STATE OF MICHIGAN
IN THE SUPREME COURT

RAFAELI, LLC, and ANDRE OHANESSIAN,

Plaintiffs/Appellants,

v.

OAKLAND COUNTY and
ANDREW MEISNER,

Defendants/Appellees.
_____/

Supreme Court No. 156849

Court of Appeals No. 330696

Oakland County Circuit Court
No. 15-147429-CZ

Hon. Langford-Morris

APPELLANTS RAFAELI, LLC, AND ANDRE OHANESSIAN'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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

LAWRENCE G. SALZMAN
Cal. Bar No. 224727
Pro hac vice
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Phone: (916) 419-7111
Fax: (916) 419-7747
Email: lsalzman@pacificlegal.org

CHRISTINA M. MARTIN
Fla. Bar No. 100760
Pro hac vice
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Phone: (561) 691-5000
Fax: (561) 691-5006
Email: cmartin@pacificlegal.org

ANDREW F. FINK III (P74182)
Fink & Fink, PLLC
320 N. Main St., Suite 300
Ann Arbor, MI 48104
Phone: (734) 994-1077
Fax: (734) 994-3737
Email: andrew.fink@finkandfink.com

AARON D. COX (P69346)
Of Counsel
The Law Offices of
Aaron D. Cox, PLLC
23380 Goddard Rd.
Taylor, MI 48180
Phone: (734) 287-3664
Fax: (734) 287-1277
Email: aaron@aaroncoxlaw.com

MARK K. WASVARY (P51575)
Of Counsel
Mark K. Wasvary, P.C.
2401 W. Big Beaver Rd., Suite 100
Troy, MI 48084
Phone: (248) 649-5667
Fax: (248) 649-5668
Email: mark@wasvarylaw.com

Counsel for Plaintiffs/Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

State Statutes

Historical Statute

Rules

Other Authorities

Constitutions

INTRODUCTION AND SUMMARY OF ARGUMENT

Uri Rafaeli, an octogenarian and mostly retired engineer, bought the Southfield, Michigan, home at the center of this controversy to create a source of retirement income. He hired a professional to help form a business—Rafaeli, LLC—and purchased the home in its name for $60,000.[1] Mr. Rafaeli accidentally underpaid property taxes on the house by $8.41. Pursuant to Michigan's General Property Tax Act (Act), Oakland County and Andrew Meisner (County) took Rafaeli's home to collect on the small debt. The County also took Andre Ohanessian's 2.7 acres of valuable land in Orchard Village to collect a $6,000 debt. This was a devastating blow to both former owners whose equity was taken by the County as a massive windfall.

The takings clauses in the Michigan and U.S. Constitutions require that the County pay just compensation for this equity. The County attempts to avoid a plain application of takings law by ignoring some cases and misinterpreting others. *See* County Br. 14–23. The County argues that Rafaeli and Ohanessian have no property rights to their equity merely because the Act does not expressly protect it. *Id.* at 18, 23–24. But they rely on rights that pre-date the Act—rights recognized by common law, constitutional law, and other sources, Rafaeli Br. 10–13, and the state cannot define those rights out of existence. *Id.* at 17–19.

The County argues that the constitutional duty to pay just compensation does not apply in this case because the property was forfeited, "voluntarily . . . relinquished," or taken as a tax. County Br. 4, 14. But the County lacks any lawful source of authority to keep more than it was owed. The government's desire to eradicate blight (not an issue in this case) and avoid raising

[1] The County incorrectly insinuates that Mr. Rafaeli is not a member of Rafaeli, LLC. County Br. 6. But he is able to submit records showing he has been its sole member since January 26, 2011, before the purchase of the house. Michigan law expressly allows LLCs to be organized by non-members, as Manny Klier was hired by Mr. Rafaeli to do. *See* MCL 450.4202.

taxes do not "warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The County's taking of Rafaeli and Ohanessian's equity fails the Michigan Constitution, the U.S. Constitution, and is grossly unjust. This Court should reverse.

