2020) (Oldham, J., concurring) ("Article III is just as important in class actions as it is in individual ones.").

Plaintiff's Complaint fails at this threshold step. At all relevant times, Plaintiff was a Gratiot County resident. (Am. Compl. ¶ 4.) The Property is located in Gratiot County. (*Id.*) Gratiot County sold the Property. And Gratiot County kept the

proceeds from the sale. **There is not a single allegation that links the Washtenaw Defendants to the claims raised by Plaintiff.** Thus, even assuming Plaintiff has suffered a redressable injury in fact, there is no "causal connection between the injury and [the Washtenaw Defendants'] wrongdoing." *Lyshe*, 854 F.3d at 857; *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 66 (2d Cir. 2012) (rejecting the argument that "a plaintiff's injury resulting from the conduct of one defendant should have any bearing on her Article III standing to sue other defendants").

Indeed, the Sixth Circuit recently addressed an analogous situation in *Perry v. Allstate Indemnity Co.*, 953 F.3d 417 (6th Cir. 2020). There, the plaintiff filed a putative class action complaint, naming the defendant that directly harmed the plaintiff (Allstate Indemnity Company, who issued the plaintiff's insurance policy), along with other defendants who had allegedly harmed unnamed class members (affiliates of Allstate, who issued policies to unnamed class members). *Id.* at 420. Before any class certification ruling, the Sixth Circuit found that dismissal against the other Allstate affiliates was required for want of standing:

> **Perry concedes that the remaining Allstate entities are not parties to the policy at issue in this case. Therefore, Perry lacks standing to pursue her claims against those entities because her injury is not traceable to them. It does not matter that Perry brought this suit as a putative class action on behalf of policyholders of the other Allstate entities. The rule works the other way around. Potential class representatives must demonstrate individual standing vis-à-vis the defendant; they cannot acquire such standing merely by virtue of bringing a class action. As Perry is the only named plaintiff in the action,**

> **no other named plaintiffs exist to create standing against the remaining Allstate entities.**

*Id.* at 420 (cleaned up) (emphasis added).

The same analysis applies here. Put simply, because there are no allegations that the Washtenaw Defendants committed any wrongdoing against any named party, the Washtenaw Defendants have been improperly named as defendants. Plaintiff's standing against the Washtenaw Defendants "cannot be acquired through the back door of a class action," so his claims should be dismissed. *Allee v. Medrano*, 416 U.S. 802, 828–29 (1974) (Burger, C. J., concurring and dissenting in part); *Perry*, 953 F.3d at 420.

**B. Plaintiff's Reliance on the Juridical Link Doctrine is Misplaced.**

In separate pleadings in this case, Plaintiff has not disputed that he has not personally suffered an injury at the hands of counties other than Gratiot. Instead, Plaintiff has attempted to get around his clear lack of standing by arguing that the "juridical link" doctrine displaces Article III's requirements, allowing him to sue every county in the State regardless of whether he has ever stepped foot in that county. (*See, e.g.*, ECF No. 118, PageID.2047 ("But as Plaintiff explained in his Motion, the juridical link doctrine permits Plaintiff to represent a class of victims in all Defendant Counties, and standing is not an issue."); ECF No. 109, Page ID.1699 ("Defendants' general standing analysis is simply irrelevant because, again, it fails to account for the juridical link doctrine.").)

This Court should reject that argument. The juridical link doctrine is a doctrine that the Ninth Circuit created out of whole cloth nearly fifty years ago in *La Mar v. H&B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973). *See Kombol v. Allstate Ins. Co.*, No. 20-70-BLG-SPW, 2020 U.S. Dist. LEXIS 180992, at *12 (D. Mont. Sept. 29, 2020) (explaining that through *La Mar*, the "Ninth Circuit created the juridical link doctrine"). *La Mar* presented the issue of "whether a plaintiff having a cause of action against a single defendant can institute a class action against the single defendant *and* an unrelated group of defendants who have engaged in conduct closely similar to that of the single defendant on behalf of all those injured by all the defendants sought to be included in the defendant class." 489 F.2d at 462. The court held "that he cannot." *Id.*

The Ninth Circuit's opinion in *La Mar* had nothing to do with Article III standing, however. The court found that resolving the case based on Rule 23's class certification requirements provided a clearer path to judgment than having to analyze "problems of [] standing." *Id.* at 464. Thus, it chose to "pass on th[e] issue" of Article III standing, and to "assume the presence of standing." *Id.*; *Zeyen v. Boise Sch. Dist. No. 1*, No. 1:18-cv-207, 2019 U.S. Dist. LEXIS 16769, at *12 (D. Idaho Jan. 30, 2019) ("*La Mar* assumed standing existed and analyzed only the class certification issues . . ."). When analyzing Rule 23's requirements, the court found that, as a general matter, plaintiffs "are not entitled to bring a class action against

defendants with whom they had no dealing." *La Mar*, 489 F.2d at 464. But in doing so, it stated in dicta that there could be some "situations" when "all injuries are the result of a conspiracy or concerted scheme[]," or some "instances in which all defendants are judicially related in a manner that suggests a single resolution of the dispute would be expeditious," which could allow for class certification against defendants who did not cause the plaintiff's injuries. *Id.* at 466.

So was born the juridical link doctrine. As Plaintiff has noted, since *La Mar*'s creation of this judge-made doctrine, some other courts began to latch on.[3] Plaintiff now urges the same result. Plaintiff contends that the judge-made juridical link remains a "well-established" doctrine that "allows the victim of a statewide policy administered by local governments to serve as representative of a class of victims throughout the state – including the victims of local government defendants with whom the plaintiff had no contact." (ECF No. 109, PageID.1697.) And Plaintiff urges the Court to bypass the Article III standing analysis in its entirety, like the



[3] As the Second Circuit explained in *Mahon*, courts who have adopted the juridical link doctrine "in *La Mar*'s wake have generally dealt with the Article III standing issue in one of two ways—or ignored it altogether." *Mahon*, 683 F.3d at 63. "First, a number of decisions have merged the issue with the Rule 23 analysis, concluding that a plaintiff entitled under the juridical link doctrine to represent a class against non-injurious defendants has Article III standing to sue the non-injurious defendants." *Id.* (collecting cases). "Other decisions have maintained the distinction between class certification and Article III standing, but have held that a court should decide class certification first and treat the class as a whole as the relevant entity for Article III purposes." Both methods are "flawed." *Id.*

Ninth Circuit did in *La Mar* when it "assumed" that standing existed in order to reach the merits. (*See* ECF No. 118, PageID.2047 (citing *La Mar* for the proposition that "the juridical link doctrine permits Plaintiff to represent a class of victims in all Defendant Counties, and **standing is not an issue**"); ECF No. 109, PageID.1699 (**"Defendants' general standing analysis is simply irrelevant because . . . it fails to account for the juridical link doctrine.**") (emphasis added).)

Respectfully, Article III of the Constitution is not "irrelevant." Not even the Ninth Circuit nor its district courts still apply the analysis Plaintiff now urges, because **since *La Mar* issued, the Supreme Court has expressly rejected *La Mar*'s approach of "assuming" standing exists in order to resolve the case on other grounds.** *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("We decline to endorse" the "Ninth Circuit . . . practice—which it characterizes as 'assuming' jurisdiction for the purpose of deciding the merits"). That holding should have "come as no surprise," the Court said, because "it is reflected in a long and venerable line of our cases. 'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Id.* (quoting *Ex Parte McCardle*, 7 U.S. 506, 7 Wall. 506, 514 (1869)).

