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

RAFAELI, LLC, and ANDRE OHANESSIAN'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Other Authorities

INTRODUCTION

Uri Rafaeli's small business—Rafaeli, LLC—lost a valuable Southfield, Michigan home to pay an $8 debt to Oakland County. Andre Ohanessian lost 2.7 acres of valuable land in Orchard Village to pay a $6,000 debt. The County concedes that the General Property Tax Act inflicted a harsh result but insists that the Court must defer to the legislature's policy decisions embodied in the Act. *See* Appellees' Brief in Opposition (Opp.) at vii. But Rafaeli and Ohanessian do not allege a mere bad policy; they allege an *unconstitutional* one that can only be made constitutional with the payment of just compensation. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (a "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"); *Buckeye Union Fire Ins. Co. v. State*, 383 Mich. 630, 641 (1970) (takings clause was "adopted for the protection of and security to the rights of the individual as against the government" and limits legislature's discretion).

The County attempts to avoid a plain application of takings law, by mischaracterizing decisions in other jurisdictions and the Supreme Court, to argue that all courts have rejected such takings claim. *See* Opp. at 8-12. The County similarly fails in its attempt to argue that inaction by the property owners—here, the failure to pay property taxes on time—turns the taking into a forfeiture. *See id.* at 7. Finally, the County wrongly dismisses the Petitioners' claims in the alternative as futile. *See id.* at 14. Whether considered a taking or a forfeiture, the confiscation of surplus equity fails the Michigan Constitution, 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 . . . . This 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). This Court should grant the Petitioners' Application for Leave to Appeal.

ARGUMENT

I

THE COUNTY CASTS NO DOUBT ON THE NEED FOR REVIEW BY THIS COURT OF THE QUESTION PRESENTED

Rather than contest the importance of the question presented, the County argues that the question presented has already been settled in the government's favor by United States Supreme Court and all lower courts. Opp. at vii, 9-10. The County is wrong.

Nelson reserved the question presented here, because the New York property tax statute provided former owners with the opportunity to claim the surplus proceeds from the sale of their property. *Nelson v. City of New York*, 352 U.S. 103, 110 (1956). The plaintiffs in *Nelson* failed to seek that remedy. *See id.* (New York statute allowed the opportunity to recover the surplus and the owner chose not to seek that remedy.). Put another way, the government does not effect an uncompensated taking when it offers to pay you for the taking, but you refuse to collect until it is too late. Michigan's Act offers no such opportunity, and thus *Nelson* is inapposite.

The County likewise fails in its attempt to dismiss as irrelevant cases in other jurisdictions that found takings under similar statutes. The County argues this Court should pay no attention to decisions by the Vermont and New Hampshire supreme courts, because those decisions found takings under their respective state constitutions and statutes. *See* Opp. at 12. But like Michigan, the takings clause in both states' constitutions offer similar protection as the federal Takings Clause. *See, e.g., Bogie v. Town of Barnet*, 270 A.2d 898, 900, 903 (Vt. 1970) (interpreting the

federal Constitution as requiring a refund of the surplus proceeds, and holding it violated the Vermont Constitution); *Purdie v. Attorney Gen.*, 143 N.H. 661, 667 (1999) (treating New Hampshire and federal just compensation requirements similarly); *see also Burrows v. City of Keene*, 121 N.H. 590, 599, 601 (1981) (arguing law violated U.S. Constitution's Takings Clause but ultimately resting its decision solely on the state constitution). Moreover, this Court has held that Michigan's Takings Clause offers *greater* protection than the federal counterpart and thus this Court has no reason to limit itself to only weighing decisions that hinge on the federal Takings Clause. *See AFT Michigan v. State of Michigan*, 497 Mich. 197, 217 (2015).