ARGUMENT

I

BY TAKING MORE THAN IT IS OWED, THE COUNTY VIOLATES THE TAKINGS CLAUSE

A. The County Took Protected Property Without Just Compensation

The County argues that Rafaeli and Ohanessian have no property rights to their equity because the General Property Tax Act does not expressly protect it. County Br. 18, 23–24. But the state cannot define property rights out of existence, Rafaeli Br. 17–19, and Rafaeli and Ohanessian rely on rights that pre-date the Act. Common law recognized a tax-debtor's equity as protected property. Sir William Blackstone wrote that whenever officials took and sold property to pay delinquent taxes, they did so subject to "an implied contract in law . . . to render back" profits that exceeded the debt. 2 William Blackstone, *Commentaries on The Laws of England* *452; *see also Timbs v. Indiana*, 139 S. Ct. 682, 695 (2019) (looking to Blackstone to determine traditional rights). Consistent with that principle, the British land tax required "surplus" proceeds from the sale of delinquent properties to be refunded to the former owner. *Martin v. Snowden*, 59 Va. 100, 137 (1868), *sub nom. Bennett v. Hunte*r, 76 U.S. 326 (1869). Similarly, Magna Carta required less valuable movable goods to be seized (instead of land) when sufficient to satisfy a tax debt, *Martin*, 59 Va. at 136, and when collecting from a deceased person's estate, the "value of the goods seized had to approximate the value of the debt." Vincent R. Johnson, *The Ancient Magna Carta and the*

Modern Rule of Law: 1215 to 2015, 47 St. Mary's L.J. 1, 47, 50 (2015).

Early American law built on English law to protect tax debtors' equity. *Martin*, 59 Va. at 137; *Timbs*, 139 S. Ct. at 695 (colonists had rights of Englishmen). For over 100 years after the founding, the states and courts were in accord in protecting that equity. *See, e.g.*, *id.*; Thomas M. Cooley, *A Treatise on the Law of Taxation* 343 (1876) (noting all states protected former owner's equity); *McDuffee v. Collins*, 23 So. 45, 46 (Ala. 1898) (tax collector must follow "well-known general rule of law" by paying proceeds in order of priority); Rafaeli Br. 10–16. Michigan likewise protected equity when it became a state and for decades thereafter. *See People ex rel. Seaman v. Hammond*, 1 Doug. 276, 280–81 (Mich. 1844); 1915 CL ch. 83, § 49 (surplus to former owner).

To deny the roots of this traditional right, the County cites only the district court's decision in *Wayside Church v. County of Van Buren*, No. 1:14-cv-1274, 2015 WL 13308900 (W.D. Mich. Nov. 9, 2015), *rev'd on other grounds*, 847 F.3d 812 (6th Cir. 2017), which stated without analysis that the right did not exist. County Br. 17–18. But as the County acknowledges, that same court recently granted a Rule 60(b)(6) motion to reopen the case, allowing for reconsideration of the matter. *Id.* at 18, n.1; Fed. R. Civ. P. 60(b). Although such motions are granted only under "extraordinary circumstances," the court held that the claim qualified because of the Act's "potential for inequity." *Wayside*, No. 14-01274, ECF No. 64, 4–5 (W.D. Mich. Mar. 26, 2019). The court relied partly on Judge Kethledge "likening the tax collection system to 'theft' and viewing it as a 'gross injustice.'" *Id*. at 5 (quoting *Wayside*, 847 F.3d at 823).

The County also argues that Rafaeli and Ohanessian have no entitlement to the surplus profits from the auction because the Act provides no means of securing the surplus after the time to pay the underlying debt (i.e., the redemption right) has expired. County Br. 18–19. That logic does not defeat a takings claim, but merely establishes the date of the taking as April 1, 2014 (when

the redemption right ended)—34 days after foreclosure. App. 54a. Common law avoided uncompensated takings of equity when officials took property to pay a debt by requiring officials to sell it and refund the surplus profits. In evading this traditional protection, the County has violated the Michigan and federal takings clauses.

B. *Nelson* Is Inapposite Because Michigan Does Not Provide an Opportunity To Claim the Surplus Proceeds From a Sale of the Property

Unable to refute the deep roots of the property right at issue, the County instead hinges its legal position on the U.S. Supreme Court's decision in *Nelson v. City of New York*, a *due process case* in which the takings claim was raised only in the reply brief. 352 U.S. 103, 109 (1956). *Nelson* rejected the takings claim because the tax foreclosure statute provided owners a means of recovering the surplus profits. *Id.* The Court relied on *City of N.Y. v. Chapman Docks Co.*, 1 A.D.2d 895 (N.Y. App. Div. 1956)—a case in which the city argued that it gained "absolute ownership" of the tax foreclosure under state law. The five-judge panel unanimously refused to interpret New York's statute that way, noting it would deprive the owner "of an equitable right to surplus moneys." *Id.* at 896. Thus the Supreme Court concluded that New York entitled delinquent owners to the surplus profits; Mr. Nelson lost because he failed to claim it. *See Nelson*, 352 U.S. at 110.

