STATE OF MICHIGAN
IN THE SUPREME COURT

RAFAELI, L.L.C., 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 SUPPLEMENTAL BRIEF ON APPEAL

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

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

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

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(s)

Cases

Constitutions

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

To collect $8.41 in property taxes, plus penalties, interest and fees, Oakland County and Andrew Meisner (collectively "County") confiscated Uri Rafaeli's Southfield house, which he owned through his small business, Rafaeli, LLC. App. 54a, 68a at 2 n.2. The County sold it for $24,500 and kept all the profits. App. 54a. The County also took Andre Ohanessian's land to collect a $6,000 debt, sold it for $82,000 and kept all the profits. App. 29a-30a, ¶ 70. By taking more than owed, the County effected an unconstitutional taking of Rafaeli and Ohanessian's private equity that violated the Fifth Amendment's Takings Clause of the United States Constitution, and the Takings Clause of the Michigan Constitution.

This Court heard oral argument on November 7, 2019. On November 27, 2019, the Court granted the County's motion for supplemental briefing addressing three issues discussed during oral argument: (1) whether Oakland County's treasurer (Meisner) had discretion to provide post-foreclosure relief to Rafaeli and Ohanessian; (2) whether an unjust enrichment claim under *Dean v. Michigan Dep't of Nat. Res.*, 399 Mich. 84, 247 N.W.2d 876 (1976), could provide relief and whether that claim was abandoned in this case; and (3) whether the County's actions violate the Michigan Constitution's prohibition on takings for transfer to a private entity for economic development or enhancement of tax revenues.

The Court may grant Rafaeli and Ohanessian just compensation without answering these questions. Whether the treasurer had discretion to provide relief to Rafaeli and Ohanessian after foreclosure is irrelevant to the merits of their takings claims. Their claims arose when the County took their property without just compensation and extinguished their equity interest in it. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2170, 204 L. Ed. 2d 558 (2019). Similarly, if this Court provides a complete relief for the taking, it need not decide whether a theory of unjust

enrichment could provide a remedy to Rafaeli and Ohanessian. But if the constitutions fail to provide relief, then an unjust enrichment claim should, because after collecting what it was owed, the County retained a $24,215 from the sale of Rafaeli's house and $76,000 from the sale of Ohanessian's land that in justice and equity belong to Rafaeli and Ohanessian respectively. *See Wright v. Genesee Cty.*, 504 Mich. 410, 418, 934 N.W.2d 805, 809 (2019).

The Takings Clause "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 (1960). To benefit the County's budget, the County has confiscated home and land equity from Rafaeli and Ohanessian. The takings clauses of the federal and Michigan constitutions require payment for what the County has taken.

I. The County Had Discretion to Collect the Tax Debts Without Effecting a Taking

The County argues that its treasurer lacked discretion to provide post-foreclosure relief to Rafaeli or Ohanessian. County Mot. at ¶ 1. Whether this is true is irrelevant to their takings claims. The taking (and their right to go to court to enforce their constitutional right to just compensation) arose at the time the County took their private property without just compensation, regardless of whether the County could later provide a remedy other than just compensation. *See, e.g., Knick*, 139 S. Ct. at 2170; Michigan Const. 1963, art. X, § 2 (compensation must "first" be paid before the government may take property). Even if the County would have later remedied the taking, that would not transform the taking into a lawful action. *Knick*, 139 S. Ct. at 2172. "A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. . . . A bank robber might give the loot back, but he still robbed the bank." *Id.*

The treasurer's contention that he lacked discretion to provide a post-foreclosure remedy to Rafaeli or Ohanessian is also incorrect. Media reports demonstrate that other treasurers frequently exercise discretion to provide relief well after the County foreclosed. Micah Walker, *Detroit man pays tax bill for woman about to lose her home to foreclosure*, Detroit Free Press, Aug. 31, 2019 (treasurer allows return of property after foreclosure, just days before auction); Christine MacDonald, *Westland couple to keep home after tax foreclosure fight*, The Detroit News, Apr. 29, 2016; Nancy Kaffer, *Wayne County treasurer has power to hand-pick foreclosures*, Detroit Free Press, Sept. 5, 2019. Moreover, the General Property Tax Act gives the County a choice to abstain from any takings. *See* MCL 211.78(3)-(6) (authorizing the County to instead elect for the state to handle foreclosures). Regardless of what the property tax statute mandates, local officials owe a higher duty to follow the federal and Michigan constitutions. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S. Ct. 446, 452, 66 L. Ed. 2d 358 (1980) (County liable to pay just compensation for a taking where "state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry."); Mich. Const. 1963, art. XI, § 1 (county officials swear an oath to "support the Constitution of the United States and the constitution of this state.").

