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 BRIEF ON APPEAL

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

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

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STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to MCR 7.303(B)(1). The Court of Appeals issued its unpublished opinion on October 24, 2017. On December 4, 2017, Appellants Uri Rafaeli and Andre Ohanessian timely filed an application for leave to appeal with this Court. App. 9a. This Court granted Appellants' application for leave to appeal on November 21, 2018. On December 14, 2018, this Court extended the time for Appellants to file their brief to February 13, 2019.

STATEMENT OF QUESTIONS PRESENTED

Does a local government violate the federal and state takings clauses by retaining proceeds from the sale of tax-foreclosed property, where the sale yields a windfall surplus over the amount of the tax delinquency?

Plaintiffs/Appellants: Yes
Defendants/Appellees: No
Court of Appeals: No

INTRODUCTION

This case challenges a "gross injustice" in the administration of Michigan's General Property Tax Act (Act) that "calls out for relief." App. 69a (Shapiro, J., concurring) (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")). Under the Act, when a county forecloses on a tax delinquent property, it is permitted to retain the entire proceeds of the sale—even where the proceeds exceed taxes, penalties, interests, and costs due, stripping the property owner of the equity they may have built up in the property and providing an unjust windfall to the government. *See* MCL 211.78m. This result is not merely inequitable, but often tragically harsh. In the case of Uri Rafaeli, Oakland County foreclosed on the home he owned to

collect $8.41 owed due to Rafaeli's mistaken underpayment. App. 68a n.2. The County sold the home for $24,500, and refused to refund Rafaeli the $24,215 in profits—8,496% of the actual tax, penalties, and interest due—that exceeded Rafaeli's debt to the County. Likewise, the County took Andre Ohanessian's land and sold it for $82,000 to pay $6,000 in taxes, penalties, interest, and fees. The County pocketed the $76,000 windfall. Federal courts have (so far) concluded that they are without jurisdiction to remedy this predatory tax regime; Michigan courts to date have refused to do so.

The seizure of this equity violates the Michigan and federal constitutional mandates that government pay "just compensation." *See* Mich. Const. 1963, art. 10, § 2; U.S. Const. amend. V. While the government may foreclose property for the purpose of satisfying a tax debt, it must do so subject to the constitutional command to pay "just compensation" for the taking of the excess private equity. This means that a county must pay just compensation for the excess equity taken at foreclosure, or alternatively, take the property subject to the duty to sell it and refund the proceeds that exceed the debt and costs to the former owner. *See, e.g.*, *Bogie v. Town of Barnet*, 129 Vt. 46, 49; 260 A.2d 898 (1970).

The court below refused to seriously consider Appellants' takings argument, let alone provide compensation as a remedy. Instead, it opined (incorrectly) that the government was authorized to keep the entire proceeds of the tax sales under principles announced in the forfeiture case of *Bennis v. Michigan*. 516 U.S. 442; 116 S. Ct. 994; 134 L. Ed. 2d 68 (1996). App. 65a. But *Bennis* is inapplicable and not analogous to the case at hand. The forfeiture of an automobile in *Bennis* was defended as remedial and as punishment for the use of the car in the crime of prostitution. The taking of Rafaeli and Ohanessian's surplus equity is neither remedial, nor is it

punishment for a crime, and forfeiture law cannot shelter the government from takings liability here.

This Court should reverse and vindicate the rights of Rafaeli, Ohanessian, and thereby protect the property rights of all Michigan citizens.

STATEMENT OF FACTS AND PROCEEDINGS

1. Oakland County Takes Surplus Equity in Tax Delinquent Property Pursuant to General Property Tax Act

In 2011, Uri Rafaeli's small business—Rafaeli, LLC (Rafaeli)—purchased a modest rental property in Southfield, Michigan, for $60,000. App. 23a (Complaint) ¶ 44. Rafaeli inadvertently underpaid the property's 2011 taxes. *See id*. In January 2013, Rafaeli attempted to pay the full 2011 tax debt, including penalties, interest, and fees, but miscalculated the interest due and underpaid by $8.41.[1] App. 24a, ¶¶ 46-47; App. 68a at 2 n.2 (Shapiro, J., concurring). Rafaeli paid the other property taxes on the home, including all taxes due for 2012, 2013, and early 2014. *See* App. 59a. On February 26, 2014, Oakland County foreclosed on the property for the $8.41 tax deficiency, which after penalties, interest, and fees, had grown to a $285 debt at foreclosure. App. 54a (Summary Disposition Opinion and Order). The County auctioned the property for $24,500 and refused to refund Rafaeli the amount that exceeded the debt. *Id*.

Appellant Ohanessian fell behind on his property tax payments for a 2.7 acre property in Orchard Village, Michigan. App. 28a ¶ 57. He purchased the land in 2004, hoping to one day build a house there for his family. *Id*. During the subsequent economic recession, Mr. Ohanessian struggled to make the property tax payments. *Id*. ¶ 61. He resumed large annual payments on the back taxes and related penalties, fees, and interest in 2009 until 2013. *Id*. at 28a-30a, ¶¶ 61-69. But

[1] Mr. Rafaeli's payments for 2011 well exceeded the *taxes* owed. His payments failed to satisfy the debt for 2011 solely because of added penalties, interest, and fees. App. 24a.

Ohanessian inadvertently failed to pay his 2011 taxes. He had stopped receiving his tax bills after he moved to California in 2011 and did not realize his peril until after the County foreclosed on February 26, 2014. *Id*.; App. 54a. When the County foreclosed, he owed approximately $6,000 in overdue taxes, fees, and interest on property. *Id*. at App. 29a, ¶ 67. The County sold the property for $82,000 and kept all proceeds—a windfall to the County of $76,000. *Id.* at 30a, ¶ 70.

