No. 15-2463

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYSIDE CHURCH, et al.,

Appellants,

v.

COUNTY OF VAN BUREN and KAREN MAKAY,

Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
Honorable Paul L. Maloney, District Judge

CORRECTED BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

CHRISTINA M. MARTIN
Fla. Bar No. 0100760
Pacific Legal Foundation
8645 N. Military Trail, Suite 511
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006

Counsel for Amicus Curiae
Pacific Legal Foundation

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(A) the amicus curiae brief was authored by attorneys of the Pacific Legal Foundation, and no portion was authored by counsel for any party;

(B) funding for preparation of the amicus curiae brief was provided by Pacific Legal Foundation, and no party or party's counsel, contributed money that was intended to fund preparing or submitting the amicus curiae brief;

(C) no person, other than Amicus Curiae Pacific Legal Foundation, contributed money that was intended to fund preparing or submitting the amicus curiae brief.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of plaintiffs Wayside Church, Myron Stahl, and Henderson Hodges, and the proposed plaintiff class and for reversal of the district court's judgment dismissing the case. All parties consented to the filing of PLF's brief 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.) (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.*, *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 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 U.S. Constitution. It does. The 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, *i.e.*, is equivalent to *money*, the Takings Clause unquestionably protects it. *See Koontz*, 133 S. Ct. at 2601 (Takings Clause protects

money); 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").

Wayside Church alleges that Van Buren County violated the Takings Clause when it took all of the surplus equity it held in its property as part of a tax-sale foreclosure. Opinion and Order Granting Motion to Dismiss (Opinion), ECF No. 38 at Page ID 406. Wayside Church owed $16,750 in taxes, interest, and fees. *Id*. Van Buren County sold the church's property for $206,000. *Id*. 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, *et seq*., kept the surplus proceeds—$189,250—as profit. Opinion, ECF No. 38 at Page ID 406, 417. Wayside received none of the surplus.[1] *Id*.

Wayside Church and the other foreclosed landowners sued, claiming that the government took their property without just compensation when it sold the property and kept the surplus proceeds. *Id*. at 406. The district court dismissed the action, holding that Wayside Church "forfeited" the protections guaranteed by the Takings Clause by failing to pay its debt within the time period provided by Michigan law. *Id*. at 405, 418. The district court suggested that the taxing power allows government to

[1] For the sake of brevity, amicus will only discuss Wayside Church's claims, however, the identical legal arguments apply to the other plaintiffs in this case.

pass laws by which property owners forfeit all rights to surplus proceeds from tax sales. *Id*. at 416. The court reasoned that because the Michigan General Property Tax Act, Mich. Comp. Laws § 211.60, *et seq*., does not vest delinquent taxpayers with rights to surplus proceeds from a tax sale, the government does not take anything when it confiscates the surplus equity or proceeds. Opinion, ECF No. 38 at 416-17. In effect, the decision authorizes 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 escape the guarantees of the Takings Clause by invoking its power to tax or by creatively interpretating forfeiture precedent. The Michigan property tax law, insofar as it requires confiscation of surplus equity, fails the "chief object of government": the protection of individual liberties and property. *See* Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. Pub. Int. L.J. 335, 337 (2001) ("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." (quoting James Madison)).

The district court's dismissal of Wayside's takings claim should be reversed.

ARGUMENT

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); *Nixon v. United States*, 978 F.2d 1269, 1276 n.18 (D.C. Cir. 1992) (citing *First Victoria National Bank v. United States*, 620 F.2d

1096, 1103 (5th Cir. 1980) ("law or custom may create property rights where none were earlier thought to exist").

While 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 Horne*, 135 S. Ct. at 2427 ("[P]hysical appropriation of property g[i]ve[s] rise to a per se taking, without regard to other factors" like statutory scheme and public benefit, because both "history and logic" support the idea that a physical appropriation of property is a taking.); *Palazzolo*, 533 U.S. at 630 ("A law does not become a background principle for subsequent owners by enactment itself."). Historically acknowledged property rights extend far beyond the title and possession of real property (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) ("[I]ncontestable 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.

Given the depth and breadth of these precedents, the Takings Clause must also protect a landowner's equity in land and its improvements. "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*, at 640 n.1.

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 Wayside Church's interest in surplus proceeds from the tax foreclosure and sale of its property.