II. Unjust Enrichment Provides an Alternative Remedy That This Court Has Authority To Provide Only If a Takings Remedy Is Insufficient

The County argues that an unjust enrichment claim under *Dean*, 399 Mich. at 87, cannot provide relief to Rafaeli and Ohanessian. County Mot. at ¶ 2. If this Court fully vindicates Rafaeli and Ohanessian's property rights with their takings claims, then the County is correct, albeit for the wrong reason. A claim for unjust enrichment may proceed only where there is no adequate

remedy at law. *Tkachik v. Mandeville*, 487 Mich. 38, 45-46 (2010). Rafaeli and Ohanessian's takings claims should provide an adequate remedy at law.[1]

But if this Court rejects the takings claim and does not provide alternative complete relief under the Excessive Fines Clause,[2] then it should provide relief through the unjust enrichment claim. Although Rafaeli and Ohanessian believe the takings clauses the more appropriate path for relief, they have argued unjust enrichment at every stage of this case. After the trial court granted summary disposition to the County, rejecting Plaintiffs' takings claims (and their due process claims), Rafaeli and Ohanessian moved to amend their complaint to add claims that the County's actions violated substantive due process, the Eighth Amendment's provision barring excessive fines, and the doctrine of unjust enrichment. The Circuit Court denied the motion to amend as futile. App. 55a, 57a-58a. The Court of Appeals declined to decide whether Rafaeli and Ohanessian could find relief under unjust enrichment, substantive due process, or the Eighth Amendment, deeming those claims abandoned, because they were argued in the initial brief's footnotes and in the reply brief. App. 65a-66a at n.6.

The trial court abused its discretion when it denied Rafaeli and Ohanessian's motion to add these claims. *See Ben P. Fyke & Sons v. Gunter Co.*, 390 Mich. 649, 656 (1973) ("[T]he leave

[1] To be clear, a full takings remedy may be more than the surplus proceeds from the sale of their property. The Takings Clause requires that compensation restore the owner to "as good position pecuniarily as he would have occupied if his property had not been taken." *U.S. v. Miller*, 317 U.S. 369, 373, 63 S. Ct. 276 (1943). While surplus from a tax sale is evidence about the value of the foreclosed property, it may be less than "just compensation." Some treasurers sell property (sometimes intentionally) for far less than it is are worth—even as a foreclosure. Refaeli Reply Br. 9. Moreover, "[a] person has a constitutional right to interest from the date of a taking until the date of compensation." *Miller Bros. v. Dep't of Nat. Res.*, 203 Mich. App. 674, 690, 513 N.W.2d 217, 224 (1994).

[2] If this isn't a taking, it must be an unconstitutionally excessive fine. Rafaeli Br. on Merits 27 n.10; Reply on Appl. for Leave 8-9; Amicus Br. of Institute for Justice 2-9.

sought should, as the rules require, be 'freely given'" unless it would cause undue delay, undue prejudice, and there is no bad faith or dilatory motive on the part of the movant, and the amendment would not be futile.); MCR 2.118(A) (leave to amend "shall be freely given when justice so requires"). Regardless of whether the claims were abandoned on appeal, Plaintiffs have consistently urged this Court to allow relief under this unjust enrichment or under an excessive fines claim, if it rejects their takings claims. Rafaeli Appl. for Leave at 9 n.4, 25-26; Appl. Reply Br. at 8-10; Rafaeli Br. on Merits at 5-6 n.4; Rafaeli Reply on Merits at 10. The Court has authority to revive claims to prevent a manifest injustice. *Id.*; *People v. Snow*, 386 Mich. 586, 591 (1972); MCR 7.316(A)(7); MCR 2.118(A). Plainly, allowing the County to keep money that rightfully belongs to Rafaeli and Ohanessian would cause a manifest injustice that the doctrine of unjust enrichment could help remedy.

"[U]nder the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *Kammer Asphalt Paving Co., Inc. v. E. China Tp. Sch.*, 443 Mich. 176, 185 (1993) (citing Restatement, Restitution, § 1, p. 12). "A claim of unjust enrichment can arise when a party has and retains money or benefits which in justice and equity belong to another." *Wright*, 504 Mich. at 418 (internal quote omitted).

In *Dean*, 399 Mich. at 87, this Court allowed a former homeowner to bring a claim for unjust enrichment, where the homeowner owed $146.90 in taxes, but government sold her property for $10,000 and kept it all. The former homeowner did not raise takings or excessive fines claims. *See generally id.* This Court held that the plaintiff could pursue the claim for unjust enrichment and seek restitution for the surplus profits from the sale of the property. *Id.* at 87. Thus the Court held dismissal was improper and remanded for consideration on the merits.