The difference between Michigan and Vermont's tax statute, too, is irrelevant. The Vermont statute at issue in *Bogie* required the government to sell off "only so much of the land as is necessary to pay taxes and costs," and the tax collector followed that requirement. *Bogie*, 270 A.2d at 900-901. He offered the property for auction and received no bids, except one by the Town for the whole property. *Id.* At that point, the statute allowed the town to hold, lease, sell or convey the property "like other real estate belonging to such city or town." *Id.* at 899-900. There was no longer a statutory duty for the town to sell the smallest piece possible. Nevertheless, the Vermont Supreme Court held that when the government took title, it owed a fiduciary responsibility to the former owner to refund the surplus proceeds after the sale, because keeping it would violate the "'fifth amendment to the constitution, and . . . take property for public use without just compensation'" and it would violate "the corresponding rights under the Vermont Constitution." *Id.* (quoting *United States v. Lawton*, 110 U.S. 146, 150 (1884)).

Similarly, the County mischaracterizes *Coleman through Bunn v. District of Columbia*—a class action seeking just compensation for valuable property taken to pay small tax debts. The County inaccurately claims the case only addresses the Tax Injunction Act and did not raise the

issue of tax "forfeiture." *See* Opp. at 12. Like the County argues here, the District also argued the plaintiffs' takings claims were barred by *Nelson* and were *forfeited* by the property owners. *Coleman*, 70 F. Supp. 3d 58, 68, 77 (D.D.C. 2014). The court, however, disagreed. *Id.* at 79 (explaining that *Nelson* expressly reserved the question of whether the Takings Clause was violated when a tax law offers no opportunity to claim surplus proceeds). Although the *tax statute* did not create a property right to the surplus proceeds, the right to such proceeds may be found in other sources, including background principles and common law. *Id.* at 80.

Later, the District moved for judgment on the pleadings and the *Coleman* court revisited the question of whether the plaintiffs' property interest in the equity that exceeded their tax debts arose from some other source. *See Coleman*, No. 13-1456, slip opinion at 8 (June 11, 2015) available at https://pacificlegal.org/wp-content/uploads/2016/06/Memorandum-Opinion.pdf. The court denied that motion too, because plaintiffs "identified sources of law," including decisions in bankruptcy and divorce cases, where the District of Columbia recognized a homeowner's property interest in the equity of their former land. *Id.* at 5-8.

The *Coleman* court was right: "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 v. Rhode Island*, 533 U.S. 606, 629-30 (2001); *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426-27 (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, 83-85 (1982) (takings clause protects common law property rights).

Likewise, Plaintiff-Appellants do not allege that their rights to the surplus arise from the tax Act; rather they allege that they arise from common law and principles that predate the Act. The common law recognizes that an owner of a home or land has a property right in the equity. *See* Application for Leave to Appeal at 14-21; *AFT Michigan*, 497 Mich. at 218 (takings clauses protect "everything over which a person may have exclusive control or dominion" including intangible property). Because the law recognizes home and land equity as "property," the government may not confiscate it without paying just compensation or providing the means to collect the surplus taken by the government. *Armstrong v. United States*, 364 U.S. 40, 41 (1960) (government effects a taking when it takes more than owed, at expense of inferior lienholders).

Perhaps recognizing the logic of this argument, the County implies that decisions in related federal cases already rejected the merits of these takings claims. *See* Opp. at 1-2. But the Eastern District of Michigan rejected Plaintiff-Appellants' case for lack of jurisdiction under statutory and prudential doctrines. *Rafaeli*, No. 14-13958, 2015 WL 3522546, at *9 (E.D. Mich. June 4, 2015). The court did not reach the merits of the takings claim, but noted that the confiscation of the surplus proceeds "is a manifest injustice that should find redress under the law." *Id.* at n.2. When one of the original co-plaintiffs (Great Lakes Affordable Housing) later lost in Wayne County Circuit Court, it sought to re-open the federal case, rather than appeal to the Michigan Court of Appeals. The federal court held that res judicata barred hearing the takings claim. *Rafaeli*, No. 14-13958, slip opinion at 7 (June 16, 2016). The merits were never decided. Likewise, the Sixth Circuit, believing Michigan to offer a remedy for takings, has held it lacks jurisdiction to reach the merits of similar takings claims, although Judge Kethledge called it "theft" and signaled it is likely a taking. *See Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 823-25 (6th Cir. 2017) (Kethledge, J., dissenting).

