COA No. 330696
Lower Case No. 2015-147429-CZ

STATE OF MICHIGAN
IN THE MICHIGAN COURT OF APPEALS

RAFAELI, L.L.C., and ANDRE OHANESSIAN,

Plaintiffs/Appellants,

v.

OAKLAND COUNTY and ANDREW MEISNER,

Defendants/Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS/APPELLANTS

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Pursuant to Michigan Court Rule 7.212(H), Pacific Legal Foundation (PLF) respectfully requests leave to file the accompanying amicus curiae brief in support of Rafaeli, L.L.C., and Andre Ohanessian. All parties consent to this motion for leave to file an amicus brief.

1. PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded over 40 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Murr v. Wisconsin*, 136 S. Ct. 890 (2016) (granting cert.) (Case No. 15-214); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also routinely participates in important property rights cases as amicus curiae. *See, e.g.*, *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012). PLF attorneys have extensive experience with the question at issue in this case, having participated in several cases where the court must determine those property interests protected by the Constitution. *See, e.g.*, *Wayside Church v.*

County of Van Buren, No. 15-2463 (6th Cir. pending) (supporting plaintiffs' claim that Van Buren County effected a taking without just compensation when it took the surplus equity of a tax foreclosure property); *Coleman through Bunn v. District of Columbia*, No. 1:13-cv-01456-EGS (June 11, 2016) (supporting dispossessed homeowner's claim that District of Columbia tax code effected a taking without just compensation when it confiscated surplus equity may proceed); *Koontz*, 133 S. Ct. 2586 (Takings Clause protects money).

2. The proposed amicus brief will assist the Court by providing a unique viewpoint on the question whether the Constitution protects the surplus equity in an owner's house when the government takes the property in a tax-sale foreclosure. *People v. Hermiz*, 611 N.W.2d 783, 792 (Mich. 2000) ("This court is always desirous of having all the light it may have on questions before it.") (quoting *Grand Rapids v. Consumers' Power Co.*, 185 N.W. 852 (Mich. 1921)). Specifically, the proposed amicus brief provides an overview of the U.S. Supreme Court's takings jurisprudence to demonstrate that an individual's financial investment in his or her home constitutes "property" and is subject to the protections of the Takings Clause of the Fifth Amendment. Moreover, it explains how the Eighth Amendment protects property owners from forfeitures that are excessive in relation to the offense that gives rise to the forfeiture.

3. PLF and its supporters believe that this case is of significant importance and has far-reaching implications for traditional rights in property. PLF further believes that its public policy perspective and litigation experience will provide an additional and useful viewpoint in this case. For these reasons, PLF respectfully requests leave to participate in this action as amicus curiae and to file the attached brief. *Grand Rapids*, 185 N.W. at 854 ("In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . .").

DATED: August 5, 2016.

Respectfully submitted,

/s/ Andrew F. Fink III

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, I electronically filed the foregoing motion for leave to file brief amicus curiae, which was served by the e-filing and service system of the Michigan Court of Appeals.

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

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JURISDICTIONAL STATEMENT

Amicus curiae does not contest appellants' statement of jurisdiction.

STANDARD OF REVIEW

Amicus curiae does not contest appellants' standard of review on appeal.

STATEMENT OF QUESTIONS INVOLVED

Pacific Legal Foundation (PLF) addresses the following two issues only:

Does the government effect a taking without just compensation when it takes valuable property to pay relatively small tax debts, and keeps the excess proceeds from the sale of the property?

Appellant answered: Yes.

Appellee answered: No.

Amicus curiae answers: Yes.

If such confiscation of property is not a taking, then should the plaintiff be allowed to amend its complaint to add an Eighth Amendment Excessive Fines challenge?

Appellant answered: Yes.

Appellee answered: No.

Amicus Curiae answers: Yes.