This basic principle—that courts must first determine whether there is jurisdiction before proceeding to the merits of a claim—renders the juridical link

doctrine bad law. To apply the doctrine, courts must "assume" that Article III standing exists, and proceed straight to Rule 23's requirements. But again, it is now well established that doing so is improper. In every case, courts must first determine whether Article III standing exists. *Midwest Media Prop.*, 503 F.3d at 470 ("A court should not analyze or resolve substantive issues before addressing the issue of standing. Before turning to the merits, a court must address the plaintiffs' standing."); *Steel Co.*, 523 U.S. at 94. And the juridical link doctrine is completely unrelated to the question of whether Article III's requirements have been met.

Indeed, even the Ninth Circuit (which created the doctrine in the first place) recently recognized as much. In *Bah. Surgery Ctr., LLC v. Kimberly-Clark Corp.*, No. 18-55478, 2020 U.S. App. LEXIS 23100 (9th Cir. July 23, 2020), the plaintiff purchased hospital gowns that were "manufactured and sold by Kimberly-Clark," and alleged those gowns were falsely labeled as compliant with medical requirements. *Id.* at *3. Rather than just sue Kimberly-Clark, however, the plaintiff filed a putative class action against other defendants (including "Halyard"), whom the plaintiff alleged committed similar violations against unnamed class members.

After the district court certified a class and held a jury trial, the Ninth Circuit was forced to vacate the judgment because the plaintiff never had standing to sue Halyard in the first place. *Id.* at *4. The court recognized that the plaintiff had "no claim against Halyard because it purchased no gowns from it, and any injuries it has

are not traceable to Halyard's conduct. Without a claim of its own, [plaintiff] cannot 'seek relief on behalf of itself or any other members of the class.'" *Id.* (citations omitted). "Even if other class members have valid claims against Halyard, that cannot retroactively cure the district court's improper certification of a class wherein the named plaintiff . . . lacked standing to pursue those claims." *Id.* **In so holding, the Ninth Circuit explained that "[t]he juridical link doctrine is irrelevant to [the plaintiff's] standing here."** *Id.* at *4 n.4 (emphasis added) (citing *La Mar*, which "assumed standing," and citing *Citizens for a Better Environment*, which made clear that *La Mar*'s approach of assuming standing exists is improper).

Before and after that time, courts within the Ninth Circuit have come to similar conclusions: whether a plaintiff has Article III standing is a threshold issue that must be addressed first. And the juridical link is entirely irrelevant to that threshold question. Indeed, the District of Montana did so just last week, holding that the doctrine has "applicability only during the adequacy and typicality analysis of a class certification," and that standing "is a threshold requirement separate from the class action analysis which must be established in every case. Merely filing a class action lawsuit does not provide the named plaintiff with a loophole to that requirement." *Kombol*, 2020 U.S. Dist. LEXIS 180992, at *12-13 (citations omitted).[4]

[4] *See also, e.g.*, *Blyden v. Navient Corp.*, No. 14-02456, 2015 U.S. Dist. LEXIS 96824, at *29-31 (C.D. Cal. July 23, 2015) (threatening Rule 11 sanctions against party who made argument similar to Plaintiff's argument here, after

Other courts, including the Sixth Circuit, have held similarly. *See Perry*, 953 F.3d at 420, 420 n.2 (6th Cir. 2020) (recognizing that the juridical link "is a *sparingly applied class-certification* doctrine," and holding that "potential class representatives must demonstrate individual standing vis-à-vis the defendant; they cannot acquire such standing merely by virtue of bringing a class action."); *Mahon*, 683 F.3d at 64 (2d Cir. 2012) (finding the juridical link doctrine inapplicable to Article III standing, and stating that the plaintiff's "interpretation of Article III—that it permits suits against non-injurious defendants as long as one of the defendants in the suit injured the plaintiff—is unprecedented . . . [W]hether or not Rule 23 would permit a plaintiff to represent a class against non-injurious defendants cannot affect the plaintiff's Article III standing to sue the non-injurious defendants. A federal rule cannot alter a constitutional requirement."); *Wong v. Wells Fargo Bank N.A.*, 789 F.3d 889, 895-97 (8th Cir. 2015) ("The juridical link doctrine does not confer standing on the named borrowers. Although our court has not previously addressed

---

recognizing that (1) *La Mar* "declined to address standing, but instead assumed standing for purposes of determining whether Rule 23 authorized plaintiffs to represent their proposed class," (2) "following *La Mar*, . . . the Supreme Court rejected the practice of 'assuming' jurisdiction," and (3) "Ninth Circuit case law clearly and unambiguously forecloses Plaintiff's arguments on her standing to sue" defendants who did not cause her injuries); *Zeyen*, 2019 U.S. Dist. LEXIS 16769, at *12 ("*La Mar* assumed standing existed and analyzed only the class certification issues, so it has little value here . . ."); *Jimenez v. Progressive Cas. Ins. Co.*, No. CV-15-01187, 2016 U.S. Dist. LEXIS 144275, at *12 (D. Ariz. Oct. 3, 2016) ("The juridical link doctrine does not create standing[.]").

this doctrine, we agree with other circuits that, under similar circumstances, have found it inapplicable.").[5]

This Court should come to a similar conclusion. Despite Plaintiff's contention that the juridical link remains a "well-established" doctrine, just the opposite is true. The law is in fact "well-established" that a "plaintiff proceeding against multiple defendants must establish standing as to each defendant and each claim." *Holland*, 2019 U.S. Dist. LEXIS 146553, at *14. It is "well-established" that "[a] court should not analyze or resolve substantive issues before addressing the issue of standing." *Midwest Media Prop.*, 503 F.3d at 470. And it is equally "well-established" that the Ninth Circuit's judge-made juridical link doctrine is "irrelevant to" the threshold inquiry of whether a plaintiff has standing. *Bah Surgery*, 2020 U.S. App. LEXIS 23100, at *4 n.4; *Jimenez*, 2016 U.S. Dist. LEXIS 144275, at *12 ("The juridical link doctrine does not create standing[.]"); *Wong*, 789 F.3d at 895-97 ("The juridical link doctrine does not confer standing . . .").



[5] *See also, e.g.*, *Richard v. Flower Foods, Inc.*, No. 15-02557, 2016 U.S. Dist. LEXIS 153446, at *16-17 (W.D. La. Oct. 13, 2016) ("[T]he constitutional requirement of Article III standing should not be trumped by a judge-made doctrine (*i.e.*, the 'juridical link' doctrine) that has never been adopted by this Circuit."); *Rolaff v. Farmers Ins. Co.*, No. CIV-19-0689-J, 2020 U.S. Dist. LEXIS 161038, at *10 (W.D. Okla. Mar. 19, 2020) ("Neither *Payton* nor any of the other authorities Plaintiffs cite persuade this Court to adopt the juridical link doctrine and undermine the threshold Constitutional requirement of standing. As such, Plaintiffs are required to establish standing against each Defendant.").

Thus, setting aside the inapplicable juridical link doctrine, the analysis is simple. Plaintiff has not alleged any injury that is traceable to the Washtenaw Defendants, and he has not argued otherwise. Plaintiff therefore lacks standing to sue those defendants. Plaintiff's "interpretation of Article III—that it permits suits against non-injurious defendants as long as one of the defendants in the suit injured the plaintiff—is unprecedented," and should therefore be rejected. *Mahon*, 683 F.3d at 64 (2d Cir. 2012).