The County kept all profits from the sales of Rafaeli and Ohanessian's properties pursuant to the General Property Tax Act. Under the Act, a landowner's property becomes "delinquent" if he fails to pay taxes levied in the previous year. MCL 211.78a(2). If the landowner fails to pay the outstanding taxes, fees, and penalties within the next year, the government declares the property "forfeited," although the delinquent property owner keeps title and all rights of possession unless and until it is subsequently foreclosed. MCL 211.78g(1). If all taxes are not paid after two years of delinquency, the government will foreclose. *Id*. On the subsequent March 31, the right of redemption—i.e., the right of the former owner to buy back the property by paying the full debt to the County—ends. MCL 211.78g(2).[2] At this point, under the Act, title vests "absolutely" in the County and all inferior liens and interests are "extinguished." MCL 211.78k(5).

The County ordinarily auctions foreclosed property at regularly scheduled tax sales. MCL 211.78m. The Act requires any surplus proceeds from tax sales to be paid into the delinquent tax revolving fund, which pays for administration, fees, and litigation costs arising from all tax foreclosures in the County. MCL 211.78m(8)(a)–(*l*). Surplus funds may later be transferred to the County's general fund. MCL 211.78m(8)(h). The Act does not provide former owners any

[2] In this case, the right of redemption expired 34 days after the County foreclosed Rafaeli and Ohanessian's properties. App. 54a. Neither Rafaeli nor Ohanessian knew about the foreclosures until well after this time. App. 27a, 29a-30a.

opportunity to claim the surplus proceeds from the sale of their respective property, nor does it provide or create a process to claim compensation at the time the County seizes title to their property.

2. Appellants Seek Relief in Court

Rafaeli and Ohanessian contend that the County unconstitutionally took their property without just compensation when it took their valuable properties as payment for the much smaller debt. They first sought relief in the U.S. District Court for the Eastern District of Michigan. Although that court noted that Rafaeli and Ohanessian suffered "a manifest injustice that should find redress under the law," the court dismissed the claim, holding federal courts lack jurisdiction under the Tax Injunction Act and *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194; 105 S. Ct. 3108; 87 L. Ed. 2d 126 (1985). *Rafaeli, LLC v. Wayne Cty.*, No. 14-13958, 2015 WL 3522546, at *3 n.2 (E.D. Mich. June 4, 2015).

Rafaeli and Ohanessian then filed their complaint in the Circuit Court for Oakland County, alleging that the County violated the just compensation clauses in both the Fifth Amendment and the Michigan Constitution.[3] *See* App. 34a-35a; 65a. Their lawsuit, a putative class action, sought declaratory relief, just compensation, and damages pursuant to 42 U.S.C. 1983. App. 50a. Appellants' suit did not object to the owed taxes, penalties, interest, and fees. *See* App. 34a-39a. Rather, they objected to the County taking and keeping more than necessary to satisfy their tax debts. *See id.* The Circuit Court issued summary disposition in favor of the County, holding that the County did not take property, because the Appellants instead forfeited it and compensation is not owed for property lawfully acquired by forfeiture.[4] *See* App. 55a (granting summary

[3] Appellants also raised due process claims that the Circuit Court and Court of Appeals rejected.
[4] After summary disposition, Rafaeli and Ohanessian moved to amend their complaint alleging a

disposition under MCR 2.116(C)(7) (barred by immunity); MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted); and MCR 2.116(C)(10) (no genuine issue of material fact and entitled to judgment as a matter of law)).

On appeal, the Michigan Court of Appeals affirmed, holding that the County took Rafaeli's house and Ohanessian's land "by way of a statutory scheme that did not violate due process." App. 65a. The lower court thereby upheld these massive windfalls to the County based on its interpretation of *Bennis*, 516 U.S. at 452. App. 65a. In *Bennis*, 516 U.S. at 443-44, the police used a nuisance abatement law that provided for forfeiture as a remedy to forfeit a car that had been used to commit the crime of prostitution. Although failure to pay property taxes is not a crime, the lower court justified its reliance on *Bennis* because failure to pay property taxes is "contrary to the welfare of the state." App. 65a n.5.

Judge Shapiro disagreed with this reliance on *Bennis*, noting that forfeiture precedent is unhelpful outside the context of property "involved with, or resulting from, criminal activities." App. 68a. He counseled against the extension of civil forfeiture law to the tax foreclosure context, noting that civil forfeiture is controversial and its application is not analogous to circumstances of tax delinquency. *Id*. at 68a n.1. Judge Shapiro concurred in the result, but instead relied (incorrectly, as explained below) on *Nelson v. City of New York*, 352 U.S. 103, 110; 77 S. Ct. 195;

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violation of substantive due process, the Eighth Amendment's provision barring excessive fines, and the common law doctrine of unjust enrichment. The Circuit Court denied the motion to amend as futile, holding that the Plaintiffs have no redress under the law. *See* App. 57a-58a. The Court of Appeals declined to decide whether the forfeiture violated unjust enrichment protections, substantive due process, or the Eighth Amendment's protection against excessive fines, holding that the Plaintiffs abandoned those claims, because they were insufficiently argued on appeal. App. 65a-66a at n.6. If this Court were to deny their takings claims, Appellants request that this Court reverse the denial of their motion to amend the complaint to add these claims in the interest of justice. *See* MCR 7.316(A)(7).

1 L. Ed. 2d 171 (1956), a case which held surplus proceeds from a tax sale could be kept by the government under certain circumstances. *See* App. 68a. He quoted Judge Kethledge of the Sixth Circuit, who recently wrote that the Act works a "gross injustice—both equitably, and from the standpoint of the interests protected by takings law." App. 69a (quoting *Wayside Church*, 847 F.3d at 823 (Kethledge, J., dissenting from dismissal for lack of jurisdiction)). Judge Shapiro concluded that Rafaeli and Ohanessian's claims "call out for relief," but he believed that such relief could only be remedied by the United States Supreme Court or the Michigan Legislature. App. 68a-69a.

SUMMARY OF ARGUMENT

This Court can and should grant relief to Rafaeli and Ohanessian. The Michigan Constitution and U.S. Constitution prohibit government from taking private property without just compensation. Both constitutions protect the financial equity in homes and land, even when that property is lawfully sold to pay a government debt. By taking more than owed in property taxes, penalties, interest, and fees, the County triggered the guarantee that it must pay just compensation when it takes private property.