STATEMENT OF INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded over 40 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Murr v. Wisconsin*, 136 S. Ct. 890 (2016) (granting cert.) (No. 15-214); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF also routinely participates in important property rights cases as amicus curiae. *See, e.g.*, *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419 (2015); *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 770 (Mich. 2004); PLF attorneys have extensive experience with the issues in this case, having participated in several cases that determine whether particular interests in property are protected by the United States Constitution. *See, e.g.*, *Wayside Church v. County of Van Buren*, No. 15-2463 (6th Cir. pending) (challenging Michigan's confiscation of surplus equity from tax foreclosures as a taking without just compensation); *Coleman v. District of Columbia*,

No. 1:13-cv-01456-EGS (D.D.C.), pending (amicus brief filed Aug. 19, 2015, in support of Plaintiffs' Opposition to Def. Mot. for Judgment on the Pleadings); *Koontz*, 133 S. Ct. 2586; *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014). PLF believes that this experience will assist the Court in its adjudication of the constitutional questions raised in this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether equity in a property owner's home, land, or business constitutes "property" entitled to the protections of the Takings Clause of the United States Constitution. It does. The United States Supreme Court has repeatedly held that a person's money—just like a home or parcel of land—is protected property and cannot be taken without payment of just compensation. *See, e.g.*, *Koontz*, 133 S. Ct. at 2600 (a demand for money is subject to the same constitutional protections as a demand for land); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (applying per se rule to a taking of interest from an Interest on Lawyer Trust Account); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945) (analyzing the property rights protected by the Fifth Amendment as a group of rights citizens possess in a "physical thing"). Because "equity" simply describes the fair market cash value of the property after all debts are deducted, it is equivalent to money. The Takings Clause unquestionably protects it. *See Koontz*, 133 S. Ct. at 2601 (Takings Clause protects money). *Cf.* Debra Pogrund Stark, *Facing the Facts:*

An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform, 30 U. Mich. J.L. Reform 639, 640 n.1 (1997) (defining "equity" as "the extent to which the fair market value of the property exceeds the amount of debt secured by the property").

Rafaeli and Ohanessian allege that Oakland County violated the Takings Clause when it took all of the surplus equity they held in their property as part of a tax foreclosure. Oct. 8, 2015 Summary Disposition Opinion and Order (Sum. Disp. Order) at 2. Rafaeli owed $8 in interest or penalties for overdue taxes, which grew to $285 in taxes, interest, and fees when the County foreclosed. *Id.*; Appellants' Brief on Appeal at 13 (stating Rafaeli's debt). Oakland County sold Rafaeli's property for $24,500. Sum. Disp. Order at 2. The County paid the overdue taxes with the proceeds from the sale of the property and, pursuant to Michigan's tax statute, Mich. Comp. Laws § 211.60-211.60a, kept the surplus proceeds—$24,215—as profit. *See id*. Rafaeli received none of the surplus. *Id*. Likewise, Ohanessian owed around $6,000 in overdue taxes, fees, and interest when the County foreclosed. The County sold the property for $82,000 and kept all proceeds—a windfall of around $76,000. *See id*.

Rafaeli and Ohanessian sued, contending that the government unconstitutionally took their property without just compensation when it sold the property and kept the surplus proceeds. *Id*. Below, the County argued that Michigan

law does not vest delinquent taxpayers with rights to surplus proceeds from a tax sale. Consequently, the government does not take anything when it confiscates the surplus equity or proceeds. *See* Defendants' Mot. for Summary Disposition at 16-17. Instead, the County asserted, the taxing power allows government to pass laws by which property owners forfeit all property rights, including the right to surplus proceeds from tax sales. *See id.* at 16. The trial court agreed with the County and granted summary disposition, holding that Rafaeli and Ohanessian "forfeited" the protections guaranteed by the Takings Clause by failing to pay their debt within the time period provided by Michigan law. *See id*. at 3. The plaintiffs thereupon requested leave to amend their complaint to add a claim under the Eighth Amendment, which protects individuals from excessive fines or forfeitures. *See* Plaintiffs' Mot. for Reconsideration and for Leave to File a First Amended Complaint ¶ 2. The trial court denied that motion. Order Denying Mot. For Reconsideration and for Leave to File Amended Compl. at 1. Thus, the trial court's decisions authorize the County to take a person's land, house, or business, and all equity therein, in order to satisfy unpaid taxes—no matter how small the debt or how valuable the property. The court was wrong.