## II. The Washtenaw Defendants Are Entitled to Sovereign Immunity.

Even if Plaintiff had standing to sue the Washtenaw Defendants or any county other than Gratiot (which he does not), his claims would still be subject to dismissal because those Defendants are entitled to sovereign immunity. Under the Eleventh Amendment, a "damages action against a State in federal court" is barred "when state officials are sued for damages in their official capacity." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *Cady v. Arenac Cty.*, 574 F.3d 334, 342 (6th Cir. 2009) ("The Eleventh Amendment bars § 1983 suits against a state, its agencies, and its officials sued in their official capacities for damages."). Although municipalities are not ordinarily considered state actors, "[w]here county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the State." *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999); *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 995 (6th Cir. 2019).

That is the case here. Plaintiffs' claims against Washtenaw County and its Treasurer center on the Defendants' compliance with a statute that prohibited those Defendants from providing Plaintiffs with the "surplus proceeds." Mich. Comp. Laws § 211.78m(8) provides that "foreclosing governmental unit[s] *shall* deposit the proceeds from the sale of property under this section into a restricted account designated as the 'delinquent tax property sales proceeds for the year ___.'" *Id.* (emphasis added). And it states that:

> Proceeds in that account *shall only be used by the foreclosing governmental unit for the following purposes in the following order of priority*: (a) The delinquent tax revolving fund shall be reimbursed for all taxes, interest, and fees on all of the property, whether or not all of the property was sold. (b) All costs of the sale of property for the year shall be paid. (c) Any costs of the foreclosure proceedings for the year, including, but not limited to, costs of mailing, publication, personal service, and outside contractors shall be paid . . . .

*Id.* (emphasis added). The Legislature thus directed foreclosing governmental units to spend the "excess surplus" in specific ways, none of which include reimbursing the delinquent taxpayer. *See id.*

For this reason, although Judge Kethledge vehemently disagreed with the framework and policy behind the GPTA, he recognized that "[i]n the County's defense, the Michigan Act appears actually to *require* the County to short the taxpayer the difference between the value of the property forfeited and the amount of taxes and penalties owed." *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 824

(6th Cir. 2017) (Kethledge, J., dissenting) (emphasis in original). Judge Friedman has stated similarly. *Freed v. Thomas*, No. 17-cv-13519, 2018 U.S. Dist. LEXIS 190424, at *5 (E.D. Mich. Nov. 7, 2018) (Friedman, J.), *vacated on other grounds* ("It is unconscionable that the Michigan legislature has seen fit to adopt a property taxation system that not only permits but requires county treasurers to take title to real property when the taxes thereon are not timely paid and to then retain all of the proceeds obtained for the property at auction . . ."). So has the Michigan Supreme Court. *Rafaeli*, 2020 Mich. LEXIS 1219, at *12 ("Michigan is one nine states with a statutory scheme that *requires* the foreclosing governmental unit to disperse the surplus proceeds to someone other than the former owner." *Rafaeli*, 2020 Mich. LEXIS 1219, at *12 (emphasis added).

In short, when enacting the GPTA, Michigan's legislature required foreclosing governmental units (including Defendants) to distribute surplus proceeds in a specific way. Defendants did only what State law required of them, and so "by simply complying with state mandates that afford no discretion, they act[ed] as an arm of the State, not the county." *McNeil*, 945 F.3d at 995 (cleaned up). The claims against Defendants should therefore be dismissed. *See id.*; *see also Ladd v. Marchbanks*, __ F.3d __, 2020 U.S. App. LEXIS 26484 (6th Cir. Aug. 20, 2020) (Fifth Amendment takings claim seeking both monetary and declaratory relief may be dismissed when defendants are protected by sovereign immunity).

## III. The Claims Against McClary Should be Dismissed.

Finally, Plaintiff's claims against Washtenaw County Treasurer Catherine McClary are subject to dismissal for other reasons, too. *First*, to the extent these claims are raised against McClary in her "individual" capacity, McClary is entitled to qualified immunity because her good-faith compliance with a statute that had never been found unconstitutional does not violate a clearly-established constitutional right. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (setting forth qualified immunity framework); *see specifically Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 441 (6th Cir. 2016) ("The Supreme Court tells us that public officials should generally receive qualified immunity when enforcing properly enacted laws.").

As the Sixth Circuit recognized in *Husted*, "the Supreme Court has *never* denied qualified immunity to a public official who enforced a properly enacted statute that no court had invalidated." 810 F.3d at 441. Here, both federal district courts and Michigan's Court of Appeals previously held that counties' enforcement of the GPTA's requirements was constitutional. *Rafaeli*, 2017 Mich. App. LEXIS 1704, at *10-11 ("Plaintiffs' taking argument is without merit."); *Wayside Church v. Van Buren Cty.*, Case No. 1:14-cv-01274, 11/9/2015 Op. & Order, ECF No. 38, PageID.418 (W.D. Mich.) ("Because Plaintiffs do not have a property interest in the pleaded 'surplus equity' at the time of the tax sale, they fail under Rule 12(b)(6) to

state a claim under the Takings Clause of the Constitution upon which relief can be granted.") The existence of this "split by itself amply supports [McClary's] position" that she did not violate a *clearly established* law. *Husted*, 810 F.3d at 443 ("If judges can reasonably disagree about the meaning of the Constitution, we should not punish public officials for reasonably picking one side or the other of the debate.").

*Second*, to the extent these claims are raised against McClary in her official capacity as Washtenaw County Treasurer, the Amended Complaint is duplicative of the claims raised against the County itself. Official capacity claims "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dep't. of Soc. Servs.*, 436 U.S. 658, 690, n.55 (1978). So when the entity is named, there is no need to name the entity's officers in their official capacities. *Doe v. Claiborne Cty.*, 103 F.3d 495, 509 (6th Cir. 1996); *Hawthorne-Burdine v. Oakland Univ.*, 158 F. Supp. 3d 586, 602 (E.D. Mich. 2016) ("An official-capacity claim is redundant where the entity is named as a defendant.") (citing *Foster v. Michigan*, 573 F. App'x. 377, 390 (6th Cir. 2014)); *Skellett v. Washington*, No, 1:19-cv-703, 2019 U.S. Dist. LEXIS 218894, at *16-17 (W.D. Mich. Dec. 20, 2019) (dismissing official capacity claims because "[t]he courts have recognized that, where an entity is named as a defendant, official-capacity claims against employees of that entity are redundant").

## CONCLUSION

For the reasons stated above, this Court should dismiss the claims against the Washtenaw Defendants for lack of Article III standing or, alternatively, because those Defendants are entitled to sovereign and qualified immunity. In the event this Court denies the Washtenaw Defendants' Motion to Dismiss, the Washtenaw Defendants reserve the right to challenge the merits of Plaintiffs' eight claims at a later time.

Date: October 6, 2020

Respectfully submitted,

**DYKEMA GOSSETT PLLC**

By: /s/ *Theodore W. Seitz*
Theodore W. Seitz (P60320)
Kyle M. Asher (P80359)
201 Townsend Street, Suite 900
Lansing, MI 48933
TSeitz@dykema.com
KAsher@dykema.com

*Counsel for the Washtenaw Defendants*

## CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2020, my assistant caused the foregoing to be electronically filed with the Clerk of the Court using the electronic filing system, which will send notification of such filing to all counsel of record at their respective addresses as disclosed on the pleadings.