II

THE COUNTY CANNOT ESCAPE THE TAKINGS QUESTION BY BLAMING RAFAELI AND OHANESSIAN

Without citing any authority, the County argues that a forfeiture happens "because of the citizen's action" whereas "a taking occurs because of a government's action." Opp. at 7. Even if that distinction has any merit, its logical conclusion is that a taking indeed occurred here: Failing to pay property taxes is an *inaction*, not an action. In contrast, the County's foreclosure and sale of their properties is an action. Thus under the County's rule, this was a taking.

The idea underlying the County's argument is that government may escape liability for a physical taking of property on the ground that the property owners could have made different economic or life choices that would have kept their property out of the government's cross-hair. But the U.S. Supreme Court has already rejected this argument. *See, e.g.*, *Horne*, 135 S. Ct. at 2430 (finding a taking where government argued raisin growers "voluntarily" agree to taking because they could avoid it by "'plant[ing] different crops,' or 'sell[ing] their raisin-variety grapes as table grapes or for use in juice or wine'"). Certainly, everyone should pay their property taxes in full and on time. But failing to do so does not justify the theft of a home's entire equity, any more than paying a parking ticket late justifies the theft of your car, or failing to shovel snow off the sidewalk in your front yard justifies the government's theft of your land.

Nor does legislatively declaring the theft a "forfeiture" make it one, as the County avers. *See* Opp. at 8. The County offered no rebuttal to Plaintiff-Appellants' argument that civil asset forfeiture law applies only to property used for a crime or that is the product of a crime. Compare *id.* with Application at 22-25. Because the County's actions are not properly deemed civil asset forfeitures, this Court should reject the lower court's holding that this was a "forfeiture," as both

the Texas and Alaska Supreme Courts have done in similar cases. *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981) ("We have recently recognized the basic injustice inherent in requiring delinquent taxpayers to forfeit the total value of their property far in excess of taxes due. . . . We are naturally reluctant to impute to the legislature an intent to impose a forfeiture. . . ."); *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191-92 (Tex. 1995), *as amended* (June 22, 1995) (construing a statute worded similarly to Michigan's General Property Tax Act as requiring the surplus to return to the dispossessed property owners, in part because "Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit."). The Court should grant review.

III

ALTERNATIVELY, IF THIS COURT BELIEVES THIS IS NOT A TAKING, THIS COURT SHOULD IN THE INTEREST OF JUSTICE, REVERSE THE LOWER COURT'S DECISION ON THE EIGHTH AMENDMENT, SUBSTANTIVE DUE PROCESS, AND UNJUST ENRICHMENT CLAIMS

The County further argues that Plaintiff-Appellants should not be allowed to press their alternative claims, because they are futile and were inadequately briefed in the Court of Appeals. Opp. at 14. Petitioners' failure to press the Excessive Fines, Substantive Due Process, and unjust enrichment claims reflected their certainty that the County's confiscation of their property was a taking without just compensation, not a forfeiture. But if this Court does not think it is a taking, then it was an abuse of discretion for the trial court to deny plaintiffs the opportunity to add these claims, because the Excessive Fines, substantive due process, and unjust enrichment claims are not futile. *See Ben P. Fyke & Sons v. Gunter Co*, 390 Mich. 649, 656 (1973) ("[T]he leave sought should, as the rules require, be 'freely given'" unless it would cause undue delay, undue prejudice, and there is no bad faith or dilatory motive on the part of the movant, and the amendment would

not be futile.); MCR 2.118(A) (leave to amend "shall be freely given when justice so requires"). If there is no taking, then this Court should in the interest of justice reverse the lower court's decision denying the motion to amend and deeming the claims abandoned, because one or more of those claims will prevail. *See People v. Snow*, 386 Mich. 586, 591 (1972) (allowing abandoned claims to be raised to prevent manifest injustice).