Although a state can enact laws creating new property rights, it cannot destroy recognized rights by legislative fiat. *See Palazzolo*, 533 U.S. at 628; *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980). Landowners have a

cognizable property right in equity and a statute cannot extinguish those rights. Nor may the County avoid the limitations of the Takings Clause by invoking its power to tax or by creatively interpreting forfeiture precedent. Recharacterizing the government's confiscation as a forfeiture cannot help the County, for in that instance the forfeiture would violate the Eighth Amendment's Excessive Fines Clause. *See United States v. Bajakajian*, 524 U.S.321, 334 (1998) (forfeiture of cash subject to protections of Excessive Fines Clause). Thus, whether considered a taking or a forfeiture, the confiscation of surplus equity fails the United States Constitution and the central purpose of government: the protection of individual liberties and property. *See* James Madison, *Property*, National Gazette, Mar. 29, 1792 ("Government is instituted to protect property of every sort . . . [t]his being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."), *quoted in* Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. Pub. Int. L.J. 335, 337 (2001).

The dismissal of the plaintiffs' takings claims should be reversed and the Court should direct the trial court to grant the plaintiffs leave to amend their complaint to add an Eighth Amendment claim.[1]

[1] Because of PLF's unique interest in the Excessive Fines Clause, this amicus brief focuses on the plaintiffs' motion to add an Eighth Amendment claim, without commenting on the plaintiffs' other proposed amendments.

I

THE TAKINGS CLAUSE PROTECTS EQUITY

To prove a compensable taking, the claimant must first show that he possesses a valid property right affected by governmental action. If the claimant does possess a compensable property right, he must show that the governmental action at issue constituted a taking of that right. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984); *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000). The Constitution does not itself create or define the "range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Rather, property includes those interests recognized by common law, federal or state law, or that arise from custom and practice or other independent sources. *Palazzolo*, 533 U.S. at 629-30; *see also Horne*, 135 S. Ct. at 2426-27 (2015) (Takings Clause protects property interests recognized in Magna Carta and by the Founders); *Bott v. Comm'n of Nat. Res. of State of Mich. Dep't of Nat. Res.*, 327 N.W.2d 838, 849, 852 (Mich. 1982) (eliminating common law property rights would require the awarding of just compensation); *Nixon v. United States*, 978 F.2d 1269, 1276 n.18 (D.C. Cir. 1992) ("[L]aw or custom may create property rights where none were earlier thought to exist.") (citing *First Victoria Nat'l Bank v. United States*, 620 F.2d 1096, 1103 (5th Cir. 1980)); *see also Buckeye Union*

Fire Ins. Co. v. State, 178 N.W.2d 476, 482 (Mich. 1970) (Constitutional provision against uncompensated taking 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.).

Although state and federal authorities may define certain parameters of property rights, and may even create new property rights, they may not extinguish property rights recognized by independent sources. *Webb's Fabulous Pharmacies*, 449 U.S. at 164 ("[A] State, by ipse dixit, may not transform private property into public property without compensation"); *see also Palazzolo*, 533 U.S. at 630 ("A law does not become a background principle for subsequent owners by enactment itself."); *Bott*, 327 N.W.2d at 852 (the government must compensate property owners if it takes common law riparian rights). Historically acknowledged property rights extend far beyond the title and possession of land. For example, the Takings Clause protects personal property, money, interest on money, liens, mortgages, company equity (in the form of stock), and homes. *See, e.g.*, *Horne*, 135 S. Ct. at 2426 (personal property); *Koontz*, 133 S. Ct. at 2601 (money and real property); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 496 (2005) (homes); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 168 (1998) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (mortgages); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458