Dated: October 6, 2020

By: /s/ *Theodore W. Seitz*
Theodore W. Seitz (P60320)

*Attorney for the Washtenaw Defendants*

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

084100.000039 4828-5549-9725.3

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MICHIGAN**

THOMAS A. FOX, for himself and all those similarly situated,

Plaintiff,

v.

COUNTY OF SAGINAW, *et al.*,

Defendants.
_____/

Case No.: 19-cv-11887
Hon. Thomas L. Ludington
Mag. Judge Patricia T. Morris

**CLASS ACTION**

**PLAINTIFF'S RESPONSE TO WASHTENAW DEFENDANTS' MOTION TO DISMISS (ECF NOS. 119 AND 120)**

## COUNTER-STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiff has standing to sue Defendants on behalf of those who have suffered the same injury as Plaintiff where a class has been properly certified?

   Plaintiff and the Class answer: YES.

2. Are the Washtenaw County Defendants not entitled to sovereign immunity where they chose to be the foreclosing governmental unit?

   Plaintiff and the Class answer: YES.

3. Are the Class's claims barred by qualified immunity or *Monell* immunity?

   Plaintiff and the Class answer: NO.

## INDEX OF MOST CONTROLLING AUTHORITIES

*Order Granting Plaintiff's Motions to Lift the Stay, Certify the Class, and Appoint Class Counsel, et al.*, ECF No. 124

*La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973)

*Mt Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)

*Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)

*Payton v. Cty. of Kane*, 308 F.3d 673 (7th Cir. 2002)

*Rafaeli, LLC v. Oakland Cty.*, No. 156849, 2020 WL 4037642 (Mich. July 17, 2020)

*Thompson v. Bd. of Educ. of Romeo Cmty. Sch.*, 709 F.2d 1200 (6th Cir. 1983)

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**



**TREATISES**



**CONSTITUTIONAL PROVISIONS**

## INTRODUCTION

This Court, the Sixth Circuit, and Courts around the country all agree: when multiple local governments administer the same illegal policy, a victim of one such government can bring a class action on behalf of all the defendants' victims under the "juridical link doctrine." Defendants cite no case in which a court has rejected this important protection against government misconduct. And there is no question that their conduct here was unconstitutional: the Michigan Supreme Court has recently confirmed that their destruction of foreclosed taxpayer's equity constitutes an illegal taking that violates the Class's constitutional rights. *Rafaeli, LLC v. Oakland Cty.*, __ Mich. __ No. 156849, 2020 WL 4037642, at *21-22 (Mich. July 17, 2020) (unpublished cases attached as Exhibit A). Yet, they ask the Court to disavow its Class Certification decision, defy the Sixth Circuit, and determine that the doctrine constitutes "bad law" based on inapposite authorities concerning private sector defendants. They also ask the Court to – again, contrary to clear precedent – radically expand the concept of sovereign immunity to encompass local governments, even though Defendants voluntarily decided to administer the unconstitutional practice here. None of their arguments merit depriving the Class of its right to seek redress.

## BACKGROUND

This case involves what happens after the taxation process is completed, and

equity remains after each county is paid in full for all delinquent taxes, interest, penalties, and fees. ¶ 13.[1] Plaintiff Thomas A. Fox was the owner of residential property in Gratiot County (the "Property"), ¶ 16, which, like the other Defendant Counties, has affirmatively elected to administer the tax foreclosure process instead of allowing the state to administer it. ¶ 33. *See also* MCL 211.78(6).

As of the auction sale, the Property had an outstanding tax delinquency of $3,091.23. ¶ 18. Defendants seized ownership of the Property on or about February 21, 2017. ¶ 19. At this time, the Property had a fair market value of at least $50,400.00. ¶ 20. Defendants later sold the Property at a tax auction on August 16, 2017 for $25,500.00. ¶ 21. The Property had equity – that is, the difference between what the Property was worth and the tax delinquency that Plaintiff owed. ¶¶ 23-24. Plaintiff had a property interest in this equity. ¶¶ 52, 63, 71. But Defendants seized it and failed to return it. ¶ 25. The Gratiot Defendants 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. Throughout, they neither initiated a condemnation action nor afforded Plaintiff any process to seek the equity's return. ¶¶ 27, 30.

On June 25, 2019, Plaintiff filed a complaint on behalf of himself and all others similarly situated. Plaintiff later amended his complaint to include additional defendants. In late 2019, an initial round of motions to dismiss were filed and were

[1] "¶" refers to paragraphs in Plaintiff's First Amended Complaint (ECF No. 17).

fully briefed. On January 10, 2020, the Court stayed this case pending the Sixth Circuit's decision in *Freed v. Thomas*, No. 18-2312, 2020 WL 5814503 (6th Cir. Sept. 30, 2020). (Order Staying Case, ECF No. 85.) On July 17, 2020, the Michigan Supreme Court decided *Rafaeli*, triggering a wave of new cases. Plaintiff moved to lift the stay, certify the class, appoint class counsel and representative, and for expedited consideration. (ECF Nos. 92, 93, 94.) During the pendency of these motions, the Sixth Circuit decided *Freed*, rejecting the jurisdictional defenses of defendants in that case and some defendants here.

On October 16, 2020, this Court lifted the stay, certified the class of Defendants' equity destruction victims, and appointed Plaintiff as class representative and his counsel as lead counsel. (Order to Lift Stay, Certify the Class, and Appoint Class Counsel, ECF No. 124, PageID.2305.)

## STANDARD OF REVIEW

Defendants move for dismissal under Fed. R. Civ. P. 12(b)(6), for a failure to state a claim, and under Fed. R. Civ. P. 12(b)(1), for a lack of subject matter jurisdiction, alleging that Plaintiff lacks standing as to them. (Wash. Defs.' Br., ECF No. 120, PageID.2093.) Under Rule 12(b)(6), the Court must accept Plaintiff's pleadings as true. *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012). Yet, Defendants ask this Court to resolve fact-sensitive immunity issues. As to Rule 12(b)(1), "[w]here subject matter jurisdiction is challenged … [t]he plaintiff will

survive the motion to dismiss by showing 'any arguable basis in law' for the claims set forth in the complaint." *Mich. S. R.R. Co. v. Branch & St. Joseph Ctys. Rail Users Ass'n, Inc.*, 287 F.3d 568, 573 (6th Cir. 2002). Such a motion may attack the court's subject matter jurisdiction either facially or factually. Facial challenges address only the legal sufficiency of the allegations in the complaint; and all reasonable inferences are drawn in the plaintiff's favor, just as under Rule 12(b)(6). *Gentek Bldg. Prod., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320 (6th Cir. 2007). Defendants' argument appears to be facial.