The balance of authority has decidedly rejected confiscatory provisions like Michigan's law. Common sense and the common law compel recognition that the surplus equity taken in the process of collecting debts belongs to the debtor.

The County cannot avoid its liability for compensation to Appellants by seeking shelter behind *Bennis*. That case applies to an entirely different type of forfeiture—one that is inextricably linked to criminal activity. When counties seize homes and land to pay overdue property taxes, they do not allege any crime has occurred and the draconian penalty of forfeiture is not justified under any precedent.

This Court should reverse the Court of Appeals and remand for further proceedings and determination of just compensation.

ARGUMENT

I

OAKLAND COUNTY VIOLATED THE TAKINGS CLAUSE BY TAKING AND RETAINING MORE THAN OWED PURSUANT TO THE GENERAL PROPERTY TAX ACT

Federal and state takings law confirms that under the federal and Michigan constitutions, the County must compensate Rafaeli and Ohanessian for their equity, the surplus value of their property that exceeded the amount of their tax delinquency, plus reasonable fees, penalties, interest, and costs.

A. Takings Law

1. Federal Takings Law

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for a public use without paying just compensation.[5] U.S. Const. amend. V. When government action invades a protected property interest, courts focus on the nature of the government action to determine whether the action effects a taking. While regulatory actions that restrict the use of property are weighed under a balancing test, *Penn Central*, 438 U.S. at 124, actions that invade a property interest are subject to a strict, *per se* test. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426; 102 S. Ct. 3164; 73 L. Ed. 2d 868 (1982). A per se physical taking happens, for example, when government seizes land or money. *Koontz v. St. Johns*

[5] The Fifth Amendment of the federal constitution is applicable to the states through the Fourteenth Amendment. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122; 98 S. Ct. 2646; 57 L. Ed. 2d 631 (1978).

River Water Mgmt. Dist., 570 U.S. 595, 613; 133 S. Ct. 2586; 186 L. Ed. 2d 697 (2013); *Lucas v S.C. Coastal Council*, 505 U.S. 1003, 1014; 112 S. Ct. 2886; 120 L. Ed. 2d 798 (1992) ("direct appropriation" of property or the "functional equivalent" is a classic taking). An uncompensated physical taking violates the Constitution, regardless of the circumstances of the taking or its economic impact. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322; 122 S. Ct. 1465; 152 L. Ed. 2d 517 (2002).

The government cannot avoid the just compensation mandate by redefining a preexisting private interest as public property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164; 101 S. Ct. 446; 66 L. Ed. 2d 358 (1980). Government may regulate property rights, but it cannot "by *ipse dixit* . . . transform private property into public property without compensation." *Id.*; *Lucas*, 505 U.S. at 1014 ("[T]he government's power to redefine" property rights is "necessarily constrained" by the Constitution.).

2. Michigan Takings Law

The Takings Clause in Article 10, Section 2, of the 1963 Michigan Constitution offers "substantially similar" protection against government action as the federal Takings Clause. *Tolksdorf v. Griffith*, 464 Mich. 1, 2; 626 N.W.2d 16 (2001). This Court usually looks to federal precedent to determine whether government action effected a taking under the state Takings Clause. *Id*. But the Michigan Takings Clause offers greater protection than its federal counterpart. *AFT Michigan v. State*, 497 Mich. 197, 213; 866 N.W.2d 782 (2015). State constitutional and common law history, state law preexisting the state constitutional provision at issue, or "matters of special state interest may compel [this Court] to conclude that the state Constitution offers" broader protections than the federal Constitution. *Id*. at 213 n.6.

B. The County Violated the Takings Clause by Taking More Than Rafaeli and Ohanessian Owed

When the County applied the Act to retain the proceeds that exceeded the outstanding tax debts of Rafaeli and Ohanessian, it invaded and unconstitutionally took a protected property interest. The Act does not recognize former owners' right to the surplus proceeds. But state tax statutes are not the only source from which property rights arise. *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30; 121 S. Ct. 2448; 150 L. Ed. 2d 592 (2001). In fact, "the right to the surplus exists independently of such statutory provision." *Farnham v. Jones*, 32 Minn. 7, 11-12; 19 N.W. 83 (1884) (considering entitlement to surplus proceeds from tax sales in statute that failed to recognize the right); *McDuffee v. Collins*, 117 Ala. 487, 491-92; 23 So. 45 (1898) (right of former owner to surplus proceeds preexisted the statute). "Property" protected by the Constitution includes those interests recognized by common law, federal or state law, or that arise from custom and practice or other "background principles" of property law. *Palazzolo*, 533 U.S. at 629-30; *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426-27; 192 L. Ed. 2d 388 (2015) (Takings Clause protects property interests recognized by Magna Carta and Founders); *Nixon v. United States*, 978 F.2d 1269, 1276 n.18 (D.C. Cir. 1992) ("law or custom may create property rights where none were earlier thought to exist"); *Bott v. Comm'n of Nat. Res. of State of Mich. Dep't of Nat. Res.*, 415 Mich. 45, 83-87, 327 N.W.2d 838 (1982) (Takings Clause protects common law property rights). The right to the surplus arises from these sources.

1. The Michigan and Federal Takings Clauses Protect the Equity in Homes and Land as a Discrete Property Interest

The Supreme Court has held the Takings Clause protects a diverse array of property interests from government confiscation, including homes, personal property, intangible property, money, interest on money, liens, and mortgages. *See, e.g.*, *Horne*, 135 S. Ct. at 2426 (personal

property); *Koontz*, 570 U.S. at 616 (money and real property); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 168; 118 S. Ct. 1925; 141 L. Ed. 2d 174 (1998) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 48; 80 S. Ct. 1563; 4 L. Ed. 2d 1554 (1960) (liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02; 55 S. Ct. 854; 79 L. Ed. 1593 (1935) (mortgages). Indeed, the Michigan and federal takings clauses protect "everything over which a person may have exclusive control or dominion" including intangible property like an "identifiable fund of money." *AFT Michigan*, 497 Mich. at 217-18 (internal quote marks omitted).