U.S. 419, 427 n.5 (1982) (considering as an "incontestable case for compensation" where government formally expropriates property or where it (or its agent) deliberately uses or occupies the "space or a thing which theretofore was understood to be under private ownership") (internal quotation omitted); *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 72 (2012) (company equity—in the form of common stock—is a cognizable property right under the Takings Clause), appeal pending No. 15-5133 (Fed. Cir., Aug. 14, 2015).

It follows from this precedent that the Takings Clause protects a landowner's equity in his or her land, because that equity constitutes a property interest. *See, e.g.*, *McCallister v. McCallister*, 300 N.W.2d 629, 633 (Mich. Ct. App. 1980) (treating "home equity" as "property" in divorce proceeding). "Equity" describes the fair market cash value of the property after all encumbering debts are deducted; thus it is equivalent to money. *See Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984); Stark, *supra*, note 1, at 640. A landowner's interest in surplus equity is also equivalent to an interest in a lien, mortgage, or company equity in the form of common stock, because those interests only have value provided that the property is worth more than any paramount liens or paramount debts. Because the Takings Clause protects money, liens, mortgages, company equity, and the underlying physical property, it follows that the Takings Clause protects Rafaeli's and Ohanessian's interests in the surplus proceeds from the tax foreclosure and sale of their property.

Indeed, at one time, Michigan tax law specifically recognized that delinquent taxpayers have a property right to the surplus proceeds produced by a tax sale. *See, e.g.*, *People ex rel. Seaman v. Hammond*, 1 Doug. 276, 280-81 (Mich. 1844) (Michigan law required state to pay former owner the surplus proceeds from tax sale. "[T]he 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 . . . .").[2]

Constitutional protections for equity do not disappear when property taxes become delinquent. Although there are no controlling cases directly on point, the United States Supreme Court has recognized that where a plaintiff has a statutory property right to the surplus proceeds from a tax sale, the government effects a taking without just compensation if it fails to pay the plaintiff the proceeds. In *United States v. Lawton*, 110 U.S. 146 (1884), an heir to a landowner who lost his property under a federal tax statute sought the surplus proceeds of the sale. *Id.* at 149. The federal government refused to pay the heir, even though federal law required the government to pay surplus proceeds to the delinquent taxpayer. *Id.*; *see United States v. Taylor*, 104 U.S. 216, 218 (1881) ("[T]he surplus of the proceeds of the sale, after satisfying

[2] Sometime later, the legislature changed course and adopted tax laws purporting to extinguish all claims and pre-existing liens upon tax sale and expiration of the right of redemption. *See Dean v. Michigan Dep't of Nat. Res.*, 247 N.W.2d 876, 881-82 (Mich. 1976) (Coleman, J. dissenting).

the tax, costs, charges, and commissions, shall be paid to the owner of the property . . . .") (quoting Act of August 5, 1861, § 36, 12 Stat. 292, 304). The government did not technically receive *any* proceeds for the sale of the property, because as the winning bidder, "no money was paid on the sale." *Lawton*, 110 U.S. at 147. When the government sold the property later, another statutory provision forced it to pay half the proceeds from that sale of the land to another party. *Id.* Thus, the government argued that if it had to pay the delinquent taxpayer's heir, then it would pay out significantly more money than the amount it bid in the original sale. *Id.* The Supreme Court was not persuaded, explaining that "[t]o withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and deprive him of his property without due process of law or take his property for public use without just compensation." *Id.* at 150. The fact that the government ended up with a financial loss did not matter. *See id.*