## ARGUMENT

### I. The Class Has Standing to Vindicate Its Claims

#### A. Overview

As this Court recognized when it certified the class, "Defendants are juridically related for purposes of standing." (ECF No. 124, PageID.2294.) "[A]ll Defendants have, by electing to act as foreclosing governmental unit and retaining surplus proceeds under the [General Property Tax Act], become so juridically linked to one another that Plaintiff has standing against each of them to the same extent that he has standing against the Gratiot County Defendants." *Id.*[2]

[2] Plaintiff and the Class do not "urge" this Court to "latch on" to a "judge-made doctrine." (Wash. Defs.' Br., ECF No. 120, PageID.2100.) Rather, they assert that the Court was correct to apply the Sixth Circuit's rule. Defendants' Motion was filed prior to this Court's Order certifying the class. It can reasonably be inferred that the

Defendants' Motion consists largely of an effort to undo this decision based on their assertion that the doctrine is "bad law." (Wash. Defs.' Br., ECF No. 120, PageID.2093.) The effort fails for two reasons. First, it is inconsistent with the law of the case doctrine. "As the doctrine goes, 'findings made at one stage in the litigation should not be reconsidered at subsequent stages of that same litigation.'" *Edmonds v. Smith*, 922 F.3d 737, 739–40 (6th Cir. 2019) (citing *Burley v. Gagacki*, 834 F.3d 606, 618 (6th Cir. 2016)).[3]

It also fails because the Court was correct. The Sixth Circuit recognizes the juridical link doctrine, and courts unanimously find that a juridical link exists between political subdivisions applying a common policy. Yet, Defendants cite to multiple red herring authorities discussing *private* sector defendants and cases that were not class actions. And once a juridical link is established, Article III standing is considered in terms of the entire class – not the original named plaintiff.

**B. This Court Was Correct to Apply the Juridical Link Doctrine**

---

Court's Order already considered and rejected the arguments here against juridical relation.

[3] "[T]he doctrine aims to 'maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" *Edmonds*, 922 F.3d at 740 (citing 18B Wright & Miller § 4478). *See also* § 4478.1, Law of the Case—Trial Courts, 18B Fed. Prac. & Proc. Juris. § 4478.1 (2d ed.) (acknowledging Fed.R.Civ.P. 54(b) but explaining that "[t]he policies that support adherence to earlier rulings without perpetual reexamination surely do apply" at the trial court level, and that "[t]he "law-of-the-case" label is a convenient way of invoking these policies and is often used.")

### 1. The Court Was Correct to Apply the Doctrine When a Named Plaintiff Challenges the Misconduct of Political Subdivisions Administering a Common Statewide Policy

As Plaintiff explained in the class certification briefing, 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. Thus, as discussed in Plaintiff's prior briefs, a plaintiff injured by a local government's administration of a state law may represent a class that includes victims of other local governments that acted under the same law.

*La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973) was one of the first cases to articulate this well-established concept. *Id.* at 462.[4] The Sixth Circuit recognizes the doctrine. *See, e.g.*, *Thompson v. Bd. of Educ. of Romeo Cmty. Sch.*, 709 F.2d 1200, 1204–05 (6th Cir. 1983) (analyzing the juridical link doctrine). In *Thompson*, the Sixth Circuit explained that a class plaintiff can represent those having causes of action against other defendants under certain circumstances. *Id*. at 1204. One such circumstance applies here: "Instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious." *Id.* at 1205. Such a juridical relationship amongst defendants, the

[4] Contrary to Defendants' assertion, *La Mar*'s analysis was not "created out of whole cloth." (Wash. Defs.' Br., ECF No. 120, PageID.2099.) Rather, it collected cases and discerned the doctrine in the jurisprudence. *La Mar* at 469-70.

*Thompson* court observed, 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.

Indeed, the Sixth Circuit 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 explicitly 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 v. Cty. of Kane*, 308 F.3d 673 (7th Cir. 2002) *cert. denied sub. nom., Carroll Cty., Ill. v. Payton*, 540 U.S. 812 (2003) (citing *Fallick*, 162 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").

In fact, as this Court acknowledged, the Sixth Circuit declined to overturn these decisions in the *Perry* case that Defendants cite (Order Certifying Class, ECF No. 124, PageID.2293), (discussing *Perry v. Allstate Indemnity 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 Certifying Class, ECF No. 124, PageID.2293.) In *Perry*, "[t]he problem for the [plaintiff] was that no such statute or statewide policy was at issue." *Id*. In other words, the Sixth Circuit found that the doctrine did not apply on the facts, but again recognized the doctrine; "[h]ad the Sixth Circuit intended to reject the doctrine *per se*, it could have easily done so." *Id*.

Indeed, it is universally recognized that where, as here, the defendants are governmental entities operating under the same state law, a class representative harmed by one such governmental entity may bring a class on behalf of the victims of all of them.[5] Thus, in *Payton*, the Seventh Circuit found that the juridical link

[5] *See, e.g., City of Tampa v. Addison*, 979 So. 2d 246, 253 (Fla. Dist. Ct. App. 2007) ("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); *Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Illinois, Inc.*, 97 FRD 668, 673–76 (N.D. Ill.

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

As Judge Hayes in the Charlevoix Circuit Court explained in a different tax equity case, "[t]he juridical link doctrine makes sense in the context of class action litigation in the Federal District Court where, without the rule, one district court would be the forum for numerous class action lawsuits dealing with substantially the same legal issues but different governmental defendants." *Zettel v. County of Leelanau et al.*, Case No. 18-0591-26-CZ (Aug. 31, 2020), Transcript at 6-7 (Exhibit B). Put simply, Defendants are attempting to "truncate potentially efficient uses of the class action device when they are otherwise not prohibited and here the class

---

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); *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) (concerted scheme by Defendants was sufficient to give Plaintiffs standing to challenge this practice); *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 scheme of abusive intelligence gathering).

action device may be superior to 19, or 102, different cases in each [Michigan] county challenging the effects of the same state statute." *Payton*, 308 F.3d at 681.

Moreover, far from being "bad law," (Wash. Defs.' Br., ECF No. 120, PageID.2093), the doctrine is an important protection against government abuse. Statewide policies are often administered or enforced at a local level, just as they were here. Without the doctrine, class relief for abuse in such contexts could be all but eliminated. The misconduct here was bad enough: Defendants pursued a unified policy that illegally destroyed the Class Members' property. But under Defendants' argument, governments could be staggeringly unaccountable. For example, a state could direct local officials to seize political literature from a particular candidate or destroy religious objects sacred to a certain denomination. Yet, the victims would only be able to seek redress from one local official at a time, even if such piecemeal litigation made any effort to compensate the victims impracticable.

**2. Defendants' Cases Do Not Undermine This Court's Decision**

In response, Defendants cite numerous red herrings: cases which are either not class actions or cases in which courts reject juridical links between *private* sector defendants,[6] without ever citing a case in which a court declined to apply the doctrine

[6] *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250 (6th Cir. 2018), for example, is not a class action; it was unclear that any prospective class members would suffer harm; and it also did not concern adding and linking defendants. *Wong v. Wells Fargo Bank N.A.*, 789 F.3d 889 (8th Cir. 2015) merely found that the juridical link doctrine did not apply to private sector banks. In *Richard v. Flowers*

to public sector defendants such as here.[7]

One good example is Defendants' reliance on *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59 (2d Cir. 2012). The issue in *Mahon* was the extent to which the juridical link doctrine can apply to private defendants. While it declined to extend the

---

*Foods Inc.*, No. CV 15-02557, 2016 WL 6539144 (W.D. La. Oct. 13, 2016) defendants consisted of different corporate subsidiaries. *Jimenez v. Progressive Cas. Ins. Co.*, No. CV-15-01187-PHX-ROS, 2016 WL 5858738 (D. Ariz. Oct. 3, 2016) was a suit against multiple insurance companies. *Blyden v. Navient Corp.*, No. EDCV1402456JGBKKX, 2015 WL 4508069 (C.D. Cal. July 23, 2015) involved interest rates on private loans, and any suggestion that Plaintiff's arguments are sanctionable is completely misguided – again, Plaintiff is simply arguing that the Court was correct when it certified the class. 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.