The private property interest at issue in this case is privately generated and owned equity. "Equity" is, by definition, the fair market cash value of the property after deduction of all encumbering debts (like tax debts). *Crane v. Commissioner*, 331 U.S. 1, 7; 67 S. Ct. 1047; 91 L. Ed. 1301 (1947) ("'[E]quity' is defined as 'the value of a property above the total of the liens.'"); *see also Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 392 (6th Cir. 1986); *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Ultimately, "equity" is like money or any other investment. And just like the takings clauses protect money, land, interest, and liens, they protect equity in homes and land. *See, e.g.*, *United States v. Lawton*, 110 U.S. 146, 150; 3 S. Ct. 545; 28 L. Ed. 100 (1884) (takings clause protects equity realized in the sale of property sold for delinquent taxes); *Koontz*, 570 U.S. at 616 (money and "a right to receive money that is secured by a particular piece of property"); *AFT Michigan*, 497 Mich. at 218 (intangible property including identifiable fund of money); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 529; 118 S. Ct. 2131; 141 L. Ed. 2d 451 (1998) (taking where government inflicts retroactive monetary liability on company) (O'Connor, J., announcing decision of Court); *Buckeye Union Fire Ins. Co. v. State*, 383 Mich. 630, 641; 178 N.W.2d 476 (1970) (Takings Clause was "adopted for the protection of and security to the rights of the individual as against the government" and protects value, not just title to land).

Equity is realized when property is sold. Thus, logically, common law and statutory law have traditionally treated the surplus proceeds from the sale of foreclosed property as representing the former owner's equity. *See, e.g.*, *Grand Teton Mountain Invs., LLC v. Beach Props., LLC*, 385 S.W.3d 499, 502 (Mo. Ct. App. 2012) ("[A] foreclosure sale surplus 'retains the character of real estate for purposes of determining who is entitled to receive it . . . . Such surplus represents the owner's equity in the real estate."); Restatement (Third) of Property (Mortgages) § 7.4 (1997) ("The surplus stands in the place of the foreclosed real estate, and the liens and interests that previously attached to the real estate now attach to the surplus."); *McDuffee*, 117 Ala. at 491-94 ("surplus proceeds in the hands of the tax collector [after a tax sale] represented the property," and the right to the funds by the proper owner attached at the time of the tax sale, and the tax collector had a "duty to pay the surplus to the party lawfully entitled to receive it [the owner]"); 72 Am. Jur. 2d State and Local Taxation § 911 (1974) ("Any surplus remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner."). Thomas M. Cooley, A Treatise on the Law of Taxation 343 (1876) (noting the belief that a tax debt only authorized the government to take as much property as the taxes owed and author was unaware of any jurisdiction that failed that duty). Consequently, the law has traditionally required the surplus proceeds from property taken to pay a tax to be paid over to the former owner. *Martin v Snowden*, 59 Va. 100, 137 (1868), *sub nom. Bennett v Hunter*, 76 US 326; 19 L Ed 672 (1869) (discussing common law, English land tax statute, and early colonial laws); 2 William Blackstone, Commentaries on The Laws of England, *452 (If officials seize goods for delinquent taxes, "they are bound, by an implied contract in law, . . . to render back the overplus."). To a lesser degree, even Magna Carta

recognized a similar principle by limiting the king's right to seize property to prevent him from taking more than necessary to satisfy a tax debt.[6]

Michigan law ordinarily—outside the context of tax sales in which the government is the beneficiary—treats the surplus proceeds from the forced sale of debtors' property as private property to which the debtor is entitled. *See, e.g.*, MCL 600.6044 (surplus due to debtor when executing judgments); *Bank of America, NA v. First American Title Ins. Co.*, 499 Mich. 74, 91, 878 N.W.2d 816 (2016) ("No one disputes that the mortgagee is entitled to recover only his debt. Any surplus value belongs to others, namely, the mortgagor or subsequent lienors.") (internal quotes omitted); *Sinclair v Learned*, 51 Mich. 335, 340; 16 N.W. 672 (1883) ("The sheriff must account to the mortgagor for the [surplus] money [from the foreclosure sale], even though he failed to obtain it . . . ."). MCL 324.8905c (surplus when seizing car to pay misdemeanor littering fine). In fact, this Court has previously recognized the principle that "the right to receive and control [the surplus proceeds from a tax sale], no more follows the title to the land, than does the ownership of the cattle and farming utensils that a man may happen to have on his farm when it is sold for taxes . . . ." *People ex rel. Seaman v. Hammond*, 1 Doug. 276, 280-81 (Mich. 1844).

[6] For example, the 26th Clause required that the king could take only so much personal property as required to pay the debt of a deceased crown tenant. Prior to Magna Carta, when someone died owing any form of taxation to the king, the king's officials "were in the habit of seizing everything they could find on his manors, under excuse of securing the interests of their royal master. They attached and sold chattels out of all proportion to the sum actually due. A surplus would often remain in the sheriff's hands, which he refused to disgorge. Magna Carta sought to make such irregularities impossible . . ." William Sharp McKechnie, *Magna Carta, A Commentary on the Great Charter of King John*, 322-23 (2d ed. 1914); Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 St. Mary's L.J. 1, 8 (2015).