On appeal, the County claims that *Lawton* offers no guidance here, based primarily on *Nelson v. City of New York*, 352 U.S. 103 (1956), and *Balthazar v. Mari Limited*, 301 F. Supp. 103 (N.D. Ill. 1969), *aff'd*, 396 U.S. 114 (1969). *See* Appellees' Response to Appellants' Brief at 15-17. But in *Nelson,* the Supreme Court held only that the government does not commit a taking when a landowner fails to take advantage of state procedures to claim the surplus proceeds from a tax sale. *Nelson*, 352 U.S. at 109. The City of New York had taken the plaintiffs' valuable property via

state tax-sale procedures for relatively small overdue water bills. *See id.* at 105-06. The plaintiffs brought a takings challenge because the city kept the excess proceeds from these sales. *Id*. at 109. The Supreme Court held that *Lawton* did not apply because the New York statute did not "preclude[ ] an owner from obtaining the surplus proceeds of a judicial sale." *Id*. at 110. The Court relied on a New York state court case that "construed [the tax-sale statute] to mean that upon proof [that the sale value substantially exceeded the amount of taxes due] a separate sale should be directed so that the owner might receive the surplus." *Id*. In contrast here, the County contends that Michigan law provides no such right to a tax sale's surplus. The County's reliance on *Nelson* is misplaced.

Balthazar is similarly unpersuasive. In that case, the plaintiffs alleged a violation of the Due Process and Takings Clauses when their property was sold in a tax sale, and the government kept the proceeds pursuant to a tax statute. *Balthazar,* 301 F. Supp. at 104-05. The district court rejected the plaintiffs' takings and due process claims, but only mentioned the takings claim in a footnote, offering no analysis of the claim. *Id.* at 105 n.6. The Supreme Court summarily affirmed the judgment. *See Balthazar*, 396 U.S. 114. But as the district court recognized in *Coleman*, the Supreme Court's summary decision should be read narrowly, "carr[ying] little more weight than denials of certiorari." *Coleman v. D.C.*, 70 F. Supp. 3d 58, 79 (D.D.C. 2014) (quoting *Hohn v. United States*, 524 U.S. 236,

260 (1998) (Scalia, J., dissenting)). Indeed, without an opinion, it is impossible to know the grounds for the decision, which may well have been on the independent ground that the plaintiff's request for an injunction would be improper given the availability of money damages in the form of just compensation. *See id.*

Modern Supreme Court precedent recognizes that the Takings Clause protects property interests essentially identical to the surplus equity interest present in this case, and government must pay surplus proceeds where an independent source protects the landowner's property rights to those proceeds. *Horne*, 135 S. Ct. at 2426 (personal property); *Koontz*, 133 S. Ct. at 2601 (money and real property); *Phillips*, 524 U.S. at 168 (accrued interest); *Armstrong*, 364 U.S. at 48 (liens). Accordingly, this Court should hold that the Takings Clause protects Rafaeli's and Ohanessian's interests in their surplus equity, and thus the surplus proceeds from the tax sale. *Cf. United States v. Miller*, 317 U.S. 369, 374 (1943) (property owner entitled to just compensation—measured as the market value of property at time of taking—when government takes private property for a public use); *Peterman v. State Dep't of Nat. Res.*, 521 N.W.2d 499, 511 (Mich. 1994) ("[T]he moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain.") (citation omitted).

II

THE GOVERNMENT MAY NOT AVOID TAKINGS LIABILITY BY REDEFINING PROPERTY RIGHTS

The County may not avoid the Takings Clause simply because a Michigan statute purportedly authorizes it to take an individual's entire interest in land in order to pay a relatively small tax debt. The statute unconstitutionally redefines property rights. *Cf. Lucas*, 505 U.S. at 1014 ("[T]he government's power to redefine" property rights is "necessarily constrained" by the Constitution.).