[7] In their standing argument, Defendants only cite two cases that involve public sector defendants. *Midwest Media Prop., L.L.C. v. Symmes Twp., Ohio*, 503 F.3d 456, 469–70 (6th Cir. 2007) was not a class action and did not even involve multiple defendants. And *Zeyen v. Boise Sch. Dist. No. 1*, No. 1:18-CV-207-BLW, 2019 WL 403864, at *4 (D. Idaho Jan. 30, 2019) supports the Class: the court, denied motions to dismiss based on standing and quoted *Melendres v. Arpaio*, 784 F.3d 1254, 1261-1262 (9th Cir. 2015) for the proposition 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." (citing 1 William B. Rubenstein, Newberg on Class Actions § 2:6 (5th ed.). *See also Id.* at *3 (citing Wright & Miller, Federal Practice & Procedure § 1785.1 (2d ed. 2005) for the proposition that "Representative 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.").

doctrine, 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, "[t]he [] 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), which allowed a class of current and former detainees in local Alabama jails to sue state sheriffs and wardens, many of whom the named plaintiffs had no contact; *Broughton v. Brewer*, 298 F. Supp. 260, 267 (S.D. Ala. 1969), which certified a class of persons "whose poverty or lack of apparent means of livelihood renders them susceptible to arrest under ... Alabama vagrancy laws" to sue most of the state's law enforcement apparatus, despite the named plaintiffs' lack of injury by most of the defendants; and *DeAllaume v. Perales*, 110 F.R.D. 299, 302 (S.D.N.Y. 1986), in which a putative class of New York state welfare recipients sought to challenge a common, state-directed method 58 county commissioners used to calculate certain heating subsidies, and in which "the lone representative plaintiff did not, of course, have a colorable claim against each defendant").

The *Mahon* concurrence thus 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 because the court determined that the defendants were so closely related that they should be treated substantially as a single unit." *Id.* (brackets in the original) (citing 7AA Charles Alan Wright et al., Fed. Prac. & Proc. Civ. § 1785.1 (3d ed. 2011) (footnotes omitted)). "The canonical juridical link cases such as *Washington, Broughton,* and *Payton,* are cases in which numerous defendants are being sued for acting at the direction of a single governmental policy." *Id.* In other words, as the *Mahon* concurrence found: there is a clear consensus that the juridical link doctrine applies to public sector cases such as the present case.[8] Any disagreement involves the doctrine's application to private sector defendants, which is simply irrelevant here.[9]

---

[8] Indeed, since *Mahon*, courts throughout the country have continued to apply the juridical link doctrine, either explicitly or implicitly. *See, e.g., Jett v. Warrantech Corp.*, 436 F. Supp. 3d 1170, 1176–77 (S.D. Ill. 2020); *In re Chicago Bd. Options Exch. Volatility Index Manipulation Antitrust Litig.*, 435 F. Supp. 3d 845, 860 (N.D. Ill. 2020); *Watson v. City of Southlake*, 594 S.W.3d 506, 516 (Tex. App. 2019), *review denied* (Feb. 14, 2020), *review denied* (Apr. 3, 2020); *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); *Murillo v. Kohl's Corp.*, 197 F. Supp. 3d 1119, 1134 (E.D. Wis. 2016); *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, 366 Mont. 450, 288 P.3d 193; *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, 379 Mont. 265, 350 P.3d 39.

[9] The *Mahon* concurrence acknowledged this dispute. *Mahon*, *supra* at 69. Indeed, the juridical link doctrine is so well established that courts have frequently expanded it to private sector defendants. *See, e.g., Weiss v. Winner's Circle of Chicago, Inc.*,

### C. Article III Standing is Considered in Terms of the Class

#### 1. Standing is Considered in Terms of the Class

Once a class is certified, Article III standing is considered in terms of the class – not the named plaintiff. "The certification of a class changes the standing aspects of a suit, because '[a] properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff.'" *Payton*, 308 F.3d at 680 (citing *Whitlock v. Johnson*, 153 F.3d 380, 384 (7th Cir. 1998)).[10] Thus, "once 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." *Id*. (applying judicial link doctrine).[11] Accordingly, an Article III standing challenge does not impede application of the juridical link doctrine – because "[t]he doctrine is premised on the idea that the class, not the class representative, is the legal entity for the purposes of Article III standing." *Reyes*, No.

---

91 C 2780, 1995 WL 755328 (N.D. Ill. Dec. 14, 1995); *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd sub. nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970); *Texas Commerce Bank Nat. Ass'n v. Wood,* 994 S.W.2d 796, 807 (Tex. App. 1999); *Peters v. Blockbuster, Inc.*, 65 S.W.3d 295, 306 (Tex. App. 2001); *Samuel v. University of Pittsburgh*, 56 F.R.D. 435 (W.D. Pa. 1972); *Moore v. Comfed Sav. Bank*, 908 F.2d 834, 838 (11th Cir. 1990); *In re Computer Memories Secs. Litig.*, 111 F.R.D. 675 (N.D. Cal. 1986).

[10] *See also Sosna 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]").

[11] Thus, the doctrine is not a risk to "displace[] Article III's requirements," (Wash. Defs.' Br., ECF No. 120, PageID.2098), because these requirements are considered in terms of the Class.

CIV.A. 12-2043, 2013 WL 442524, at *3 (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)).[12]

Defendants argue in response that proceeding to class certification prior to resolving all standing issues was "improper." (Wash. Defs.' Br., ECF No. 120, PageID.2102). They are wrong, and the Court was right. In *Amchem Products, 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.[13] Accordingly, the "growing consensus" in this District and others is to defer whether a plaintiff has standing to represent absent class members until class certification. *In re Duramax Diesel Litig.*,

[12] Defendants (erroneously) claim that "Plaintiff urges the Court to bypass the Article III standing analysis in its entirety." (Wash. Defs.' Br., ECF No. 120, PageID.2100). This is incorrect—under the juridical link doctrine, Plaintiff may represent the entire class; and the class as a whole has Article III standing with respect to each Defendant. Standing is "not an issue," (*id.* at PageID.2101), in that it is not an impediment to the Class's case. Put another way, Plaintiff and the Class do not ask the Court to "bypass the Article III standing analysis in its entirety" (*Id.* at PageID.2100.); they ask the Court to perform it correctly, in accordance with the Court's earlier conclusion and Sixth Circuit jurisprudence.

[13] As discussed *infra*, *Ortiz* came after *Steel*. This renders puzzling Defendants' repeated suggestion that, under *Steel*, the standing analysis must precede class certification. For example, if it "is now improper" under *Steel* to consider certification first, then why did the Supreme Court direct courts to do so in *Steel*'s immediate aftermath?