2. The County Violates the Takings Clause When It Confiscates Equity That Exceeds a Debt to the Government

Because the law recognizes equity and its equivalent—surplus proceeds—as a discrete and protected property interest, the government is liable for a per se taking when it seizes that property for public use. *Bott*, 415 Mich. at 78 (government action that destroys traditional, common law property rights effect a taking); *Thomas Tool Services, Inc. v. Town of Croydon*, 145 N.H. 218; 761 A.2d 439 (2000) (taking where state law gives surplus from tax sale to government); *see also Webb's Fabulous Pharmacies*, 449 U.S. at 164; *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235; 123 S. Ct. 1406; 155 L. Ed. 2d 376 (2003). The government may constitutionally take and sell foreclosed properties for the public purpose of collecting a valid tax debt. But to avoid violating the just compensation component of the takings clauses, government must either pay for the equity at the time it takes the property, or it must sell and refund to the former owner the surplus proceeds. *See id.*; *Bogie*, 129 Vt. at 46-47. The government is only entitled to collect as much as it is owed; it has no lawful entitlement or claim to anything more. *Cf. Munger v Sanford*, 144 Mich. 323, 326; 107 N.W. 914 (1906) ("This excess did not belong to [the creditor], and it was obviously his duty to pay it.").

Most states already recognize that principle by guaranteeing the surplus proceeds from the sale of tax-indebted property to the former owner.[7] When statutes have attempted to deny former owners the surplus proceeds from such states, many courts—including the supreme courts of New

[7] *See, e.g.*, Ala. Code § 40-10-28; 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; 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; 72 Pa. Cons. Stat. Ann. § 1301.19; 72 Pa. Cons. Stat. Ann. § 1301.2; S.C. Code Ann. § 12-51-130; S.D. Code § 10-22-27; Tenn. Code Ann. § 67-5-2702; Va. Code Ann. § 58.1-3967; Wash. Rev. Code Ann. § 84.64.080; W. Va. Code § 11A-3-65; Wis. Stat. § 75-36(4) (homesteads); Wyo. Stat. § 39-13-108(d)(4).

Hampshire, Vermont, and Mississippi—have held that such attempts violate the constitutional just compensation requirement. *Thomas Tool Services*, 145 N.H. at 220 (violates state constitution's takings clause); *Bogie*, 129 Vt. at 55 (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation, contrary to . . . Vermont Constitution"); *Griffin v. Mixon*, 38 Miss. 424, 436-37 (Miss. Err. & App. 1860) (violation of due process and just compensation guarantee); *Coleman through Bunn v. D.C.*, 70 F. Supp. 3d 58, 80 (D.D.C. 2014) (takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman through Bunn v. D.C.*, No. 13-1456, 2016 WL 10721865 (D.D.C. June 11, 2016) (recognizing district law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits); *King v. Hatfield*, 130 F. 564, 579 (C.C.D.W. Va. 1900). Similarly, the Minnesota and Alabama supreme courts have recognized an inherent right—independent of any statute—to a refund of these surplus profits. *Farnham*, 32 Minn. at 11-12; *McDuffee*, 117 Ala. at 491; *see also Stierle v. Rohmeyer*, 260 N.W. 647, 652; 218 Wis. 149 (1935) (holding government could not constitutionally penalize mortgagee by extinguishing the entire mortgage, because "the legislature . . . had no authority" to do so "without a just compensation").

Many more courts have criticized the idea that government could legitimately confiscate the surplus proceeds from a tax sale, interpreting tax sale statutes to avoid that result. *Lake Cty. Auditor v. Burks*, 802 N.E.2d 896, 899-900 (Ind. 2004) (noting it would "produce severe unfairness" and likely violate the Takings Clause and *Lawton*, 110 U.S. at 150); *Martin*, 59 Va. at 142-43 (would violate due process); *Shattuck v. Smith*, 6 N.D. 56, 69 N.W. 5 (1896) (indicating such a law would likely be unconstitutional); *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191-92 (Tex. 1995), *as amended* (June 22, 1995) ("Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit."); *City of Anchorage v. Thomas*, 624 P.2d 271, 274

(Alaska 1981) (refusing to interpret the law as confiscating the surplus, in part because injustice that would result). Similarly, the U.S. Supreme Court has repeatedly refused to interpret federal law as depriving property owners the surplus value of their property when sold by the United States to satisfy a tax debt. *United States v. Taylor*, 104 U.S. 216, 221; 17 Ct. Cl. 427 (1881); *Bennett*, 76 U.S. at 335-36 ("[I]t is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction."); *Lawton*, 110 U.S. at 147 (relying on *Bennett* and *Taylor*).

The few courts that have allowed the confiscation of surplus profits from tax sales have primarily done so under a misconception of the Supreme Court's decision in *Nelson*. *See Reinmiller v. Marion County, Oregon*, No. CV-05-1926-PK, 2006 WL 2987707, at *3 (D. Or. 2006); *City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Me. 1974); *Ritter v. Ross*, 207 Wis. 2d 476, 485 n.7; 558 N.W.2d 909 (Wis. Ct. App. 1996). In *Nelson*, a city took the plaintiffs' properties via state tax sale procedures to pay relatively small overdue water bills. *See Nelson*, 352 U.S. at 105-06. The dispossessed owners brought a takings challenge because the city kept the excess proceeds from these sales. *Id.* at 109. But the New York statute provided dispossessed owners with the opportunity to recover the surplus proceeds by raising a claim for the surplus in the foreclosure proceedings. The Supreme Court held there had been no taking because the plaintiffs failed to avail themselves of the statutory remedy to claim the surplus. *Id.* at 110 (The New York statute did not "preclude[ ] an owner from obtaining the surplus proceeds of a judicial sale."); *Coleman through Bunn*, 70 F. Supp. 3d at 77-79; Ralph D. Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. Mass. L. Rev. 274, 285-86 (2018). *Nelson* offers no guidance here because Michigan's Act offers no opportunity for former owners to claim the surplus proceeds.

3. The County Cannot Escape the Takings Clause by Redefining Well-Settled Property Rights

A fair reading of U.S. Supreme Court precedent points decidedly toward the finding of a taking in this case. Supreme Court takings cases show that government violates the Fifth Amendment when it confiscates preexisting property interests by redefining private property as public property. In *Webb's Fabulous Pharmacies*, 449 U.S. at 158-59, for instance, the Supreme Court considered whether government violated the Takings Clause by keeping the interest earned on private funds deposited with a court. The Court answered in the affirmative, and in so doing held that the Takings Clause cannot be avoided by the expedient of converting private funds into public funds: "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. To the same effect is *Phillips*, 524 U.S. at 167 ("at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests"); *see also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713; 130 S. Ct. 2592; 177 L. Ed. 2d 184 (2010) (states effect a taking when they re-characterize traditionally private property as public property).