The County claims *Nelson* is indistinguishable from this case, because Michigan property owners have an opportunity to save their equity by paying the full debt and thereby preventing foreclosure. County Br. 19. But the three-year grace period to pay a debt and prevent the foreclosure of property is a *process* protection; it is not just compensation. *See* U.S. Const. amend. V ("nor shall private property be taken . . . without just compensation"); Mich. Const. 1963, art. X, § 2. In *Nelson*, New York gave a four-year grace period, yet that is not why the takings claim was denied. *See* 352 U.S. at 110. What thwarted the takings claim was the "absence

of timely action . . . to recover any surplus." *Id.* Michigan provides no opportunity to claim the surplus profits. *See* MCL 211.78m(8). Therefore the County's citation to *Nelson* is unavailing.

C. The Balance of Takings Law Supports Rafaeli and Ohanessian's Claims

The state supreme courts of Vermont, New Hampshire, and Mississippi, and multiple federal district courts have recognized that confiscations like the one at issue in this case violate the constitutional mandate that government pay just compensation. Rafaeli Br. 14–15. The state supreme courts of Alabama, Indiana, Minnesota, North Dakota, and Virginia have noted either that debtors retain a common law right to their equity, or that property tax laws that attempt to redefine who owns equity would in some way violate the Constitution. *Id.* at 15. The U.S. Supreme Court and the supreme courts of Texas and Alaska have refused to interpret property tax delinquency as causing a forfeiture of equity, partly because it would be unjust. *See id.* at 15–16. The County argues that after *Nelson*, courts have "consistently" rejected takings claims for surplus equity due from tax sales. County Br. 1, 14. The County's conclusion is too sweeping and mistakes the meaning of several of the cases it claims on its side.

The County claims support from *Kelly v. City of Boston*, 204 N.E.2d 123, 125 (Mass. 1965), and *Oosterwyk v. Milwaukee Cty.*, 143 N.W.2d 497, 499 (Wis. 1966), although neither case involved takings claims, nor did they discuss the aforementioned authorities demonstrating a historically based right to the surplus profits. The County also cites *Booty v. State*, 149 S.W.2d 216, 217 (Tex. Ct. App. 1941), but that was ultimately disapproved of by the Texas Supreme Court in *Syntax, Inc. v. Hall*, 899 S.W.2d 189 (Tex. 1995). Similarly, the County claims support from *Spurgias v. Morrissette*, 249 A.2d 685, 687 (N.H. 1969), even though it was "distinguishable on its facts [and] did not address the takings issue." *Thomas Tool Servs., Inc. v. Town of Croydon*, 761 A.2d 439, 441–42 (N.H. 2000). When the New Hampshire Supreme Court later heard the

takings claim in *Thomas Tool*, it held that government violated the state constitution's takings clause by keeping more than the taxes, penalties, interest, and costs. *Id*.

The County disputes the relevance of *Thomas Tool*, claiming (without support) that New Hampshire has an "unduly-harsh-penalty theory" undergirding its takings clause. County Br. 21. But New Hampshire's takings clause is similar to the federal Takings Clause. *Hill-Grant Living Tr. v. Kearsarge Lighting Precinct*, 986 A.2d 662, 665–70 (N.H. 2009). New Hampshire's Supreme Court noted the unfairness of the tax law just as courts have commented on the injustice caused by Michigan's Act. *See* Rafaeli Br. 18. Moreover, fairness and justice *are* the core principles of the federal Takings Clause. *See id.* at 18–19.

The County similarly fails to distinguish the property tax statute at issue in *Bogie v. Town of Barnet*, 270 A.2d 898 (Vt. 1970), from the one at hand. County Br. 21. The Vermont statute required the tax collector to sell "only so much of the land as is necessary to pay taxes and costs." *Bogie*, 270 A.2d at 900-01. But the town placed the only bid for the whole property. At that point, the statute recognized the town as holding absolute title, which it could hold or sell as it desired. *Id*. at 899-900. Nevertheless, because the purpose of the statute is collecting taxes, not "operat[ing] a real estate business for profit," the Vermont Supreme Court held that the town took title subject to a fiduciary responsibility to the former owner to re-sell it and refund the surplus proceeds. *Id.* Keeping more would "'take his property for public use without just compensation'" and violate the state's takings clause. *Id.* (quoting *United States v. Lawton*, 110 U.S. 146, 150 (1884)).