A. If the County's Seizure Was a Forfeiture and Not a Taking, Then It Violates the Eighth Amendment's Excessive Fines Clause

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.'"); *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 forbids punitive forfeitures that are "grossly disproportional to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). To determine whether fines are excessive, the court must also consider the individual culpability of the property owner. *Id.*; *United States v. Certain Real Prop. Located at 11869 Westshore Drive, Putnam Twp., Livingston Cty., Mich.*, 70 F.3d 923, 927 (6th Cir. 1995).

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 Supreme Court of the United States held that the forfeiture was an excessive fine in violation of the Eighth Amendment, because it was "grossly disproportional to the gravity of [the] offense." *Id.* at 339-40. 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 340.

Like the forfeiture in *Bajakajian*, the County's action here (if a forfeiture) violates the Excessive Fines Clause. The County is keeping thousands of dollars that have no correlation to any injury suffered by the County. Rafaeli mistakenly underpaid his property tax by $8. Any harm caused by that mistake should be satisfied by the additional $277 in interest, penalties, and fees that the County later added to the debt. Likewise, Ohanessian owed around $6,000, which already included interest, penalties, and fees and thus should have been penalty enough. Taking $24,215 and $76,000 in surplus proceeds from the respective tax sales is grossly disproportional to the gravity of the offense, which is not criminal. If these confiscations are properly deemed forfeitures, then depriving Rafaeli and Ohanessian of these surplus proceeds violates the Eighth Amendment. Thus, the trial court should have granted their motion to amend the complaint.

B. If the County's Seizure Was Not a Taking, Then It Also Violated Substantive Due Process and the Equitable Principle of Unjust Enrichment

If the County did not effect a taking, then it violates other protections for property owners. Substantive due process forbids the government from acting in an arbitrary, capricious, irrational, or illegitimate manner. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). The protection "was intended to prevent government officials from abusing their power, or employing it as an instrument of oppression." *Id.* at 846 (internal quotations and citations omitted). The government has no legitimate interest in turning the tax foreclosure process into a real estate business for profit, at the expense of former owners. *Bogie*, 270 A.2d at 900; *Syntax*, 899 S.W.2d at 191.

With a similar root in fairness, the doctrine of unjust enrichment offers additional protections from the government acting unjustly: "[U]nder the equitable doctrine of unjust

enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *Kammer Asphalt Paving Co., Inc. v. E. China Tp. Sch.*, 443 Mich. 176, 185 (1993) (citing Restatement, Restitution, § 1, p. 12). The Michigan Supreme Court held in *Dean v. Michigan Dep't of Natural Res.*, that a plaintiff who tried unsuccessfully to pay off his full tax debt, could plead unjust enrichment when the government profits by taking surplus equity (there was no takings claim in that case). 399 Mich. 84, 87 (1976). The court thus held the lower court's dismissal was improper and remanded for consideration on the merits. This Court has not considered this type of unjust enrichment claim on its merits, but the County's actions plainly qualify. The County gained a windfall at Rafaeli and Ohanessian's expense. It did not just collect the owed taxes, interest, penalties, and fees; it swallowed tens of thousands more in profit as a windfall.

CONCLUSION

Rafaeli and Ohanessian respectfully request that this Court grant the application for leave to appeal, or reverse the lower court's opinion.

Dated: January 11, 2017. Respectfully submitted,

/s/ Christina M. Martin

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2017, I electronically filed the foregoing Reply brief, which was served by the TrueFiling system of the Michigan Supreme Court.

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