Yet that is exactly what the Act purports to do. The Act purports to convert any surplus equity in tax-indebted properties to "public" property at the time of foreclosure, merely because the County takes title to the property. The Takings Clause will not permit such a state-authored transformation of a private interest to public property. *Webb's Fabulous Pharmacies*, 449 U.S. at 164 (Government may regulate property rights, but it cannot "by *ipse dixit* . . . transform private property into public property without compensation.").

This Takings Clause protection doesn't simply disappear because the property owner owes the government money. In *Armstrong*, 364 U.S. at 41, a shipbuilder contracted by the United States defaulted on a contract to build ships, and the United States took title to the unfinished boats and materials, pursuant to its contractual and common law rights. *Id*. Material suppliers claimed the United States had unconstitutionally taken their liens on some of the materials when the government took the shipbuilders' unfinished boats and supplies, and refused to compensate the suppliers. *Id*. The Supreme Court agreed, holding that property rights in liens do not simply disappear when the government takes title. *Id.* at 48. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id*. "This was not because their property vanished into thin air. It was because the government for its own advantage destroyed the value of the liens." *Id*. The government could only take the underlying property subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id*. at 49.

Armstrong confirms that Michigan counties' sleight-of-hand, transferring the equity in private homes and land into public funds through the tax-sale process is a taking. As in *Armstrong*, the County here, "for its own advantage," destroyed the private value of the equity when it took the entire value of homes and land in which it had a limited interest. *See id*. at 48. More accurately, it changed that value from a private interest into a public one. This transformation of a private interest to public property is a taking. The County thus has the "constitutional obligation to pay just compensation" or to return the private property it takes. *See id*. at 49.

Ultimately, the scheme at issue here violates the "fairness and justice" principles at 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."). Justice is the government collecting only what it was owed. Fairness is the return of any excess equity monies to those who have had their properties taken and sold. Neither exists here. *Wayside Church*, 847 F.3d at 823 (Kethledge, J., dissenting) (Act is causing "gross injustice" that looks like "theft" and raises serious takings implications); *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546, at *3 (E.D. Mich. June 4, 2015) ("a manifest injustice that should find redress under the law"); *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 5831013, at *2 (E.D. Mich. Nov. 7, 2018) (calling it "unconscionable"). Indeed, this Court has previously recognized that it is wrong for government to use the Act to "unjustly to enrich [it]self at the expense of another." *See Spoon-Shacket Co., Inc. v. Cty. of Oakland*, 356 Mich. 151, 156; 97 N.W.2d 25 (1959); *Dean v. Mich. Dep't of Natural Res.*, 399 Mich. 84, 87; 247 N.W.2d 876 (1976) (allowing claim against government for unjust enrichment, where homeowner owed $146.90 in taxes, but government sold property for $10,000 and kept surplus equity).

It has been said that "the spirit of the tax law . . . is to levy and collect taxes, not to appropriate lands." *Hartman v. Edwards*, 260 Mich. 281, 286; 244 N.W. 474 (1932). This Court should revive that spirit by enforcing the state and federal Takings Clause to protect Rafaeli and Ohanessian's right to their equity or the surplus proceeds from the sale.

C. The Michigan Constitution Provides Even Greater Protection for the Surplus Proceeds Than the Federal Takings Clause

As the foregoing demonstrates, federal takings law favors Rafaeli and Ohanessian in this case. But even if that were not true, this Court has an independent duty to protect Rafaeli and Ohanessian's property rights recognized in its state constitution. The Takings Clause in Article 10, Section 2, of the 1963 Michigan Constitution offers even greater protection than its federal

counterpart. *AFT Michigan*, 497 Mich. at 217. Interpretations of Michigan's Constitution must reflect the "distinct" will of its citizens to "ensure that [Michigan] citizens are receiving the measure of the protections that they created." *People v. Tanner*, 496 Mich. 199, 221-23 n.15; 853 N.W.2d 653 (2014) (emphasis omitted). The Court's "responsibility in giving meaning to the Michigan Constitution must invariably focus upon its particular language and history, and the specific intentions of its ratifiers, and not those of the federal Constitution." *Id.* at 222 n.16. (emphasis omitted).

Michigan's Takings Clause was "adopted for the protection of and security to the rights of the individual as against the government." *Bott*, 415 Mich. at 82 n.43 (quoting *Pearsall v. Eaton County Supervisors*, 74 Mich. 558, 561; 42 N.W. 77 (1889). Its purpose was to ensure that "the [government's] power to appropriate in any case must be justified and limited by the necessity." *Peterman v. State Dep't of Nat. Res.*, 446 Mich. 177, 187; 521 N.W.2d 499 (1994) (quoting Justice Cooley).[8] Moreover, the protection is broad and extends to "cases where the value [of property] is destroyed by the action of the government." *Bott*, 415 Mich. at 82 n.43 (quoting *Pearsall*, 74 Mich. at 561). The destruction of common law property rights triggers the protection of the Michigan Takings Clause. *Id.* at 78-79.

[8] Justice Cooley also described the power of eminent domain by distinguishing it from the taxing power: "Taxation [also] takes property from the citizen for public use, but it does so under general rules of apportionment and uniformity, so that each citizen is supposed to contribute his fair share to the expenses of government, and be compensated for doing so in the benefits which the government brings him. [But under eminent domain] 'something exceptional' is taken. 'The case, therefore, is not one in which there can be and apportionment of the burden as between the citizen whose property is taken, and the body of the community, and compensation to him of a pecuniary nature must therefore be made.'" Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 333-34 (Little, Brown & Co. 1880). What happened to Rafaeli and Ohanessian was "something exceptional" and not a "uniform apportionment" by which they are contributing a fair share in return for the benefits government has provided.

