STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

RAFAELI L.L.C. and ANDRE OHANESSIAN, Plaintiffs/Appellants,	Supreme Court No. 156849
v.	Court of Appeals No. 330696
OAKLAND COUNTY and ANDREW MEISNER, Defendants/Appellees.	Oakland CC No. 15-147429-CZ

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS IN SUPPORT OF PLAINTIFFS/APPELLANTS

THE UNDERLYING APPEAL INVOLVES A CLAIM THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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STATEMENT OF INTEREST

This amicus brief is submitted by The Buckeye Institute for Public Policy Solutions ("The Buckeye Institute").[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is located directly across from the Ohio Statehouse on Capitol Square in Columbus, where it assists executive and legislative branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by IRC 501(c)(3).

Through its Legal Center, The Buckeye Institute defends constitutional rights, including property rights. This amicus brief furthers The Buckeye Institute's mission of protecting private property from government takings without just

[1] In its Order of November 21, 2018, this Court advised, "[p]ersons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae." Concurrently with the filing of this brief, The Buckeye Institute has filed a motion for leave. In that motion, it advises this Court that all parties have consented to the filing of this brief. The Buckeye Institute states further that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or its counsel made a monetary contribution to the brief's preparation or submission.

compensation consistent with the Takings Clause in the Fifth Amendment to the Constitution of the United States and the Takings Clause in the Michigan Constitution of 1963.

STATEMENT OF THE BASIS FOR JURISDICTION

The Buckeye Institute agrees with the statement of the basis of jurisdiction set forth in Plaintiffs'/Appellants' brief.

STATEMENT OF QUESTIONS PRESENTED

The Buckeye Institute agrees with the statement of questions presented as set forth in Plaintiffs'/Appellants' brief.

STATEMENT OF FACTS

The Buckeye Institute agrees with the statement of facts as set forth in Plaintiffs'/Appellants' brief.

STANDARD OF REVIEW

The Buckeye Institute agrees with the standard of review as set forth in Plaintiffs'/Appellants' brief.

SUMMARY OF THE ARGUMENT

In contrast to nearly every other State, Michigan law provides that, when local governments seize title to tax delinquent properties and sell them, they keep the entirety of the proceeds, not just the amount necessary to secure their claim. As Judge Kethledge noted in his Sixth Circuit dissent, "In some legal precincts that sort of behavior is called theft." *Wayside Church v Van Buren County*, 847 F3d 812, 823 (CA 6 2017) (Kethledge, J., dissenting).

Michigan's law is not just inconsistent with the practice in most other States, it is inconsistent with the general practice with respect to other non-tax liens. Accordingly, it is an outlier. This case presents this Court with an opportunity to end an abusive and unconstitutional practice shared by only a small minority of States.

ARGUMENT

In its Order of November 21, 2018, this Court directed the attention of the parties and amici to address whether, "by retaining proceeds from the sale of tax foreclosed property that exceeded the amount of the tax delinquency," the Oakland County Appellees violated the Takings Clauses in the Constitution of the United States and the Michigan Constitution.

For the reasons set forth in the brief by Plaintiffs/Appellants, the United States Constitution and the Michigan Constitution forbid the taking of the excess proceeds from the state tax sale of real property without just compensation. The Buckeye Institute agrees with the constitutional arguments set forth by Plaintiffs/Appellants, and writes as *amicus curiae* to demonstrate that the proper constitutional outcome also corresponds with sound public policy. The Buckeye Institute will demonstrate that Michigan's practice of allowing municipalities to take windfall profits from tax sales violates the spirit of constitutional prohibitions against exorbitant exactions recently announced in *Timbs v Indiana*, 586 US __; 139 S Ct 682; __ L Ed 2d __ (2019), is inconsistent with sound governmental practices, and is an outlier, both with respect to the practice in other States, and with respect to non-tax liens.