Three Supreme Court cases establish the fundamental principle that the government cannot legislate a recognized property right out of existence. First, in *Palazzolo*, a landowner claimed that the state's extensive zoning regulation of his waterfront land effected a taking without just compensation. *Palazzolo*, 533 U.S. at 613, 615. In response, the state argued that it could "shape and define property rights" to extinguish the right to challenge zoning regulations that pre-exist the plaintiff's purchase of property. *Id*. at 626. "[I]n effect" the state sought to "put an expiration date on the Takings Clause." *Id*. at 627. The Supreme Court rejected that argument, explaining that landowners may assert a violation of the Takings Clause when an onerous government regulation affecting their property "compel[s] compensation." *Id*. Government may not extinguish constitutional rights by statute. *Id.* at 614.

Second, in *Webb's Fabulous Pharmacies*, state law provided that deposits in a court registry were "public money" until they were withdrawn, and that interest earned on that money was also public property. *Webb's Fabulous Pharmacies*, 449 U.S. at 158-59. The Supreme Court rejected the state's attempt to redefine traditional property rights, holding that the interest belonged to the owner of the principal and that the government could not take the interest without paying the owner just compensation. *Id*. at 164. The state could not "by ipse dixit" secure a windfall for itself. *Id*.

Third, in *Armstrong*, the United States hired a shipbuilder to construct naval boats. *Armstrong*, 364 U.S. at 40. When the shipbuilder defaulted, it transferred to the government title to the incomplete boats and the remaining construction materials, pursuant to the hiring agreement. *Id*. at 41. The construction material suppliers had liens on the materials, because the shipbuilder had not yet paid for them. *Id.* The United States argued that it took the property free of the liens because it held a paramount lien to all others, and because the law forbade liens on government property. *Id*. at 44-45. The Supreme Court held that "the total destruction by the Government of all value of these liens" had "every possible element of a Fifth Amendment 'taking.' " *Id*. at 50. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; immediately afterwards, they had none. *Id*. at 48. "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.* Although the government could take the property for the public purpose of building navy boats, it could only do so subject to the "constitutional obligation to pay just compensation for the value of the liens the petitioners lost." *Id*. at 49.

Just as in *Palazzolo*, *Webb's Fabulous Pharmacies*, and *Armstrong*, the government in this case argues that the homeowners' property rights to the equity in their properties "vanished into thin air" when the government foreclosed on its small tax liens. Indeed, the Michigan tax statute flagrantly ignores *Armstrong* and related Supreme Court precedent, purporting to extinguish not only a property owner's surplus equity, but also any third-party liens (*e.g.*, suppliers' liens) in the property. *See* Mich. Comp. Laws § 211.78i. *Cf*. *Koontz*, 133 S. Ct. at 2601 ("[W]e have repeatedly held that the government takes property when it seizes liens . . . .") (citing *Armstrong*, 364 U.S. at 80; *Louisville Joint Stock Land Bank*, 295 U.S. at 601-02). The Supreme Court has repeatedly explained that property rights are not extinguished just because the government says so. *Palazzolo*, 533 U.S. at 627; *Webb's Fabulous Pharmacies*, 449 U.S. at 164; *Armstrong*, 364 U.S. at 49. Rather, Rafaeli and Ohanessian have a recognized interest in their equity above what they actually owed in back taxes. That property interest cannot be taken without payment of just compensation.

If the government were allowed the final say on what constitutes a valid forfeiture of constitutional rights, then private property would no longer be safe from uncompensated government expropriation. *Lucas*, 505 U.S. at 1014 ("If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature would be to extend the qualification more and more until at last all private property disappeared.'") (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)) (brackets omitted). The government could take property without paying compensation as well as "redefine" when other constitutional rights are forfeited. This Court may avoid such a liberty-threatening course by holding that statutes that define the terms of forfeitures cannot thwart the Constitution's protections for private property.