298 F. Supp. 3d 1037, 1088 (E.D. Mich. 2018) (internal citations and quotations omitted) (citing cases); *see also Bledsoe v. FCA US LLC*, 378 F. Supp. 3d 626, 641-642 (E.D. Mich. 2019) ("the certification issues in the instant case are logically antecedent to the Article III standing concerns"); *In re Auto. Parts Antitrust Litig.*, No. 12-MD-02311, 2013 WL 2456612, at *11 (E.D. Mich. June 6, 2013) ("[T]he better path is to defer this issue [of standing] until the class certification stage") (citing cases); and *Zeyen v. Boise Sch. Dist. No. 1*, No. 1:18-CV-207-BLW, 2019 WL 403864, at *4 (D. Idaho Jan. 30, 2019) (discussing Ninth Circuit's adoption of this approach).

**2. Defendants' Arguments to the Contrary Fail**

Defendants state that in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) the Supreme Court "expressly rejected *La Mar*'s approach of 'assuming' standing exists in order to resolve the case on other grounds." (Wash. Defs.' Br., ECF No. 120, PageID.2101.) But *Steel* 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 now the relevant litigant for purposes of Article III; and Article III is thus clearly satisfied.[14]

Indeed, several of the leading juridical link cases postdate *Steel*. *See, e.g.*, *Payton*, 308 F.3d at 680–82. Just the next year after *Steel*, the Supreme Court decided *Ortiz*, affirming that the class certification analysis should precede any Article III analysis. It affirmed that "[o]rdinarily, of course, [an] Article III court must be sure of its own jurisdiction before getting to the merits." *Ortiz*, 527 U.S. at 831 (citing *Steel* 523 U.S. at 88–89). "But" where, as here, "the class certification issues are … 'logically antecedent' to Article III concerns … the issue about Rule 23 certification

[14] None of Defendants' cases undermine this conclusion. *Chapman v. Tristar Prod., Inc.*, 940 F.3d 299 (6th Cir. 2019) was not a class action, and thus did not suggest that a court should look to anything other than the certified class to determine standing. In *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020), the class definition was too wide, including unnamed class members who likely suffered no injury at all; in any event *Flecha* cites *Payton* approvingly for the notion that a court should "begin[] its analysis with the question of class certification … prior to issues of standing," and should only address standing before class certification if the class representative does not have standing against any defendant. *Flecha* 946 F.3d at 769. *Holland v. JPMorgan Chase Bank, N.A.*, No. 19 CIV. 00233 (PAE), 2019 WL 4054834 (S.D.N.Y. Aug. 28, 2019) declined to apply the juridical link doctrine to a case against private sector entities. In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the named plaintiff could not even satisfy the injury-in-fact requirement at all, whereas Plaintiff here was clearly injured. *Allee v. Medrano*, 416 U.S. 802, 828–29, 94 S. Ct. 2191, 2207, 40 L. Ed. 2d 566 (1974) predated much of the juridical link jurisprudence, and there is no doubt here that the Class Members all share the same injury, even if it was caused by different discrete defendants. *Lyshe v. Levy*, 854 F.3d 855 (6th Cir. 2017) was a debt collection case with no concrete harm that was only brought against a single defendant. *Ex Parte McCardle*, 7 U.S. 506, 7 Wall. 506, 514 (1869) articulates a general standing requirement but does not address its interplay with the juridical link doctrine.

should be treated first, 'mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints...'" *Id.* (quoting *Amchem, supra*, at 612–613, 117 S.Ct. 2231 and *Steel Co., supra*, at 92, 118 S.Ct. 1003). In turn, *Payton* relied upon *Ortiz* to conclude that a plaintiff may be typical of absent class members injured by juridically linked defendants that did not themselves injure the plaintiff; that if so, then the court may certify the class; that this certification analysis is "logically antecedent" to any Article III analysis;[15] and if the class is certified under the juridical link doctrine, then Article III standing is considered in terms of the certified class. *Payton*, 308 F.3d at 680-681.[16]

Defendants draw the wrong conclusion from this principle. Courts distinguish between an Article III analysis and juridical link analysis. But this does not mean that, after certification, the hypothetical Article III status of the named plaintiff can divest standing from some or all of the absent class members. Rather, it means that

[15] Thus, while the Court need not consider the precise contours of any bar to "hypothetical jurisdiction" here because it has already certified the Class, nothing in *Steel* forbids courts from concluding that a forthcoming or simultaneous certification will establish standing.

[16] Defendants' *Mahon* discerned an alternative approach among the many courts to apply the doctrine: the "merge[r of] the [class certification] issue with the Article III standing issue" in applying the juridical link doctrine. *See* (Wash. Defs.' Br., ECF No. 120, PageID.2100, n.3) (citing *Mahon*, 683 F.3d at 63). But there seems no practical difference between this approach and *Payton*'s. And *Mahon*'s finding that these approaches were "flawed," *id.*, is moot here: as discussed above, *Mahon*'s own concurrence recognized that the doctrine could and should be applied in cases such as this one involving public entities.

the juridical link analysis is part of the class certification inquiry – and if the class is certified, then the class is the focus of any Article III analysis. The juridical link and standing doctrines should be read together: what would be the point of certifying a class under the doctrine, if the class would need to be decertified in order to grant certain defendants with Article III-based dismissals?[17]

## II. Defendants Are Not Immune for their Misconduct

### A. Defendants are Not Entitled to Sovereign Immunity for Unconstitutional Conduct.

Defendants next claim that municipalities should be considered as extensions of the State, and thus they are entitled to Eleventh Amendment immunity, citing *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999). (Wash. Defs.' Br., ECF No. 120, PageID.2106.)

This argument fails for multiple reasons. First, the Eleventh Amendment does not apply to counties. "[S]ubdivisions of the state, such as counties and

[17] Defendants suggest that *Bahamas Surgery Ctr., LLC v. Kimberly-Clark Corp.*, 820 F. App'x 563, 565 (9th Cir. 2020) overruled *La Mar* because it found that "[t]he juridical link doctrine is irrelevant to … standing *here*." *Id.* at n.4 (emphasis added). But that case again involved private sector defendants. It was thus no surprise that the minimally reasoned memorandum declined to apply the doctrine. And it hardly overruled *La* Mar; it simply noted in a footnote that *La Mar* had assumed standing. *Id. Bahamas Surgery* was an unpublished, non-precedential memorandum. *See id. passim; see also* Ninth Circuit Rule 36-3. Any suggestion that the Circuit meant to overturn a leading authority such as *La Mar* through a footnote in such an order is unfounded. And the memo never addressed *Melendres*'s *Payton*-style approach. *See Melendres*, 784 F.3d at 1261-1262; *Zeyen*, 2019 WL 403864, at *4.

municipalities, are not protected by the Eleventh Amendment," because the "Amendment limits the jurisdiction only as to suits against a state." *Lawson v. Shelby Cty., TN*, 211 F.3d 331, 335–36 (6th Cir. 2000) (citing *Lincoln County v. Luning*, 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890)). *See also Mt Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (the Eleventh Amendment "does not extend to counties and similar municipalities."); *Geller v. Washtenaw County*, 2005 WL 3556247, at *4 (E.D. Mich. 2005) (a "[c]ounty cannot claim sovereign immunity, because it is not an arm of the state. The Eleventh Amendment's protection does not extend to counties," citing *Alkire v. Irving*, 330 F.3d 802, 811 (6th Cir.2003)). Even Defendants' *McNeil* case provides that "[s]overeign immunity protects States, not state subdivisions such as counties." *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 994 (6th Cir. 2019) (citation omitted).