1. Measured against *Timbs*, Oakland County's actions are exorbitant.

In *Timbs*, the Supreme Court held that the Eighth Amendment's ban on excessive fines was incorporated and rendered applicable to civil *in rem* forfeitures by the States. The Court reasoned that the ban was deeply rooted in Anglo-American history, with grounding in the Magna Carta that carried through to the

colonial period and, from there, to the Fourteenth Amendment. It observed that the provision in the Magna Carta limiting amercements (payments to the Crown by those at the King's mercy for wrongdoing) "required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood." *Id*. at 688 (brackets in *Timbs*) (quoting *Browning-Ferris Industries of Vt*, *Inc v Kelco Disposal*, *Inc*, 492 US 257, 271; 109 S Ct 2909; 106 L Ed 2d 219 (1989)).

Timbs involved a civil *in rem* forfeiture. Timbs pleaded guilty to dealing in a controlled substance and conspiracy to commit theft. He was sentenced to a year of home detention and five years of supervised probation, and was assessed $1203 in fees and costs. The State seized and subsequently sought civil forfeiture of Timbs' Land Rover SUV on the ground that it had been used to transport heroin. Timbs, though, had purchased the SUV with insurance proceeds he received after his father's death, not the proceeds of criminal activity. In addition, the purchase cost of the SUV ($42,000) was more than four times the maximum fine of $10,000. *Id*. at 686.

The effect of the Supreme Court's decision is to send the case back to the Indiana courts, where the trial court and the Indiana Court of Appeals have already held the forfeiture to be excessive.

Granted, *Timbs* applies to the excessive fines provision of the Eighth Amendment to the United States Constitution,[2] and Takings Clause claims are grounded in the Fifth Amendment. Nonetheless, both provisions set a limit to the

[2] See also Const 1963, art 10, § 2.

government's authority to make claims of legal right against private property. Put differently, they are each species of the same genus. What is excessive under *Timbs* and the Eighth Amendment is certainly unjust. Accordingly, *Timbs* provides an analytical lens to view and sheds light on the constitutionality of the Fifth Amendment claims in this case, in which the question of whether the state has met the requirement of the Fifth Amendment turns in no small measure on the *proportionality* of the property taken to the debt owed.

Without endorsing the metric in *Timbs*, The Buckeye Institute observes that, if the measure of excessive is 4:1, Oakland County's "windfall" with respect to both Rafaeli and Ohanessian is far in excess. Likewise, The Buckeye Institute notes that, even if Rafaeli has other rental properties, taking one of them certainly puts a crimp in his ability to earn a living.

Bennis v Michigan, 516 US 442; 116 S Ct 994; 134 L Ed 2d 68 (1996), is not to the contrary. *Bennis* involved the forfeiture of an automobile used in a crime, just like *Timbs*. In her concurring opinion, Justice Ginsburg prefigured her *Timbs* opinion, noting that because the underlying action was equitable in nature, "[T]he State's Supreme Court stands ready to police exorbitant applications of the statute." 516 US at 457. The forfeiture of Bennis's automobile did not produce an "exorbitant" result "for two practical reasons: the Bennises have another automobile, and the age and value of the forfeited car (an 11-year-old Pontiac purchased by John and Tina Bennis for $600) left practically nothing to divide after subtraction of costs." *Id.* at 457-458 (internal quotations and citations omitted).

This case involves far more than "practically nothing."

2. Public policy is not on Oakland County's side.

A. The practice of taking windfalls from tax foreclosures is inconsistent with sound budgeting and appropriations of public funds.

Michigan's practice raises concerns about the way in which Michigan counties fund their operations. As the Rafaeli Appellants note, the County pocketed $100,215 in excess of the tax debts and related charges from the sale of Petitioners' properties. Plf. Aplnt. Br. on App. at 3-4. Michigan law provides that "[a]ll or a portion of any remaining balance . . . may subsequently be transferred into the general fund of the county by the board of commissioners." MCL 211.78m(8)(h).

Ordinarily, the county would agree on a budget that is based on its anticipated tax and fee revenues. It would then apply those revenues to the budgeted expenses. When it takes a windfall, as Oakland County did in the case of Rafaeli and Ohanessian, those ordinary processes are by-passed, and oversight by the public suffers.

Should Michigan's outlier practice be allowed to be enforced going forward, it could lead to more widespread use and abuse. Should this Court allow it, other cash-strapped entities are likely to see the practice as an attractive source of potential revenue—one that offers large sums of money with little accountability. The political process might—or might not—provide a potential check on this sort of legislative activity, but this Court should not rely on political checks as a safety net for clear constitutional violations.