Constitutional protections for equity do not disappear when property taxes become delinquent. While there are no controlling cases directly on point, the Supreme Court has recognized that where a plaintiff has a statutory property right to the surplus proceeds from a tax sale, government effects a taking without just compensation if it fails to pay the plaintiff the proceeds. *United States v. Lawton*, 110 U.S. 146 (1884). In *Lawton*, 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 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 Court explained that it did not matter that the government did not technically receive any proceeds for the sale, because the federal government was the winning bidder in the tax sale and thus "no money was paid on the sale." *Lawton*, 110 U.S. at 147. The government argued that another statutory provision forced it to pay half the proceeds from subsequent sales of the land to another party, and if it had to pay the delinquent taxpayer's heir, too, then it would pay out significantly more than the amount it bid in the original sale. *Id*. But the Supreme Court rejected that argument, because "[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 Supreme Court later held that 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 v. City of New York*, 352 U.S. 103 (1956). 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. 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 199. 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*.

Similarly unpersuasive is *Balthazar v. Mari Limited*, 301 F. Supp. 103 (N.D. Ill. 1969). In that case, 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. *Id*. at 104-05. The district court denied 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 v. Mari Ltd.*, 396 U.S. 114 (1969). As the district court recognized in *Coleman*, the 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) (citation omitted). Indeed, without an opinion, it is impossible to know the grounds for the decision, which was as likely a rejection of the plaintiff's attempt to get an injunction to stop the taking of his property, where just compensation would have been the appropriate remedy. *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. *See Lawton*, 110 U.S. at 150. Accordingly, this Court should hold that the Takings Clause protects Wayside Church's interest in the surplus equity, and thus the surplus proceeds from the tax sale.[2]

[2] *See U.S. v. Miller*, 317 U.S. 369, 373 (1943) (Just compensation must put the owner in "as good [a] position pecuniarily as he would have occupied if his property had not been taken.").

II

THE GOVERNMENT MAY NOT AVOID TAKINGS LIABILITY BY REDEFINING PROPERTY RIGHTS

The County may not avoid the Takings Clause simply because the state passed a law that purportedly authorizes it to take an individual's entire interest in land in order to pay a relatively small 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. In *Palazzolo*, a landowner claimed that the state's extensive zoning regulation of his waterfront land effected a taking without just compensation. 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; *see also id*. at 627 (rejecting state's attempt to transform its argument into a "background

principle"); U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land.").

In *Webb's Fabulous Pharmacies*, state law provided that deposits in the court registry were "public money" until they were withdrawn, and that interest earned on that money was also public property. 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. In short, the state could not "by *ipse dixit*" secure a windfall for itself. *Id*.

In *Armstrong*, the United States hired a shipbuilder to construct naval boats. 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 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*. Thus, while 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*, and *Armstrong*, the government in this case argues that the homeowners' property rights "vanished into thin air" when the government foreclosed on its tax lien. 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.*, materialmens' liens) in the property. Mich. Comp. Laws § 211.78i; *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. 555, 601-02 (1935)). But 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*, 449 U.S. at 164; *Armstrong*, 364 U.S. at 49. Rather, Wayside Church and the other property owners 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 government would find it all too easy to take property—indeed, all rights—from the public. *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). They could not only take property without paying compensation but also "redefine" when other constitutional rights are forfeited. Accordingly, statutes that define the terms of forfeitures cannot thwart the Constitution's protections for private property.

III

NEITHER THE TAXING POWER NOR FORFEITURE LAW JUSTIFIES A TAKING OF SURPLUS EQUITY

A. The County's Taxing Power Does Not Allow It To Evade the Takings Clause

Government may not use its taxing power to avoid the Takings Clause. The district court, however, suggested that the County took title to Wayside Church's property in its entirety—including all surplus proceeds—as part of its taxing power, and that the taxing power trumps the protections of the Takings Clause. *See* Opinion, ECF No. 38 at 415-16 (taxing power deserves greater deference than the protections of the Takings Clause and even if Wayside Church could prove a property right to the

surplus equity, it would be "tough" for the court to find a taking occurred). That is contrary to the law. Government may not "expand its power under the Taxing Clause" nor may it evade the protections of the Constitution by hiding behind the taxing power. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012). The County's right to "safeguard its interests does not relieve the State of its constitutional obligation." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983); *see also In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich. 295, 301, 806 N.W.2d 683, 689 (2011) (taxing power subject to constitutional protection of Equal Protection).