Here, the County's actions plainly qualify as unjust enrichment. The County gained a windfall at Rafaeli and Ohanessian's expense. The County did not just collect the owed taxes, interest, penalties, and fees; it took property worth far more than their debt. When it sold that property, it kept $24,215 more than Rafaeli owed and $76,000 more than Ohanessian owed. Rafaeli Br. on Merits 3-4. Thus the County was "enriched at the expense" of Rafaeli and Ohanessian. *See Kammer Asphalt Paving Co*, 443 Mich. at 185.

That enrichment was also unjust. App. 69a (Shapiro, J., concurring) (calling it a "gross injustice" that "calls out for relief") (quoting *Wayside Church v. Van Buren County*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting) (likening the Act's collection in cases like this one to "theft")); *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546, at *3 (E.D. Mich. June 4, 2015) (this is "a manifest injustice that should find redress under the law"); *see also Freed v. Thomas*, No. 17-CV-13519, 2018 WL 5831013, at *2 (E.D. Mich. Nov. 7, 2018) (calling similar action "unconscionable"); 2 William Blackstone, Commentaries on The Laws of England, *452, *443 (the requirement that a tax collector sell property and refund extra profits arose from an "implied contract in law"; "implied contracts" arise from that which "reason and justice dictate."). The County took a house worth more than $24,500 to pay $8.41 in property taxes. The County sold all 2.7 acres of Ohanessian's land for $82,000 to pay $6,000 in taxes, interest, penalties, and fees. "Justice and equity" require restitution. *Wright*, 504 Mich. at 418.

Although unclear from its motion, the County's purpose for disputing whether *Dean* supports an unjust enrichment claim in this case may be to challenge Rafaeli and Ohanessian's takings claims. Rafaeli and Ohanessian cited *Dean* in their merits brief and application for leave to appeal primarily to support their takings claims. Specifically, Rafaeli and Ohanessian noted that "fairness and justice" principles are the heart of the takings clauses. *Armstrong*, 364 U.S. at 49.

(The Takings Clause "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."). And in *Dean* this Court recognized the unfairness of government using the General Property Tax Act to "unjustly to enrich [it]self at the expense of another" by keeping the surplus profits from the sale of foreclosed property. *See* Rafaeli Br. on Merits at 19 (also citing *Spoon-Shacket Co., Inc. v. Cty. Of Oakland*, 356 Mich. 151, 156; 97 N.W.2d 25 (1959). *Dean* also serves as yet another piece of evidence that Michigan's common law protects Rafaeli and Ohanessian's property rights in the value of their property that exceeds any tax debt to the government. But even if *Dean* could be distinguished, the many takings cases, and historical evidence cited in their merits briefs demonstrate that that the County took private property when it confiscated Rafaeli and Ohanessian's equity in their properties. Rafaeli Br. on Merits at 10-16; Reply Br. at 2-4.

III. The County's Taking of Surplus Equity from Rafaeli and Ohanessian Might Also Violate the Constitutional Prohibition on Taking Property for the Purpose of Economic Development or Enhancement of Tax Revenue

Rafaeli and Ohanessian have a clear property interest in their home and land equity. *Id.* Therefore, the County may not redefine or extinguish that property interest without violating the federal and Michigan takings clauses. Rafaeli Br. on Merits 17-21; Reply Br. 7-8. That is the best rationale supporting Rafaeli and Ohanessian's takings claim. But arguably the Michigan Takings Clause could provide a second basis by which this Court could rule against the County. The Michigan Constitution prohibits takings that are not for a public use; it narrowly defines "public use":

> "Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.

Mich. Const. of 1963, Article X, § 2. This public-use clause prohibits government from taking property when two conditions are met: (1) the government takes property "for transfer to a private entity," and (2) the purpose of the transfer is "economic development or enhancement of tax revenues." Mich. Const. of 1963, art. X, § 2. When interpreting these conditions, the Court should employ the meaning "which reasonable minds, the great mass of the people themselves, would give it." *County of Wayne v. Hathcock*, 471 Mich. 445, 468, 684 N.W.2d 765, 779 (2004) *Hathcock*, 471 Mich. at 468 (internal quote omitted). To determine that meaning, the text's plain language should control. *Coal. of State Emp. Unions v. State*, 498 Mich. 312, 323 (2015). A case can be made that both conditions are met here, although that argument admittedly enjoys less historical and modern support than the takings argument raised in Plaintiffs' merits briefs.