B. Tax lien foreclosures should not generate windfalls.

Windfalls are inconsistent with the fundamental nature of tax lien foreclosures. As the Supreme Court of Texas noted, "Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit. The only reason they hold this property at all is 'pursuant to' their powers of foreclosure as a taxing entity." *Syntax, Inc v Hall*, 899 SW 2d 189, 191 (Tex 1995). The Texas Supreme Court held that the former owner had the right to excess proceeds, pointing out that the taxing entity "is made whole by its collection of delinquent taxes, costs, interest and penalties from the proceeds of the sale." *Id*. at 192; Cf. *Harmelin v Michigan*, 501 US 957, 979, n 9; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (opinion of Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

While the court was construing Texas law, its observations apply to all taxing entities. Oakland County should not be in the business of buying and selling real estate for profit. Moreover, even if the state law gives the excess proceeds to the government, as Michigan law does, Oakland County was made whole by the collection of delinquent taxes, fees, interest, and penalties. It cannot deny that it has received a windfall.

3. Michigan's rule is the minority rule.

Michigan law gives the excess proceeds remaining after back taxes and other charges have been paid to the general fund of the county or to the foreclosing governmental body. Only a handful of other States do that. Further, other States provide for a redemption period in which the property owner can recover the

property. Even if there are opportunities to cure, as Defendants/Appellees suggest, the point remains that taxpayers in Oakland and Van Buren Counties have not gotten that message.

Michigan appears to be joined by five other States: Arizona, North Dakota, Massachusetts, Minnesota, and Montana. In pertinent part, North Dakota law provides, "If the property was sold for an amount sufficient to cover all outstanding taxes and special assessments, tax receipts must be written for all such years, and any remaining amount must be *credited to the general fund of the county*." ND Cent Code 57-28-20.1 (emphasis added). The laws of Arizona, Minnesota and Montana are to similar effect. See ARS 42-18303C; Minn Stat 280-29; Mont Code 7-6-4414(2), 15-17-322. Finally, in *Kelly v City of Boston*, 348 Mass 385; 204 NE 2d 123 (1965), the court held that, under Massachusetts law, any surplus went to the foreclosing municipality.

In contrast to the laws of Michigan and those other states, Virginia law expressly states, "The former owner, his heirs or assigns of any real estate sold under this article shall be entitled to the surplus received from such sale in excess of the taxes, penalties, interest, reasonable attorneys' fees, costs and any liens chargeable thereon." Va Code Ann 58.1-3967.

The laws of 22 other States (Alabama, Alaska, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Missouri, Nevada, Ohio, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming) are to the same effect in giving the former owner or

redeeming party a chance to claim the excess proceeds.[3] Those former owners may have to submit a claim within a specified time after the sale or notice, but they are still better off than they would be under a scheme that gives the taxing jurisdiction any or all of the excess proceeds.

4. Michigan's practice of taking more than it is owed is inconsistent with the practice for ordinary non-tax liens in the private sector.

In the private sector, lien claimants do not get a windfall. Rather, they are reimbursed for their contributions and expenses, and the owner of the property at issue has an opportunity to claim any residue. Public bodies, like Oakland County, should be adequately compensated just like all other lienholders, but not enriched beyond the debt, reasonable interest, and expenses.

Michigan provides for a construction lien claimant to file a foreclosure suit. Once the foreclosure suit is initiated, the court determines the priorities of the claims and can order sale of the property. See MCL 570.1118(2), MCL 570.1119 and MCL 570.1121(1). However, "[a]fter the making of all payments directed by the court, any surplus from the proceeds of the sale of property on the foreclosure of a construction lien under this act shall be paid over to the owner, co-owner, lessee, co-lessee, or such other person as may be entitled to the surplus." MCL 570.1121(4). Likewise, under the Michigan Garage Keeper's Act, a garage keeper who furnishes