The Act's needless confiscation of home and land equity violates all of these purposes. It takes property that greatly exceeds what the County needs to satisfy its debt. It nullifies otherwise recognized property rights. Michigan's Takings Clause is supposed to ensure that "those whose property is seized will receive fair treatment" and that government officials consider "the loss inflicted on private parties" property. *Bott*, 415 Mich. at 84-85. But the Act accomplishes the opposite. It has created a perverse incentive for counties to foreclose desirable properties to boost their budgets. And counties have been unable to resist the temptation. *See* Joel Kurth, et al., *Sorry we foreclosed your home. But thanks for fixing our budget.*, Bridge Magazine, June 6, 2017, http://www.bridgemi.com/detroit-journalism-cooperative/sorry-we-foreclosed-your-home-thanks-fixing-our-budget. This Court should declare an end to this uniquely predatory practice pursuant to an interpretation of the state's Takings Clause regardless of the Court's interpretation of the federal Takings Clause.

II

THE COUNTY CAN FIND NO SHELTER FROM THE TAKINGS CLAIM IN FORFEITURE PRECEDENT

As the foregoing analysis makes clear, the County's retention of Rafaeli and Ohanessian's surplus equity under the General Property Tax Act violated both the federal and Michigan Takings Clause. The lower court relied on the forfeiture case of *Bennis v. Michigan*, however, to avoid the takings question entirely, holding that the clauses do not apply to property acquired through forfeiture proceedings so long as those proceedings do not violate due process. App. 65a. The lower court was wrong: *Bennis* and its rationale are inapplicable to the case at hand.

The lower court elided meaningful differences between *Bennis* and this case by equivocating on the term "forfeiture." But the General Property Tax Act and Michigan's civil

forfeiture statutes each use the word to reference two utterly different concepts. Judge Shapiro recognized the court's equivocation in his concurrence. He wrote:

> the majority implicitly concludes that all "forfeitures" are equal under the law, whether based upon a criminal enterprise or a property owner's failure to pay $8.41 in taxes. I respectfully disagree, and suggest that *the substance and not the nomenclature should control*. I think that this case bears little, if any, relation to *Bennis*, and that it is a mistake to conclude that *Bennis* addresses, let alone controls, the issues in this case.

App. 68a-69a (Shapiro, J., concurring) (emphasis added). Indeed, the forfeiture at issue in *Bennis* differed in substance to the one at issue in this case.

From start to finish, Michigan's civil forfeiture laws—the type of statute at issue in *Bennis*—aims to remedy or punish criminal activity. Michigan's civil forfeiture scheme was enacted specifically to reduce the financial incentives for criminal activity, particularly drug crime. Michigan law derives substantially from an amended version of a model law, the 1970 Uniform Controlled Substances Act, which was widely adopted during the 1980's "war on drugs." Nineteen other states' civil forfeiture laws share nearly identical language with Michigan's. Steven L. Kessler, 1 Civil and Criminal Forfeiture: Federal and State Practice, § 10:1 (West 2012). These laws uniformly subject property that facilitates or serve as instrumentalities of various types of crime to forfeiture.

The Supreme Court has tolerated such civil forfeitures, but only when the property is associated with criminal activity, *Austin v. United States*, 509 U.S. 602, 609-10; 113 S. Ct. 2801; 125 L. Ed. 2d 488 (1993), and only when the forfeiture is not unconstitutionally excessive. *United States v. Bajakajian*, 524 U.S. 321, 334; 118 S. Ct. 2028; 141 L. Ed. 2d 314 (1998) (overturning forfeiture that was "grossly disproportional to the gravity of the offense that it is designed to punish"). Even then, courts routinely disfavor forfeiture law and construe it strictly against the

government to protect property rights because its penalties can be so harsh. *United States v. One 1936 Model Ford V-8 DeLuxe Coach*, 307 U.S. 219, 226; 59 S. Ct. 861; 83 L. Ed. 1249 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35; 23 L. Ed. 196 (1875) ("When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred."); *Sogg v. Zurz*, 121 Ohio St. 3d 449, 451; 905 N.E.2d 187 (2009) (Fairness and justice instruct that courts should "favor individual property rights when interpreting forfeiture statutes."); *see also Harmelin v. Michigan*, 501 U.S. 957, 978 n.9; 111 S. Ct. 2680; 115 L. Ed. 2d 836 (1991) (Scalia, J., plurality opinion) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

Michigan's civil forfeiture law provides that property is subject to civil forfeiture in only three sets of circumstances. It permits the forfeiture of property used (1) to facilitate drug crimes and a select number of environmental or white collar crimes (MCL 333.7531, *et seq*. & 600.4701, *et seq*.); (2) to commit crimes involving racketeering (MCL 750.159f); and (3) in the commission of public vice crimes including gambling, illegal liquor production and sale, and prostitution (MCL 600.3801 & 600.3825). *Bennis* involved this latter type of forfeiture.

In *Bennis*, the police seized a car that had been used to facilitate the crime of prostitution. *Bennis*, 516 U.S. at 443-44. The police then sold the car pursuant to Michigan's civil forfeiture statute allowing confiscation of the car or proceeds of sale as a remedy for its illicit use. The 11-year-old Pontiac was sold for $600, leaving "'practically nothing' to divide after subtraction of costs." *Id*. at 458 (Ginsburg, J., concurring). At issue before the U.S. Supreme Court was whether the government could keep the entire proceeds of the sale, including any interest in the proceeds claimed by its innocent co-owner. The Court held that the forfeiture of the entire car was lawful

because the innocent co-owner had "entrusted" the car to the co-owner who used it to commit criminal activity. *Id.* at 445, 453 ("The Bennis automobile, it is conceded, facilitated and was used in criminal activity."); *see also id.* at 453-55 (Thomas, J., concurring) (decision's narrow grounds rested on car's role as "an 'instrumentality' of the crime"). Moreover, "key" to the slim majority decision in *Bennis* was the fact that the statute acted in a remedial manner. The taking of the proceeds from the sale of the car ($600) did not measurably exceed the costs of seizing and selling the car, and of enforcing the anti-prostitution law against Bennis. *Id.* at 457-58 (Ginsburg, J., concurring). The Court also relied on the fact that the forfeiture proceeding in *Bennis* was an equitable action. *Id.* at 452. Justice Ginsburg noted the importance, explaining that this Court "stands ready to police exorbitant applications of the statute. It shows no respect for Michigan's high court to attribute to its members tolerance of, or insensitivity to, inequitable administration of an 'equitable action.'" *Id.* at 457.