In this case, the County took Rafaeli and Ohanessian's valuable properties—worth far more than $8.41 or $6000. The County extinguished Rafaeli and Ohanessian's equity interest in their property without compensation, and consistent with MCL 211.78m, the County sold and therefore transferred those properties to private parties. The "great mass of the people themselves" might understand this as a taking "for transfer to a private entity." *See Hathcock*, 471 Mich. at 468. Moreover, as the amicus brief of Michigan Association of Counties, et al., explained, the legislature adopted the current tax foreclosure law *partly* to "allow investors to quickly return valuable properties to the market."[3] Amicus Br. at 8, n.2 (citing law's sponsor); *see also City v. Bay Co. Treasurer*, 292 Mich. App. 156, 168, 807 N.W.2d 892 (2011) (Act 123 intended "to

[3] The same quote states that the Act was also intended to eradicate blight. Of course there is no allegation that blight existed in this case. If the County effected a taking to eradicate blight, the County would carry a burden under Article X, § 2, to show by "clear and convincing evidence that the taking of that property is for a public use."

effectuate the efficient and expeditious return to productive use of property returned for delinquent taxes"). A taking for that purpose is a transfer for "economic development."

Another purpose for such takings is that the County uses the surplus proceeds from the sale of foreclosed properties to raise the County's revenue. The County uses that revenue to offset unrelated tax shortfalls, and enlarge its general fund. *See* County Br. at 3; MCL 211.78m(8), 211.87b. This could potentially fall within the clause's meaning of a taking for "enhancement of tax revenues."[4] But to be clear, the County was not engaging in *tax collection* when it collected more than it was owed, even if the purpose was to raise revenue. Rafaeli Br. 20 n.8. Michigan law limits the taxes that the treasurer may impose, MCL 211.39, and provides the exact amount of interest, penalties, and fees that may be added. MCL 211.43a, 211.44, 211.78g. The County cannot 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). When the County took Plaintiffs' remaining value in their property, it engaged in a taking, not tax collection.

The County's motion suggests that the clause does not apply here, because the County seized full title to Rafaeli and Ohanessian's properties before transferring them to private parties, and therefore the takings did not "involve any property transfer to a private entity." Mot. for Supplemental Br. at 3. If the taking occurred when the County refused to refund the surplus profits from the sales, then the County is correct that it did not involve transfer to a private party, because the County kept that money. But the County is wrong if the taking occurred when it claims to have seized absolute title to Rafaeli and Ohanessian's property. *See* County Br. 18-19; MCL 211.78m. By taking absolute title and selling it to a private party, the County transferred it to a private entity.

[4] Article X, § 2 prohibits transfers to private entities for the enhancement of tax revenues for *either* "economic development *or* enhancement of tax revenues." (emphasis added).

See, e.g., Black's Law Dictionary (11th ed. 2019) (A "[t]ransfer" is "[a] conveyance of property or title from one person to another"); *Hathcock*, 471 Mich. at 451 (unconstitutional where county would take title to properties before transferring to private entity for private purpose).

The County's amici worry that counties will be unable to collect property taxes if this Court holds the County's actions were an unconstitutional taking for economic or tax revenue enhancement. But amici's fears are based on a misunderstanding of why the County's actions effected a taking of Rafaeli and Ohanessian's properties. The taking in this case was not caused by merely forcing a sale of private property to collect delinquent taxes. The County *can* legitimately seize private property to collect a debt. But to avoid an uncompensated taking, the County must honor the debtor's remaining equity interest in the property. Thus, to avoid a taking, the County should have taken the property subject to the common law requirement, recognized at the founding of this nation, that the County sell the property in a fair and public sale, and after collecting what it was owed, refund the surplus to the Rafaeli and Ohanessian. *See* Rafaeli Br. on Merits at 10-21; Reply on Merits 2-4.

Here, the County effected an unconstitutional taking because it took more than $285 and $6,000 when it extinguished Rafaeli and Ohanessian's remaining equity interests in their properties. In other words, by seizing *absolute title* to an entire house to collect $8.41, plus penalties, interest, and fees—more than owed—the County effected a taking of Rafaeli's equity in his property. Likewise with Ohanessian's equity in his land. Because the County extinguished this equity without paying for it, the County effected an uncompensated taking in violation of the federal and Michigan Takings Clause. And because the County took the property for transfer to a private party for enhancing economic development or revenue, the County also may have violated the Michigan Constitution's requirement that a taking be for a "public use."

DATED: December 13, 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) 419-7444
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

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

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

Counsel for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, I electronically filed the foregoing Appellants' Supplemental Brief on Appeal, which was served by the TrueFiling system of the Michigan Supreme Court.

/s/ Christina M. Martin
CHRISTINA M. MARTIN