[3] Ala Code 40-10-28(a)(1); Alaska Stat 29-45-480(b); Ark Code 26-37-209; Conn Gen Stat 12-157(h); Del Code Tit 9, § 879; Fla Stat 197.522, 197.582; Ga Code Ann 48-4-5(a); Idaho Code 31-608(2)(b); Kan Stat 79-2803; Ky Rev Stat 426.500; Me Rev Stat Tit 36, § 949; Mo Rev Stat 140.340; Nev Rev Stat 361.610.5; Ohio Rev Code 5723.11; SC Code 12-51-130; SDCL 10-22-27; Tenn Code 67-5-2702(c); Tex Tax Code 34.04(c); Wash Rev Code 84.64.080(10); WV Code 11A-3-65; Wis Stat 75-36(4) (homesteads); Wyo Stat 39-13-108(d)(4).

labor or material for storing, repairing, maintaining, keeping, or otherwise supplying automobiles or other vehicles can obtain a "garage keeper's lien," which allows the garage keeper to sell the vehicle serviced at a public sale. See MCL 570.305. Once the vehicle is sold and the garage keeper has recouped the amounts permitted by MCL 570.304, the act makes clear that the proceeds of the sale return to "[t]he owner or owners of the vehicle as described in subsection (2)." MCL 570.306(1)(c).

The same holds true in other states. In Alabama, for example, private lien claimants must be content with recovering the value of their input, interest, and, depending on their contract, a reasonable attorney's fee. Mechanics and materialmen working on a building or improvement for land can claim a lien for the "unpaid balance due the contractor by the owner or proprietor," or they can claim a full balance lien if they give notice to the owner before furnishing any labor or materials, unless the owner objects. See Ala Code 35-11-210 (2014). A condominium association can claim a lien for "any unpaid assessment . . . , together with interest thereon and, if authorized by the declaration or bylaws, reasonable attorney's fees." Ala Code 35-8-17; see also Ala Code 35-8A-316(a) ("The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due.").

Likewise, a number of craftsmen and service providers, who have a possessory lien on the property they work on or have in their possession, are to hold or pay any balance remaining after their charge to the owner. They include:

Hotels find themselves in possession of goods and baggage of their guests and have the right to sell them after a specified period of time to recover the amount owed. See, e.g., Ohio Rev Code 4721.04, 4721.06 (establishing a lien, allowing owner to claim the residue after sale within three years); Ala Code 35-11-131 ("[T]he balance, if any there be, shall be paid over to the owner on demand."); Mont Code 71-3-1403 (owner given one year to claim balance); Miss Code 75-73-17 (2017).

Jewelers, see, e.g., Ga Code Ann 44-14-433 (residue held by county for one year with opportunity for owner to claim); Ala Code 35-11-151 ("[T]he balance, if any, to be held for the debtor.").

Laundries, see, e.g., Ga Code Ann 44-14-455 ("[T]he residue, if any, shall be paid on demand to the owner of the goods sold."); Ala Code 35-11-171 ("[T]he balance, if any to be held for the debtor.").

Equipment service or repair, see, e.g., Ga Code Ann 44-14-465 ("[T]he residue, if any, shall be paid on demand to the owner of the equipment sold."); ORS 311.644(5) (For real property machinery sold for taxes, "If the amount realized on the sale is in excess of the amount of taxes, interest, penalties and costs due on the property, the excess shall be repaid to the person charged with the taxes, interest, penalties and costs.").

Livery stable keepers, see, e.g., Ala Code 35-11-191 ("[T]he balance, if any there be, he shall pay over to the owner.").

Sawmill owners, see, e.g., Ala Code 35-11-251(a) ("[T]he residue, if any there be, he shall pay over to the owner of such lumber.").

Cotton gin and other facility owners, see Ala Code 35-11-291(a) ("[T]he residue, if there be any, shall be paid to the owner" of the commodity sold.).

If cotton gin owners, livery stable keepers, and others in their position can be happy with recovering their costs, so too should be jurisdictions empowered to tax real property.

CONCLUSION

For the foregoing reasons, and those stated by Plaintiffs/Appellants, amicus respectfully requests that this Court reverse the decision of the Michigan Court of Appeals.

Respectfully submitted,

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Date: April 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2019, I electronically filed the foregoing papers with the Clerk of the Court using the TrueFiling e-filing system, which will send notification of such filing and e-serve the document upon all attorneys of record.

By: /s/ Thomas J. Rheaume, Jr.

Date: April 24, 2019