III

THE EIGHTH AMENDMENT PROTECTS LANDOWNERS FROM EXCESSIVE FORFEITURES

The government may not avoid constitutional limits by claiming that the confiscation of the plaintiffs' property was a forfeiture pursuant to Michigan tax law. Below, the government argued and the lower court accepted that the confiscation was

a forfeiture.[3] But if it is a forfeiture (and not a taking without just compensation), then the court should have allowed the plaintiffs to amend their complaint.

The law strongly disfavors forfeitures and construes forfeiture provisions against the government. *United States v. One 1936 Model Ford V-8 DeLuxe Coach*, 307 U.S. 219, 226 (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 (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."). "Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing

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[3] The government is right to avoid calling the confiscation merely a collection of a tax. *See generally* Appellees' Response to Appellants' Brief (repeatedly calling the confiscation a "forfeiture" not a "tax"); *see, e.g., Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36-37 (1922) (labeling something a "tax" does not necessarily make it a tax). Michigan law limits the amount of ad valorem taxes that local governments may impose on property owners. *See, e.g.*, Mich. Comp. Laws Ann. § 211.39(1) (taxes assessed "according to the taxable values entered in the assessment roll of that local tax collecting unit for the year"). The property tax statute provides the amount of interest, penalties, and fees that an assessor may add to that amount. Mich. Comp. Laws § 211.43a (fees on unpaid taxes); § 211.78g (additional $175 fee); § 211.44 (administration fees and penalties). Michigan's tax law does not grant local governments discretion to increase the amount of taxes, interest, penalties, and fees owed by a delinquent taxpayer so that it equals the value of the property that is threatened with foreclosure. *See id.* Indeed, if it did, the law would violate the Due Process and Equal Protection Clauses. *See, e.g.*, *Elec. Data Sys. Corp. v. Twp. of Flint*, 656 N.W.2d 215, 222 (Mich. Ct. App. 2002) ("[U]nderlying purpose of [due process] is to secure the individual from the arbitrary exercise of governmental power" and Equal Protection Clause protects taxpayers from invidious discrimination and arbitrary classifications that are unrelated to a legitimate government purpose.).

them." *Loeser v. Gardiner*, 1 Alaska 641, 645 (D. Alaska 1902); *Mt. Diablo Mill & Mining Co. v. Callison*, 17 F. Cas. 918, 925 (C.C.D. Nev. 1879). Fairness and justice instruct that courts should "favor individual property rights when interpreting forfeiture statutes." *Sogg v. Zurz*, 905 N.E.2d 187, 191 (Ohio 2009); *see also Dean*, 247 N.W.2d at 877 (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); *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., plurality opinion) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."). Because the law disfavors forfeitures, the government has the burden of proving that its forfeiture is valid. *See People v. Campbell*, 198 N.W.2d 7, 10 (Mich. Ct. App. 1972); *Loeser*, 1 Alaska at 645; *Mt. Diablo Mill & Mining Co.*, 17 F. Cas. at 925; *see also Spoon-Shacket Co., Inc. v. Oakland County*, 97 N.W.2d 25, 28 (Mich. 1959) ("[E]quity can and should intervene whenever it is made to appear that one party, public or private seeks unjustly to enrich himself at the expense of another on account of his own mistake and the other's want of immediate vigilance—litigatory or otherwise.").

The Excessive Fines Clause of the Eighth Amendment protects property owners in civil asset forfeitures where the "forfeiture" is punitive.[4] *Austin v. United States*,

[4] The United States Supreme Court has not yet addressed whether the Eighth Amendment's Excessive Fines Clause applies to the states. *McDonald v. City of*
(continued...)

509 U.S. 602, 609-10 (1993) (The Eighth Amendment "limits the government's power to extract payments, whether in case or in kind, 'as punishment for some offense.'"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001) (Excessive Fines Clause limits states' discretion "with respect to the imposition of criminal penalties and punitive damages."); *Furman v. Georgia*, 408 U.S. 238, 332 (1972) ("The entire thrust of the Eighth Amendment is, in short, against that which is excessive.") (internal quote omitted).