The County also downplays *Coleman through Bunn v. District of Columbia*—a class action seeking just compensation for homes taken to pay smaller tax debts. County Br. 21. Like the County argues here, the government in that case argued that *Nelson* barred the takings claims and the property owners *forfeited* their rights. *Coleman*, 70 F. Supp. 3d 58, 68, 77 (D.D.C. 2014). The

court held *Nelson* "expressly reserved" the takings question when state law offers no opportunity to claim sale profits. *Id.* at 79. Later, the government moved for judgment on the pleadings, claiming no common law sources protected the equity. The court denied that motion because plaintiffs "identified sources of law" other than the tax statute that treated equity as protected property. *Coleman*, No. 13-1456, 2016 WL 10721865, at *3 (D.D.C. June 11, 2016).

Perhaps most glaringly, the County ignores takings precedents outside the property tax context. These takings cases make clear that the Michigan and U.S. takings clauses protect property interests indistinguishable from the equity at issue in this case, including money, land, and liens. Rafaeli Br. 10–13. And Michigan's Takings Clause offers *greater* protection than the federal counterpart and thus this Court has no reason to limit itself to only weighing decisions that interpret the federal Takings Clause. *Id.* at 19–21. The County "may not sidestep the Takings Clause by disavowing traditional property interests," or by otherwise redefining property rights. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998); Rafaeli Br. 17–18.

II

THE TAKING IN THIS CASE WAS NEITHER A FORFEITURE, NOR VOLUNTARY, NOR A TAX

Legislatively declaring a taking a "forfeiture" does not make it one. The County offers no rebuttal to Appellants' argument that forfeiture, as it was approved in *Bennis v. Michigan*, 516 U.S. 442 (1996), applies only to property involved in crime. *Compare* County Br. 26 *with* Rafaeli Br. 21–26. When presented with similar cases, other courts have refused arguments that forfeiture law applied. *E.g.*, *Bennett*, 76 U.S. at 334–35 (statute did not impose absolute "forfeiture" because "the general principles of the law of forfeiture seem to be inconsistent with such a transfer"); *Martin*, 59 Va. at 142–43; *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981).

The County also argues that the taking was really "voluntar[y]," because Rafaeli and Ohanessian could have avoided it by paying the debt. County Br. 4. According to the County, because they bought the property subject to the requirements of the Act, they cannot now challenge the Act as causing a taking. *Id.* at 25. But a takings claim is not extinguished merely because an owner had "notice" that his property was subject to regulation that could adversely affect his interests. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001). Although notice can be relevant to *regulatory* takings claims (because it relates to investment-backed expectations), it has *no* relevance to a physical takings case like this one. *Id.*; *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2425–428 (2015). The Supreme Court has refused similar arguments in other contexts. *E.g.*, *id.* at 2430 (rejecting government argument that raisin growers "voluntarily" agree to taking because they could avoid it by "'plant[ing] different crops,' or 'sell[ing] their raisin[s]'" for other use).

The County also raises a new argument that the taking of home equity is merely "tax collection," which cannot be a taking. County Br. 14. But the County did not tax Rafaeli and Ohanessian when it took title and confiscated their equity. Nothing about the taking of the equity resembles a tax. Rafaeli Br. 20 n.8. Michigan law limits the amount of ad valorem taxes that the treasurer may impose. MCL 211.39. The Act also provides the exact amount of interest, penalties, and fees that an assessor may add. MCL 211.43a, 211.44, 211.78g. The assessor lacks any authority to increase the amount owed to equal the value of the property foreclosed upon. *See, e.g.*, Mich. Const. 1963, art. IX, § 3 (requiring uniform, proportional taxes). The right to collect property taxes "does not relieve the State of its constitutional obligation." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983); *Thomas Tool*, 761 A.2d at 441–42 ("the taxing power [is] limited as to how [it] adversely affect[s]" property rights); *Nat'l Fed'n of Indep. Bus. v. Sebelius*,

132 S. Ct. 2566, 2583 (2012) (government cannot escape constitutional protections "by labeling a severe financial punishment a 'tax'").