Indeed, the Supreme "Court has repeatedly refused to extend sovereign immunity to counties." *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193, 126 S.Ct. 1689, 164 L.Ed.2d 367 (2006). *See also Jinks v. Richland County*, 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."). Thus, 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 New York*, 547 U.S. at 194, 126 S. Ct. 1689, 1693–94.

This "arm of the state" exception is indeed narrow. "[A]n entity that asserts sovereign immunity … bears the burden of demonstrating that it's an 'arm of the state.'" *Cutrer v. Tarrant Cty. Local Workforce Dev. Bd.*, 943 F.3d 265, 270 (5th Cir. 2019), as revised (Nov. 25, 2019). Defendants do not meet this burden. "'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. Planning Servs., Inc.*, 280 F.3d 684, 692 (6th Cir. 2002) (quoting *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999) and citing *Scott v. O'Grady*, 975 F.2d 366 (7th Cir. 1992), *cert. denied*, 508 U.S. 942 (1993); and *Echols v. Parker*, 909 F.2d 795 (5th Cir. 1990)).

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." *Id.* at 693. But that is in stark contrast to the situation here. Under MCL 211.78(m)(8)(h), the county had the choice to opt out and allow the State to foreclose.[18] They chose to be the foreclosing government unit, or "FGU." "Counties may elect to serve as the foreclosing governmental unit;

[18] 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).

otherwise, the state will do so." *Rafaeli, LLC v. Oakland Cty.*, No. 156849, 2020 WL 4037642, at *7 (Mich. July 17, 2020).[19] And as Plaintiff explained in his responses to earlier motions to dismiss, the statute does not require the FGUs to seize equity – they could have chosen to read the statute in a constitutional manner. *See*, *e.g.*, (Pl.'s Resp., ECF No. 28, PageID.637-638.)[20]

If there was any doubt on this issue, the Sixth Circuit has dispelled it. In another case that also sought damages for Michigan counties' tax foreclosure equity seizure, the Sixth Circuit rejected Defendants' analysis, albeit in a slightly different context: "Plaintiffs' action … is not an action against the State of Michigan. Instead,

---

[19] The Sixth Circuit has also articulated a more formalized multifactor test, considering "1. The State's potential liability for a judgment; 2. How state statutes and courts refer to the official; 3. Who appointed the official; 4. Who pays the official; 5. The degree of state control over the official; and 6. Whether the functions involved fell within the traditional purview of state or local government." *Ermold v. Davis*, 936 F.3d 429, 433 (6th Cir. 2019), *cert. denied*, No. 19-926, 2020 WL 5881537 (U.S. Oct. 5, 2020). Here, again, defendants are a quintessential county official and a county itself. The only way they would all within this test is if they were required to seize the equity – they were not, and as discussed above they were not even required to administer the process to begin with. Likewise, in *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) the Sixth Circuit discussed factors considered by Sixth Circuit and Supreme Court have considered in distinguishing between arms of the state and political subdivisions, emphasizing the possibility that the state will be liable for the alleged misconduct. *Id*. at 659 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51, 115 S. Ct. 394, 406, 130 L. Ed. 2d 245 (1994)). Again, that is simply not an issue here.

[20] Defendants cite *dicta* from *Rafaeli* saying that the counties were "required" to administer the policy as they did. *Rafaeli*, 2020 WL 4037642 at *9. (Wash. Defs.' Br., ECF No. 120, PageID.2108.) But the issue was not a focus of that case, and as discussed above, *Rafaeli* recognized that the decision to administer the policy at all was voluntary.

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 v. Van Buren Cty.*, 847 F.3d 812, 821 (6th Cir. 2017).

Second, even if, *arguendo*, Eleventh Amendment immunity could apply here in some sense, it does not apply to takings claims against a county.[21] The Sixth Circuit has found that the Eleventh Amendment does bar federal-court takings claims against the state itself. *See Ladd v. Marchbanks*, 971 F.3d 574, 578–79 (6th Cir. 2020). But 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. Defendants' 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

[21] "The [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. __ (2020) (attached as Exhibit C).

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.")

**B. Defendants' Qualified Immunity Argument Fails.**

Defendants also argue that the treasurers should not be held liable because they are entitled to qualified immunity for their personal capacity claims and that the official capacity claims are duplicative. Their arguments parallel those made by Ogemaw Defendants (ECF No. 22, PageID.407-08) and Saginaw, et al. Defendants (ECF No. 23, Page ID.449-50). For all the reasons that Plaintiff explained in his responses to these defendants' motions to dismiss (ECF No. 27, PageID.534-35), (ECF No. 28, PageID.637-38), and (ECF No. 71, PageID.921), which Plaintiff and the Class readopt here, these arguments fail. At the very least, the issue is premature at the 12(b)(6) stage.

Defendants also argue that Plaintiff cannot pursue individual and official capacity claims under 42 USC § 1983. Their arguments parallel those made by the Ogemaw Defendants (ECF No. 22, PageID.409-12); Saginaw, et al. Defendants (ECF No. 23, Page ID.445-49); and Macomb Defendants (ECF No. 66, PageID.871-72). For all the reasons that Plaintiff explained in his responses to these defendants' motions to dismiss (ECF No. 27, PageID.538-40), (ECF No. 28, PageID.636-38), and (ECF No. 71, PageID.921), which Plaintiff and the Class readopt here, these arguments fail. At the very least, plaintiffs are entitled to plead in the alternative.

Defendants also claim immunity under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). Their arguments parallel those made by Ogemaw Defendants (ECF No. 22, PageID.408-09); Saginaw, et al. Defendants (ECF No. 23, Page ID.450-54); and Macomb Defendants (ECF No. 66, PageID.871-72). For all the reasons that Plaintiff explained in his responses to these motions, (ECF No. 27, PageID.535-38), (ECF No. 28, PageID.632-35), and (ECF No. 71, PageID.921), which Plaintiff and the Class readopt here, these arguments also fail. In short, Defendants had an official policy or custom to administer the illegal policy here, and, again, at the very least the issue is premature at the Rule 12(b)(6) stage.

## CONCLUSION

For all the reasons discussed above and in the earlier briefing, the Court should deny Defendants' Motion.

Date: October 27, 2020

RESPECTFULLY SUBMITTED:

*/s/ E. Powell Miller*

E. Powell Miller (P39487)
Sharon S. Almonrode (P33938)
Christopher D. Kaye (P61918)
Gregory A. Mitchell (P68723)
THE MILLER LAW FIRM PC
950 W University Drive, Ste 300
Rochester, MI 48307
(248) 841-2200
epm@millerlawpc.com
ssa@millerlawpc.com
cdk@millerlawpc.com
gam@millerlawpc.com
**Co-Lead Class Counsel**

OUTSIDE LEGAL COUNSEL PLC
Philip L. Ellison (P74117)
PO Box 107, Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com
**Co-Lead Class Counsel**

Matthew E. Gronda (P73693)
PO Box 70, St. Charles, MI 48655
(989) 249-0350
matthewgronda@gmail.com
**Class Counsel**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 2020 I electronically filed the foregoing document using the Court's electronic filing system, which will notify all counsel of record authorized to receive such filings.

*/s/ E. Powell Miller*
E. Powell Miller
**THE MIILLER LAW FIRM, P.C.**
950 W. University Dr., Ste. 300
Rochester, MI 48307
Tel: (248) 841-2200
epm@millerlawpc.com