The Clause requires a two-step analysis. First, is the government action punitive? Second, is the punitive action—in the form of a "fine"—excessive? *See Bajakajian*, 524 U.S. at 333-34. A forfeiture is punitive (not remedial) when it goes well beyond the reasonable costs of enforcing the law against the offender. *United States v. Alt*, 83 F.3d 779, 782 (6th Cir. 1996). *Cf. Bailey*, 259 U.S. at 41 ("tax" was not remedial and was really a punishment). A tax sale in which a massive surplus is taken from an innocent property owner is plainly punitive. Here, Rafaeli owed $285 in taxes, interest, penalties, and fees, yet the County took at least an additional $24,215 in equity. *See* Sum. Disp. Order at 2. Likewise, Ohanessian owed around

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[4] (...continued)
Chicago, Ill., 561 U.S. 742, 765 n.13 (2010) ("We never have decided whether . . . the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause."). The Michigan Constitution, however, contains a parallel provision. *See* Mich. Const. art. I, § 16 ("[E]xcessive fines shall not be imposed . . . ."); *In re Forfeiture of $25,505.*, 560 N.W.2d 341, 347 (Mich. Ct. App. 1996) (treating federal and state Constitutions' ban on excessive fines the same).

$6,000 in overdue taxes, fees, and interest, but the County took at least an additional $76,000 in equity. *See id.* If these confiscations are properly deemed forfeitures, then they were punitive forfeitures and subject to the limitations of the Excessive Fines Clause.

The Excessive Fines Clause forbids punitive forfeitures that are "grossly disproportional to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. To determine whether fines are excessive, the Court must also consider the individual culpability of the property owner. *Id.*; *United States v. Ferro*, 681 F.3d 1105, 1115-16 (9th Cir. 2012); *United States v. Certain Real Prop. Located at 11869 Westshore Drive, Putnam Twp., Livingston County, Mich.*, 70 F.3d 923, 927 (6th Cir. 1995); *von Hofe v. United States*, 492 F.3d 175, 185 (2d Cir. 2007). In *Bajakajian*, the government seized and sought forfeiture of $357,144 when Hosep Bajakajian lied to government officials about how much money he was taking abroad. 524 U.S. at 324. The Court held that the fine was excessive in violation of the Eighth Amendment, because it was "grossly disproportional to the gravity of [the] offense." *Id*. at 339-40. It explained that Bajakajian's "[f]ailure to report his currency affected only one party, the Government, and in a relatively minor way." *Id*. at 339. Moreover, the fine "b[ore] no articulable correlation to any injury suffered by the Government." *Id*. at 339-40.

Likewise here, the County is keeping thousands of dollars that have no correlation to any injury it suffered. The government's injury should be satisfied by $16,750 of the sale, which covers the back taxes, punitive fines, and remedial costs. Unlike *Bajakajian*, the property owners in this case did not commit a crime or immoral action. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 671 (1983) (Constitution does not permit "punishing a person for his poverty."). Accordingly, taking $24,215 and $76,000 in surplus proceeds from the respective tax sales is grossly disproportional to the gravity of the offense. Depriving Rafaeli and Ohanessian of these surplus proceeds of the tax sale violates the Eighth Amendment. Thus, the trial court should not have denied the plaintiffs' motion to amend the complaint as "futile."

CONCLUSION

The Constitution protects equity from uncompensated takings by the government. The government cannot circumvent that guarantee by calling a taking a "forfeiture" or "tax" or anything else. The Constitution demands that the County compensate Rafaeli and Ohanessian for their surplus equity to fulfill the requirements of the Constitution's Takings and Excessive Fines Clauses.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, I electronically filed the foregoing brief amicus curiae, which was served by the e-filing and service system of the Michigan Court of Appeals.

/s/ Andrew F. Fink III
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