Notably, even the harsh statute authorizing the civil forfeiture of the car in *Bennis* contains added protection for property owners when the subject of forfeiture is reality rather than personal property. The law does not permit the seizing agency to strip the property owner of all interest in real property, even property used in a public vice crime; rather, the property owner retains ownership, while allowing the government to close a building used in vice crime for any purpose for a period of one year as a penalty. MCL 600.3825. Even the notoriously severe civil forfeiture law at issue in *Bennis*, applicable only against property used in crime, better protects property owners from inequitable confiscation than the lower court's interpretation of Michigan's General Property Tax Act.

Bennis is not only inapplicable, its rationale supports no analogy. Here, the forfeiture is neither related to any criminal offense nor limited to a remedial sum. When counties seize homes

and land to pay overdue property taxes, they do not allege any crime has occurred. The property owners in this case did not commit a crime or immoral action by falling short on their property taxes; nor was the property itself used as an instrumentality of crime.[9] *See* App. 68a (Shapiro, J., concurring) (noting it is not a crime to fail to pay property taxes); *Martin*, 59 Va. at 142-43, *aff'd on other grounds sub nom. Bennett*, 76 U.S. 326 ("But the land of a delinquent tax-payer cannot be brought within the principle of this class of cases; it is neither the instrument nor the fruit of any offence.").

Further, there is no justification for the County to keep their surplus equity as a remedial offset for costs incurred to collect what they owed. The Act already includes the cost to collect on the debt, by adding more than 40% in interest and administrative fees to the underlying taxes owed. MCL 211.78a (4% administrative fee, plus 1% interest per month for two years); MCL 211.78g(3) (adding another 0.5% per month). Moreover, the Act does not give provision for equitable administration of the law. The County is keeping thousands of dollars that have no correlation to any injury it suffered.

What the foregoing makes clear is that *Bennis*'s application of Michigan's civil forfeiture laws, accepted with caveats by the U.S. Supreme Court, bears no resemblance at all to the circumstances of this case arising out of the General Property Tax Act. The *only* commonality is that both laws include within their language the word "forfeiture," but even that comparison fails, because the statutes employ entirely different definitions for the term. The word "forfeiture," in the context of Michigan's civil forfeiture statutes means that all interest in the property is stripped

[9] Indeed, any attempt to make it a crime to underpay property taxes would likely be unconstitutional, akin to debtors' prisons, because the Constitution does not permit "punishing a person for his poverty." *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 671; 103 S. Ct. 2064; 76 L. Ed. 2d 221 (1983).

from its owner by virtue of the taint of the wrongdoing and vested in some agency of government without compensation. By contrast, the "forfeiture" defined by the General Property Tax Act has a completely different character. According to the Act, the term,

> "[f]orfeited" or "forfeiture" means a foreclosing governmental unit may seek a judgment of foreclosure under [section 78k of the Act] if the property is not redeemed as provided under this act, but does not acquire a right to possession or any other interest in the property.

MCL 211.78(8)(b). Under the Act, "forfeiture" simply means that the County is granted a cause of action—subject to various procedures and limits—to seek a judicial judgment of foreclosure as means of collecting unpaid taxes. *Id*. It does not vest any "right to possession or any other interest in the property" in the County. *Id*. In short, *Bennis* provides no support for the County's attempt to justify the taking of Rafaeli and Ohanessian's property.

Rather, *Bennis* in fact provides support for Appellants' takings claim. The Supreme Court indicated that had the property not been taken as the instrumentality of a crime, *Bennis* would have presented a credible takings claim. 516 U.S. at 452-53; *see also United States v U.S. Coin & Currency*, 401 U.S. 715, 720; 91 S. Ct. 1041; 28 L. Ed. 2d 434 (1971) (suggesting a forfeiture statute that goes too far would violate the Takings Clause); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90; 94 S. Ct. 2080; 40 L. Ed. 2d 452 (1974) (suggesting that an "unduly oppressive" forfeiture would violate the just compensation requirement laid out in *Armstrong*, 364 U.S. at 49); *see also Calero-Toledo*, 416 U.S. at 694 (Douglas, J., dissenting in part) ("[I]n my view, [the forfeiture effected] a taking of private property 'for public use' under the Fifth Amendment, applied to the States by the Fourteenth, and compensation must be paid an innocent owner.").

In sum, *Bennis* provides no shelter at all against the County's takings liability to provide Rafaeli and Ohanessian the value of their equity.[10] Unlike *Bennis*, the confiscation in this case may only be made lawful by paying Rafaeli and Ohanessian just compensation.

CONCLUSION AND RELIEF SOUGHT

Rafaeli and Ohanessian respectfully request that the Court reverse the Court of Appeals, and remand for further proceedings and determination of just compensation.

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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

[10] Even if civil forfeiture law was applicable to the case at hand, the Eighth Amendment's Excessive Fines Clause prohibits the forfeiture of Appellants' entire equity because it is grossly disproportionate to any act or omission by Rafaeli or Ohanessian. *See Austin v. United States*, 509 U.S. 602, 622-23 (1993) (forfeitures that confiscate more than a remedial sum are subject to limitation under the Eighth Amendment); *United States v. Bajakajian*, 524 U.S. 321 (1998) (A forfeiture is unconstitutional if it is "grossly disproportionate" to the gravity of the offense giving rise to the forfeiture.).

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

/s/ Andrew F. Fink III
ANDREW F. FINK