Moreover, the County did not tax Wayside Church when it took the surplus proceeds from the sale of its property. *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 the treasurer may impose on property owners. *See*, *e.g.*, Mich. Comp. Laws Ann. § 211.39(1) ("The appropriate assessing officer in each local tax collecting unit shall assess the taxes apportioned to that local tax collecting unit according to the taxable values entered in the assessment roll of that local tax collecting unit for the year."). The 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 the

assessor 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*, *e.g.*, *id*. Indeed, if it did, the law would violate the Due Process and Equal Protection Clauses. Nor has the government claimed that it is merely collecting a tax, fee, interest, or paying its costs of foreclosure when it took the surplus equity of Wayside Church's foreclosed property. *See generally* Defendants' Brief In Support of Its Motion to Dismiss.[3] Accordingly, this Court should resist excusing the government's action under the taxing power.

B. Forfeiture Law Supports Wayside Church's Takings Claim

Just as the government may not use its taxing power to evade the Takings Clause, it may not creatively interpret forfeiture law to evade paying just compensation to Wayside Church. Indeed, the law strongly disfavors forfeitures and

[3] The government suggested below that it should keep surplus proceeds from tax sales because, when property sells for less than the tax owed, it bears the loss. Brief in Support of Defendants' Motion to Dismiss, ECF No. 8 at Page ID 48, n.2 ("the Treasurers in Michigan take both the upside and downside risk of taking title to the property, whereas the Plaintiffs seek to recoup the upside without accounting for the risk they would owe more to the Treasurer than the property at issue is worth"). But that is nonsense. The government suggests that if a property does not sell for enough to pay the debt, another property owner should compensate the government by giving up rights to surplus proceeds from tax sales. But "[t]he Takings Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Armstrong*, 364 U.S. at 48-49. Moreover, if property cannot fetch enough to pay overdue taxes—which at most could accrue for only a few years—then that suggests the government was exceeding the statutorily authorized tax amount.

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 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 v. Michigan Dep't of Natural Res.*, 399 Mich. 84, 87, 247 N.W.2d 876, 877 (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); *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 its forfeiture is valid. *See Loeser*, 1 Alaska at 645; *Mt. Diablo Mill & Mining Co.*, 17 F. Cas. at 925.

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

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.'").[4] 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); *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. Wayside Church owed $16,750 in taxes, interest, penalties, and fees, yet the County took $206,000 in equity. Opinion, ECF No. 38 at Page ID 406. If the County claims its property was really just a forfeiture, then it was a punitive forfeiture and subject to the requirements 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

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[4] Unlike the Takings Clause, the Supreme Court has not yet decided whether the Eighth Amendment's Excessive Fines Clause applies to the states through the Fourteenth Amendment. In *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001), the Court suggested that the clause did apply to the states: "Th[e Due Process] Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." The Court cited *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) for that proposition, but that decision dealt only with cruel and unusual punishment, not with the Excessive Fines Clause. More recently, *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 765 n.13 (2010), noted that the Court had never "decided whether the . . . Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause.".

consider the gravity of the offense and 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., Together with all of its Fixtures, Improvements & Appurtenances*, 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. Customs law required him to report all money in excess of $10,000. *Id*. "The crime of smuggling or failing to report cash" is "serious" and can be used to facilitate "organized crime, drug trafficking, money laundering, and other crimes." *Id*. at 337 (Kennedy, J. dissenting). But the court held 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 reasoned, "[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 $189,250 in surplus proceeds from the tax sale is grossly disproportional to the gravity of the offense. Taking the surplus proceeds of the tax sale fails the limits of the Eighth Amendment even if forfeiture law applied, therefore, no forfeiture doctrine justifies the government's action.

CONCLUSION

Judicial precedent is unequivocal: 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 Wayside Church and the other foreclosed homeowners for their surplus equity. The district court's decision that the claim fails under 12(b)(6) should be reversed, and the remainder of the decision affirmed.

DATED: November 3, 2016.

Respectfully submitted,

/s/ Christina M. Martin
CHRISTINA M. MARTIN

Counsel for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing corrected brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 5,020 words.

/s/ Christina M. Martin
CHRISTINA M. MARTIN

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2016, I electronically filed the foregoing corrected brief amicus curiae with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Christina M. Martin
CHRISTINA M. MARTIN