III

JUSTICE REQUIRES THE PROTECTION OF EQUITY

The County claims the Act is "good policy" that allows it to address blight, and warns that enforcing the takings clauses here would "conscript[ ] the government as a realtor" and "privatiz[e] gains" and "socializ[e] losses." County Br. 2, 22–23. First, no rational property owner wants the County as its realtor. Not only does the Act impose the costs of sale on the property, MCL 211.78a, 211.78g(3), but foreclosures sell for less than traditional sales.[2] The County sold Ohanessian's vacant land for $82,000; the buyer listed it for resale soon after at $349,000. App. 30a.

Second, the County's feared "losses" arise from properties that fail to sell for enough to satisfy the tax debt. But such low auction prices suggest that governments are overassessing property or failing to fairly auction it. And in fact, sometimes officials do discourage competitive bidding to serve other public purposes. *See* Detroit Wants to Know With Steve Hood, Oct. 4, 2015, https://youtu.be/hxpN4t1C0HA (at 4:30–5:10 tax official explains how and why Wayne County at times ensures low sales prices). Ultimately, the County is shifting costs that belong to the public onto Rafaeli and Ohanessian by taking their equity to fund other foreclosures and the general budget. *See* MCL 211.78m(8)(a)–(*l*). This violates the Takings Clause which "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49

[2] Daniel Indiviglio, *Chart of the Day: Foreclosure Sale Discount by State*, The Atlantic, May 26, 2011, https://www.theatlantic.com/business/archive/2011/05/chart-of-the-day-foreclosure-sale-discount-by-state/239517/.

(1960). The County's related fears that enforcing the Takings Clause will force it to raise taxes or ignore blight are less compelling than predictions rejected by the Supreme Court. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 36–37 (2012) ("Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest.").

Finally, the County insists that Rafaeli and Ohanessian's failures hurt the general welfare, and they deserve to lose their equity because they could have prevented it. County Br. 1, 27. But people often make small mistakes—like underpaying a debt by $8 or failing to fill out the right change of address form. Other owners are incapacitated or underestimate the trouble they will encounter finding employment, getting a loan, or selling property. These failures do not justify the theft of a home's entire equity, any more than paying a parking ticket late justifies the theft of your car, or failing to shovel snow off the sidewalk justifies the taking of your land. The Constitution not only protects the perfect and the diligent; it protects the imperfect and unfortunate alike.

The County violated the takings clauses by taking more than it is owed from Rafaeli and Ohanessian. But if this Court disagrees, it should, in the interest of justice, allow an opportunity to add an Excessive Fines or unjust enrichment claim to their complaint—an opportunity denied by the trial court as futile and the Court of Appeals as inadequately briefed. *See People v. Snow*, 386 Mich. 586, 591 (1972) (allowing abandoned claims to be raised to prevent manifest injustice); MCR 2.118(A) (leave to amend "shall be freely given when justice so requires"). This case "calls out for relief," App. 68a, and this Court has authority to grant it.

CONCLUSION

Rafaeli and Ohanessian respectfully request that this Court reverse the lower court's decision and remand for determination of just compensation.

Dated: May 8, 2019.

Respectfully submitted,

/s/ Christina M. Martin

LAWRENCE G. SALZMAN
Cal. Bar No. 224727
Pro Hac Vice
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Phone: (916) 419-7111
Fax: (916) 419-7747
Email: lsalzman@pacificlegal.org

CHRISTINA M. MARTIN
Fla. Bar No. 0100760
Pro Hac Vice
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Phone: (561) 691-5000
Fax: (561) 691-5006
Email: cmartin@pacificlegal.org

ANDREW F. FINK III (P74182)
Fink & Fink, PLLC
320 N. Main St., Suite 300
Ann Arbor, MI 48104
Phone: (734) 994-1077
Fax: (734) 994-3737
Email: andrew.fink@finkandfink.com

MARK K. WASVARY (P51575)
Mark K. Wasvary, P.C.
2401 W. Big Beaver Rd., Suite 100
Troy, MI 48084
Phone: (248) 649-5667
Fax: (248) 649-5668
Email: mark@wasvarylaw.com

AARON D. COX (P69346)
The Law Offices of
Aaron D. Cox, PLLC
23380 Goddard Rd.
Taylor, MI 48180
Phone: (734) 287-3664
Fax: (734) 287-1277
Email: aaron@aaroncoxlaw.com

Counsel for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2019, I electronically filed the foregoing Reply brief, which was served by the TrueFiling system of the Michigan Supreme Court.

/s/ Christina M. Martin
CHRISTINA M. MARTIN